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For each of the past two years, *The International Review of Constitutional Reform* (IRCR) has reported on all forms of constitutional revision around the world. Now in its third year, the IRCR has become a fixture in constitutional studies—and it has become a valued resource in universities, courts, and parliaments.

The IRCR continues to offer an invaluable service to scholars, jurists, practitioners, and beyond: to explain and contextualize events in constitutional reform over the previous year. This year's edition features separate and self-standing reports on over 80 jurisdictions from every region of the globe.

The IRCR defines constitutional reform broadly. We include constitutional amendments, constitutional dismemberments, constitutional mutations, constitutional replacements and other events in constitutional reform, including the judicial review of constitutional amendments.

In order to facilitate cross-jurisdictional comparison, each country report follows the same format:

1. "Introduction," which offers a brief overview of the year in constitutional reform;
2. "Proposed, Failed, and Successful Constitutional Reforms," which examines proposed constitutional reforms and explains the reasons for the failure or success;
3. "The Scope of Reforms and Constitutional Control," which evaluates the proposed reforms and explains whether they were the subject of constitutional review;
4. "Looking Ahead," which identifies the big questions that await the jurisdiction in the context of constitutional reform in the year or years ahead; and
5. "Further Reading," which recommends relevant readings for those interested in learning more about the reforms discussed in the report.

All reports are authored by scholars or jurists, or by teams of scholars and jurists working collaboratively. At the very end of the IRCR, we provide a summary of the most important developments in constitutional reform over the past year in each jurisdiction; this section is intended to be a quick overview of the previous year.

The IRCR is a joint iniative of the *Constitutional Studies Program* at the University of Texas at Austin in partnership with the *International Forum on the Future of Constitutionalism*.

In our capacity as Co-Editors for this volume, we have benefited from the invaluable contributions of our outstanding team of Associate Editors: Elisa Amorim Boaventura, Maria Letícia Borges, Bruno Santos Cunha, Matheus de Souza Depieri, Júlia Quintão Frade, and David Sobreira. They are colleagues of the first-rate, and it has been an honor to work so closely with them.

As always, the IRCR aspires to cover the globe. We would like to continue improving this resource and increasing the number of jurisdictions we cover every year. This will only benefit the field of constitutional studies.

We invite readers and new contributors to contact us to suggest new jurisdictions to cover in the IRCR or to offer other ideas for our book—or both! We look forward to hearing from you.

Until then, we thank you for reading the IRCR!

Constitutional Reforms in 2022:

What Trends to Expect in the Global Constitutional Dynamics?

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The 2021 edition of the International Review of Constitutional Reform (IRCR) showcased the rebirth of constitutional dynamics in the post-pandemic era. With the easing of the pandemic, constitutional reform began to regain diversity and re-flourish globally. As constitutional debates became increasingly diverse, our introduction to the 2021 IRCR raised a critical question: would the post-pandemic era usher in a resurgence of social progress toward democracy, equality, and human rights, or would governments exploit the pandemic and the unprecedented social challenges it presented as a means to advance illiberal agendas?

One year later, the 2022 IRCR reveals that the pandemic's influence on the constitutional arena has waned, as only a few jurisdictions continue to discuss constitutional measures related to COVID-19. While the pandemic is no longer a convenient pretext for advancing illiberal agendas, certain jurisdictions have reverted to familiar patterns of constitutional debates. Amidst these patterns, we observed not only progress in relevant agendas of liberty, equality, and democracy but also multiple instances of constitutional dismemberment or shifts toward autocracy.

The year 2022 witnessed a significant number of proposals and amendments aimed at reforming the governmental structure in various jurisdictions. Notably, one of the strongest trends noted was the increase in election-related constitutional reforms. Numerous countries have been making varying degrees of modifications to the rules governing popular participation in politics. Constitutional changes in electoral systems could raise concerns for the coming years, as the chosen path may either strengthen democratic principles or lead to a decline in democratic standards. It is worth noting that not all constitutional reforms sought to enhance the election system; some appeared to manipulate democratic processes. Even seem-

"We remain hopeful that the positive trend of advancing constitutional fundamental rights will continue to flourish."

ingly bureaucratic reforms, such as altering election dates or campaign funding rules, can be motivated by power calculations and pose structural risks depending on the political context of each country.

Countries from various continents have been actively promoting or attempting to promote constitutional changes concerning the organizational structure of government bodies. These modifications, more or less significant, encompass changes to the executive, legislative, and judicial branches. The scope of these structural reforms spans the concentration of power within the executive branch to the broadening of jurisdiction for constitutional courts, as well as amendments to the judicial review process and the composition of courts. In certain instances, this restructuring aims to align with the standards set by neighboring countries, while in others it represents an effort to exert political control over institutions.

While we have observed proposals for illiberal structural reforms, it is important to note the significant progress made in some jurisdictions toward the realization of fundamental rights and the strengthening of core principles inherent to liberal democracies. For instance, constitutional changes related to women's rights have emerged as a trend in several jurisdictions. Some countries strived for greater representative diversity by advocating for increased women's participation in parliaments, others engaged in discussions concerning reproductive rights, encompassing topics such as the right to an abortion and contraception. Additionally, certain jurisdictions have witnessed constitutional amendments concerning LGBTQIAPN+ rights, such as the constitutional recognition of same-sex marriage and the right to non-discrimination based on gender identity. Finally, some jurisdictions have addressed the lack of authority and capabilities of courts and governments in safeguarding fundamental rights, though it is crucial to acknowledge that several countries remain inactive in the face of human rights violations due to the assumed absence of remedies available to protect constitutional rights.

We remain hopeful that the positive trend of advancing constitutional fundamental rights will continue to flourish, enabling countries to fulfill their crucial role in safeguarding human rights, ensuring social security, promoting transparent governance, and contributing to peace. It is our aspiration that global constitutionalism will persist in its trajectory, facilitating the realization of these objectives worldwide.

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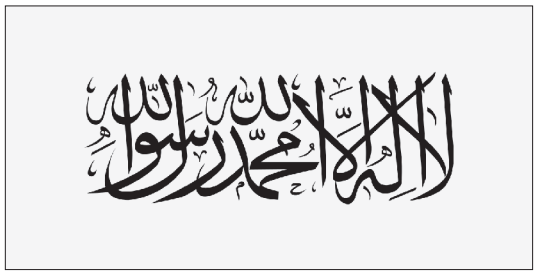
Three years after the release of the first edition of the *International Review of Constitutional Reform*, the publication has become an important resource in constitutional academic research, fostering comparative debate and collaboration worldwide. We, as associate editors, have also learned and grown alongside the project. For the amazing experience of being a part of the IRCR, we would like to thank the Constitutional Studies Program at the University of Texas at Austin, the International Forum on the Future of Constitutionalism, Professor Richard Albert, and President Luís Roberto Barroso. We are honored to work with leading scholars and institutions in the development of such an important project for comparative constitutional studies.

Afghanistan



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I. INTRODUCTION

Last year's report highlighted how it would differ from many others in the global catalogue of constitutional reform. This was due to the nature of constitutionalism in Afghanistan under the Taliban. This year's report is no different. The Taliban continue to rule by decrees, directives, and unwritten codes, remaining far from the territory of 'formal constitutionalism.'

Last year's report only allowed a brief insight into Afghanistan under the Taliban, as they were only in power for a little over four months by the end of 2021. Hence, much of the report contained speculation based on early signs and past experiences from when they were in power in the 1990s. However, considering that we now have more than a year of Taliban governance to observe, we are better positioned to comment on how the Taliban have dismembered the constitutional order implemented by the 2004 Constitution.

Similar to last year's report, at the primary level, this report analyses the unwritten constitution that the Taliban are implementing in Afghanistan. At the secondary level are the constitutional reforms which the Taliban have effected as they pertain to 1) the governmental and political system, 2) the law and justice system, and 3) the human rights system.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

As the Taliban were tasked with starting a state from scratch, numerous reforms, arguably classified as constitutional, have and have not been implemented in 2022.

First, we turn to a reform that did not occur – promulgating a new constitution. Last year's report highlighted uncertainties over the interim Constitution the Taliban was operating under. These were mainly due to the contradictory statements of different Taliban officials. Initially, they declared that they would temporarily govern under provisions of the 1964 Constitution that are 'not in conflict with Sharia law.' They subsequently changed their stance and clarified that Afghanistan's 2004 Constitution was still in force, but its presidential and parliamentary provisions had been suspended. We highlighted many reasons why this might be the case, ranging from the Taliban not wanting to recognize the 2004 Constitution by formally repealing it (as they considered it an illegitimate and imposed constitution) to stating they are operating under the 2004 Constitution (one of the most liberal in the Islamic World) to give international acceptability to their regime. Beyond these contradictory statements, a few months after coming to power, a spokesman for the Taliban also stated that they planned to form a commission in 2022 to draft a new Islamic constitution.

Nonetheless, there have been no changes regarding which formal constitution Afghanistan is temporarily operating under, nor have any plans to draft a new constitution been implemented. It is safe to conclude that the Taliban are *de facto* not operating under any written constitution despite their claims. This effectively ends an over 100-year tradition of written constitutionalism in the country.[1] Today's reality is that Afghanistan operates under an unwritten constitution composed of decrees by fiat, laws, and informal codes enforced with intimidation and fear.

Another aspect mentioned in last year's report was the establishment of an interim government by the Taliban similar to the one they had during their previous rule. However, titles in the interim government were comparable to those used by modern governments elsewhere, such as prime minister, defence minister, interior minister, and the like. This temporary arrangement continues into 2023, and no timetable has been proposed for installing a permanent government. Apart from minor internal reshuffling and adding a handful of new members to accommodate factions within the Taliban and demonstrate a more inclusive government to the world, the interim government (and most senior positions within it) have remained the same since last year's report. At the same time, this government operates as a shadow government, answering to the Taliban leadership council, comprised of religious clerics, and headed by an all-powerful 'Amir' – currently Hibatullah Akhundzada. Although the Taliban are highly opaque in their decision-making, it seems that the Amir enacts important legislation via decrees, whereas other less significant matters are legislated via the government ministries and departments in the form of resolutions or directives.[2] As the Taliban do not operate under a formal written constitution, there are no 'constitutional amendments' in the picture.

1 See Shamshad Pasarlay, 'The Taliban and the Fall of Afghanistan's Constitutional Tradition' (*International Journal of Constitutional Law Blog*, 22 July 2022) <http://www.iconnectblog.com/2022/07/the-taliban-and-the-fall-of-afghanistans-constitutional-tradition/> accessed 16 March 2023.

2 Haroun Rahimi, 'Afghanistan's Laws And Legal Institutions Under The Taliban' (*Melbourne Asia Review*, 6 June 2022) <https://melbourneasiareview.edu.au/afghanistans-laws-and-legal-institutions-under-the-taliban/> accessed 16 March 2023.

As last year's report mentioned, the Taliban closed the Independent Human Rights Commission, the Election Commission, and the Women's Affairs Ministry. They subsequently justified these measures as budget cuts and unnecessary in the new regime. They also established the Ministry of Vice and Virtue, religious police overseeing moral code enforcement. However, other than these changes, most of the previous government's bureaucracy and ministries have been incorporated into the Taliban Regime in 2022. Most lower and middle-ranking public officials have kept their jobs, except those working in the judiciary and the military.[3] The only significant reform is that most of these ministries and departments are now headed by Taliban officials (some unqualified for their roles). One department that appears to have been either formally abolished or not integrated into the new regime is the National Water Affairs Regulation Authority, the government agency responsible for water management.[4] Perhaps this might be because technical experts and scientists associated with the authority fled Afghanistan upon the Taliban coming to power.[5] However, ceasing this authority's operation has critical ramifications for drought-struck Afghanistan.[6]

From a democratic standpoint, a major change we observed last year was the abolition of the election commission. At that point, the Taliban had remained silent on whether they would hold elections in the future. No significant elections were held in 2022, although some reports have emerged of elections for the position of *wakilon guzar* ("neighbourhood representatives") in a few urban districts.[7] Optimists saw this as a potential for electoral democracy in the near future. However, as the next section explains, we should not take away much from these elections.

We turn now to the one area that has seen the most significant reform in Afghanistan: the law and justice system. Last year's report mentioned that the Taliban had opened their own Supreme Court in Kabul and stated their intention to govern according to Sharia. However, very little was known about the law and justice system, and we engaged in speculation. Nevertheless, the situation is now much clearer in 2022. First, the Taliban have begun to establish an elaborate network of district and provincial courts. As stated earlier, the judiciary is one area where the Taliban have purged all members of the previous regime. Judges associated with the Taliban regime were forced to flee (and some were even retaliated against in the early days). Similarly, the Taliban fired all prosecutors when they took control of Afghanistan.[8] Although some male prosecutors were reinstated in the following months, all remaining prosecutors were ordered to halt their work and transfer investigations to the courts themselves.[9] Nevertheless, regarding the new courts in the country, the Taliban have periodically announced the appointment of new district and provincial judges. Judges appointed by the Taliban regime do not possess a modern legal education and are instead trained in Islamic traditions in madrasas.[10]

Although the Taliban handpick their judges across all levels, they do not significantly interfere with its day-to-day functioning. Moreover, the Supreme Court wields tremendous power under the new regime.[11] To illustrate this, we must refer to last year's report, wherein we mentioned how the Ministry of Justice instituted a committee to review all existing laws drafted during the previous regime and assess their compatibility with the Taliban's version of Sharia. This committee was also vested with the power to remove statutes the Taliban found repugnant to Islamic dictates or to the Hanafi school of jurisprudence (the school of Islamic jurisprudence the Taliban subscribe to). With 2022 over, this committee has yet to review all laws over the past year, and much of the legal codes from the previous regime remain formally 'suspended.'[12] However, outside the judiciary, most administrative laws are still used to keep the bureaucracy and revenue collection running.[13] Regarding the judiciary, the Amir has personally ordered the courts to fully implement Hanafi Law.[14] Nonetheless, lower courts do not possess the authority to decide what Hanafi law is or requires.[15] Instead, when faced with a legal question, these courts must make a referral to the Supreme Court,[16] which then determines the content of the Hanafi law and transmits it to the lower courts and other relevant authorities.[17] The Supreme Court's responses to such referrals become part of the law of the land in the Taliban state.[18]

Finally, there is the much-scrutinized issue of human rights under the Taliban Regime. When the Taliban came to power, they promised to govern moderately. They even claimed that 'international laws and instruments which do not conflict with the principles of Sharia' would be respected. Many high-ranking officials in the Taliban continued in 2022 to state that they would not govern as harshly as when they were last in power. What precisely the 'principles of Sharia' are depends on one's interpretation of Sharia law. Within the old and the new guard of the Taliban, there are severe disagreements about this, and the Taliban have vacillated on various policies, particularly those concerning women and their education.[19] However, sixth grade is currently the highest level girls can be formally educated in Afghanistan.[20] Furthermore, concerning human rights issues, the Ministry of Promotion of Virtue and Prevention of Vice has been highly active, issuing numerous directives in 2022 (the highest of any ministry or department), which

3 Ibid.
4 Ruchi Kumar, 'Confronting climate change – and the Taliban – in Afghanistan' (*The Hindu*, 14 March 2023) <https://www.thehindu.com/sci-tech/energy-and-environment/confronting-climate-change-and-the-taliban-in afghanistan/article66617676.ece> accessed 16 March 2023.
5 Ibid.
6 Ibid.
7 Franz J. Marty, 'The peculiar case of elections under the Taliban' (*The Diplomat*, 26 April 2022) <https://thediplomat.com/2022/04/the-peculiar-case-of-elections-under-the-taliban/> accessed 16 March 2023.
8 UN Experts: Legal Professionals in Afghanistan Face Extreme Risks' (*Amu TV*, 20 January 2023) <https://amu.tv/en/32907/> accessed 16 March 2023.
9 Ibid.
10 Mohammad Farshad Daryosh, 'Supreme Court Appoints 69 Provincial Judges' (*TOLO News*, 16 December 2021) <https://tolonews.com/afghanistan-175920> accessed 16 March 2023.
11 Shamshad Pasarlay, 'The Curious Case of the Taliban's Judicial Empowerment,' (*International Journal of Constitutional Law Blog*, 16 September 2022) <http://www.iconnectblog.com/2022/09/the-curious-case-of-the-talibans-judicial-empowerment/> accessed 16 March 2023.
12 Rahimi (n 2)
13 Ibid.
14 Imran Danish, 'Islamic Emirate Leader Orders Full Implementation of Sharia Law' (*TOLO News*, 14 November 2022) <https://tolonews.com/afghanistan-180747> accessed 16 March 2023.
15 Pasarlay (n 11).
16 Ibid.
17 Ibid.
18 Ibid.
19 Susannah George, 'Taliban Reopens Afghan Schools — Except For Girls Beyond Sixth Grade' (*Washington Post*, 23 March 2022) <https://www.washingtonpost.com/world/2022/03/23/taliban-afghan-girls-school-secondary/> accessed 16 March 2023.
20 'Afghanistan: Taliban Ban Women from Universities Amid Condemnation' (*BBC*, 21 December 2022) < https://www.bbc.com/news/world-asia-64045497> accessed 16 March 2023.

frequently have constitutional and human rights ramifications.[21] As stated by Rahimi, these directives notify the public that the Ministry intends to enforce certain provisions it considers obligatory upon Afghans by virtue of being Muslim (or subject to a Muslim state in the case of non-Muslims) and due to the Hanafi jurisprudence of Islam being the supreme law of the land.[22] Examples of these directives include women having to wear full-body coverings in public.[23] Failure to do so results not in punishment for the women but instead fines, prison time, or termination from government employment of the male "guardians" who failed to ensure that their female relatives abided by the directives.[24] The year 2022 has not provided a long-term vision for Taliban plans *vis-à-vis* human rights, and the situation remains in a constant state of flux, mainly due to internal differences in the Taliban over which versions of Sharia are to be adopted (and also, as discussed later, due to the desire to retain a bargaining chip with international actors).

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

There are numerous reasons, contexts, and implications behind the reforms (or lack thereof) described in the previous section. They are as follows:

Most important are the internal power divides within the Taliban. Like any government or organization, the Taliban are highly divided.[25] On one side is the Kandahar faction, named after the southern city where Mullah Omar founded the group.[26] It includes the country's Amir, Haibatullah Akhundzada, and the acting defence minister, Mohammad Yaqoob, Mullah Omar's son. Its public face is Abdul Ghani Baradar, the acting Deputy Prime Minister, who played a crucial role in negotiations with the Trump government regarding the withdrawal of American troops.[27] On the other side is the Haqqani network, a militant group closely linked by family ties.[28] Whereas the Kandahar faction was primarily concerned with gaining control of Afghanistan, the Haqqani Network was more involved in global jihad;[29] for them, it was the suicide missions and militant attacks that secured victory over the foreign occupiers,[30] but for the Kandahar faction, it was by negotiating with the Americans.[31]

These divisions have undoubtedly created tensions with the allotment of power in the caretaker government. Currently, the Haqqani faction has an outsized role in the military, and the Kandahar faction has a disproportionate one in the government.[32] Both sides want a bigger role in underrepresented areas of the state. To complicate matters, neither is willing to relinquish control over their respective domains. A further disagreement concerns appointments within the Taliban. The group's leadership council is divided between moderate and conservative factions. Moderate factions prefer an inclusive government with the potential to gain international recognition, whereas conservatives oppose inclusivity.[33] Divides such as these are why a permanent government has yet to be named.[34] However, we should not see these divides as a potential cause of the Taliban losing ground and disintegrating. The Taliban strongly value cohesion and are frequently able to resolve divides internally.[35] Considering that today the Taliban face internal enemies in the form of the Islamic State and the National Resistance Front (a group of armed militias loyal to the previous regime), they might keep aside their differences to hold ground rather than give in to infighting.[36]

Beyond the power divides, there are disagreements regarding ideology. These disagreements are the primary cause of uncertainty over human rights issues, particularly girls' education. The debate pits most of the Taliban's political leadership against a small group of religious conservatives (including Akhundzada, the Taliban's ultimate decision-maker).[37] Those in the Taliban with more moderate views, including many in government, argue there is no religious rationale for prohibiting girls from schools and universities as long as they are segregated from males.[38] Since they came to power in August 2021, senior Taliban officials have taken over ministerial positions in Kabul. However, ultimate authority remains in the hands of the reclusive Akhundzada, who rarely leaves Kandahar.[39] Communication between his circle in Kandahar and the government in Kabul is limited, frequently depending on written notes carried by messengers.[40] It has been reported that the education framework was created in Kabul, and the leadership in Kandahar was not kept informed.[41] When government ministers from Kabul travelled to Kandahar, they faced opposition from the leaders there.[42] This is why the Taliban has vacillated on women's education access since coming to power – first stating that girls could attend school and universities and then slowly backtracking on this – and currently, the situation has been left open by stating that they are deciding on appropriate girls' curricula and uniforms.[43]

However, in the future, if the conservatives give way to younger and more moderate factions (or if the Taliban as a whole gives in to international pressure), significant progress on the human rights front – particularly women's rights – should not be expected. Key evidence for this can be found in the group's manifesto written by Abdul Hakim Haqqani, the Chief Justice of the Supreme Court, titled al-Imarat

21 Rahimi (n 2).
22 Ibid.
23 David Zucchino and Safiullah Padshah, 'Taliban Impose Head-to-Toe Coverings for Women' (*New York Times,* 7 May 2022) <https://www.nytimes.com/2022/05/07/world/asia/taliban-afghanistan-burqa.html> accessed 16 March 2023.
24 Ibid.
25 Ali Latifi, 'How deep are divisions among the Taliban? (*Al Jazeera,* 23 September 2021) <https://www.aljazeera.com/news/2021/9/23/how-deep-are-divisions-among-the-taliban> accessed 16 March 2023.
26 John Lee Anderson, 'The Taliban Confront the Realities of Power' (*New Yorker,* 21 February 2022) < https://www.newyorker.com/magazine/2022/02/28/the-taliban-confront-the-realities-of-power-afghanistan> accessed 16 March 2023.
27 Ibid.
28 Ibid.
29 Ibid.
30 Ibid.
31 Ibid.
32 Sune Rasmussen and Margherita Stancati 'Taliban Splits Emerge Over Religion, Power and Girls' Schools' (*WSJ,* 1 July 2022) <https://www.wsj.com/articles/taliban-splits-afghanistan-religion-girls-schools-11656682831> accessed 16 March 2023.
33 Latifi (n 25).
34 Haroun Rahimi, 'The Taliban In Government: A Grim New Reality Is Settling In' (*Al Jazeera,* 23 March 2023) <https://www.aljazeera.com/opinions/2023/3/23/taliban-in-government-a-grim-new-reality-is-settling-in> accessed 16 March 2023.
35 Andrew Watkins, 'Taliban Rule at Three Months' [2021] 14(9) CTCSENTNIAL 1, 3.
36 Ibid., 1-5.
37 Rasmussen and Stancati (n 32)
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 Ibid.
43 Ibid.

al-Islamiat wa-Manzumatuha (English: The Islamic Emirate and its System). This manifesto describes establishing and running an Islamic Emirate.[44] This manifesto has been reviewed by Akhundzada, among other prominent religious figures within the Taliban.[45] Although there are doubts about whether the manifesto represents the views of the entire Taliban, considering the power wielded by the Supreme Court in present-day Afghanistan (as described in detail later), Haqqani's work is highly relevant. Furthermore, the manifesto's chapter on women's education and careers arguably represents a relatively centrist take on the topic from the Taliban's point of view.

The manifesto states that women's education is not *haram* but that the curriculum must comply with Sharia to prevent moral corruption.[46] Furthermore, women must pursue careers deemed appropriate for their gender, such as child rearing, elderly care, or embroidery.[47] Ideally, education for such careers must be conducted at home by family members.[48] The manifesto leaves open the possibility of other necessary careers, such as those in medicine (treating other women) and teaching (only girls).[49] It also states that women must be fully covered in the hijab and should not pursue careers or education where they will be without a male guardian for longer than three days.[50] The manifesto also states that women are barred from senior government leadership positions.[51]

Even beyond the issue of women's rights, little should be expected on the human rights and democracy front simply because of the Taliban's viewpoint on individuals and the role of the state. Individuals are not thought of in terms of sovereign entities but rather in terms of their obligations towards their creator, family members, broader society, and themselves.[52] On the other hand, the function of a state is to ensure individuals honor their divine obligations and put them on the path decreed for them by God.[53] In the Taliban's view, this requires the state to enforce Sharia Law (or rather their interpretation) on behalf of society. Therefore, the state is legitimate only when it can enforce Sharia Law upon its subjects. Consequently, they consider Sharia sufficient to run the state and other laws or rights as not *per se* necessary.[54] These views of the Taliban also enable their leadership to pursue whatever policies they consider essential to implement Sharia Law – even if this is at the expense of the rights of the general populace.[55]

The Taliban's view on the state also explains why elections should not be expected. Shamshad Pasarlay notes that, unlike democratic governments that gain legitimacy from free and fair elections, the Taliban view only God as the source of sovereign power and reject popular elections as a Western imposition.[56] In addition, they believe that elections through a universal adult franchise are futile because not everybody's votes are equal.[57] According to the Taliban, only those versed in Sharia law can select the individuals to enforce it on behalf of society.[58] This is why we should not seek too much meaning in the elections conducted for neighborhood representatives. Andrew Watkins explains how The Taliban might have conducted the municipal elections for either of two purposes: (i) gauging the international community's reaction and testing whether they view this as inclusive governance; (ii) probing their standing with urban populations where they have not traditionally governed.[59]

Lastly, we consider the law and justice system. We mentioned earlier how the Supreme Court has the sole authority to decide the scope of Sharia Law. Given that reality, it decided over 630 referrals in 2022.[60] This allows the Court to play a transformative role in Afghan society (though not in the traditional manner we see courts playing a transformative role).[61] The Taliban, although hand-picking judges, benefits from maintaining the court system's independence from day-to-day interference as it accords legitimacy to the courts' decisions. Moreover, given the underdeveloped nature of the Afghan State, the Supreme Court is in an excellent position to enable the enforcement of Sharia Law.[62] In addition, unlike the last time, the Taliban was in power, this time around, the Court exercises strong form review and has the right to examine government conduct for compliance with Sharia Law.[63] In many ways, this also allows the Court to mediate disputes and disagreements regarding competing versions of Sharia in the country.

Beyond the Supreme Court, the reason the Taliban has expanded the court system is primarily to ensure domestic support for their rule. Support for the Taliban has always been driven more by practical considerations than theoretical ones.[64] Nationally, the Taliban have championed law and order and curbing corruption – something the previous Western-backed government was unable to do effectively. Maintaining a degree of law and order and swiftly resolving disputes were objectives the Taliban government was successful at achieving in areas under their control, even when in exile.[65] For many local Afghans, the Taliban did this far better than the Western-backed government could ever manage.[66] Thus, the Taliban have incentives to maintain and develop their court system.

IV. LOOKING AHEAD

Looking ahead to 2023, the most important factors that will have ramifications for constitutional reform in Afghanistan are how the Taliban will manage their internal differences and the extent to which they give into Western pressure. This could impact the political structures in Afghanistan and the human rights landscape. The country is suffering

44 See generally Abdul Hakim Haqqani, Al-Emarat al-Islamiyya wa Nizamoha (2022).
45 Borhani Jawad, 'The Islamic Emirate And Systems: An Overview of the Taliban's Manifesto of Statehood' (*Reporterly*, 7 June 2022) < https://reporterly.net/latest-stories/the-islamic-emirate-and-systems-an-overview-of-the-talibans-manifesto-of-statehood1/> accessed 16 March 2023.
46 Maryam Baryalay and Abdul Mateen Imran, 'Do the Taliban Have Transnational Ambitions? (*The Diplomat*, 29 July 2022) <https://thediplomat.com/2022/07/do-the-taliban-have-transnational-ambitions/> accessed 16 March 2023.
47 Ibid.
48 Jawad (n 45).
49 Baryalay and Imran (n 46).
50 Ibid.
51 Ibid.
52 Rahimi (n 2).
53 Ibid.
54 Shamshad Pasarlay, 'Dead or Alive?: The Taliban and the Conundrum of Afghanistan's 2004 Constitution' (*Blog of the International Journal of Constitutional Law*, 23 March 2022) <http://www.iconnectblog.com/2022/03/dead-or-alive-the-taliban-and-the-conundrum-of-afghanistans-2004-constitution/> accessed 16 March 2023.
55 Rahimi (n 2).
56 Pasarlay (n 1).
57 Ibid.
58 Ibid.
59 Marty (n 7).
60 Pasarlay (n 11).
61 Ibid.
62 Ibid.
63 Ibid.
64 Rahimi (n 2)
65 Adam Baczko, 'How the Taliban Justice System Contributed to their Victory in Afghanistan' (*Insights From Social Science*, 26 October 2021) <https://items.ssrc.org/insights/how-the-taliban-justice-system-contributed-to-their-victory-in-afghanistan/> accessed 16 March 2023.
66 Ibid.

from a financial crisis, with billions in aid suspended. Considering this, it would not be surprising if the Taliban conceded somewhat to Western governments and improved the country's human rights situation, at least vis a vis women's rights, or announced a more inclusive government. However, we should not keep our hopes high. It may be the case that the Taliban could preserve the status quo as a bargaining chip with the West, whom they seem to have little trust in. Another sign to look out for would be the expansion of the law and justice system, one of the few sectors in Afghanistan that appears to be growing rapidly. In conclusion, like last year's report, we can only hope to see constitutional reforms that result in some moderation from the Taliban.

V. FURTHER READING

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Albania

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I. INTRODUCTION

During 2022 there was one constitutional amendment presented and approved, which prolonged the mandate of vetting institutions for 2 more years.[1] This amendment was considered necessary in order to conclude the revaluation process of judges and prosecutors, which resulted to be more complicated and time-consuming than initially foreseen[2]. It did not bring any substantial changes to the rest of the constitutional provisions. It was a technical amendment or an "*ordinary housekeeping measure.*"[3]

In addition, parliamentary activity during 2022 has undergone some restrictions due to measures taken in order to prevent the spread of the COVID-19 pandemic, which have had an impact not only on the life of people but also on institutions' activity. The Republic of Albania presented a verbal note to the general secretariat of the Council of Europe to inform them that some of the measures to prevent the spread of Covid 19 derogated from some of the rights of the Convention. The Council of Ministers Decision restricted certain fundamental human rights and freedom enshrined in Articles 37 (inviolability of housing), 38 (freedom of movement), 41, paragraph 4 (right to property), 49 (right to work) & 51 (the right to strike) of the Constitution of Albania[4].

Meanwhile, the implementation of the 2016 Justice Reform went slowly forward in 2022. Its focus was particularly to fill the last 3 vacancies of the Constitutional Court and also a further 4 new judges at the Supreme Court in order to become fully operational after the vetting process.[5]

In the absence of any amendment to the content of the Constitution, except for a single amendment to the Annex of the Constitution, the report will focus on the trend of modifying the Constitution informally (constitutional dismemberment) by the Constitutional Court case law. There are two decisions worth noting: the first one dealt with the role and responsibility of the Head of State in a parliamentary system, in dividing the power of government nomination/selection between parliament, president, and prime minister equally, which is not in conformity with the constitutional text and previous case law of the Court. The second one was important because for the first time in its history, the Constitutional Court had to decide on President's impeachment procedure, focusing on the interpretation of "political neutrality," "unity of people," and "lack of responsibility of President during its duty" as the most important features/qualities of head of state.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. EXTENSION OF VETTING PROCESS

Although there was a formal constitutional amendment – which aimed an extension of the mandate for vetting institutions foreseen in the Annex of the constitutional body text – it did not bring any significant changes to be considered as constitutional reform. The vetting process began in 2017 and was supposed to end in 2022. This process has encountered several hurdles (the process of recruitment, training, and application of the procedures), and the pandemic COVID-19 impacted directly the activity of these institutions due to a lack of logistical infrastructure, lack of electronic equipment, difficulty in accessing confidential documents, etc. Although the vetting process was planned and regulated to finish in 5 years, at least a major part of it, it resulted not possible to evaluate more than 60% of judges and prosecutors. After asking the opinion of the Venice Commission[6] if the extension conforms with European standards, according to which an extraordinary evaluation process of judges should be time-limited and as swiftly as possible, and it must not be done at the expense of the fairness of the procedures, the parliament approved the extension until the end of 2024. It did not affect any part of the constitution, therefore, no important discussion followed, except for the daily political rhetoric.

1 See for detailed information the country report in: Global Review on Constitutional Law, Albert, Richard and Landau, I·CONnect-Clough Center 2019 Global Review of Constitutional Law (November 26, 2020). Albania Country Report.
2 Constitution of Republic of Albania, as Amended by Law no. 115/2020, dated 30.07.2020
3 See: Richard Albert, "Constitutional Amendments, Making, Breaking and Changing Constitutions", Oxford university press, 2019, pg. 12.
4 The verbal note is available in: https://rm.coe.int/16809e0fe5
5 See for more details Global Review on Constitutional Law 2020, 2021 Albania Country Report.
6 See Venice Commission opinion no. 1068/2021, dated 14 December 2021, CDL-AD(2021)053 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2021)053-e

2. INFORMAL CONSTITUTIONAL AMENDMENTS/DISMEMBERMENTS

2.1. COMPETENCES OF HEAD OF STATE IN PARLIAMENTARY SYSTEM

Trying to qualify informal constitutional changes as amendments or dismemberments is a challenging undertaking. It requires looking into a society's pre-existing constitutional architecture and anticipating the effects of a given change. While amendments build on an existing constitution, dismemberments break up with a pre-existing constitution. As Richard Albert writes: *"A dismemberment of a constitutional structure entails a clear break from how the constitution organizes the allocation of power, how it balances competing claims to and the exercise of authority, or how its public institutions function."*[7] Based on this perquisition, the authors would like to present the latest Albanian Constitutional Court case law on the power of the President to nominate/elect the government and its relation to parliament's discretion.

As previously reported,[8] there was an ongoing conflict between the parliamentary majority and the President, which has escalated throughout the years. It included not only political declarations but also concrete acts such as the postponement of the date of election by the President without consulting with political parties, the appointment of Constitutional Court judges not in conformity with the constitution, the refusal to appoint a cabinet member proposed by the Prime Minister, etc. For these reasons, an impeachment procedure against the President started in 2021 (see below point b.).

Due to the fact that the President refused to nominate the Minister of Foreign Affairs proposed by the Prime Minister, the latter asked the Constitutional Court to give an interpretation of the constitutional provision that foresees the power of the Prime Minister to nominate or discharge the Cabinet's member and the power of President to reject it. The arguments of the President for the refusal were based on "his internal conviction that the proposed candidacy, due to lack of political, diplomatic, administrative experience, did not justify the public interest, national unity and security of the country to hold the post of Minister for Europe and Foreign Affairs.". The parliamentary majority argued that the President does not have the right to refuse the nomination because the responsibility to form the government is of the Prime Minister, not of the President, who should be politically neutral and has not so ever any power to decide on a political matter, because of its position in a parliamentary system. It is a prerogative of the parliament not to approve the Cabinet's members proposed by Prime Minister at the end.

What Court stated could be summed up that more than a clear cut between the Prime Minister, President, and Parliament in nominating and approving the Cabinet's members, there should be a collaboration during the evaluation and verification of the candidates proposed by the Prime Minister, not only by him but also by the President and Parliament involved in the process, each according to its role and constitutional competencies.[9]

As to the position of the President in appointing the Prime minister and ministers, Albanian Constitution provides that the President appoints and dismisses cabinet members[10]. But on the other hand, the President cannot appoint or dismiss any minister without the proposal of the Prime Minister. To sum up, the right of the President to nominate candidates, presented by the Prime Minister, is as follows: a) The president has the right to control only moral and political figures, proposed by Prime Minister; b) The President is obliged to take into consideration the proposals of the Prime Minister because the latter is the head of a government voted by the majority of voters; c) The president conducts a political examination of submitted nominations; d) President monitors the compliance of qualities of the candidate with the general welfare and progress of the country because it represents the unity of the people and should stay above the interests of political parties.[11] For these reasons, it is accepted that the President has no room to move beyond exercising competence regarding the rejection of nominations submitted by political forces that have received the most votes from voters from general parliamentary elections. The Assembly is precisely the institution that reflects on them as a legislative body, inspects the government in a parliamentary republic, and reflects the political majority[12].

The same can be said about the case when during a legislature, the governmental cabinet undergoes vacancies. Article 98(2) of the Constitution provides that the new minister is appointed by the President upon the proposal of the Prime Minister. Parliament admits for approval of the decree of appointment of the President. In fact, there is debate among lawyers whether it is necessary that when a vacancy remains in government, the new minister passes through the initial approval procedures of government, so the proposal of the Prime Minister, the decree of the President, and approval of parliament, but the practice remained unchanged. In many cases, the discretion of the parliament to review the Presidential decrees on the appointment of Cabinet members has resulted in political crises between them.[13]

Having the above explanation in mind, one could admit that the Court's decision not only did not bring any contribution in clarifying the actual conflict – not to mention that it came out almost a year later – but did not make it to finally give any interpretation of the constitutional provision as expected. It only reinstated its previous elaborations on the separation of powers between executive and legislative, which in the given case did not apply at all. Just underlining the neutrality of the President and the principle of constitutional loyalty without making a useful link to the actual conflict is no contribution to the institutional and political cohabitation in a democratic state. The Court could go a bit further in explaining why the President, Prime Minister, and

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

8 Arta Vorpsi, *Country Report on Albania published in: 2021 Global Review of Constitutional Law, 16.*

9 See decision of Constitutional Court no.26/2021.

10 Article 96/1 of the Albanian Constitution

11 Arta Vorpsi, the Head of State according to the Albanian Constitutional Law in: Recent Developments in Albanian Constitutional Law (2012), 53. Universitaetsverlag Regensburg.

12 See decision no.6/2002 of Constitutional Court.

13 Xhezair Zaganjori, Aurela Anastasi, Eralda Cani, "Shteti i së Drejtës në Kushtetutën e Republikës së Shqipërisë", Tirana, 2011 pg. 123.

Parliament should collaborate if the constitution itself foresees the responsibility of the Prime Minister, not of the President, throughout 4 years of governance. Also, the Court failed to explain why and how the President should evaluate the Cabinet's members prior to its approval/rejection by parliament. The candidate for Prime Minister, after winning the election and after being proposed by their party is expected to propose the Cabinet and its program, upon which the Parliament (not the President) has the right (not) to give the confidence vote. Almost two decades ago, the Constitutional Court had stated that it is up to the Prime Minister (not the President of the Republic!) to select his cabinet's members for whom he/she takes full responsibility, not only for the minister but also for the whole Cabinet.[14] The latest decision of the Constitutional Court has shifted the power from Prime Minister and parliament to the President without giving any convincing argument. It imposes a collaboration between three institutions which could impair the competence and responsibility of the Prime Minister to build his/her cabinet toward the parliament (not the President), where he/she has to gain confidence.

In conclusion, it could be said that it deformed the concept of a parliamentary regime, which is based on governance by the executive and legislative, not the President, which should maintain a neutral position towards both of them. Neutrality in political questions does not mean inactivity or indifference, but it sure does not mean interfering in any political decision despite good intentions. To conclude, in a parliamentary republic, the political responsibility at all times of the governing lies on the prime minister, which is the leading figure in the government and therefore has the right to nominate members of the cabinet and its program.

2.2. PRESIDENT'S IMPEACHMENT – HOW MUCH POLITICAL ACTIVISM IS TOO MUCH?

Shortly after the first failed impeachment proceedings against the President,[15] and after the conflict escalated even more, the parliament opened a new impeachment procedure with added allegations about his role as head of state. The Albanian Constitution foresees the possibility of discharging the President from duty for serious violation of the Constitution and serious crime. The procedure should be initiated by at least ¼ of the MPs, and it should be supported by 2/3 of them. The parliament's decision for removal of the President from office should be certified by the Constitutional Court. If the latter reaches the conclusion that the President is guilty, it declares their removal from duty.[16]

In 2020 the Parliament initiated the first impeachment procedure and concluded that while the President had overstepped his Constitutional competencies, the violations did not justify his impeachment. The actions of the President of the Republic that caused the initiation of the impeachment procedure were mostly related to: (i) issuing several decrees on the date of local elections without any consultation with political parties; (ii) refusing to appoint the Foreign Minister proposed by the Prime Minister by arguing that the candidate was not adequate and experienced enough to lead Albania towards European Integration; (iii) the appointment of a Constitutional Court's judge not in accordance with the Constitution. Although the parliamentary committee worked for more than a year, the result was only a recommendation to approve a special law on the competencies of the President of the Republic, which could have been reached simply via legislative activities without the need to aggravate the political situation more than usual the opposition and attacking the majority. Shortly after that, a second impeachment process reopened for breaching the constitution because of his political engagement in the electoral campaign, accusing him of meddling in the April 25 national election and violating the country's constitution, which does not allow for the President to exercise political activities.[17] The Parliament's decision underwent the control of the Constitutional Court. It declared that although the President has been more than expected involved in political debate, it does not constitute a constitutional violation.[18]

Before we go through some points of the Court decision, it is worth mentioning that it took almost 8 months for the Court to decide on the case, which among others, raised a question of the legitimacy of oath-taking by the government after the general elections, which has to be executed by the impeached President by the same ruling majority who discharged him. The Constitution does not provide for a suspension of the President during impeachment; therefore, an abnormal political situation took place where the parliamentary majority ignored any act of the President, and the latter attacked any political initiative of the majority.

We would like to stress some questions which could raise implications on how the constitutional provisions are interpreted in the first case of impeachment. The first one deals with a constitutional provision providing that the President should not be held responsible for any act committed during his/her duty.[19] The Albanian constitution foresees a head of state that does not belong to any of the three classic state powers and does not have governing powers. He/she should be politically neutral and represent the unity of the Albanian people. Therefore, the President shall not be held politically responsible for his/her acts. His/her figure is similar to any other head of state in a parliamentary regime.[20] The so-called non-executive presidents typically embody and represent the legitimate constitutional authority of the state, performing ceremonial and official functions in which the identity and authority of the state as such, rather than that of the incumbent government, is emphasized. For example, the president will usually accredit and receive ambassadors, open sessions of parliament and designate or appoint the prime minister. The president might also formally appoint certain high-ranking officials and will almost always formally promulgate laws and sign treaties. Non-executive presidents usually have little or no discretion in the performance of these official duties (for example, the president may formally sign a treaty ratified by the parliament but must do so: he/she does not have the discretion to refuse signature) but by their presence, they may strengthen the legitimacy of government

14 Decision no.28/2002 of Constitutional Court.
15 Arta Vorpsi, *Country Report on Albania published in: 2021 Global Review of Constitutional Law, 16.*
16 Article 90 of Albanian Constitution.
17 https://www.dw.com/en/albania-parliament-impeaches-president-ilir-meta-removes-him-from-office/a-57830015. See also https://www.voanews.com/a/europe_albania-parliament-votes-impeach-president/6206820.html
18 Decision no.1/2022 of Constitutional Court.
19 Article 90(1) of Constitution.
20 FN 9.

acts by adding their moral, ceremonial and institutional authority as the embodiment of the state as such (or, if directly elected, as a representative of the people as whole) to the government's partisan mandate. It follows from the above that the separation of offices between the head of government and the non-executive president helps to maintain a symbolic separation between the incumbent government, which is party-political, and the permanent institutions of the state as such, which are supposed to be politically neutral and universal. To sum up, a non-executive president is a symbolic leader of a state who performs a representative and civic role but does not exercise executive or policymaking power. A non-executive president may, nevertheless, possess and exercise some discretionary powers of extraordinary political intervention as a constitutional arbiter or guarantor.

Back to Court's decision, one could notice the struggle of the Court in identifying if there is a political or criminal responsibility of the President. As for political responsibility, there is none because it is not compatible with a non-executive President. The second one also does not appear because the impeachment was based on his political involvement *stricto sensu*, which constitutes a constitutional violation and not a crime. The court established four criteria for judging in relation to the constitutional liability of the president: The violation committed by actions or inaction must be of the constitutional level; the violation must affect the essence of the rights and freedoms provided for in the Constitution; the violation must be of an irreversible nature; the subjective position of the author of the violation.

The Court justifies the lack of responsibility with "special protection of Constitution,"[21] which is merely not the aim of the provision. A non-executive President should not be held accountable during his/her duty because it is not his/her job to govern, therefore, he/she could not bear any political liability. The Constitution does not offer 'special protection' for the President, more it offers a clear separation of powers among different organs in a parliamentary regime. For that reason, there is a provision that forbids the President to exercise any competence other than those provided for in the Constitution. This interpretation also contradicts the jurisprudence of the European Court of Human Rights regarding the responsibility of public persons. The aim is not to protect institutions per se but to ensure the rule of law, meaning the separation of powers. Having that in mind, the majority of 2/3 to remove the President should not be considered as protection towards him/her, but more a procedural guarantee offered by a democratic constitution to prohibit that his/her position is not subject to the whims of the parliamentary majority.

However, the Court starts from the premise that the reason for the dismissal of the President is a serious violation of the Constitution or a serious crime, which, based on the criteria defined by it (para 144-149 of the decision), it must not only conflict with a constitutional provision/prohibition, therefore violate a relationship, value or issue that is expressly protected by the Constitution, but also be proven in terms of real consequences and effects in the life of the country, as well as of the irreversible nature of the impossibility of repairing the constitutional damage except by dismissing the President from office. Reiterating that the impeachment of the President interferes unusually in the functioning of the constitutional order, as an exceptional event, which aims to protect the Constitution to the extent that the benefits of its protection prevail over the loss that the impeachment would cause to the country his, in this particular case, the President's activity of a political nature, regardless of whether it was partisan or not, does not result in having real consequences and effects in terms of violating the essence of the basic rights and freedoms guaranteed in the Constitution, especially those who are applied during the electoral process, the constitutional order or the functioning of the state institutions, in such proportions that would dictate the constitutional responsibility of the President and would justify his dismissal from office. Consequently, the Court assesses that the political activity of the President before and during the election campaign is not considered a serious violation of the Constitution (para 187). Also, the interference of the President in the electoral campaign in raising public awareness not to vote in favour of the socialist party is not considered a constitutional violation (para 190) because the level of interference was not high enough! After this decision, the concepts of "unity of people" and "impartiality in political matters" foreseen in the Constitution face a very wide degree of relativity which would negatively impact the relations between different branches of state power. The dissenting opinion emphasizes that the President has committed a serious violation of the Constitution. It states that the Court didn't bring any clarification on the subjective position of the President towards the constitutional violations. According to the judge, "*...the President was fully aware not only of the obligations arising from his position and constitutional role, but also of the eventual consequences of these acts...*". To sum up, according to this interpretation of the Court, the meaning of the constitutional provision was given a different meaning, which could be seen as a constitutional dismemberment.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As mentioned above, there was no constitutional reform in 2022, just a minor change with regard to the mandate of vetting institutions, without having any effect on the constitutional design of institutions. One could further discuss informal constitutional changes, the effects of which are to be seen in upcoming years.

IV. LOOKING AHEAD

The polarization of the Albanian political scene is continuously heated, which led to formal and informal adaptations of the legal framework to find solutions that do not promise long stability. One could notice the frequency of legal amendments, including the constitutional framework, even through constitutional interpretation by the courts or other institutions. Therefore, one could notice attempts to initiate formal changes to the current constitution were abandoned, and instead, informal constitutional changes were introduced through the back door. It seems that this practice could become frequent in the near future. If the case law of the Constitutional Court would further contribute to that matter is to be seen. As for the formal constitutional changes, there

21 See para 124 of decision no.1/2022 of Constitutional Court.

is a need for a qualified majority which seems difficult to be reached, although sometimes the political parties could surprise with their compromise reached overnight when there is a strong political will to do so.

V. FURTHER READING

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Angola

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I. INTRODUCTION

Angola's independence process is recent, having occurred on November 11, 1975. The nation's independence happened after a lasting state of the liberation war against Portuguese colonial rule. The following *Alvor* accords were signed in Portugal and the three national liberation movements which paved the way towards Angola's independence: MPLA (Popular Movement for the Liberation of Angola), FNLA (National Front for the Liberation of Angola), and UNITA (National Union for the Total Independence of Angola). However, despite being an independent nation, Angola had many internal issues which resulted in the country entering a long period of violent war, in which there were several political processes that hoped to bring peace to the country. After the country gained its independence, Angola had a socialist republic, a period that lasted until 1991, with the publication of the first Constitutional Law in 1992 and the holding of the first elections in the country. This period (1975/1992) is known as the First Republic.

Afterward, the period that comprises the constitutional approval from 1992 until January 2010 is Angolan Historiography II. Republic. During this period, the civil war that ravaged the country ended, and in 2002, "the Angolan government and UNITA signed the Luena Memorandum of Understanding, which ended the military conflict." Finally, the III Republic began (2010 to present) with the entry into force of the current Constitution of the Republic of Angola on February 5, 2010.

Given the institutional breakdowns and long periods of civil war described above by Araújo, Angola is now forming and establishing its primary institutions.[1] Therefore, the Constitutional Reform Law (Law nº. 18, of August 13, 2021, published in the Republic Official Gazette, Series I, nº. 154) helped strengthen local government and the process of institutionalization of local authorities in the country.

This theme is still in the building framework of the Angolan Democratic State of Law and the decentralization of political power, constituting one of the formulas for the participation of citizens in public life. Participants gave new wording to the thirty articles of the Constitution of the Republic of Angola, adapting them to the country's current context. They also adjusted some matters not sufficiently dealt with and inserted some subjects absent from the original text.

The amendments strengthen the Democratic State of Law and the principle of separation of powers by removing the principle of gradualism from the constitutional text (article 241, nº. 1) and ensuring all revenues and expenses of the local government budget are an integral part of the General State Budget listed in Article 64 of the Angolan Constitution. The Reform Constituent Power wishes that there are no more subterfuges that will prevent the implementation of decentralization pursued by the original Constitutional text (2010) that tried to establish local authorities as important members of the Angolan government. The principle of gradualism was withdrawn, which declared that creating local authorities, decentralization, and local autonomy would be gradual—according to the conditions of each Municipality—to give full effect to the constitutional text without limiting the principles of its provisions. Likewise, there have been efforts made to ensure that Local Authorities have financial autonomy.

In the chapter about private property and free enterprise, the reform text reinforces the capitalist foundations of the Angolan State in which the State must protect and respect the individual property of natural and legal citizens. The State must also promote economic and business initiatives to be exercised following the Constitution and the law.

Concerning the intervention of private property, the reform establishes that, in whole or in part, immovable or movable property and shareholdings of individual or collective private persons may be the object of public appropriation when, for reasons of national interest, they are at stake. Examples include national security, food security, public health, the economic and financial system, and the provision of essential goods or services. This modality arose from needs observed in the COVID-19 pandemic and attitudes adopted at that moment of limitation of fundamental rights. With this punctual revision of the Constitution, there is now parliamentary intervention in this area as well.

The reform establishes that the National Bank of Angola (BNA) is the independent monetary and exchange authority to preserve price stability, the value of the national currency, and to ensure the country's financial system remains stable. The reform also highlights that the President of the Republic is the one to appoint the BNA governor after the National Assembly hearing.

When it comes to the electoral system, the Revision Law brings some ineligibility for the position of President of the Republic: former Presidents who have exercised two terms; Presidents who have been removed, resigned, or abandoned their functions; Presidents who have abdicated during their second term; and citizens who have been sentenced to imprisonment for more than three years.

1 ARAÚJO, Raul. "A Evolução Constitucional das Justiças de Angola". In: SANTOS, Boaventura de Sousa; VAN DÚNEM, José Octávio Serra (Orgs.). Sociedade e Estado em Construção: desafios do direito e da democracia em Angola. v. I. Coimbra: Almedina, 2012.

Finally, another noteworthy issue in Angola is the supervision of the work of the Judiciary, which was extended with the Constitutional Reform. All Superior Courts must make an annual report to be appreciated by the Superior Council of the Judiciary and then forwarded, either to the President of the Republic or to the National Assembly, giving these bodies the possibility of knowing the work of the Judiciary.

In view of the relevance of removing the principle of gradualism from the constitutional text and the importance this issue has for the institutionalization of Local Autarquias in Angola, this paper will emphasize this matter related to Angolan Constitutional Reform.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Considering the current 2010 Constitution of the Republic of Angola, local power is a phenomenon of political power based on power decentralization and civil society participation, as provided in Articles 213 and 214 of the Constitution. In this sense, local government has a three-dimensional valence, explicitly institutionalized in three organizational forms: the local authorities, the institutions of traditional power, and other specific modalities of citizen participation, as provided in paragraph 2 of Article 213 of the Constitution. See below:

1. TRADITIONAL POWER

As an essential organ of local government, the institution of traditional power was innovated in the 2010 Constitution of the Angolan Republic. It is a matter of recognizing constitutional dignity to a previously existing reality in which the custom or customary law of the authorities of traditional power has "always" guided the political organization of the Angolan community, being before the State itself. According to Armando Marques Guedes et al., the constitutional provision of recognizing the power of traditional authorities was an intelligent decision and a mechanism for legitimizing state power. For the authors, "It is important to emphasize the nature and pragmatic purposes of the dialogue between the "sobas" (the generic term used in Angola for all types of traditional authorities) and the State, a discussion that often takes place at their initiative, which now glimpses a new way of legitimizing themselves (or rather, gaining additional legitimacy) in the eyes of "their" populations.

There were many challenges Angola faced in establishing a centralized state after the civil war. In post-war periods, it is difficult to presume enforcement of legal orders without recognizing pre-existing customary law and local authorities. Thus, "The Angolan sovereign state, like others a little throughout Africa, has accepted to recognize the efficacy of 'traditional' authorities in their heritage of intermediation with many of the local and regional groups distributed over the extensive territory."[2] Because they are considered essential organs in Angolan constitutional and administrative law, traditional authorities are centers of emanation of will with legal force. Article 224 of the Angolan Constitution states: "They embody and exercise power within the respective traditional political-community organization, following customary values and norms and with respect for the Constitution and the law." Thus, decisions taken in a participatory manner in the community and led by the "Soba" or traditional leader should be recognized by the state and prevail in the solution of the concrete case, provided that, according to the Angolan Constitution, Article 233, nº.2, they are not in conflict with the Constitution or the dignity of the human person.

Therefore, to form state institutions, Angolan history required the recognition of legal pluralism and the coexistence of traditional power with state power. In certain regions of Angola, the lack of public government powers had led to traditional authorities being called upon to exercise administrative functions. By exercising their authority and taking on administrative functions, these traditional authorities have social autonomy within certain communities. When the traditional authorities do not coexist with the state representatives, they become representatives of the state's local administrations. Thus, the 2010 Constitution of the Angolan Republic recognizes traditional authorities as very important members of the local government, and the Constitutional Reform did not change this arrangement between traditional authorities and state representatives.

2. SPECIFIC MODALITIES OF PARTICIPATION: CCSC (COUNCILS OF HEARING AND SOCIAL DIALOGUE)

Regarding the specific modalities of citizen participation in the Local Administration of the State, legally enshrined in the Angolan legal system at the municipal level, we will discuss the Municipal Council for Community Consultation, the Municipal Council for Social Consultation, the Municipal Council for Community Monitoring, and the Residents' Commission.

First, we will address Law n. 7/16 of June 1, which established the organization and functioning of the Residents' Commissions. This law defined the legal regime of the committees, which are legal entities under public law, resulting from the voluntary union and organization of people residing in a particular street, block, neighborhood, village, or town. These non-profit committees are non-partisan and aim to promote a culture of associationism and boost citizen participation in their respective territorial or administrative constituencies.

There was criticism from those who wanted the neighborhood committees to be included in the legislative package under discussion in Angola for the creation of local authorities rather than a sparse law. The opposition's concerns are regarding the fact that such committees could resemble the old PACS (Political Action Committees), which served to watch and police citizens. However, the opposition's position was not predominant, and the preceding law was approved on June 1st, 2016.

Not only will the Residents' Commission be endowed with administrative and financial autonomy, but there will also be potential community and political autonomy to elect members residing in the area where the commission is located. The Residents' Commission's functions include the following: solving conflicts among residents; promoting participation, solidarity, and cooperation in the community; defending the common interests of the residents; and improving the quality of life within communities. The Residents' Commission will consist of an assembly, administration, and a fiscal council.

The Residents' Commission has many different duties, which include

2 GUEDES, Armando Marques *et. al.* Pluralismo e Legitimação: a edificação pós-colonial de Angola. Coimbra: Almedina, 2003. p. 96.

cooperating with the State's Local Government bodies and local authorities, especially concerning the identification of national and foreign residents by denouncing illegal immigrants, illegal churches, and sects. Other responsibilities of the Commission include promoting the maintenance of green space, accusing unauthorized construction and unlawful land occupation, reporting unfair trade practices, addressing security issues, managing local road traffic, addressing noise pollution, health surveillance, issuing warnings about natural disasters or calamities, and identifying criminality and violations of the law. In addition to all of the duties listed above, the Residents' Commission represents the residents of that territorial circumscription. For example, the Commission also has the right to petition before government agencies and the right to resolve conflicts between members of the community through conciliation. Ultimately, the Commission serves to promote cultural, recreational, and environmental preservation, and the quality of public spaces in these areas.

However, it is essential to point out that the central government has the authority to define the areas and geographical limits of the neighborhood committees. In case of a violation of the Constitution and the Committee Statutes, the central government exercises administrative supervision over them and can dismiss or dissolve the neighborhood committee's governing bodies.

In turn, there are the Hearing Councils—vital for citizen participation—which serve as opportunities for citizens to make themselves heard in their claims and demands. These Councils also contribute to solving problems of the *res publica* management, favoring a significant improvement in the provision of public services to communities and populations in the qualification of local governance.[3] After changes in legislation, the former Municipal Councils of Hearing and Social Dialogue were dissolved and replaced by the Municipal Councils of Community Hearing, the Municipal Council of Social Dialogue, and the Municipal Council of Community Surveillance.

Angolan Local government institutions, such as the Hearing Councils and Resident committees, are political powers; however, they are not sovereign (they cannot threaten the sovereignty of the unitary State) and must coexist with other public, traditional, and private governments, as well as other administrative powers of the State, especially that of control, in the terms foreseen in Article 241 of the Constitution.

Despite the number of efforts being made for improvements, the constant legislative changes in Angolan participatory institutions hinder their consolidation in the daily practice of the communities.

In June and July 2018, the Angolan Ministry of Territorial Administration and State Reform unleashed an intense citizen consultation campaign with the purpose of collaborating with civil society regarding the creation of a legislative package. This package aimed to support the effective decentralization and institution of municipal authorities in Angola. This package would develop gradually, starting with a few municipalities chosen according to their degree of autonomy and progress.

3. LOCAL AUTHORITIES

Finally, regarding local authorities, the previous Constitutional Law of 1992 already referred to them in Article 146. It defined local authorities as collective territorial groups which aim to pursue the interests of the population. These local authorities have their own elected representative bodies and the freedom to manage their respective collectivities.

Currently, it is Article 217 of the Constitution of the Republic of Angola of 2010 that conceptualizes local authorities as a collective territorial person, corresponding to the set of residents in certain circumscriptions of the national territories that ensure the pursuit of specific interests resulting from the neighborhood, through representative bodies elected by the populations.

Therefore, the constitutive elements of the concept of local authorities include the following: legal personality, the community of residents, territory, own interests, the elective nature of the bodies, and municipal government powers. These local authorities can be classified as municipal, supra-municipal, or infra-municipal entities.

One should note that, to date, local authorities are decentralized organs of the State Administration, which means they do not have administrative, political, legislative, or financial autonomy. However, Angola is pursuing the concretization of the Constitution, with effective administrative decentralization and recognition that municipal autarchies are autonomous. The most recent Constitutional Reform of the Angolan Constitution is focused on strengthening the local authorities. This is significant because local authorities aren't as effective due to the great difficulty in instituting the decentralization process of power from the center to the territorial periphery.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Due to these institutional breakdowns and the long period of civil war, Angola is still in the process of forming and establishing its primary institutions. Angola is a Unitary State, with the presence of only one political party in central power, the MPLA, since the nation's democratization. This is referred to as a "strong presidential system." Consequently, the process of decentralization is a recent experience due to pressure from political parties that have not ascended to central power, such as UNITA. The gradual institutionalization process of local authorities depends on operative conditions; however, an acceleration of the process started in 2018 with the proposal of the Municipal Legislative Package in the Angolan Parliament. Ultimately, the decentralization process serves to increase local authority and decision-making in Angola.

The main diplomas (Bills and draft laws) mentioned above are summarized as follows:

- Organic Law on the Organization and Functioning of Local Authorities.
- Law on the Financial Regime of Local Authorities.
- Organic Law on Local Government Elections.
- Law on the Administrative Supervision of Local Authorities.
- Law on the Transfer of Duties and Competencies from the State to the Local Authorities.
- Law on the General Regime of Local Government Fees.
- Law on the Institutionalization of Local Authorities.

Most of these law proposals were approved and aimed at establishing

3 PESTANA, Nelson. Os Novos Espaços de Participação em Angola. In: FAURÉ, Yves-A; RODRIGUES, Cristina Udelsmann. (Org.) Descentralização e Desenvolvimento Local em Angola e Moçambique: processos, terrenos e atores. Coimbra: Almedina, 2011. p. 190.

criteria and objectives in the scope of the decentralization of the Angolan municipal bodies, with the creation of local autarchies in their Municipalities. Although the legal framework is almost entirely in place, the political will to approve its contents for the effective institutionalization of the Autarchies is still missing.

The Parliament needs to conclude the discussion and approval of the Autarchic Legislative Package. A serious issue, though, is gradualism, removed from the Constitution with the Constitutional Reform. The governing party believes it is safer to start implementing autarchies with few municipalities. On the flip side, the opposition wants this reform to occur in all cities around the country.

Without harming the integrity and territorial unity of the State concerning the exercise of political and administrative power, decentralization aims to promote good governance since it has the benefit of bringing the public administration closer to the administrators. Decentralization also serves to facilitate the participation of the community in the governance process, thereby democratizing public administration. After all, there will only be Local Authorities when they have administrative, political, and financial autonomy. In general, the central government decides which municipalities have the human and technical resources to become local autarchies in Angola. Additionally, the central government of Angola will also give these local authorities their desired autonomy, allowing them to function without excessive control by the financial or administrative guidance of the federal government.

For this, there also needs to be a guarantee for the exercise of autonomy to protect local authorities against eventual abuses that may exist on the part of the supervisory bodies. This will allow local authorities to sue illegalities committed in the exercise of central supervisory power.

However, paradoxically, after the Constitutional Reform, a legislative proposal was sent to the Angolan Parliament by the Executive aiming to change the current political-administrative division of the country by increasing the number of provinces from 18 to 20 and the number of municipalities from 164 to 581. What is criticized here is that the proposal seems to be another way to relegate the implementation period, prioritizing the administrative division instead of the effective implementation of decentralization, the desired idea written in the Angolan Constitutional Charter of 2010.

Unfortunately, the Executive, at this moment of Constitutional Reform, wants to triple the number of municipalities before implementing the Local Authorities and carrying out the Autarchic Legislative Package, just when it has justified that the main reason for the gradualism of the autarchies is the lack of material, financial, technical and human conditions for their creation. The creation of 417 more municipalities from the existing 164, without giving them autonomy and freedom from the central government, could worsen the issues mentioned above. It creates 417 more municipalities from the existing 164 which do not have autonomy since they depend on the central power. If the opposition's idea of placing local autarchies in all municipalities prevails, it may also lead to the proliferation of ineffective municipalities in cities in such a short time.

The local autarchies are deconcentrated organs of the State Administration, which means they do not have administrative, political, legislative, or financial autonomy. However, the Reforms in Angola serve to concretize the Constitution, which should move towards effective administrative decentralization and self-rule for local autarchies which can be municipal, infra-municipal, or supra-municipal.

Thus, local government in Angola is on the political agenda, both constitutionally and for the framework for building the Angolan democratic rule of law while decentralizing political power. Decentralization aims to help citizens participate in public life and have the local government respond more competently to the demands of millions of citizens. Decentralization also helps promote public services suited to the unique needs of each region, as well as contributing to the consolidation of a universalized tax base. Decentralization may even favor the territorial development of other parts of the country, displacing the concentration of population, services, and public and private investment from the capital, Luanda.

IV. LOOKING AHEAD

The Constitution of the Republic of Angola of 2010 has shown, in more than ten years in force, to have been capable of governing the country in the essential aspects of national life. It organized and structured State power by allowing for the coexistence of pluralism from local government and the centralized power forms from a Unitary State with a "strong" presidential system. The Constitution has also guaranteed the legitimacy and legitimization of the constitutional legal order, enabling the peaceful existence of conventional forms of traditional power if they do not contradict the constitutional order and fundamental rights. Additionally, it has also maintained the country's stability by ensuring harmonious coexistence with respect for political pluralism, the protection of freedom and fundamental rights, and establishing state programs, ends, and tasks.

Therefore, it is about a constitution with considerable longevity potential that, with the current reform, seeks to adapt to a changing society that requires greater decentralization of power, which includes the valorization of Local Power and the effective creation of local authorities.

For the decentralization attempts to become effective, a more substantial dialogue will be necessary among the Parliament, the governing party, opposing parties, the President of the Republic, and the Judiciary. By strengthening the relationship between these groups, it is necessary to materialize what Angola's constitution says, especially on issues related to decentralization, local authorities, and local decision-making.

V. FURTHER READING

Janaína Rigo Santin, *Estado, Constituição e Administração Pública no Século XXI: novos desafios da cidadania e do Poder Local* (Arraes 2017)

Argentina

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I. INTRODUCTION

The National Constitution of the Argentine Republic had its last reform in 1994. New institutions and bodies, such as the Judicial Council, the Jury of Judgment, the Ombudsman, the General Audit of the Nation, and the Public Ministry were incorporated, granting them constitutional status, but referring to the National Congress. The case of the National Judicial Council is emblematic because, through its ruling, the Supreme Court of Justice of the Nation of 2021 reinterprets section 114 of the National Constitution, and thus it discovers new conflicts and opens a series of questions.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

On December 16, 2021, the Supreme Court of Justice of the Nation resolved one of the pending issues that it had experienced for a long time: the unconstitutionality of Law 26080, which granted a different integration of the Judicial Council. This law had been declared unconstitutional by a Federal Chamber in 2015, and since then, it had been under study by the Supreme Court.

The Judicial Council, the constitutional body incorporated in the constitutional reform of 1994, is in charge of formulating the shortlists that are sent to the Executive Branch to select the lower magistrates of the federal jurisdiction.

At the same time, it has the power to apply sanctions for minor offenses or initiate the procedure to remove magistrates for serious offenses. It will be the Trial Jury, a different body, where the trial of political responsibility will be substantiated. Finally, another one of the powers granted by the Constitution to the Judicial Council is to administer the resources of the Judiciary, which is, without a doubt, a very powerful attribution.

The Constituent Convention of 1994 addressed the problem of lack of legitimacy and public confidence that haunted the Judiciary, and the introduction of the Judicial Council was proposed as a solution. Moreover, the figure already existed in some local constitutional systems. The theoretical debates on the institutional location of this new body as well as the design of the administration of justice gave rise to various doctrinal and political counterpoints. It should be remembered that Argentina maintains, at the federal level and mostly at the local level, a system of constitutional control similar to that of the United States.

The wording of Article 114 of the National Constitution left the regulation of its integration free to the National Congress, making it clear that there should be four estates: those that arise from the representation of political bodies resulting from popular election; the judges of all instances; federally registered lawyers; and members of the academic and scientific fields. These sectors should exist in balance.

The first law that regulated this body was Law 24,397, which was amended by Law 24,939 just a week after its enactment. In 2006, Law 26,080 was enacted. It amends Law 24,937, in regard to the conformation of the Judicial Council.

The composition of the Judicial Council was formed in accordance with sections 1 of Law 26080 and 2 of Law 24937 as follows:

"The Council will be made up of thirteen members as follows:

1. Three judges of the National Judiciary, elected by the D'Hont system, ensuring the equal representation of chamber and first instance judges and the presence of magistrates, with federal jurisdiction within the Republic.
2. Six legislators. For this purpose, the presidents of the House of Senators and of the House of Representatives, at the proposal of the parliamentary blocks of the political parties, will designate three legislators for each of them, two corresponding to the majority and one to the first minority.
3. Two representatives of the lawyers of the federal registration, designated by the direct vote of the professionals who have that registration. One of the representatives must have a real domicile at any point in the interior of the country
4. A representative of the Executive Branch.
5. A representative of the academic and scientific field who must be a tenured university professor at national law schools and have a recognized track record and prestige, who will be elected by the National Interuniversity Council with an absolute majority of its members."

Additionally, section 5 of Law 26080 modifies the quorum and the majorities necessary to adopt decisions of section 9 of the original law. In short, the number of members is changed, reaching a quorum with only one of the estates that make up the Council. The main grievance is that this estate was made up exclusively of the political sector.

An unsuccessful reform to this composition took place in 2013 through Law 26855, which brought the number of members to nineteen (19), significantly increasing the establishment of academics and scientists, who,

together with judges, would emerge from popular elections. This reform was struck down as unconstitutional in record time by the Supreme Court in the "Rizzo"[1] case, restoring the validity of Law 26080.

For further illustration and in order to compare the members of the Judicial Council, see the table below.

Estate	Law 24937/24939	Law 26080 (unconstitutional) Ruling "Colegio de Abogados)	Law 26855 (unconstitutional) Ruling "Rizzo"	Current integration Ruling "Colegio Abogados"
Executive Branch	1	1	1	1
SCJ members	1	-	-	1
Judges	4	3	3	4
Representatives	4	3	3	4
Senators	4	3	3	4
Academics	2	1	6	2
Federal Lawyers	4	2	3	4
Total	20	13	19	20

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. THE "COLEGIO DE ABOGADOS" CASE[2]

The Bar Association of the City of Buenos Aires promoted an action to declare the unconstitutionality of Law 26080, considering that it violated the representative balance established by the National Constitution for the integration of the Judicial Council. It maintained that the challenged regulations altered the nature, functional autonomy, and independence of the Council, as well as its institutional powers and functionality.

With the integration of 13 members, there was a full predominance of the political class within the Council. This conformation broke the balance required by the National Constitution, since the number of representatives of the political bodies reached an absolute majority, guaranteeing their own quorum, and, except for the cases of aggravated majorities, adopted decisions without the endorsement of the rest of the estates.

In the first instance, the action filed was rejected. The National Chamber of Appeals in Federal Administrative Litigation revoked the ruling and declared the unconstitutionality only of section 1 of Law 26080, before which the Ministry of Justice and Human Rights of the Nation, the Honorable Senate of the Nation, and the Honorable Chamber of Representatives filed an extraordinary federal appeal.

The Supreme Court of Justice of the Nation in December 2021 finally resolved with the joint votes of Judges Rosatti, Rosenkranz, and Maqueda, and with partial dissent from Judge Lorenzetti. It declared the unconstitutionality of sections 1 and 5, and the inapplicability of sections 6 and 8 of Law 26080, as well as section 7 subsection 3 of Law 24937, and in everything related to the majority system. The ruling urged Congress to enact new legislation to organize the Judicial Council within a reasonable period of time. The Supreme Court ordered the Judicial Council to return to the conformation prior to the now-unconstitutional regulations within 120 days, under penalty that if it does not do so after that period, its acts will be null. The decision was communicated to the rest of the Council's estates, for the purpose of selecting directors.

The central argument of the Supreme Court ruling is the analysis of the notion of what should be understood by balance. It must be remembered that section 114 of the Constitution brought about this standard of integration and the relationship between the different estates that comprise it.

Based on the fact that balance and equality are not the same, the highest court says in this regard that, "balance implies a tendency to compensate for that which is not the same." That is to say that the balance will lay the foundations of what has been decided, and that is how it analyzes the adequacy of the norm in conflict with what is regulated by section 114 of the National Constitution. Although there may be differences in the number of representatives per sector, such differences cannot result in hegemony or the predominance of one sector over another.

In accordance with what has been said, the regulations are analyzed, and the conclusion is reached that only the political establishment of the Council has the power to carry out hegemonic actions. An example of this is the possibility of imposing disciplinary sanctions on magistrates, issues which ostensibly go against the independence that the judiciary should enjoy.

One of the new and controversial issues of the ruling is that it grants full validity to a rule that was repealed sixteen years ago. In the majority vote, the Supreme Court said that, in compliance with its constitutional duty to adopt the appropriate measures to avoid institutional chaos or the potential cease of the operation of the Judicial Council, it must provide a response as head of the Judiciary establishing guidelines which are concrete and clear about the future effects of their decision, thus establishing that the previous regime must regain validity until a new regulation is issued. In his dissent, Dr. Lorenzetti clarified this point by stating that no court, including the Supreme Court of Justice, can declare applicable a law that has been repealed sixteen years ago without affecting legal certainty.

The ruling granted a period of one hundred and twenty calendar days for its composition to be adapted to the provisions of Law 24937, the first norm that regulated the operation of the Council and which was in force until 2006, when the law was sanctioned and declared unconstitutional. The deadline to adapt to this rule expired on April 15, 2022. The national government sent Congress a bill that, after some modifications in the committee debate, proposes a Council of seventeen (17) members: four (4) judges, six (6) legislators, four (4) lawyers, one (1) representative of the Executive Branch, and two (2) academics. This is a proposal that lowers the proportion of the "political" sector (7 out of 17), but that continues to leave the Supreme Court out of the Judicial Council. The bill was never approved because there were no minimum agreements between the political forces.

In order to comply with the new integration of the Judicial Council, its composition had to be adapted to what was requested by the ruling

1 "Rizzo, Jorge Gabriel (apoderado de la Lista 3 Gente de Derecho c/Poder Ejecutivo Nacional Ley 26855)" Fallos: 336:760

2 "Colegio de Abogados de la Ciudad de Buenos Aires y otro c/ PEN - ley 26.080 - decreto. 816/99 y otros s/ proceso de conocimiento" Fallos: 344:3636

before April 15, 2022. This implied adding 2 legislators, 2 lawyers, 1 judge, and 1 academic for which elections were held in the estates of lawyers, judges, and academics, in very short terms. In the National Congress, the issues were of such a nature that these processes ended up being brought to justice, and the Supreme Court had to intervene, declaring the invalidity of the vote carried out in the National Senate.

At present, the Judicial Council has begun its management with the new integration, returning to its normal operation. However, it is made up of nineteen members because the decision of the Senate has generated a conflict in the appointment, and the remaining member cannot be appointed.

The integration or not of the Supreme Court in the Judicial Council is one of the points of discussion. It is important to remember that constitutional control is exercised in a diffused manner by the judiciary, with the Court being the last instance that has generated the political conflict, and given the absolute parity of forces between the ruling party and the opposition in Congress, there is not a midpoint in the enactment of a new law.

IV. LOOKING AHEAD

Decree 635/2020 of July 29, 2020 created the "Advisory Council for the Strengthening of the Judiciary and the Public Ministry." This is a temporary council (valid for a period of 90 days from August 18 of 2020) whose objective is to advise the President of the Nation in the following areas or thematic axes: Supreme Court of Justice of the Nation, Judicial Council, Public Ministry of Justice of the Nation, Trials by Juries, and Transfer of federal non-criminal powers to the Autonomous City of Buenos Aires. After painstaking work, the Commission delivered a report with Proposals and Recommendations in November 2020.

Regarding the Judicial Council, the majority of the members formulated the following proposals for the integration and functioning of this organ:

1) Modify the current composition of the Judicial Council based on a criterion of equality of all representations (3 estates and the academic and scientific field), which should have the same number of members (25% of the total reserved for each of they); being this parity the one that best receives the notion of "balance" demanded by section 114 of the Constitution National.
2) It is suggested to integrate the body with a total of sixteen (16) counselors, four (4) from each of the aforementioned representations. The Presidency would have a double vote to settle cases of a tie.
3) In order to ensure the equal participation of all levels in the management of the body, it is suggested that the Presidency be exercised in rotation among all representations, for a period of one (1) year and with gender alternation. The order of the exercise of the Presidency will be resolved by lottery, which must be carried out at the beginning of the mandate of the Council, for the only time.
4) In order to give equal treatment to all persons who hold positions of directors, it is suggested that all representations be exclusively dedicated.
5) Regarding political representation in the Nation's Judicial Council, it is suggested that: a) its integration should reflect a parliamentary majority and minority, always respecting gender conformation and federalism; and b) it can be assumed by the legislators themselves or by representatives of this estate.
6) Regarding the representation of lawyers, it would be appropriate for it to be made up of members of the Argentine Federation of Bar Associations (FACA) and the Public Bar Association of the Federal Capital (CPACF), respecting the principles of equal opportunity, gender, and federalism.
7) In relation to the representation of academics and scientists, it is suggested to integrate it with members not only from the field of Law (for example, the Permanent Council of Deans of National Universities or the National Inter-University Council) but also from other professions and specialties, without it being necessary for the latter to have a lawyer's degree. For this purpose, priority should be given to the integration of academics and scientists who are knowledgeable and committed to issues of gender, sexual diversity, human rights, and scientific advances applicable to the administration of justice.
8) Regarding the mandate of the directors, it is suggested that the permanence of the position should be four (4) years without renewal; or with the possibility of renewing for another identical period mediating an interval thus guaranteeing the principle of periodicity of the mandates.
9) Regarding the decision-making and functioning mechanisms, it is suggested that: a) the quorum that should be established is half plus one of the entire council; b) no estate can have its own majority; and c) no estate may have functional blocking capacity.

Taking into account that these suggestions and recommendations were made prior to the "Colegio de Abogados" ruling and that the National Congress has not yet approved a new law as urged by the Supreme Court of Justice of the Nation, this work is a valuable input for integrating, and it effectively and efficiently endows this complex constitutional body that has brought about so much trouble.

V. FURTHER READING

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Australia

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I. INTRODUCTION

In May 2022, a newly elected Labor government, led by Prime Minister Anthony Albanese, committed to changing the *Australian Constitution* to establish an Indigenous representative body, the Aboriginal and Torres Strait Islander Voice. It is expected that a referendum on this proposal will be held in the second half of 2023. The Voice would provide advice to the national parliament and government on matters relating to Aboriginal and Torres Strait Islander peoples. Labor's commitment to a constitutionally enshrined Voice was a hugely significant development given Australian politicians' longstanding aversion to attempting constitutional amendment.

The text of Australia's Constitution can be changed only by referendum. Proposals to alter the Constitution must be approved by absolute majorities of both houses of the national Parliament and then endorsed by a national majority of voters *and* a majority of voters in a majority of States.[1] Since Federation in 1901, governments have put 44 amendment proposals to the people, of which 8 have been approved. This record has understandably put a dampener on constitutional reform ambition in Australia.

Following Albanese's referendum announcement, Australia saw its most lively public conversation on constitutional reform in decades. The debate intensified over the form that such a body might take and the form of words that should be put to the people. And late in the year, the government introduced a contentious Bill to reform Australia's outdated referendum machinery laws. The year 2023 promises to be even more lively as Australians prepare to vote in their first referendum since the republic vote of 1999. Should the referendum succeed, it will trigger the first amendment to the Australian Constitution since 1977.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. FIRST NATIONS VOICE

The proposal to establish a First Nations Voice in the Australian Constitution emerged from a grassroots process led by Aboriginal and Torres Strait Islander peoples. The Voice proposal was one of three reforms, alongside treaty-making and truth-telling, put forward in a document called the *Uluru Statement from the Heart*. The *Uluru Statement* was issued to the Australian people at the First Nations National Constitutional Convention in 2017. The convention followed a series of 13 regional dialogues in which a representative cross-section of the Indigenous community expressed their views on what constitutional change they wanted.[2]

Megan Davis, one of the architects of the Uluru process, has explained that a constitutionally enshrined Voice would reconfigure the relationship between First Nations people and the state in a way that promises to deliver practical outcomes. She has written that 'the reform will create an institutional relationship between governments and First Nations that will compel the state to listen to Aboriginal and Torres Strait Islander Peoples in policy- and decision-making' and that this is 'the only way to achieve better quality policies and laws and a fairer relationship with government.'[3]

The new labor Prime Minister, Anthony Albanese, was elected in May 2022. On the night of his election win, he proclaimed: 'I commit to the Uluru Statement from the Heart in full.' This marked a major departure from his two conservative predecessors, who were either reluctant to pursue a constitutionally enshrined body (Scott Morrison) or altogether dismissive of the Voice proposal as undesirable and too ambitious (Malcolm Turnbull).

In July 2022, Albanese took a significant step towards constitutional change when he announced how his government planned to amend the Constitution to bring the Voice into existence. He did this while attending the annual Garma Festival, a major Indigenous gathering in remote northeast Arnhem Land that celebrates Yolngu life and culture. The proposed wording is as follows:

1. There shall be a body, to be called the Aboriginal and Torres Strait Islander Voice.

2. The Aboriginal and Torres Strait Islander Voice may make representations to Parliament and the Executive Government on matters relating to Aboriginal and Torres Strait Islander Peoples.

3. The Parliament shall, subject to this Constitution, have power to make laws with respect to the composition, functions, powers, and procedures of the Aboriginal and Torres Strait Islander Voice.

1 *Australian Constitution*, section 128.

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

3 Megan Davis and George Williams, *Everything You Need to Know About the Uluru Statement from the Heart* (NewSouth Publishing, 2021) 151, 154.

Each clause is significant. The first clause provides constitutional recognition to First Nations people through the establishment of the Voice. The fact that the Voice is constitutionally enshrined confers on it special protection (it could not be abolished, except by referendum), status, and legitimacy. The second clause sets out the Voice's primary function, which is to make 'representations' to the parliament and government on matters relating to First Nations peoples. This makes it clear that the Voice will be able to provide advice but that there will be no legal obligation on the parliament or the government to follow it. The third clause makes clear that the parliament will decide the mechanics of how the Voice will operate. Put another way, Australians will be asked to approve the principle of creating an Indigenous advisory body that has constitutional status. The parliament will subsequently determine the details of that body's operation and will be able to fine-tune how the body operates into the future.

The design and operation of the proposed Voice were the subject of significant debate in the second half of 2022. In Part III, below, I discuss some of the key issues that arose.

2. REFERENDUM MACHINERY LAWS

One of the consequences of Australia's long referendum hiatus is that its referendum machinery laws have not always been updated to reflect changes in voting and campaigning. Indeed, a 2021 parliamentary committee review of the referendum process found that certain aspects of the nation's machinery laws were 'outdated and not suitable for a referendum in contemporary Australia.'[4]

In December 2022, the federal government sought to address these concerns by introducing a Bill to modernize the nation's referendum rules and bring them into line with ordinary election laws.[5] The Bill, which was still being debated by parliament as the year ended, deals with many technical procedural matters (e.g. arrangements for postal voting) alongside a small number of more contentious topics, including public education and campaign finance.

In a surprise move, the government said that it wanted to drop the official Yes/No pamphlet for the Voice referendum. For over a century, the usual practice has been for governments to mail voters a pamphlet that contains official Yes and No arguments authorized by members of parliament. The Bill would suspend the provision that allows for this. The government says the circulation of a hard-copy pamphlet is outdated in the digital age and that MPs can make their case in other ways, including via television and social media.

In lieu of an official pamphlet, the government says that it wants to focus its public education efforts on a civics campaign that will provide voters with information about 'Australia's constitution, the referendum process, and factual information about the referendum proposal.' This move follows a precedent set in 1999 when the Howard government funded a neutral education program for the republic referendum.

The Bill also makes long-overdue changes to the rules on referendum campaign finance. Labor wants campaigners to publicly report donations and expenditures that exceed the disclosure threshold (currently set at $15,200). It would also restrict foreign influence by banning foreign donations over $100. These changes would bring referendum laws into line with ordinary election laws.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. FIRST NATIONS VOICE: MATTERS OF CONTENTION

The July release of the government's proposed constitutional amendment kick-started a debate on the Voice that intensified as the year went on. In this section, I focus on two of the issues that attracted attention.

1.1. THE VOICE AND CONSTITUTIONAL DEFERRAL

One question that emerged was whether the government's proposal contains adequate detail about the operation of the Voice. This is a basic question of constitutional drafting that is not unique to this process or issue. How much detail should be included in a (notoriously rigid) written constitution, and how much should be deferred for determination by the legislature?

Megan Davis has long argued for an approach that asks voters to approve the Voice's basic purpose and function while leaving parliament to subsequently fill in the detail on such matters as size, composition, and resourcing.[6] This approach, it is said, recognizes parliament's supremacy in Australia's constitutional system while also enabling the Voice to be tweaked over time in response to new circumstances. Others have argued that the mechanics of the Voice should be detailed in the Constitution or that a specific model be tabled in draft legislation before the referendum.[7] It is suggested that this would enable electors to be fully informed about the proposed Voice before voting.

There is an intuitive appeal to the calls for the Voice design to be fully fleshed out in advance of a referendum. But such an approach brings with it both practical and legal concerns. The details of any Voice body must be developed in partnership with First Nations peoples, but there is insufficient time to conduct a meaningful consultation process in advance of the planned referendum in late 2023. More fundamentally, if a specific model appeared on the ballot paper or was tabled in parliament before the vote, the flexibility and adaptability of the Voice would be undermined.[8] There is a risk that certain features of the Voice would become entrenched (legally or effectively), and the parliament's ability to improve its design over time would be curtailed.

In any event, it is clear that the government has adopted Davis's preferred approach: voters will be asked to approve the establishment of the Voice and its core function, and the mechanics will be addressed later by the parliament. The political risks of this approach became apparent when, as the year 2023 opened, the leader of the opposition Liberal Party, Peter Dutton, identified a 'lack of detail' as a focus of his attacks on the referendum proposal. He issued the Prime Minister with a list of 15 questions asking for clarification on such matters as

4 House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into Constitutional Reform and Referendums* (Parliament of Australia, December 2021) [4.146].

5 Referendum (Machinery Provisions) Amendment Bill 2022 (Cth).

6 Megan Davis, 'A Voice of Recognition', *The Weekend Australian*, 16 July 2022.

7 Greg Brown, 'Indigenous voice should be fully formed before referendum: Marcia Langton', *The Australian*, 11 July 2022.

8 Gabrielle Appleby, 'Voters Deserve a Detailed Proposal for Constitutional Amendment', *Sydney Morning Herald*, 23 July 2022.

the eligibility and appointment of members, the body's powers, and resourcing.[9] Some suspected that Dutton's questions were disingenuous and part of a campaign seeking to undermine the Voice proposal without openly opposing it. Whatever the motivation, the significance of the opposition leader's stance was lost on nobody: no referendum proposal has succeeded in Australia without bipartisan support.

1. 2. THE SCOPE OF THE VOICE'S REMIT

The breadth of the Voice's remit has also been debated. The government's proposed wording makes clear that the Voice would be able to make representations to both the parliament *and* the executive government. Some have argued that the inclusion of the executive government is problematic as it extends the Voice's advisory power to a large number of actors (including ministers and public servants) and risks delays in decision-making and even court challenges. Proponents of the government's wording point out that the Voice will be far more effective if it can 'speak to' the executive government, given that branch's role in policy development and decision-making, and that the concerns about delays and judicial involvement are overblown.

The proposed amendment would enable the Voice to make representations on a wide range of topics – namely, 'matters relating to Aboriginal and Torres Strait Islander peoples'. Some have argued that this is too broad, potentially allowing the Voice to advise on almost any issue. But defenders of this wording say that a broad subject matter remit is appropriate as it enables the Voice to determine the issues on which it will make representations. A more limited remit – say, matters 'with respect to' or 'concerning' Aboriginal and Torres Strait Islanders – could see issues of general application fall outside the body's scope, even where they impact Indigenous peoples in particular ways. A more limited scope could also invite court challenges, as there would be potential for disagreement about whether a certain issue was within or outside of scope. In practical terms, the Voice will not have the capacity to make representations on all issues that fall within its remit, and part of its job will be deciding which matters deserve priority. As Robert French, former Chief Justice of the High Court of Australia, has observed: '[The Voice's] limits are likely to be defined by common sense and political realities.'[10]

2. REGULATING THE VOICE REFERENDUM

The Albanese government's Bill to amend Australia's referendum machinery laws was welcome. There is little doubt that the rules that govern referendums are in need of an update. However, the Bill contains some shortcomings that suggest that Australian politicians continue to be reluctant to embrace new approaches to public education and campaign finance.

On public education, the government should have reformed – not suspended – the official pamphlet. Even in the digital age, there is a role for hard-copy, official sources of information and arguments, as international experience attests. The problem with the Australian official pamphlet is its contents, not its form. For over a century, the pamphlet has contained official Yes and No arguments authorized by members of parliament, along with a copy of the proposed constitutional amendments, but no basic explanation of the referendum proposal and its effect. Past pamphlets have invariably contained exaggerated and misleading statements and tend to confuse voters rather than inform them. The Voice referendum presented an opportunity to improve the design of the pamphlet, but the government has forfeited that chance by instead choosing to suspend it.

The government's wider plans for public education remain opaque. The 2021 parliamentary inquiry recommended the establishment of an independent referendum panel to advise on public education, but the Bill has not picked up on that suggestion. That is a shame. The creation of a well-designed, independent body to oversee public education could make a huge difference to voters looking for accessible, balanced, and reliable information on the Voice. An independent panel is also more likely to gain the trust of voters and campaigners compared to an information campaign run by a minister or government department.

Turning to campaign finance, the Bill replicates the failings of Australian election laws and falls well short of best practice. The disclosure threshold of $15,200 is too high, ensuring some large donations will remain anonymous. A lower threshold, say $1,000 (as applies in the state of New South Wales), would be preferable.

The timeliness of disclosure is also a concern. If the Bill is enacted, registered campaigners will not have to report their donations or expenditure until 15 weeks *after* voting day. Electoral Commissioner Tom Rogers has confirmed that Australians will not learn who gave money to the Yes and No campaigns until 24 weeks after the date of the referendum. That information is potentially relevant to the choice voters make at the ballot box and should be made available in advance of voting day. A better approach would be to require real-time disclosure, as occurs in some Australian states.

Even with stronger disclosure requirements around donations and expenditure, Australian referendums remain vulnerable to the influence of big money. The law currently imposes no limits on the amount of money that individuals, campaign groups, and political parties can spend on referendum campaigns. There is a danger that a wealthy individual or group could take advantage of this regulatory gap to flood the airwaves of the Voice referendum campaign and drown out opposing arguments. The parliament looks like it will miss an opportunity to foster a level playing field by imposing limits on private expenditure.

Another concern with the referendum machinery Bill is its timing. The eve of a referendum is the worst possible time to negotiate amendments to the rules. Every proposed change is viewed through the lens of suspicion and self-interest. We have already seen an illustration of this, with the Liberal opposition calling the decision to suspend the official pamphlet 'worrying' and saying that it 'puts a successful referendum at risk.' Given Australia's long referendum hiatus, it is a shame that the parliament waited until now to consider process reforms that could have been progressed years ago, away from the heat of a looming campaign.

9 Josh Butler, 'Albanese accuses Dutton of engaging in 'culture war stunts' over Indigenous voice', *The Guardian*, 8 January 2023.

10 Robert French, 'The Voice: A step forward for Australian Nationhood' on *AUSPUBLAW* (20 February 2023) <https://www.auspublaw.org/first-nations-voice/the-voice-a-step-forward-for-australian-nationhood>.

IV. LOOKING AHEAD

The year 2023 is shaping up to be a momentous one for constitutional reform in Australia. The nation will vote in its first referendum in 24 years. What is more, the issue on the ballot paper is a hugely significant one. It seeks to recast the relationship between the Australian state and the continent's first peoples. It purports to do this by recognizing Aboriginal and Torres Strait Islander peoples in the Constitution and establishing a representative body to provide input into the making of laws and policies. The referendum will test Australia's ability to have a mature conversation about the proposed amendment and the wider context that feeds into it, including the ongoing damage inflicted by colonization and racial discrimination.

More broadly, the outcome of the Voice referendum will almost certainly shape the near-term future of constitutional reform in Australia. A Yes vote would encourage reformers and prompt a renewed push for referendums on other issues. On the top of that list would be a constitutional change to cut Australia's official ties with Britain and institute a republic with a President as head of state. On the other hand, a No vote would reinforce a longstanding and widely held view that constitutional reform is next to impossible in Australia and not worth attempting. It would further entrench the decades-long stalemate on constitutional change and signal that Australia's Constitution continues to approach a state of 'constructive unamendability.'[11]

All of this shows that when Australians go to the ballot box in the second half of 2023, the stakes will be very high.

V. FURTHER READING

Gabrielle Appleby, Sean Brennan and Megan Davis, 'A First Nations Voice and the Exercise of Constitutional Drafting' (2023) *Public Law Review* (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4346447>.

Megan Davis, 'A Voice of Recognition', *The Weekend Australian*, 16 July 2022.

Robert French, 'The Voice: A step forward for Australian Nationhood' on *AUSPUBLAW* (20 February 2023) <https://www.auspublaw.org/first-nations-voice/the-voice-a-step-forward-for-australian-nationhood>.

Paul Kildea, 'The government wants to change Australia's referendum laws. How will this affect the Voice to Parliament?', *The Conversation*, 7 December 2022 <https://theconversation.com/the-government-wants-to-change-australias-referendum-laws-how-will-this-affect-the-voice-to-parliament-195632>.

Anne Twomey, 'An Indigenous Voice to Parliament will not give "special rights" or create a veto', *The Conversation*, 14 December 2022 <https://theconversation.com/an-indigenous-voice-to-parliament-will-not-give-special-rights-or-create-a-veto-196574>.

11 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP, 2019) 158.

Austria

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I. INTRODUCTION

The year 2022 was dominated by a variety of topics in Austria, including the fight against corruption and the promotion of transparency in politics in the wake of widening corruption investigations.[2] In this regard, a comprehensive legislative package aimed at bringing more transparency to party financing and ensuring fair political competition has been approved by Parliament and has brought substantial constitutional amendments. Further topics of public debate were the imposition of sanctions and Austrian neutrality in regard to the war in Ukraine,[3] issues relating to climate change with calls for more measures to be taken becoming more persistent, as well as COVID-19 (still) with efforts to gradually return to pre-pandemic life and legislation. All of these areas had implications on the constitutional level, albeit only minor ones in part. Meanwhile, other major proposed constitutional reforms like the Freedom of Information Act can be said to be progressing slowly at best.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. OVERVIEW

Just like in previous years, 2022 saw several constitutional reforms successfully passed by Parliament related to a wide range of topics, with most of them not having substantial ramifications for the Austrian Constitution. The most significant – and certainly the most widely acknowledged – amendments[4] of 2022 concerned the extension of the competencies of the Austrian Court of Audit (ACA)[5] regarding party financing and the strengthening of its independence and democratic legitimacy. These changes come against the backdrop of several corruption scandals in recent years[6] and a broad social debate on corruption and transparency in politics. A "rule of law and anti-corruption" popular initiative in 2022 called for reforms on issues such as decency and integrity in politics, strengthening the rule of law or comprehensive anti-corruption and transparency legislation.[7]

2. TRANSPARENCY OF PARTY FINANCING

Constitutional amendments regarding party financing were included in a broader legislative package concerned with the increase of transparency regarding the activities and funding of political parties. Therefore, many of the details concerning specific obligations of political parties or the process of review before the ACA were enacted on a statutory level in the Federal Act on the Financing of Political Parties[8] (commonly referred to just as the Parties Act), along with some changes to other statutory acts. Even the constitutional amendments were mainly contained in constitutional acts other than the main Federal Constitutional Act[9] (F-CA, *Bundes-Verfassungsgesetz*), especially the Parties Act. While the Parties Act is not constitutional law in its entirety, several provisions, such as the amended Section 1 or Section 3, are constitutional provisions.

The amendment concerning the Parties Act[10] inserted a proclamatory affirmation that the formation of political parties "is an expression of the participation of civil society in democratic processes" in Section 1 para. 3 Parties Act. This is intended to express appreciation for socio-political engagement through political parties and the shaping of our life together in society.[11] In terms of substantial amendments, political parties are now obliged to provide the Minister of the Interior with more data than before to increase transparency. This includes the naming of their legal representatives as well as the submission of party statutes in writing, which will then be publicly accessible in the political party register kept by the Minister, replacing the less extensive party index and taking effect in 2024.

2 See Konrad Lachmayer, 'An Austrian Abyss of Cronyism and Corruption: Fighting for the Rule of Law in Austria' (*VerfBlog*, 1 June 2021) <https://verfassungsblog.de/an-austrian-abyss-of-cronyism-and-corruption/> accessed 24 April 2023.

3 See Ralph R A Janik 'Current Developments: Austrian Neutrality amid Russia's War on Ukraine' [2023] Austrian Review of International and European Law, 147, available at <https://dx.doi.org/10.2139/ssrn.4201552> accessed 24 April 2023.

4 Federal Law Gazette I No. 125/2022 and Federal Law Gazette I No. 141/2022.

5 The Supreme Audit Institution of the Republic of Austria.

6 See Lachmayer 2021 (FN 2).

7 See, for the demands of the popular petition, <https://www.bmi.gv.at/411/Volksbegehren_der_XX_Gesetzgebungsperiode/Rechtsstaat_und_Antikorruptions-volksbegehren/start.aspx#pkt_02> accessed 24 April 2023.

8 Bundesgesetz über die Finanzierung politischer Parteien, Federal Law Gazette I No. 56/2012.

9 Bundes-Verfassungsgesetz, Federal Law Gazette No. 1/1930 as last amended by Federal Law Gazette I No. 222/2022.

10 Federal Law Gazette I No. 125/2022.

11 IA 2487/A 27th legislative period, 22; IA is short for *Initiativantrag* and refers to bills by at least five members of the National Council.

The constitutional foundations for the new competencies of the ACA regarding the review of political parties are laid out in Section 1 para. 6 Parties Act. The Austrian Court of Audit now has extensive competencies in case of suspicion of irregularities regarding party financing. For this purpose, in addition to the annual financial reports showing the detailed financial situation of parties, special election campaign reports have to be submitted after the elections with a detailed breakdown of costs. Specifics of the ACA's review competencies are then laid out, in several statutory laws, with the amendment of the constitutional provision in Section 1 Parties Act serving as the necessary constitutional basis for these limitations of the freedom guaranteed to political parties by the Austrian constitution. Moreover, since the financing of a political party through donations is limited by the amendment of the Parties Act, another constitutional amendment in Section 3 Parties Act aims to ensure sufficient financing of parties using state funds.[12] Accordingly, the Federation and the *Länder* are now obliged (for municipalities, this remains optional) to provide political parties with adequate annual funding.

Furthermore, a new competence of the Austrian Constitutional Court (ACC) was introduced to settle disputes about the interpretation of the Parties Act with regard to the expanded competencies of the ACA. Political parties are then obliged to allow a review by the ACA in accordance with the ACC's legal opinion.[13]

Apart from changes to the Parties Act, the core document of the Austrian Constitution, the F-CA, was amended to strengthen the independence and democratic legitimacy of the ACA in light of its new review competencies. The president of the ACA is elected by the National Council on the recommendation of the Main Committee for a non-renewable term of office of twelve years, according to Article 122 para. 4 F-CA. The decisions in both the Main Committee and the National Council now require the presence of over 1/2 of the members and a 2/3 majority of the votes cast. Previously the election was passed with a simple majority. The premature removal of the president by the National Council now requires the same increased quorums according to the amended Art. 123 para. 2 FCA.

In addition, the rules to initiate a review by the ACA have been slightly eased in the Federal Act on the Rules of Procedure of the National Council[14], which in Austria is not of constitutional rank. The amendment now enables smaller parliamentary clubs to call for a review even if they do not constitute the otherwise foreseen 20 MPs. Moreover, the maximum number of three overall reviews brought to the ACA this way has been removed in favour of a provision allowing for one initiated review per MP until the respective ACA's report is submitted or 24 months have passed.[15]

Interestingly, the amendment concerning party financing and the strengthening of the ACA's competencies included a provision closely related to the endeavor of passing a Freedom of Information Act. The newly introduced Article 20 para. 5 F-CA now requires all bodies entrusted with tasks of the federal, provincial, and municipal administration to publish studies, expert opinions, and surveys commissioned by them along with their respective costs, in a manner accessible to everyone, as long as and to the extent that their secrecy is not required under the parameters for official secrecy enshrined in para. 3, e.g., in the interests of public order or security. This is related to the overall issue of the transparency legislation as serving the aim of preventing covert funding through studies or surveys by ministries. While this amendment is seen as a measure to increase the transparency of public funding in a certain area, only a very specific category of information is included and an individual right to the publication of this information is not presumed to be guaranteed by this newly enacted provision.[16]

3. COVID-19 RELATED AMENDMENTS

With the country gradually looking for a path to normality more than two years after the start of the COVID-19 pandemic, 2022 saw many of the limitations dropped and some legislation amended. Many amendments concerning the Federal Constitutional Act were again related to the prolongation of Covid-related rules. Consequently, they did not represent significant changes but rather served the purpose of moving the expiration date of some sunset clauses. This concerned provisions introduced in 2020 allowing the federal government as well as local governments (*Gemeinderat*) to take decisions in video conferences or circular resolutions. While the provision relating to decision-making via circular resolution by the Federal government is set to outlive the pandemic, the part of the provision referring to video conferences ceased to be in force at the end of June 2023 after having been prolonged several times.[17] For local governments, the provision has fully returned to its pre-pandemic version. Along the same lines, several constitutional provisions in other COVID-19 related acts have been introduced with sunset clauses, which have been prolonged several times.[18]

4. OTHER SUCCESSFUL CONSTITUTIONAL AMENDMENTS

Aside from the constitutional amendments mentioned above, a variety of individual provisions of constitutional rank contained in statutory acts have been adopted. The reasons for such constitutional provisions may lie in possible conflicts with existing constitutional law. Nevertheless, the ramifications of these constitutional amendments scattered across different statutory acts cannot be considered significant in substance. Therefore, only some select examples shall

12 IA 2487/A 27th legislative period.

13 See Section 10 para. 10 Parties Act as well as Section 36g of the Constitutional Court Act, Federal Law Gazette I No. 85/1953 as amended by Federal Law Gazette I No. 125/2022.

14 Federal Act on the Rules of Procedure of the National Council, Federal Law Gazette No. 410/1975 as amended by Federal Law Gazette I No. 141/2022.

15 Section 99 para. 2 and 3 of the Federal Act on the Rules of Procedure of the National Council.

16 Georg Miernicki, 'Die Veröffentlichungspflicht von Informationen der Verwaltungsorgane' [2022] Österreichische Jurist:innenzeitung [Austrian Jurists´ Journal] 1132, 1139. The change came into force at the beginning of 2023 and Art. 151 para. 67 F-CA made it clear that information on past studies, surveys or expert opinions commissioned need not be publicized retroactively.

17 The 2022 amendments saw the expiration date set to the end of December 2022 (Federal Law Gazette I No. 85/2022) and then to the end of June 2023 (Federal Law Gazette I No. 222/2022).

18 The expiration date was last set to 30 June 2023 (Federal Law Gazette I No. 222/2022); see the reports from 2020 and 2021 for more details on the COVID-19 related amendments; Susanne Gstöttner and Konrad Lachmayer, 'Report: Austria' in Luis Roberto Barroso and Richard Albert (eds), *The 2020 International Review of Constitutional Reform* (2021) 21-25; Susanne Gstöttner and Konrad Lachmayer, 'Report: Austria' in Luis Roberto Barroso and Richard Albert (eds), *The 2021 International Review of Constitutional Reform* (2022) 20-24.

be mentioned for illustration. One complex of successful constitutional amendments concerned – just as in previous years – the so-called "*Kompetenzdeckungsklauseln*" (competence coverage clauses), providing a constitutional basis for the legislative competence of the Federation (as opposed to the *Länder*) or the enforcement by federal or even specifically established authorities in specific matters. Such clauses can be found in several statutory acts concerning issues such as electricity,[19] (renewable) energy,[20] or gas[21].

Furthermore, such a competence coverage clause was also deemed necessary with regard to measures taken in the area of public procurement in fulfilment of the EU sanctions against persons, organisations, or institutions from the Russian Federation.[22] As a clear and comprehensive legislative and executive competence of the Federation for the implementation of EU sanctions appeared doubtful, the implemented provision established sufficient competence of federal legislation and provided for a concentration of enforcement on the federal level.[23] Beyond that, although the issue of Austria's neutrality was hotly debated, there were no other successful or proposed amendments related to the war in Ukraine in 2022.

5. PROPOSED CONSTITUTIONAL AMENDMENTS

Even more so than the number of successful constitutional amendments, the number of proposed amendments calling for constitutional reforms can be considered high. Among these, the proposed Freedom of Information Act is one of the most prominently discussed and eagerly awaited. Despite some aspects of this Freedom of Information Act having been passed as part of the transparency related amendments mentioned above, its transparency objectives go beyond the changes already successfully adopted, in particular by granting individuals a constitutional right to access information.[24] So far, the bill first proposed in 2021[25] is still in the pipeline, with no major legislative developments to report within the last year apart from the aforementioned limited inclusion in the legislative package on transparency. The governing parties confirmed their intention to revise the draft bill in the first half of 2023 and, therefore, still aim to pass the Act before the end of the legislative period in 2024.[26]

Negotiations on initiatives by the opposition[27] calling for a Freedom of Information Act have been resumed in the constitutional committee of the National Council but have been adjourned again. Concerns of the *Länder* and municipalities have been named as the main reason for the current delay, but the governing parties have reported that detailed talks have been held during which many agreements have already been reached and affirmed that they were confident the legislative process would be concluded soon.[28]

Aside from this, 2022 saw many other suggested constitutional amendments by the opposition. The Social Democrats (SPÖ) proposed an amendment of the equal treatment clause of Art. 7 F-CA to explicitly include the criterion "age" in order to combat discrimination based on age[29] and the strengthening of LGBTIQ rights by including "sexual orientation, gender identity, gender expression, and gender characteristics."[30] The liberal NEOS party made a renewed attempt at an amendment of the F-CA regarding the election process for the Austrian Ombudsman Board.[31] The Freedom Party (FPÖ) called for a constitutional amendment to make it possible to deselect the already-elected presidents of the National Council.[32] Meanwhile, many other past initiatives have still not been formally decided upon but have been adjourned[33] by the respective parliamentary committee or only assigned with consultations not yet having started.[34]

Concerning the intentions to establish an independent Federal Public Prosecutor,[35] the working group on the establishment of such an institution in the Ministry of Justice has submitted its final report to the National Council, and the Ministry of Justice is reported to be working on a legislative draft.[36]

And while the popular initiative on climate change did not lead to the constitutional amendment it called for by demanding individual rights of constitutional rank, the initiators considered it an initial success with resolutions[37] being passed by the National Council, though they have criticised the lack of implementation measures since then.[38]

19 Elektrizitätswirtschafts- und -organisationsgesetz (Electricity Sector and Organisation Act), Federal Law Gazette No. 110/2010 as amended by Federal Law Gazette I No. 7/2022 as well as Federal Law Gazette I No. 234/2022.

20 Erneuerbaren-Ausbau-Gesetz (Renewable Energy Expansion Act), Federal Law Gazette I No. 150/2021 as amended by Federal Law Gazette I No. 7/2022, Federal Law Gazette I No. 172/2022 and Federal Law Gazette I No. 233/2022; Energielenkungsgesetz (Energy Steering Act), Federal Law Gazette I No. 41/2013 as amended by Federal Law Gazette I No. 68/2022.

21 Gaswirtschaftsgesetz (Gas Sector Act), Federal Law Gazette I No. 107/2011 as amended by Federal Law Gazette I No. 38/2022, Federal Law Gazette I No. 67/2022 and Federal Law Gazette I No. 94/2022.

22 Bundesgesetz über Genehmigungen im Zusammenhang mit Sanktionsmaßnahmen in Angelegenheiten des öffentlichen Auftragswesens (Federal Act on Authorisations in Connection with Sanction Measures in Public Procurement Matters), Federal Law Gazette I No. 150/2022.

23 IA 2826/A 27th legislative period.

24 Claudia Fuchs and Thomas Ziniel, 'Vergaberecht, Transparenz und Geheimhaltung – ein Dauerthema mit neuer Dynamik' [2023] Zeitschrift für Vergaberecht & Bauvertragsrecht [Journal for Public Procurement Law & Construction Contract Law] 17, 20.

25 95/ME 27th legislative period; ME is the abbreviation of *Ministerialentwurf*, a bill coming from the Federal Government drafted by the competent minister.

26 'Edtstadler: Neuer Entwurf zur Informationsfreiheit bis Juni', *profil.at* (25. February 23) <https://www.profil.at/oesterreich/edtstadler-neuer-entwurf-zur-informationsfreiheit-bis-juni/402342159> accessed 24 April 2023.

27 For example IA 61/A 27th legislative period; IA 453/A 27th legislative period.

28 See the parliamentary communication No. 432, <https://www.parlament.gv.at/aktuelles/pk/jahr_2023/pk0432#XXVII_A_00061> accessed 24 April 2023.

29 IA 2279/A 27th legislative period.

30 IA 2366/A 27th legislative period.

31 IA 2776/A 27th legislative period.

32 IA 2905/A 27th legislative period.

33 From the 27th legislative period, some examples of previously-mentioned initiatives for which deliberations have not been concluded but adjourned indefinitely are IA 353/A (cooling-off period regarding prior political office for all members of the ACC), 1841/A(E) (independent Courts of Audit for cities) or IA 1997/A (constitutional basis of dedicated land for social housing). The abbreviation A(E) indicates a motion (*Antrag*) for a resolution (*Entschließung*) urging the government to take action in a certain matter.

34 From the 27th legislative period, examples of previously-mentioned initiatives assigned to a parliamentary committee but for which deliberations have not yet started are IA 360/A (extension of the Ombudsman Board's competence to include outsourced legal entities) or IA 953/A (Amendment of the Federal Constitutional Law on the Rights of Children to fully implement the UN Convention on the Rights of the Child).

35 See Gstöttner and Lachmayer 2022 (FN 18) 21.

36 Daniel Bischof, 'Ball für Bundesstaatsanwaltschaft liegt bei der Politik', *wienerzeitung.at* (10 October 2022) <https://www.wienerzeitung.at/nachrichten/politik/oesterreich/2161896-Ball-fuer-Bundesstaatsanwaltschaft-liegt-bei-der-Politik.html> accessed 24 April 2023.

37 Resolution 159/E and the identically worded resolution 160/E were passed by the National Council in March 2021 in the 27th legislative period; E is short for *Entschließung* and refers to a resolution by the National Council.

38 Klimavolksbegehren, '(K)ein Grund zur Freude: Zwei Jahre ohne Klimaschutzgesetz', *ots.at* (17 January 2023) <https://www.ots.at/presseaussendung/OTS_20230117_OTS0060/kein-grund-zur-freude-zwei-jahre-ohne-klimaschutzgesetz> accessed 24 April 2023.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. UNAMENDABLE CONSTITUTIONAL PROVISIONS

Austrian constitutional law is set up as a two-level structure distinguishing between ordinary constitutional law and basic principles of constitutional law.[39] These principles at the highest level of constitutional law include the democratic principle, the republican principle (rejecting a monarchy), the federal principle, the rule of law, the separation of powers, and the liberal principle (concerning fundamental rights). While all changes to constitutional law require increased attendance and voting quorums in the National Council, amendments affecting these basic principles additionally require a referendum to be held. Neither the reforms regarding party financing and the competencies of the ACA nor the other successful amendments concerned such far-reaching alterations to the Austrian Constitution. Hence the constitutional reforms of 2022 are amendments to the Constitution rather than dismemberments.[40]

2. LEGISLATIVE OVERSIGHT

The constitutional amendments of 2022 took the same path as regular legislative acts. This includes their assignment to one of the National Council's committees for further discussion, according to Art. 69 Federal Act on the Rules of Procedure of the National Council. The committees assess the proposed amendment and potentially propose changes before the legislative initiative is put to a vote in the National Council and subsequently transmitted to the Federal Council. The coalition of the governing parties has a majority in these committees, just like in the subsequent vote in the National Council itself. Since the two governing parties do not have a 2/3 majority in Parliament, they require the votes of some opposition parties in order to pass constitutional amendments. Therefore, in politically delicate matters, these types of amendments require a higher degree of compromise between the governing and opposition parties to ensure the necessary majority. Some of the changes ultimately passed go back to a bill by the Social Democratic Party calling for a change to the appointment procedure of the ACA's president, the facilitation of initiating a review of the ACA in Parliament, and a duty to publish certain information regarding publicly funded studies, surveys and expert opinions.[41] In exchange, the votes on the suggested extension of competencies of the ACA concerning the review of the financing of political parties were ultimately backed by the Social Democrats, despite some concerns remaining.

Frequently, drafts not supported by the governing parties will be deliberated in the committees but will ultimately keep being adjourned and are never formally dealt with. Legislative drafts left undecided at the end of a legislative period "expire" and will not be taken up again in the next period – except for those based on a popular initiative.

Another form of oversight for proposed constitutional amendments during the legislative process comes through the pre-parliamentary review process initiated for all bills drafted by the government. In the course of this step, stakeholders and any organisations involved, as well as the general public, can give statements on the proposed new law. Concerning amendments touching on constitutional matters, the *Verfassungsdienst* (constitutional service) – a department of the Federal Chancellery focused on constitutional issues – will be involved. However, both the review process and the involvement of the *Verfassungsdienst* are not legally required but have been observed as part of a decades-long state practice.[42] This pre-parliamentary procedure was applied to the government's bill of the Freedom of Information Act in 2021, and Parliament received 175 statements.[43] During the parliamentary legislative procedure, all legislative initiatives are published on the parliamentary website, and statements may be submitted.

Many of the constitutional amendments proposed by the governing parties were put before Parliament not as government bills but by individual MPs of the governing parties as an *Initiativantrag*, which means there was no pre-parliamentary review process. This was the case for the constitutional amendments concerning the Parties Act. In this case, the respective committee of the National Council decided to instigate a committee review procedure according to Section 40 para. 1 of the Federal Act on Rules of Procedure of the National Council. In the case of the amendment of the Parties Act, the committee invited statements from the Federal ministries as well as the governments of the *Länder*, along with several other public institutions and other stakeholders such as NGOs.[44]

Regarding the competence coverage clause for the Act implementing the EU sanctions against the Russian Federation, the initiative to include such a provision goes back to an evaluation of the *Verfassungsdienst*, which had raised doubts about whether the Federation had the necessary legislative competencies.[45]

3. CONSTITUTIONAL REVIEW

The constitutionality of all legislative acts can be reviewed by the ACC after they have been implemented. The ACC has assumed the competence to subject even laws at a constitutional level to its *ex post* scrutiny to detect any violation of such provisions against the higher ranking basic principles of the Austrian Constitution. The ACC initiates the proceedings *ex officio* only in cases where it would have to apply the relevant law in a pending proceeding. Other than that, it will only decide upon the constitutionality of a law following a motion by another Court, an individual, or a national or federal state government (Art. 140 Austrian Constitution). However, none of the constitutional amendments of 2022 have been subjected to this kind of *ex post* review by the ACC so far. The Austrian Constitution does not provide for a general *ex-ante* constitutional review of legislative acts – including

39 Harald Eberhard and Konrad Lachmayer, 'Constitutional Reform 2008 in Austria' [2008] ICL Journal 112, 116.

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

41 IA 2509/A 27th legislative period.

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

43 See, for the statements received on the Parliament website, <https://www.parlament.gv.at/PAKT/VHG/XXVII/ME/ME_00095/index.shtml#tab-Stellungnahmen> accessed 24 April 2023.

44 See, for the 34 statements received on the Parliament website, <https://www.parlament.gv.at/gegenstand/XXVII/AUA/242?selectedStage=101> accessed 24 April 2023.

45 IA 2826/A 27th legislative period.

constitutional reforms. The only exception is the possibility to clarify whether an act of legislature falls within the competence of the Federation or the *Länder* upon application by the national or federal state governments prior to its implementation (Art. 138 F-CA).

The constitutional mandate of the Austrian Constitutional Court as the guardian of the Austrian Constitution[46] is to review the constitutionality of legislative and administrative acts. While the ACC has become more activist in the last 50 years,[47] its approach has become more restrained in recent years, though it still does not shy away from protecting human rights when necessary.[48]

IV. LOOKING AHEAD

The past year has seen the realisation of one significant project of constitutional reform: the legislative package concerning the transparency of party financing and the related strengthening of the Austrian Court of Audit. However, other major proposed amendments of the past years, like the Freedom of Information Act or the establishment of an independent Federal Public Prosecutor, have not yet seen the light of day. Therefore, the next year will reveal if and how any of these will be successful in the long run. However, with regard to the Freedom of Information Act, hoping for a realisation within the next year in this part of the review is beginning to feel like Groundhog Day, given the halting legislative progress despite the governing parties affirming their intentions to implement this constitutional reform soon. Nevertheless, with Parliament's legislative period coming to a close in the autumn of 2024, some of these amendments might yet gather speed soon to ensure that the parliamentary process can be concluded before the end of the legislative term.

V. FURTHER READING

Anna Gamper 'Austria' in R Albert et al. (eds), *2021 Global Review of Constitutional Law* (EUT Edizioni Università di Trieste 2022) 23-26

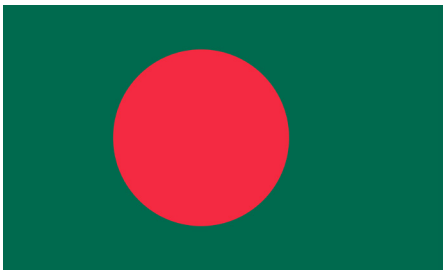
Manfred Stelzer, *The Constitution of the Republic of Austria – A Contextual Analysis* (Hart Publishing 2022)

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

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

48 Konrad Lachmayer and Susanne Gstöttner, 'The Austrian Constitutional Court 1990-2020: A Human Rights Stronghold Despite Increasing Judicial Restraint' in Kálmán Pócza (ed) (forthcoming).

Bangladesh



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I. INTRODUCTION

The Proclamation of Independence, the unilateral declaration of independence made on 26 March 1971, marked the birth of Bangladesh as an independent, sovereign People's Republic.[1] The following year saw the adoption and enactment of its current Constitution on 4 November 1972, coming into effect on 16 December 1972. Fast forward 50 years, 2022 marked the 50th anniversary of the Constitution of Bangladesh. On the golden jubilee of the enactment of the Constitution, the major development/constitutional reform in Bangladesh was the promulgation of the Chief Election Commissioner and the Other Election Commissioners Appointment Act, 2022, thereby fulfilling the obligation of Article 118(1) of the Constitution. From the judiciary's end, multiple pronouncements were made to emphasize the fundamental rights of citizens, widen the ambit of fundamental rights, devise innovative mechanisms for remedies owing to violation of fundamental rights, etc.

There were disruptions to the regular functioning of courts in 2022 as well. For example, a surge in COVID-19 cases in January led to 13 judges of the High Court Division of the Supreme Court of Bangladesh and numerous other judges and staff of the judiciary being tested positive for coronavirus.[2] Thus, the Chief Justice issued two circulars halting in-person hearings in the Appellate Division (AD) (vide memorandum no 146/2022 SC (AD)) and the High Court Division (HCD) (vide circular no 36 – A) of the Supreme Court and resumed virtual hearings as per the provisions of the Use of Information-Technology by Courts Act, 2020 from 19 January 2022.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. ELECTION COMMISSION REFORM: PROMULGATING THE CHIEF ELECTION COMMISSIONER AND THE OTHER ELECTION COMMISSIONERS APPOINTMENT ACT, 2022

Bangladesh fulfilled its constitutional obligation under Article 118(1) by enacting the Chief Election Commissioner and the Other Election Commissioners Appointment Act, 2022, 50 years after the Constitution specifically required a law to be made on the appointment of the chief election commissioner (CEC) and other election commissioners (ECs). Although the efforts to enact this law started in 2021,[3] it was ultimately passed on 29 January 2022.

The Act speaks about the formation of a search committee comprised of six members and headed by a judge of the AD (nominated by the Chief Justice).[4] Other members of the search committee include one judge of the HCD (nominated by the Chief Justice), the Comptroller and Auditor General of Bangladesh, the Chairman of the Bangladesh Public Service Commission, and two prominent citizens (nominated by the President), one of whom shall be a woman.[5] On the qualifications of CEC and ECs, the Act states that they must be Bangladeshi citizens with a minimum age of 50 years and must have served in a government, judicial, semi-government, non-government, or autonomous position or profession for not less than 20 years.[6]

The Act also elaborates on the disqualifications of being appointed as CEC and ECs: if such persons are declared to be of unsound mind by any court of law, if after being declared bankrupt, such persons have not become free from their liabilities, if such persons obtain foreign citizenship or declare or pay allegiance towards a foreign nation, if such persons are imprisoned after being found guilty of offences involving moral turpitude, if such persons are found guilty and punished for offences under the International Crimes (Tribunals) Act, 1973 or the Bangladesh Collaborators (Special Tribunals) Order, 1972, and if such persons occupy any office of profit of the republic which by law exempts them from being appointed as CEC or ECs.[7]

After the promulgation of the Act, the new CEC and ECs were appointed under its provisions on 26 February.[8] As the Election Commission

1 Constitution of Bangladesh 1972, Preamble; See Muhammad Ekramul Haque, 'The Proclamation of Independence, 1971: Unilateral Declaration of Independence of Bangladesh' in *Bangladesh in Encyclopedia of Public International Law in Asia* (Brill, Leyden/Boston 2021) 21; Muhammad Ekramul Haque, 'Formation of the Constitution and the legal system in Bangladesh: From 1971 to 1972: A critical legal analysis' (2016) 27(1) *Dhaka University Law Journal* 41-56.

2 Staff Correspondent, 'Virtual hearings return to Bangladesh's Supreme Court as COVID cases surge' *bdnews24.com* (Dhaka, 19 January 2022) <https://bdnews24.com/bangladesh/virtual-hearings-return-to-bangladeshs-supreme-court-as-covid-cases-surge> accessed 31 March 2023.

3 See Muhammad Ekramul Haque, Mohammad Golam Sarwar and Azhar U Bhuiyan, 'Bangladesh' in Luís Roberto Barroso and Richard Albert (eds) *The 2021 International Review of Constitutional Reform* (The University of Texas at Austin 2022) 25–26 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4254200> accessed 31 March 2023.

4 Chief Election Commissioner and the Other Election Commissioners Appointment Act, 2022, s 3 (the 2022 Act).

5 ibid.

6 ibid s 5.

7 ibid s 6.

8 See Regarding the appointment of Mr Kazi Habibul Awal, Senior Secretary (Retired) to the post of Chief Election Commissioner, Number 04.00.0000.421.53.044.22.067 <http://www.dpp.gov.bd/upload_file/ga-

faces some significant challenges with the upcoming national elections in January 2024,[9] this has ushered in a new era towards reforming Bangladesh's electoral laws to ensure a credible, free, and fair election under the new Commission. Due to fulfilling a major constitutional obligation with the promulgation of this Act (something which was missing for the last 50 years), it is thus a successful elaborative constitutional change,[10] as pointed out earlier.[11] To fulfill the objectives of the Act, the Government must also promulgate the Rules under it soon.[12]

2. PROMULGATING THE EVIDENCE (AMENDMENT) ACT, 2022

The parliament also extensively amended the provisions of the Evidence Act of 1872. It included 'digital record' in the definition of documents,[13] included the definition of the terms – Digital record or electronic record, Digital Signature or electronic Signature, Digital Signature Certificate, Certifying Authority – in the Act,[14] and also included forensic evidence under the definition of 'evidence.'[15] The Evidence (Amendment) Act of 2022 made further amendments by incorporating provisions relating to digital evidence and their admissibility, the presumption of digital evidence, the mode of taking digital evidence by the court, the mode of proving digital evidence in the court, etc.[16]

The Act finally repealed the controversial section 155(4) of the Evidence Act of 1872,[17] which contained the provision of impeaching the credibility of a witness by showing that the prosecutrix in a rape or attempt to rape trial was 'of generally immoral character.' Additionally, it amended section 146(3) of the Evidence Act of 1872 to deter defendants from asking questions relating to 'general immoral character or previous sexual behaviour of the victim' in cross examinations.[18] The amended section also provides that such questions can only be asked with the permission of the court if it deems them necessary for the ends of justice.[19]

The amendments (on incorporating digital and forensic evidence and repealing provisions questioning the character of female victims in rape and attempt to rape trials) are a step towards ensuring the fundamental right to equal protection of the law, protection in respect of trial and punishment, equality before the law, non-discrimination on the ground of sex,[20] etc. This will also enhance Bangladesh's efforts to ensure the rule of law by speedy disposal of civil and criminal trials.[21] Its current global performance in civil justice (ranked 130/140 with a score of 0.37) and criminal justice (ranked 120/140 with a score of 0.31) systems in the World Justice Project's Rule of Law Index® 2022 is concerning.[22] Significant efforts need to be made to ensure the speedy disposal of civil suits and criminal cases to enhance the performance in these two factors. In this regard, the admissibility of digital evidence in trial proceedings is a remarkable step. Thus, this is both a corrective as well as a reformative amendment.[23]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Apart from the above reforms, no other significant constitutional reform took place in 2022. The apex judiciary, i.e., the AD and the HCD, played their usual activist role in interpreting constitutional provisions to elaborate contents of fundamental rights as guaranteed under part III of the Constitution of Bangladesh, re-emphasized the doctrine of separation of powers among the three organs of the state, checked upon the power of autonomous bodies when they exceeded their powers in their actions, devised an innovative mechanism to ensure remedies to citizens on account of the violation of their fundamental rights by state organs, etc. However, none of the reforms can be described as 'amendments' or 'dismemberments' as put forward by Albert.[24] The pronouncements rather stayed within the periphery of the constitutional provisions. Therefore, they also did not raise any tension with the unamendable rules, i.e., the basic structure of the Constitution of Bangladesh. Overall, the pronouncements depict a combination of all three roles – countermajoritarian, representative, and enlightened – played by the Supreme Court of Bangladesh in 2022.[25] The following discussion elaborates in detail on this evaluation.

1. REEMPHASIZING THE DOCTRINE OF SEPARATION OF POWERS AND CHECKING UPON UNAUTHORIZED EXERCISE OF POWERS BY AUTONOMOUS BODIES

Firstly, in *Government of the People's Republic of Bangladesh v Md Nurul Islam Khan and others*,[26] the AD held that the HCD has no powers to pass 'any order or direction in a matter of administrative policy of the Government or any policy decision matter' in the exercise of its powers under Article 102.[27] It further held that the upgradation of posts was a policy decision and promotion was an administrative decision resting upon the higher administrative authorities after a clear reading of the Local Government (Pourashava) Act, 2009, the Pourashava Ordinance, 1977, and the Pourashava Officers Service Rules, 1992.[28] The AD then went on to modify the HCD's judgment and order and expunged the portion that had ordered for the upgradation and promotion of posts. This is a classic example of the court ensuring that it does not exceed its

zettes/43451_32769.pdf> accessed 31 March 2023; Regarding the appointment of the mentioned persons to the post of Election Commissioner, Number 04.00.0000.421.53.044.22.068 <http://www.dpp.gov.bd/upload_file/gazettes/43452_68970.pdf> accessed 31 March 2023.

9 See Mubashar Hasan, 'Can Bangladesh's Election Commission Act to Boost Its Credibility?' (*The Diplomat*, 10 March 2023) <https://thediplomat.com/2023/03/can-bangladeshs-election-commission-act-to-boost-its-credibility/> accessed 31 March 2023.

10 See Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (OUP 2019) 80–81.

11 See Haque, Sarwar and Bhuiyan (n 3) 26.

12 The 2022 Act (n 4) s 8.

13 Evidence Act, 1872, s 3.

14 ibid.

15 ibid s 3(3).

16 See Evidence (Amendment) Act, 2022 ss 3–19.

17 ibid s 21.

18 ibid s 20.

19 ibid.

20 Constitution (n 1) arts 31, 35(3), 27, 28(1) and 28(2).

21 Bangladesh ranked 127th in the World Justice Project's Rule of Law Index® 2022. See World Justice Project, 'Rule of Law Index® 2022' 10, 31 <https://worldjusticeproject.org/rule-of-law-index/downloads/WJPIndex2022.pdf> accessed 31 March 2023.

22 ibid 34–35.

23 See Albert (n 10) 80–81.

24 ibid 76–94.

25 For a detailed take on these three approaches, see Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67(1) American Journal of Comparative Law 109, 124–143.

26 CPLA No 4357 of 2018, AD, 29 August 2022 <http://www.supremecourt.gov.bd/resources/documents/1635427_C.P.No.4357_of_2018.pdf> accessed 31 March 2023.

27 ibid 9.

28 ibid 2, 9–10.

power by judicial overreach and take up the role of the executive.

Secondly, in two instances, the HCD had to remind the Election Commission to operate within the ambit of the applicable laws and not to exceed its jurisdiction. *Sadekul Islam v Election Commission*[29] pointed out the specific instances when the Election Commission can cancel an election. The HCD stated that an election in a center could not be stopped only because 'ballot boxes were removed illegally from the presiding officer's custody, damaged accidentally, destroyed intentionally, or lost.'[30] Such interference must be to the extent that the election result cannot be determined. Thus, Election Commission cannot direct for re-election unless it is satisfied that the result of the other centers cannot determine the overall election's result.

Again, in *Shahidulla (Md) v Election Commission*,[31] the HCD pointed out that the Election Commission's plenary powers to cancel election results and direct for re-election is more specific and defined under the Local Government (Union Parishads) Act, 2009, and the Local Government (Union Parishads) Election Policy, 2010, compared to the previous laws (the Local Government (Union Parishads) Ordinance, 1983 and the Union Parishads (Election) Rules, 1983). Thus, it can only cancel an election if the extent of the interference is such that owing to the interference, the result of that center cannot be determined. Moreover, the HCD stated that the disputes based on which the Election Commission decided to cancel the election result and direct re-election are matters that the Election Tribunal will decide in the exercise of its judicial authority. In this regard, the Election Commission cannot exercise its plenary and supervisory authority, which is an administrative authority. Hence, the HCD decided that the proper forum for the aggrieved persons, in this case, was the Election Tribunal, not the Election Commission.[32]

The abovementioned decisions prove that the HCD was cautious in deciding the cases and ensured that the Election Commission did not exceed its authority as provided in the relevant legislation.

2. DEVELOPING THE CONTENTS (AND ENLARGING THE AMBIT) OF FUNDAMENTAL RIGHTS

In developing the contents of fundamental rights, the Supreme Court, at times, also enlarged the ambit of each right. Thus, it took countermajoritarian, representative, and enlightened roles in pronouncing these verdicts.

Firstly, in *Tafsir Mohammad Awal v Government of Bangladesh*,[33] the HCD stated that no provisions in the Anti-Corruption Commission (ACC) Act, 2004 and the ACC Rules, 2007 authorize the ACC to pass an embargo on the petitioner from leaving and re-entering Bangladesh.[34] Hence, it declared the order of the ACC imposing the embargo upon the petitioner from leaving and re-entering Bangladesh as illegal. The HCD stated that such an order could only be made legal if it is confirmed by an appropriate court of law within three working days of its issuance.[35] Thus, in this case, the HCD recognized that the right to freedom of movement under Article 36 of the Constitution is not an absolute right but subject to reasonable restrictions (provided by a specific law and having a lawful justification).[36]

Secondly, in the full text of the verdict of *Mohammad Zahirul Islam v Government of Bangladesh and others*,[37] the HCD reiterated that it has the power to order compensation under Article 102 to victims of proven infringement of fundamental rights under Article 32 of the Constitution. Thereafter, the HCD remarkably added an 8% interest rate to the original amount of compensation awarded worth BDT 2 crore 70 lakhs to the victims in this case, to be calculated from the filing date of the writ petition till the date the amount is paid.[38] The HCD also observed that the government could recover the quantum of compensation from its defaulting officials and deposit it in the public exchequer.[39] This has ushered in a new era in the compensation jurisprudence in the Bangladeshi legal system since it will prompt respondents to pay compensation to victims on time. Otherwise, they risk incurring more costs in the form of interest.

Thirdly, on 9 January 2022, the HCD sought a report within three months from Cabinet Secretary, Law Secretary, Public Administration Secretary, and Family Planning Secretary regarding the steps taken by the government to prevent sexual harassment of women and children in all governmental and non-governmental workplaces and educational institutions.[40] The HCD issued this order in a petition filed by Ain O Salish Kendra (ASK)[41] regarding the government's inaction in implementing the guidelines issued by the HCD in 2009.[42] Coincidentally, during the pendency of this petition, the Ministry of Labour and Employment amended the Bangladesh Labour Rules of 2015 to include a provision titled 'Conduct towards women' in workplaces.[43] It contains a list of acts considered sexual harassment in workplaces and provides for a sexual harassment prevention committee to deal with such complaints.[44] This is a welcoming step as it ensures harmony between the two organs: judiciary and executive. However, a uniform set of guidelines is yet to be prepared for all educational institutions in Bangladesh.

3. OTHER IMPACTFUL PRONOUNCEMENTS ENSURING CONSTITUTIONAL SUPREMACY BY THE SUPREME COURT

In *Human Rights and Peace for Bangladesh v Bangladesh*,[45] the HCD declared the provision in section 41(1) of the Government Service Act, 2018 of seeking prior approval of the government/appointing authority before arresting any public servant on criminal charges as illegal since it violates the provisions in Articles 26, 27 and 31 of the Constitution.[46]

29 (2022) 27 BLC 327.
30 ibid.
31 (2022) 27 BLC 718.
32 ibid.
33 WP No 4437 of 2021, HCD, 24 February 2022 <http://www.supremecourt.gov.bd/resources/documents/1863981_WritPetitionNo4437of2021.pdf> accessed 31 March 2023.
34 ibid 19.
35 ibid 19–21; See also *Durnity Daman Commission v GB Hossain and others* 74 DLR 1 (AD).
36 ibid 17, 19.
37 (2022) 16 SCOB 84.
38 ibid 123, 127.
39 ibid 124.
40 UNB, 'HC seeks govt report on preventing sexual harassment in the workplace' *The Business Standard* (Dhaka, 9 January 2022) <https://www.tbsnews.net/bangladesh/court/hc-seeks-govt-report-preventing-sexual-harassment-workplace-355336> accessed 31 March 2023.
41 *ASK v Bangladesh and others* (In re: WP No 8874 of 2021).
42 See *Bangladesh National Women Lawyers' Association v Government of Bangladesh and others* (2009) 14 BLC 694 (HCD).
43 See Bangladesh Labour Rules, 2015, r 361Ka; Amendment of Bangladesh Labor Rules, 2015, SR & O 284-Act/2022 <http://www.dpp.gov.bd/upload_file/gazettes/45976_43800.pdf> accessed 31 March 2023.
44 ibid.
45 WP No 10928 of 2019, HCD, 25 August 2022 <https://supremecourt.gov.bd/resources/documents/1638655_WPNo.10928of2019.pdf> accessed 31 March 2023.
46 ibid 17.

The HCD elaborated on the unconstitutionality of this provision and how it *de facto* frustrates the objective and application of the ACC Act of 2004.[47] Thus, the pronouncement sought to curb the undue privileges and protection conferred to a special class of citizens (public servants):[48] a countermajoritarian, representative, and enlightened pronouncement by the HCD. On appeal, the AD stayed the decision until the disposal of the appeal.

In *Abdul Gaffar and another v Md Mohammad Ali and others*,[49] the AD surprisingly condoned two police officers from paying compensation of BDT 5000 each following an HCD order owing to their abuse of police power.[50] The AD took into account the fact that, as junior police officers, they failed to deal with the matter appropriately and the timeline of their entire service careers. The officers also tendered unconditional apologies to the AD. Lastly, nobody from the writ petitioners appeared to oppose the appeal. Interestingly, the AD heard the appeal 18 years after the HCD judgment, while the incident of abuse of police power took place in 1994. However, the authors note that this should not be a norm but an exception since it may open the floodgates of the practice of police tendering unconditional apology in serious charges of abuse of power to escape liability.

Lastly, in *Terab Ali and others v Syed Ullah and others*,[51] the AD elaborated on Article 111's scope and ambit. It stated that 'case laws declared by any superior courts other than those of Bangladesh, including Pakistani courts after 25 March 1971 and Indian courts after 13 August 1947,' are not binding precedents in Bangladeshi courts.[52] It stated that these decisions may have persuasive value but 'cannot be relied upon *ipso facto* as done by the Sylhet court' in this case.[53] The AD further cautioned subordinate courts, who are bound to apply 'existing laws,' from citing or relying upon foreign case laws not covered under the Bangladeshi Constitutional scheme as per articles 111 and 149.[54] It also declared the practice of relying upon reference books other than recognized law reports as per the Law Reports Act of 1875 as inappropriate.[55] Therefore, this pronouncement aims to ensure the constitutional supremacy and binding nature of the pronouncements made by both divisions of the Supreme Court of Bangladesh only.

IV. LOOKING AHEAD

After reforms in regards to the Election Commission, the parliament is gearing up to fulfill another constitutional obligation, i.e., enacting a law on the appointment of Supreme Court judges (under article 95(2)(c) of the Constitution). During a parliamentary session in January 2023, the Minister of Law, Justice, and Parliamentary Affairs stated that the new law would be tabled in the parliament 'within a few days.'[56] This would be another massive step towards formalizing the appointment of judges, the process of which has been questioned repeatedly owing to the absence of a particular law.[57]

Another issue to look forward to is the review hearing of the 16th Amendment case. The 16th Amendment conferred the power of impeachment of Supreme Court judges upon the parliament. However, when its constitutionality was challenged, both divisions of the Supreme Court declared it unconstitutional.[58] The government has already filed a review petition against the AD's decision.[59] The AD's chamber judge fixed the hearing on 20 October before the full bench. The petition appeared on AD's cause list for hearing on 15 December. However, no hearing took place. Hence, it is expected that the hearing of the review petition will commence in 2023.

V. FURTHER READING

M Ehteshamul Bari, *The Independence of the Judiciary in Bangladesh: Exploring the Gap Between Theory and Practice* (1st edn, Springer Nature Singapore 2022)

Taqbir Huda, 'Bangladesh: A Constitutional Solution for a Tort Law Deficit?' in Ekaterina Aristova and Ugljesa Grusic (eds) in *Civil Remedies and Human Rights in Flux: Key Legal Developments in Selected Jurisdictions* (1st edn, Bloomsbury Publishing 2022)

Kawser Ahmed, 'Revisiting Judicial Review of Constitutional Amendments in Bangladesh: Article 7B, the Asaduzzaman Case, and the Fall of the Basic Structure Doctrine' (2023) 56 Israel Law Review 1

S M Masum Billah, 'Bangladesh's Genesis: Rereading the Proclamation of Independence at its 50' (2022) 20(1) Bangladesh Journal of Law 1

Nirmal Kumar Saha and M Jashim Ali Chowdhury, 'The Efficacy of Parliamentary Question A Comparative Investigation into the House of Commons and the Jatiya Sangsad Practices' (2015–2021) 3 Jagannath University Journal of Law 183

Muhammad Ekramul Haque, Mohammad Golam Sarwar and Azhar U Bhuiyan, 'Bangladesh' in Luís Roberto Barroso and Richard Albert (eds) *The 2021 International Review of Constitutional Reform* (The University of Texas at Austin 2022) 25–29 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4254200> accessed 31 March 2023.

M Jashim Ali Chowdhury, 'Bangladesh: Chronic Marginalisation of the Accountability Institutions' in Richard Albert and others (eds) *The 2021 Global Review of Constitutional Law* (EUT Edizioni Università di Trieste 2022) 28–32 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4285035> accessed 31 March 2023.

47 ibid 11–12.
48 ibid 14.
49 CA No 191 of 2004, AD, 6 April 2022 <https://supremecourt.gov.bd/resources/documents/1988413_ca_191_of_2004.pdf> accessed 31 March 2023.
50 ibid 8.
51 CPLA no 3135 of 2014, AD, 31 August 2022 <https://supremecourt.gov.bd/resources/documents/790274_C.P.No.3135_of_2014.pdf> accessed 31 March 2023.
52 ibid 39.
53 ibid.
54 ibid 40–41.
55 ibid 41.
56 Prothom Alo English Desk, 'New law in the offing to appoint HC judges: Law minister' *Prothom Alo* (Dhaka, 10 January 2023) <https://en.prothomalo.com/bangladesh/cookhwods5> accessed 31 March 2023.
57 The Supreme Judicial Council Ordinance, 2008 sought to address this issue. However, the Ordinance ceased to have its effect as it was not passed by the ninth parliament in 2009.
58 See *Government of Bangladesh and others v Advocate Asaduzzaman Siddiqui and others* (2019) 71 DLR 52 (AD); *Advocate Asaduzzaman Siddiqui v Bangladesh* WP No 9989 of 2014, HCD, 5 May 2016 <http://www.supremecourt.gov.bd/resources/documents/783957_WP9989of2014_Final.pdf> accessed 31 March 2023.
59 See *Government of Bangladesh and others v Md Asaduzzaman* Civil Review Petition No 127 of 2022.

Barbados

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I. INTRODUCTION

Since the passage and promulgation of the Act of Parliament in 2021, which altered the Constitution of Barbados to enable Barbados to transition to a parliamentary Republic with a native non-executive President as Head of State to replace the Governor-General as representative of the United Kingdom monarch,[1] there was one, but somewhat inconsequential, amendment to the Constitution in 2021.[2] The year 2022 was, therefore, not a notable year for constitutional reform in Barbados. Admittedly, in 2022, there was an attempt to effect substantive amendments to the constitutional provisions relating to the eligibility for membership of both Houses of Parliament and any vacancy in the office of the Leader of the Opposition, but this attempt ultimately proved to be abortive. However, despite this failed attempt at constitutional reform, the failure should be considered, especially against the backdrop that the ruling Barbados Labour Party (BLP) on January 20, 2022, was reelected with a supermajority of 30 seats to 0 seats of the Democratic Labour Party, giving the BLP full control of both Houses of Parliament and the ability to secure the necessary two-thirds majority for the constitutional amendment[3]. The failure should also be considered against the backdrop of the following events: (i) a constitutional motion dealing with the ability of Parliament to alter the Constitution in the absence of a full complement of Senators; and (ii) the establishment of Barbados' third Constitution Reform Commission. This report critically reviews the failed attempt to amend the Constitution in 2022 against the backdrop of these events. This report also offers recommendations on the approach that should be adopted to ensure the successful implementation of the proposed amendments in the future.

1 Constitution (Amendment) (No. 2) Act, 2021. https://www.barbadosparliament.com/bills/details/581. See, Ronnie Yearwood, "Barbados' Transition to a Republic: 'Republic in Name First, Constitutional Reform After', 'Stuff and Nonsense!'" (2022) 16 Journal of Parliamentary and Political Law/Revue de droit Parlementaire et Politique 83.

2 See the Constitution (Amendment) (No. 3) Act, 2021. https://www.barbadosparliament.com/bills/details/584. This Act altered the "Constitution to empower the Director of Public Prosecutions to enter into agreements with prescribed persons in prescribed circumstances in lieu of instituting and undertaking criminal proceedings against such persons."

3 See section 49 of the Constitution which deals with the requisite votes for constitutional alterations.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. THE THREE IN ONE AMENDMENT

The only proposed constitutional reform in Barbados in 2022 took the form of a Constitution (Amendment) Bill ("the Bill").[4] The intent of this Bill was to effect three significant changes to the Constitution. These three proposed changes were contained in this one single Bill instead of three separate, distinct bills, which would have allowed discussion and voting on each matter. The effect of which would be that if one section of the Bill attracted disagreement, the entire Bill could fail, even though the other sections of the Bill may not have attracted disagreement. First, the Bill sought to alter section 37 of the Constitution by changing the minimum age of qualification for membership of the Senate from 21 years to 18 years. Second, the Bill sought to alter section 43 of the Constitution by changing the minimum age of qualification for membership of the House of Assembly from 21 years to 18 years. Third, the Bill aimed to alter section 75 of the Constitution by prescribing a new procedure to be followed if there was a vacancy in the office of the Leader of the Opposition, which occurred given that the BLP captured all the seats through the first-past-the-post voting system. To paraphrase, section 75 of the Constitution provided that where there was a vacancy in the office of the Leader of the Opposition, the President shall:

i. act in his own discretion where the Constitution required him to act *in accordance with the advice of the Leader of the Opposition*; and
ii. act on the recommendation of the Prime Minister, where the Constitution required him to act on the recommendation of the Prime Minister *after consultation with the Leader of the Opposition*. (emphasis added).

However, the intended amendment to section 75 in the Bill stipulated that where a vacancy in the office of the Leader of the Opposition arose and the Constitution provides that the President, Prime Minister, or any other person is required to act in accordance with the advice of or after consultation with the Leader of the Opposition, "the reference to the Leader of the Opposition shall be read as a reference to the

4 Constitution (Amendment) Bill, 2022. https://www.barbadosparliament.com/bills/details/608, 4 February 2022.

opposing political party which obtained the highest number of votes in the general election following the dissolution of Parliament."[5]

We are reminded that this Bill was piloted in Parliament in a political climate where: (i) the Government had a supermajority, controlling all 30 seats in the House of Assembly, and accordingly, there was no Leader of the Opposition in Parliament; and (ii) the Prime Minister had publicly announced her intention to select an 18-year-old for appointment to the Senate as a Government Senator, also naming that individual prior to the actual passage of the Bill in the Parliament.[6] This climate generated a constitutional conundrum where there was no Leader of the Opposition to select two Opposition Senators, as required by section 36(3) of the Constitution,[7] and the newly elected non-executive President refused to discharge her constitutional duty under section 75[8] to use her discretion and select the two Senators in the stead of the Leader of the Opposition. Moreover, one Senate seat for a Government Senator remained unoccupied since the Prime Minister was hopeful that the Bill would be enacted to enable the 18-year-old nominee to occupy that Senate seat. As a consequence, at this point in time, there were three senatorial vacancies in Parliament, meaning that only 18 of the 21 senatorial seats provided for by the Constitution were filled.

This state of affairs led to the controversial question of whether Parliament was properly constituted and whether the Senate could be convened to alter the Constitution via the Bill and conduct any other business without the full complement of 21 Senators.[9] The High Court was then called upon to adjudicate this question in the case of *Adriel Brathwaite v The Attorney General of Barbados*.[10] The Attorney General intimated that even though the Bill was already passed in the House of Assembly, it would not be put before the Senate for debate and consideration until the High Court made a ruling on the question.[11] On March 14th, 2022, the High Court ruled that the Senate, and, by extension Parliament, was properly constituted despite the absence of the full complement of 21 Senators. This decision paved the way for the Senate to commence its deliberations on the Bill after more than a month had elapsed since it was introduced and passed by the House of Assembly.

Nevertheless, the favourable judicial ruling did not necessarily translate into a favourable outcome for the Bill itself. When the Senate was eventually convened on March 18th, 2022, to debate the Bill, it appeared that the Government was not going to get the support of Independent Senators for a two-thirds majority, as required for the constitutional amendments. The Government intimated that the Independent Senators were the reason for the failure of the Bill. However, Independent Senators stated that they supported reducing the age of eligibility to 18 years for Senators, though it was a double-edged sword to do the same for membership to the House of Assembly since the involvement in elective politics at such a young age had the potential to promote and prejudice the youth simultaneously.[12] Other former Senators defended the Independent Senators, noting that the failure of the Bill for a Government with a supermajority was its mishandling of the process.[13] Above all, the Independent Senators opined that the Barbadian public at large should be consulted before such a significant constitutional change is proposed and that the matter should be raised as part of the wider constitutional reform project which would be undertaken to provide a new Republican Constitution for Barbados and which would be spearheaded by Barbados' third Constitution Reform Commission ("the CRC").[14]

Upon realising that the lack of support from the Independent Senators meant that the Bill would not have garnered the two-thirds majority vote required to effect the constitutional alteration to section 37, the debate on the Bill in the Senate was adjourned *sine die* by a senior Government Senator.[15] The following day, the Prime Minister "painfully" proclaimed that the Government would no longer be pursuing the proposed constitutional amendments in the Bill,[16] and the Bill in its totality was eventually withdrawn from Parliament on August 10th, 2022.[17] Consequently, the proposed amendments to the Constitution never materialised, and sections 37, 43, and 75 of the Constitution therefore remained unchanged. It was striking and perhaps showed the sophomoric Government's handling of its own legislative agenda in that the issues in the Bill were not piloted in distinct bills, nor did the Government re-introduce the issues under different bills.

It is noteworthy, however, that the three vacancies in the Senate were ultimately filled when the President appointed the final Government Senator on the advice of the Prime Minister[18] and exercised her power under section 75 by appointing two other Senators, labelled as "Independent Senators," at her discretion.[19]

It is, therefore, safe to say that even though the Bill was not voted on or defeated in the Senate, its withdrawal in the circumstances effectively rendered it a failed constitutional reform since the desired outcome was not achieved and would have likely not been achievable even if the Senate had to vote on the Bill at the material time.

5 Ibid.

6 See https://constitutionnet.org/news/barbados-prime-minister-proposes-amendment-lower-minimum-age-senators; https://gisbarbados.gov.bb/blog/prime-minister-announces-senators-moves-to-include-18-year-old/

7 Section 36(3) of the Constitution provides that: "Two Senators shall be appointed by the President, acting in accordance with the advice of the Leader of the Opposition, by instrument under the Public Seal."

8 Section 75 of the Constitution provides that: "During any period in which there is a vacancy in the office of Leader of the Opposition by reason of the fact that no person is both qualified in accordance with this Constitution for, and willing to accept, appointment to that office, the President [formerly the Governor-General] shall (a) act in his discretion in the exercise of any function in respect of which it is provided in this Constitution that the President [formerly the Governor-General] shall act in accordance with the advice of the Leader of the Opposition..."

9 See Garth Patterson, 'Our 'Senate' improperly constituted' *Barbados Today* (Barbados, 6 February 2022) <https://barbadostoday.bb/2022/02/06/btcolumn-our-senate-improperly-constituted/>; also see Barbados Today, 'Prominent lawyer at odds with Queen's Counsel over consequences of Senators' absence' *Barbados Today* (Barbados, 4 February 2022) <https://barbadostoday.bb/2022/02/04/prominent-lawyer-at-odds-with-queens-counsel-over-consequences-of-senators-absence/>

10 *Adriel Brathwaite v The Attorney General of Barbados* CIV 109/2022.

11 See Caribbean Today, 'Barbados Delays Sitting of Senate Pending High Court Ruling' *Caribbean Today* (23 February 2022) <https://www.caribbeantoday.com/sections/politics/barbados-delays-sitting-of-senate-pending-high-court-ruling>

12 See Marlon Madden, 'Independent senator supports age change for Senate' *Barbados Today* (Barbados, 19 March 2022) <https://barbadostoday.bb/2022/03/19/independent-senator-supports-age-change-for-senate/>

13 See Anesta Henry, 'Franklyn defends Independent Senators' Barbados Today (Barbados, 25 March 2022) <https://barbadostoday.bb/2022/03/25/franklyn-defends-independent-senators/>

14 Ibid; Also see Barbados Today, 'Kothdiwala suggests President now in 'awkward' position of having to choose DLP Senators' *Barbados Today* (Barbados, 24 March 2022) <https://barbadostoday.bb/2022/03/24/kothdiwala-suggests-president-now-in-awkward-position-of-having-to-choose-dlp-senators/>

15 See https://pmo.gov.bb/2022/03/19/statement-on-senate-appointment/.

16 See https://pmo.gov.bb/2022/03/19/statement-on-senate-appointment/.

17 See the Barbados Parliament's website https://www.barbadosparliament.com/bills/details/608 accessed 30 April 2023.

18 See https://gisbarbados.gov.bb/blog/gregory-nicholls-appointed-as-senator/.

19 https://gisbarbados.gov.bb/blog/two-more-senators-sworn-in-senate-is-now-complete/<https://barbadostoday.bb/2022/04/09/two-new-senators-look-forward-to-taking-seats-in-the-upper-chamber/

2. THE PRESIDENT'S "DISCRETION"

Given that the Bill to amend the Constitution was pulled by the Government, and bearing in mind that one of the proposed amendments in the Bill was to provide for an Opposition Leader where the opposition parties were unable through the first-past-the-post voting system to secure any seats, the status quo remained in section 75 of the Constitution.[20] Section 75 provides for the President as Head of State in the absence of a Leader of the Opposition to carry out the functions of the Leader of the Opposition, which include selecting two "Opposition" Senators.[21] The President, in exercising the discretion allowed in section 75 to exercise the function of the Leader of the Opposition, however, did not select two "Opposition" Senators and instead selected two additional "Independent" Senators to the seven already allowed under the Constitution.[22]

The issue here is the discretion of the President being exercised in a manner that effectively contravened the spirit of section 36(3) of the Constitution, which provides for the nature of the Senators as "Opposition" Senators and not Independent Senators, that were already selected and appointed by the President as provided for in the Constitution. It is a long established constitutional principle that the discretion of the Head of State is not unfettered or unchecked and cannot be exercised in a manner that is unreasonable, ultra vires, or not within the confines of the Constitution.[23] Section 75 read together with section 36(3), appear to require the President, in the absence of a Leader of Opposition, to assume the functionary and functions of the Leader of Opposition and exercise his/her discretion in a manner that the Leader of the Opposition would in appointing two Opposition Senators. It means that within the contemplation of the Constitution, in the absence of a Leader of the Opposition, there is no room for the absolute and unfettered exercise of the President's discretion under section 36(3), as the President has in exercising the discretion under section 36(4) to appoint Independent Senators.

IV. LOOKING AHEAD

The Government of Barbados on 24 June 2022 launched a ten-person Constitutional Reform Commission to execute the following within 15 months:

- To examine, consider and inquire into the Constitution of Barbados and all other related laws and matters with a view to the development and enactment of a new Constitution for Barbados;
- To make recommendations to the Government on the reforms that would meet the circumstances of a 21st century Barbados and promote the peace, order, and good governance of the country;
- To provide for consideration a draft Constitution; and
- To make recommendations on all matters which, in the Commission's opinion, are relevant to the attainment of the aims and objectives of the establishment of the Commission.

Not only is the time to execute this work constrained but commenting on the CRC, Barrow-Giles, and Yearwood also stated that "The process of constitution-making in Barbados since the announcement that the country would transition to a Republic has been nothing short of piecemeal with much depending on the CRC's Report, its draft Constitution and ultimately the response of the Cabinet of Ministers and Parliament to the proposals, whatever the merit of such proposals."[24] They went on to further state that "Practically speaking, however, the final arbiter of the substance and form of this new Constitution will not be the Barbadian society at large or even the CRC. The final arbiter will be the body charged with making and re-making the Constitution of Barbados, namely, the Parliament of Barbados. Therefore, what this new Republican Constitution will look like, or if the country will have any at all, will largely be dictated by the extent of political will to effect fruitful constitutional reform."[25] The result of this, as discussed in the previous review of constitutional reform in Barbados, is that meaningful consultation did not feature in the declaration of the new republic of Barbados,[26] and it is yet to be seen whether this will be a feature of the formation of the new Constitution following the declaration of the republic.

Even though there is no explicit duty on the Government in the Constitution to consult with the public when proposing constitutional changes, the Senate has made it clear that meaningful and inclusive consultation is needed to give the aforementioned proposed reforms greater legitimacy in a participatory democracy. Accordingly, if the Government is serious about successfully implementing the proposed reforms that were contained in the Bill, now is the opportune moment to ensure that happens by encouraging the CRC to consult with the Barbadian population on these issues. If the Government tries to incorporate these proposed reforms in the draft of the new Republic Constitution through the back door without any meaningful public consultation, it may run the risk of having the entire draft Republic Constitution defeated or withdrawn in the Senate, as was done with the Bill in 2022.

V. FURTHER READING

Ronnie Yearwood, "Barbados' Transition to a Republic: 'Republic in Name First, Constitutional Reform After', 'Stuff and Nonsense!'" (2022) 16 Journal of Parliamentary and Political Law/Revue de droit Parlementaire et Politique 83.

Cynthia Barrow-Giles and Rico Yearwood, 'The Constitutional Reform Commission of Barbados: Much Expectation, Great Skepticism', *ConstitutionNet*, International IDEA, 12 August 2022, https://constitutionnet.org/news/constitutional-reform-commission-barbados-much-expectation-great-skepticism

20 See n (8).
21 See n (7).
22 Section 36(4) of the Constitution provides: "Seven Senators shall be appointed by the Governor-General, acting in his discretion, by instrument under the Public Seal, to represent religious, economic or social interests or such other interests as the Governor-General considers ought to be represented".
23 *Premachandra v Jayawickremea* [1994] 4 LRC 95 *AG v Dumas* (2017) 90 WIR 507 at 565, para [34].
24 Cynthia Barrow-Giles and Rico Yearwood, 'The Constitutional Reform Commission of Barbados: Much Expectation, Great Skepticism', *ConstitutionNet*, International IDEA, 12 August 2022, https://constitutionnet.org/news/constitutional-reform-commission-barbados-much-expectation-great-skepticism.
25 Ibid.
26 Ronnie Yearwood and Rashad Brathwaite, "Review of Barbados Constitutional Reform" in The International Review of Constitutional Reform, 2020, Luis Barroso and Richard Albert (eds) September 2021, 26 -31.

Belgium

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I. INTRODUCTION

The formal constitutional amendment procedure in Belgium is a comprehensive single-track procedure. It entails that all amendable constitutional provisions (comprehensive) are subjected to one amendment procedure (single-track).[1] Formal constitutional change in Belgium takes place through a so-called rigid amendment procedure written down in Article 195 of the Belgian Constitution. This procedure encompasses two readings and an intervening election. After the election, the newly formed Parliament, consisting of the House of Representatives and the Senate, must approve the constitutional reform by a two-thirds majority.

Nowadays, Belgium is a federal state consisting of three Regions and three Communities on the subnational level.[2] As of 1970, six state reforms transformed Belgium's state structure from a unitary state to a complex federal state with two types of subnational entities. This complex state structure is an important reason why Belgium became almost 'notorious' for long government formations. In recent years, the formation of the federal government has been proven to not be self-evident and has been characterized by long negotiations. This was also the case with the formation of the current federal government, a process lasting 494 days (27 May 2019 – 1 October 2020). Nonetheless, the Guinness Book of Records did not need an update, as the previous Belgian world record of longest government formation, 541 days in 2010-2011, had been broken.

As the next federal election (May 2024) looms around the corner, steps are being taken to start the process of amending the Belgian constitution. The federal government has communicated a *provisional* list of constitutional articles to the House of Representatives and the Senate to be included in the final constitutional amendment declaration. In section *II, Proposed, Failed, and Successful Constitutional Reforms* of this report, the technique of working with a *provisional* list of constitutional articles, the lack of formal legally binding value of this provisional list, and the concrete constitutionals provisions that would be susceptible to amendment after the election as provisionally proposed by the government, will be discussed. The constitutional reforms that have been announced related to the recurrent issue of long government formation, the condemnation of Belgium by the European Court of Human Rights (ECtHR) in terms of the credentials of representatives, and the constitutional amendment procedure itself.

The contribution looks to a prime example of the impact of the ECtHR case law on the Belgian Constitution is analysed. After all, in addition to the Belgian Constitutional Court and the Council of State as important interpreters of the Constitution, the ECtHR can also substantially influence Belgian constitutional law in the complex, multi-layered legal order. More in particular, the question of whether the ECtHR Mugemangango judgment should lead to an amendment of the Belgian constitutional provisions on electoral disputes is discussed. In this regard, the notion of 'living constitutionalism' clearly emerges, as constitutional reform also entails a hermeneutical approach in which constitutional provisions and principles are interpreted by various actors in specific contexts.[3] Moreover, Article 195 of the Belgian Constitution has (again) been included in the provisional list of constitutional articles which are aimed to become revisable after the next election, enabling the application of a 'legal trick' that was also used to implement the Sixth State Reform in 2011-2012. This method enables sidestepping the important guarantees of the existing formal amendment procedure. In addition, some other examples of interesting intended institutional and constitutional reforms in Belgium are briefly covered.

Finally, the years 2023 and 2024 promise to be important for the future architecture and resilience of the Belgian constitutional system given, the ambitions regarding constitutional reform of government De Croo I in combination with the arduous process of federal government formations (*IV. Looking Ahead*).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. PROVISIONAL LIST OF REVISABLE CONSTITUTIONAL PROVISIONS

In May 2021, the federal government submitted a provisional list of revisable constitutional provisions to the House of Representatives

1 Richard Albert, 'The Structure of Constitutional Amendments Rules' [2014] Wake Forest Law Review 939
2 Art. 1-3 of the Belgian Constitution
3 David A. Strauss, *The Living Constitution* (Oxford University Press, 2010)

and the Senate.[4] This list includes several articles which are aimed to become revisable in the subsequent legislative term. It is important, however, to mention that this list has not (yet) been signed by the King and, therefore, has no formal legally binding value. By submitting a *provisional* list, the government intends to make a sort of pre-selection for the final list that will be submitted in 2024 at the end of the current legislative term. Hitherto, the Belgian constitutional amendment procedure is set up in such a way that the House of Representatives and the Senate are automatically dissolved and that new federal elections are organized once the final list with revisable constitutional amendments is published in the Belgian Official Gazette. The technique of using a *provisional* list avoids the immediate dissolution of Parliament and new elections but may, at the same time, already initiate and facilitate the process of constitutional amendment procedure.

The proposed use of this provisional list was incorporated in the Coalition Agreement of the federal government De Croo I. The Coalition Agreement stipulates that two Ministers of Institutional Reform will be instructed by the government to provisionally decide on articles of the Constitution that should be revisable after the elections of 2024. This provisional list has now been established but will be further supplemented during the current parliamentary term. Moreover, the activities of the Dialogue Platform on the future of Belgian federalism are to be considered when determining the final list of revisable provisions. The parliamentary discussion of this list, however, is not foreseen before the final stages of this parliamentary term. At the end of the parliamentary debate, the list is intended to be supplemented with the articles that are necessary to translate the guiding recommendations, in particular concerning democratic renewal and the division of powers, into revisable constitutional articles.[5]

It is an important part of the Belgian constitutional amendment procedure that not only the King (i.e., *de facto* the federal government) but also the House of Representatives and the Senate – all three actors together constitute the '*Preconstituante*' – must adopt a list of revisable constitutional articles. Subsequently, the publication in the Belgian Official Gazette of a joint declaration of revisable constitutional articles that are proposed by all three actors automatically leads to the dissolution of the House of Representatives and the Senate and new elections. Once a new Parliament takes office, only the provisions that appeared in all three constitutional amendment lists are incorporated in the joint final declaration and can thus be subject to amendment.

The provisional list that the government has communicated to the House of Representatives and the Senate concerns five constitutional provisions that relate to three topics, i.e., the recurrent issue of arduous, protracted government formation (A.), the condemnation of Belgium by the ECtHR due to the lack of judicial appeal as regards credentials disputes concerning Members of Parliament (B.), and the procedure for amending the constitution itself (C.).

4 "Regering bezorgt voorlopige lijst van te herziene grondwetbepalingen aan Senaat en Kamer", https://www.senate.be/event/20210527_institutional/20210527_institutional_nl.html.

5 'Coalition agreement 30 September 2020', https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf, 79, accessed 20 March 2023.

1.1. A SOLUTION TO LONG-LASTING GOVERNMENT FORMATIONS?

As mentioned above, Belgium is becoming notorious for protracted government formations. Belgium still holds the world record for the longest time without a newly formed government in peacetime as a result of the 541 days of government formation negotiations in 2010-2011.[6] The negotiations leading to the Sixth State Reform were one of the main reasons for this arduous government formation. However, after the federal elections in May 2019, the formation of a federal government also proved to be extremely difficult, while no state reform was intended to be negotiated nor implemented. The current government De Croo I only came into power after almost 500 days of negotiations. The COVID-19 crisis further complicated the formation of a federal government, but the increasingly complex federal state structure undoubtedly remains one of the main causes.

The recent provisional list of revisable constitutional articles includes Articles 46 and 96 of the Constitution in the hope that their amendment could contribute to an accelerated federal government formation. Article 46 of the Constitution defines the cases in which the King has the right to dissolve the Parliament. This article has been included in the list so that an additional paragraph could be added about the dissolution of the House of Representatives. An amendment of this constitutional provision could introduce new rules for the formation of a new federal government, e.g., a formal deadline or a mechanism to unblock certain stalemates.[7] Article 96 of the Constitution describes how the federal government is established. According to the first paragraph of this provision, the King appoints and dismisses the ministers. According to the second paragraph, the federal government offers its resignation to the King when the House of Representatives approves – by an absolute majority of its members – a motion of no confidence which simultaneously nominates a successor to the Prime Minister for appointment to the King or nominates a successor to the Prime Minister for appointment to the King within three days after rejecting a vote of confidence. The King appoints the nominated successor as Prime Minister, who takes office at the time of the swearing-in of the new federal government. According to the federal government, a constitutional amendment changing the above-mentioned rules for the formation of a new federal government could also provide a solution for protracted government formations, again with, for example, the introduction of a formal deadline or a mechanism to unblock certain situations.[8]

1.2. INTRODUCING JUDICIAL ACCESS FOR CREDENTIALS DISPUTES?

A second topic on the provisional list addresses the condemnation of Belgium by the ECtHR regarding the impartiality of the settlement of disputes about the credentials of parliamentary representatives. The

6 "Longest time without a government in peacetime', https://www.guinnessworldrecords.com/world-records/96893-longest-time-without-a-government-in-peacetime, accessed 20 March 2023

7 Explanatory Memorandum to the provisional list, https://www.senate.be/event/20210527_institutional/herziening_GW_NL.pdf, 1, accessed 21 March 2023

8 Explanatory Memorandum to the provisional list, https://www.senate.be/event/20210527_institutional/herziening_GW_NL.pdf, 2, accessed 21 March 2023

ECtHR has addressed the issue of the lack of impartial settlement of electoral disputes on several occasions. In its Grosaru v. Romania judgment, the Court ruled that Romania violated Article 13 of the European Convention on Human Rights (ECHR) and Article 3 of the First Additional Protocol as the verification processes were not sufficiently impartial in assessing its election results in combination with the impossibility of a judicial appeal against the decisions of an electoral commission that checked compliance with electoral legislation.[9] In 2020, the ECtHR also condemned Belgium in a case involving a Belgian subnational Parliament, the Walloon Parliament, for a violation of Article 13 ECHR and Article 3 of the First Additional Protocol in the Mugemangango v. Belgium judgment.[10] Article 48 of the Constitution states that each parliamentary chamber examines the credentials of its members and settles disputes that arise in this respect. However, there is no legal remedy against the outcome of parliamentary decisions, which the Venice Commission and the ECtHR consider problematic. It is now the question of whether an amendment of Article 48 of the Constitution is advisable or necessary after the ECtHR judgment.

The ECtHR Mugemangango judgment in itself does not strictly prohibit the settlement of post-electoral disputes by an elected not yet constituted Parliament itself if three necessaries, though sufficient conditions are met to safeguard the impartiality of the competent organ and to avoid arbitrariness: 1) providing sufficient guarantees of impartiality; 2) circumscribing the discretion of the competent parliamentary organ with sufficient precision by domestic law; and 3) providing effective procedural guarantees in domestic law to ensure a fair, objective, and sufficiently reasoned decision. The ECtHR refers to its established case law on the right to an effective legal remedy based on Article 13 ECHR, which in itself does not prescribe a legal remedy by a *judicial* authority.

Following the Mugemangango judgment, the federal government intends to expand the power of the Belgian Constitutional Court to hear appeals against decisions related to the credentials of Members of Parliament. The specific suggested in the provisional list applies the appeals mechanism set out in Article 142, the fifth paragraph of the Constitution. This Article provides the possibility of an appeal against decisions of legislative assemblies or their bodies regarding the control of electoral expenditure for elections of the House of Representatives. As such, it is the aim that disputes related to the verification of the credentials of parliamentary members would be added to this provision to achieve the desired result. Nonetheless, if Belgium, by such an amendment, intends to avoid the Members of Parliament will no longer be an involved party and final judge concerning controlling their election and credentials, the parliamentary chambers will most probably first have to act without judicial appeal once more after approval of the proposed amendment of the Constitution with a two-thirds majority after the next elections.

1.3. PROPOSED AMENDMENT OF ARTICLE 195 OF THE CONSTITUTION: LEGAL TRICK OR TRUE REFORM?

As mentioned in the introduction of this contribution, constitutional reform in Belgium can be described as a comprehensive single-track procedure. The amendment procedure is written down in Article 195 of the Belgian Constitution and consists of three phases: 1) the adoption and publication of the joint list of revisable constitutional provisions by the *'Preconstituante,'* 2) the dissolution of the Parliament and corresponding new elections, and 3) the actual amendment of the revisable constitutional provisions by the newly formed Parliament by means of a two-thirds majority.

The Coalition Agreement of De Croo I explicitly states that the provisional list "*must include at least Article 195 of the Constitution.*"[11] Where we expressed in our IRCR 2020 report the concern that it "*thus seems that the controversial 'legal trick' used to circumvent the strict amendment procedure during the legislature of 2011-2014 might be used again,*" concrete steps have now been taken to be able to walk this path again. In the explanatory memorandum to the provisional list, the government states that an amendment of Article 195 of the Constitution makes it possible, among other things, to change the procedure for the amendment of the Constitution *itself.* The government refers to the Belgian constitutional law scholarship, which – according to the government – has been requesting this amendment for several years and for various reasons.[12]

However, the explanatory memorandum to the provisional list shows that the aim of the amendment of Article 195 is broader. The government considers the goal of the amendment of Article 195 of the Constitution to implement a new state structure from 2024 onwards with a more homogeneous and efficient distribution of powers while respecting the principles of subsidiarity and interpersonal solidarity. This amendment is proposed in the hope that it will lead to a strengthening of the autonomy of the regions and the communities and of the federal level in its clout.[13] As a result, the (main) aim does not seem to be to modernize or ameliorate the amendment procedure itself but rather to make a large state reform possible after the elections, most probably without the adoption of an exhaustive list of revisable constitutional provisions necessary to execute such a state reform. Hence, – yet again – "the legal trick" that *de facto* circumvents the guarantees of the current amendment procedure might be used again.

2. OTHER INTENDED INSTITUTIONAL AND CONSTITUTIONAL REFORMS

It has already been stated that the discussed provisions are only included in a *provisional* list and that the final list is intended to be supplemented during the current legislative term. It is, therefore, still a possibility for the King (*de facto* the government) and the Members of Parliament to submit, during the parliamentary term, other proposals to be included in the final and joint declaration to revise the Constitution.

The proposal of July 14, 2022, for a declaration to revise the Constitution, submitted by Claire Hugon and Kristof Calvo of Ecolo-Groen, can be given as an example. This proposal intends to enshrine

9 ECtHR, 2 March 2010, Grosaru v. Romania, no. 78039/01.
10 ECtHR, 10 July 2020, Mugemangango v. Belgium, no. 310/15.
11 'Coalition agreement 30 September 2020', https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf, 79, accessed 20 March 2023.
12 Explanatory Memorandum to the provisional list, 2-3, https://www.senate.be/event/20210527_institutional/herziening_GW_NL.pdf, 2, accessed 21 March 2023
13 Explanatory Memorandum to the provisional list, 2-3, https://www.senate.be/event/20210527_institutional/herziening_GW_NL.pdf, 2, accessed 21 March 2023

the right to abortion in the Belgian Constitution by amending Article 22 of the Constitution to include the right to abortion as part of the right to respect for private and family life. It is worth noting that the proposers of this constitutional amendment referred to the June 25, 2022, ruling of the US Supreme Court in the case of Dobbs v. Jackson Women's Health Organization that the US Constitution does not confer a right to abortion. This proposal expresses the concern that the Belgian right to voluntary termination of pregnancy, which is currently enshrined in federal law, could – in the future – also be abolished by federal legislation with a simple majority. An inclusion by amending the Constitution would mean a stronger guarantee due to the amendment procedure consisting of an intervening election and a two-thirds majority vote in the second reading.[14]

A second notable example is the proposal of 10 November 2022 for a declaration to revise the Constitution, submitted by Senator Karl Vanlouwe of the Flemish Nationalists (N-VA), which would enable the abolishment of the Belgian Senate. It is proposed that several constitutional articles would be amended so that the Belgian Senate – whose role has already been substantially reduced in 2014 – can be entirely abolished, which would thus put an end to the Belgian bicameral system on the federal level. Several reasons are mentioned for disposing of the Senate, such as the high cost of its operation (especially in the context of the acute energy crisis) and the inadequate fulfillment of its role assigned in 2014 whereby the Senate should function as a 'meeting point' on the national level of the Regions and Communities that operate on the subnational level.[15]

Other examples of proposed constitutional amendments include the possible introduction of binding referenda in the Constitution[16], the introduction of a right to water and a ban on the privatization and trade of water in Article 23 of the Constitution[17], and a proposal to revise Article 23 of the Constitution regarding the recognition of animals as sentient beings[18].

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The first three Articles of the Constitution define Belgium as a federal state consisting of three Regions and three Communities on the subnational level. The current state structure is the result of decades of institutional reform. The starting point can be found with the first state reform in 1970, but the endpoint – even after six implemented state reforms – is not in sight. Nonetheless, the layered state structure and the complex division of powers cause ambiguities and difficulties, but opinions about the optimal design and functioning of the Belgian state differ widely.

With its Coalition Agreement of 30 September 2020, government De Croo I, however, aims to take the next step towards a seventh state reform. The government aims to make an 'important contribution' to the modernization, increased efficiency, and deepening of the democratic foundations of the state structure. As explained above, the government aims to enable the creation of a new state structure from 2024 onwards with a more homogeneous and efficient distribution of powers while respecting the principles of subsidiarity and interpersonal solidarity, which would, in turn, lead to the strengthening of the autonomy of the regions and the communities and the federal level in its clout.[19]

To further develop this ambition, the government established the 'Dialogue Platform on the future of Belgian federalism' with the task to discuss and possibly rethink Belgium's federal state structure. This platform is composed of citizens, civil society, and academia and should enable a broad democratic debate to evaluate the existing state structure. One of the motivations for opening this democratic debate is democratic renewal and the will to strengthen citizens' confidence in politics.[20] In its provisional list, the government also stated that it will be supplemented in the course of the legislature "*following the work of the Dialogue Platform*."[21] In our IRCR 2020 report, we already expressed the concern that such an initiative entails risks for the emergence of a 'participation elite' and that it might be worth considering to formally include (the option of) a preliminary phase of citizen participation, accompanied by necessary procedural guarantees, in the amendment procedure of Article 195 of the Constitution.

The Dialogue Platform includes an online platform for citizen consultations, thematic inter-federal working groups (of government actors), a deliberative process through mixed committees or citizen panels in the House of Representatives, and a dialogue between political representatives. One of the initiatives, the participation trajectory 'A Country for the Future,' aimed to collect a broad overview of the different opinions and visions of Belgians and residents of Belgium aged at least 16 years, civil society, academics, experts, and local authorities, on the Belgian state structure and the modernization, the increase of efficiency and the deepening of the democratic principles of the Belgian state structure. This online participation platform, 'A Country for the Future,' was accessible from April 25, 2022, to June 5, 2022. The report of this online platform was published in February 2023 and included the results of a survey that was conducted among Belgian inhabitants and of the discussions that were held. The report focuses, for example, on various models of the state structure that emerged from the survey, such as the return to a unitary state, the split of Belgium into two separate countries, and a centralized federal model. Other topics that were tackled are the role of the citizens, fundamental rights, the division of powers, the functioning of Parliament and the government, and the organization of elections. This report is intended to serve as an important input to prepare the next state reform and to renew democracy in Belgium.[22]

14 Proposal of 14 July 2022 to revise Article 22 of the Constitution with a view to recognizing the right to voluntary termination of pregnancy, House of Representatives, no. 2832/001

15 Proposal of 10 November 2022 to revise the Constitution to abolish the Senate, Senate, no. 7-391/1

16 Proposal of 18 January 2022 to revise Articles 33, 36, 39bis, 41, 134, and 195 of the Constitution to allow for binding referenda, House of Representatives, no. 2431/001

17 Proposal of 17 March 2022 to revise Article 23 of the Constitution to include the right to water and to prohibit the privatization and trade of water, House of Representatives, no. 2587/001

18 Proposal of 7 July 2022 to revise Article 23 of the Constitution regarding recognition of animals as sentient beings, Senate, no. 7-372/2

19 Explanatory Memorandum to the provisional list, 2-3, https://www.senate.be/event/20210527_institutional/herziening_GW_NL.pdf, 2, accessed 21 March 2023

20 'Coalition agreement 30 September 2020', https://www.belgium.be/sites/default/files/Regeerakkoord_2020.pdf, 79, accessed 21 March 2023

21 Explanatory Memorandum to the provisional list, 1, https://www.senate.be/event/20210527_institutional/herziening_GW_NL.pdf, 2, accessed 21 March 2023

22 "A country for the future – report", February 2023, https://demain-toekomst-zukunft.be/pages/rapport

IV. LOOKING AHEAD

After the installation of the federal government in 2020, important initiatives have been taken to discuss and enable a new round of reforms of the Belgian constitutional landscape. The years of 2023 and especially 2024 promise to be even more crucial for the Belgian institutional system, as the impending provisional list of revisable constitutional provisions will be further prepared and finally published, after which new elections will herald the second phase in the constitutional amendment procedure.

Nevertheless, it is not yet clear to what extent and how Belgium will be able to form a new federal government after the elections in 2024, given the arduous and long past formations, even more so when the formation of a federal government would be made dependent on successful negotiations aimed at a seventh state reform, which also requires the support of a two-thirds majority. At the same time, there is no doubt that Article 195 of the Constitution will play an important role in the debates on and potential implementation of such a large state reform. Regrettably, it is already clear that "the legal trick" used to implement the sixth state reform will most probably be made possible again. If this is the case, one might hope that the constitutional amendment procedure itself will finally be changed and modernized so that the legal trick will no longer be necessary in the future.

V. FURTHER READING

Karel Reybrouck, Stefan Sottiaux, and Wouter Pas (eds.), *Inspiration for the state reform* (Intersentia 2023) (published in Dutch)

Jurgen Goossens and Roel de Lange, 'Mugemangango v. België. Case note on ECthR (Grand Chamber), no. 310/15, 10 July 2020, ECLI:CE:ECHR:2020:0710JUD000031015' (2020) *European Human Rights Cases* (published in Dutch)

Bosnia and Herzegovina

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I. INTRODUCTION

Not much was expected from 2022 in terms of reforms in Bosnia and Herzegovina (BiH) since it was a year of general elections. While BiH politicians were focused on their election campaigns, the Office of High Representative (OHR), an institution established by annex 10 of the Dayton Peace Agreement (DPA) to oversee the implementation of civilian aspects of the DPA, was actively collaborating with the rest of international community to prevent future institutional crises and paralysis in the Federation of BiH (FBiH), one of the two entities in BiH. Since 2018, institutional dysfunction made it impossible to appoint four missing judges to the FBiH Constitutional Court (FBiH CC). Additionally, the FBiH was unable to elect a new FBiH president and vice-presidents, as well as a new government since the previous elections which were held in 2014. Rather, the FBiH operated under a technical mandate since 2018. OHR activism culminated on election night of 2022 when the High Representative (HP) enacted amendments to the BiH Election Law and to the FBiH Constitution. The BiH Parliamentary Assembly (BiH PA) debated on six amendments to the BiH Constitution. However, these amendments were doomed to fail as they were single-party proposals without the necessary coalition required for an amendment to pass. In Republika Srpska (RS), the second BiH entity, authorities have secretly been drafting a new Constitution under the supervision of its president. In the aftermath of the general elections, the leaders of the ruling parties agreed (once again) upon limited but necessary constitutional reforms. This agreement was made in accordance with the decision of the Constitutional Court of BiH (BiH CC) and the judgments of the European Court of Human Rights (ECtHR).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORM

1. FAILED CONSTITUTIONAL AMENDMENTS

In 2022, the BiH PA House of Representatives discussed six amendments to the BiH Constitution. Four amendments of Naša stranka (Our Party) were introduced to implement ECtHR judgments in cases *Sejdić-Finci*,[1] *Zornić*,[2] *Šlaku*[3], *Pilav*,[4] and *Pudarić*.[5] In these cases, ECtHR had found ethnic conditions for the eligibility of candidates in the election of the BiH Presidency members (a collective head of state) as well as of members of the BiH PA House of Peoples (the Upper House) to be discriminatory and contrary to the European Convention on Human Rights (ECHR). According to the ECtHR, "time has come for a political system which will provide every citizen of Bosnia and Herzegovina with the rights to stand for elections to the Presidency and the House of Peoples of Bosnia and Herzegovina without discrimination based on ethnic affiliation and without granting special rights for constituent people to the exclusion of minorities of citizens."[6] The amendment proposals by Naša Stranka also aimed at reforming the BiH PA by eliminating the House of Peoples and reallocating the veto mechanism in the House of Representatives. Additionally, they served to replace the current collective head of state with one president and one vice-president, as well as strengthen the responsibilities of the Council of Ministers. These amendment proposals very much align with the proposals made by the Citizens' Assembly (see report 2021).

Another amendment proposal, introduced by a single MP, was to regulate the issue of state property. This has been an issue of heated political discussion regarding legal struggles for decades. In 2012, BiH Constitutional Court (CC) decided that the regulation of state property falls under the exclusive responsibility of BiH PA.[7] Furthermore, in later decisions, BiH CC established that agricultural land is considered state property (Case No. U-8/19) as well as rivers, forests, and forestland (Case No. U-9/19 and Case No. U-4/21). Contrary to the BiH CC decisions, the RS has consistently pursued the regulation and appropriation of state property. The latest attempt was the RS Law on Immovable Property Used for Functioning of Public Authority which

1 ECtHR Grand Chamber *Sejdić cand Finci v. Bosnia and Herzegovina* App nos. 27996/06 and 34836/06 (ECtHR, 23 December 2009).
2 ECtHR *Zornić v. Bosnia and Herzegovina* App no 3681/06 (ECtHR, 15 July 2014).
3 ECtHR Šlaku v. Bosnia and Herzegovina App no 56666/12 (ECtHR, 26 May 2016).
4 ECtHR *Pilav v. Bosnia and Herzegovina* App no 41939/07 (ECtHR, 9 June 2016).
5 ECtHR *Pudarić v. Bosnia and Herzegovina* App no 55799/18 (ECtHR, 8 December 2020).
6 ECtHR *Zornić v. Bosnia and Herzegovina* App no 3681/06 (ECtHR, 15 July 2014), para 43.
7 BiH CC Decision on Admissibility and Merits in case no. U-1/11. Available at <https://www.ustavnisud.ba/uploads/odluke/_en/U-1-11-508705.pdf>.

entered into force in February 2023.[8] The proposal for a constitutional amendment was supposed to explicitly list all forms of state property and to declare the BiH as its exclusive owner, thus ending the controversy by constitutional entrenchment.

Finally, the sixth amendment debated in the BiH PA House of Representatives referred to the compensation for persons holding office in the institutions of BiH. According to the constitutional provision in force, such compensation may not be diminished during an officeholder's tenure. The proposed amendment aimed to prohibit an increase in compensation. The amendment was justified by the need to prevent an increase in politicians' salaries, which occurred when there was an increase in the salaries of civil servants.

None of these six amendments were able to receive enough support to be adopted. This was expected as the proposing MPs had failed to secure a coalition when submitting amendments to the parliamentary procedure.

2. CONSTITUTIONAL AMENDMENTS ON HOLD

At the end of 2022, there were five more proposals for constitutional amendments in the BiH PA parliamentary procedure. Two of these proposals aim at changing the provision that prohibits diminishing compensation for individuals holding office in the institutions of BiH during an officeholder's tenure. The other three proposals—each by three ethnic political parties—also aimed at implementing the above-mentioned ECtHR judgments in the *Sejdić-Finci* group cases. These proposals for constitutional amendments, which have been pending since 2012, all agree upon expanding the number of delegates in the BiH PA House of Peoples to include delegates from those who declared themselves as "Others" (i.e. as not belonging to one of the three main ethnic groups) or constituent peoples. The proposals differ in their approach to eliminating discrimination in the election to the Presidency BiH. While the Stranka Demokratska Akcije (SDA, Party of Democratic Action) and the Savez Nezavisnih Socijal Demokrata (SNSD, Alliance of Independent Social Democrats) simply wish to eliminate the ethnic prefix of single BiH Presidency members, Hrvatska Demokratska Zajednica BiH (HDZ, Croat Democratic Union of BiH) proposes the indirect election of the three members of Presidency by the BiH PA.

3. CONSTITUTIONAL AMENDMENTS ON ELECTION EVE: THE CASE OF FEDERATION OF BOSNIA AND HERZEGOVINA

Since 2014, OHR has mainly been limiting itself to monitoring and commenting on events in BiH. But, after Christian Schmidt was appointed as the new HP in July 2021, the OHR has become increasingly present and active in BiH politics.[9] To fulfill its role, coercive powers of substitution, so-called Bonn powers, have been used in the past to enact laws, including amendments to entities' constitutions, to establish institutions, and to remove obstructionist politicians and civil servants from office.

On the eve of the general elections held on 10th October 2022, the HP enacted 21 amendments to the FBiH Constitution and six amendments to the BiH Election Law.[10] Prior to this enactment, the HP attempted to enact similar amendments already in the summer, which were leaked and later abandoned due to high public pressure. Since the end of 2021 and through 2022, leaders of political parties had tried to reach an agreement on FBiH constitutional reform and BiH election law reform, with the facilitation of the EU Delegation and U.S. Administration. These negotiations focused on implementing ECtHR judgments in *Sejdic-Finci* group cases and the decision of the CC BiH in Case No. U-23/14 (*Ljubić).* In the *Ljubić* case, BiH CC found that a provision in BiH Election Law, which obliges the 10 FBiH cantons to put forward at least one delegate to the FBiH Parliament House of Peoples from each of the three main ethnic groups (Bosniaks, Serbs, and Croats), even if there are only a handful of that ethnic group living in the canton, was in conflict with the principles of the constituency of peoples and equality enshrined in the BiH Constitution.

The international community did not react uniformly. The EU Delegation in BiH "*took note of the decision*" and underlined that it was a "*decision of the High Representative alone."*[11] On the other hand, the U.S. Embassy and the UK Embassy supported the decision calling it "*urgent and necessary*" (U.S.)[12] and "*necessary in the absence of domestic political will or leadership*"(UK).[13]

OHR justified the decision with two goals: (1) improving the functionality of the FBiH and (2) ensuring the timely formation of authorities and results of the general elections.[14] The enacted amendments address the following issues:

- *Dynamizing the legislative process in FBiH Parliament*. Amendments oblige both Houses to cooperate and to consider adopted acts by other houses within a specific period.
- *Unlocking the appointment of judges to the FBiH CC*. Amendments require institutions and officials to exercise their authority in the appointment process within a specified period. Failing to do so shall result in the transfer of their responsibility to the next authority in the process. Some amendments were specific to the ongoing process of electing four new judges to the FBiH CC.
- *Preventing the abuse of the veto mechanism (Vital Nation Interests) in the FBiH Parliament House of Peoples*. Amendments specify the range of issues on which vital national interest can be invoked, by eliminating the open and abstract category of issues. Besides,

8 CC BiH granted the Interim Measure by which the Law was temporally rendered ineffective. BiH CC Decision on Interim Measure in case no. U-5/23. Available at< https://www.ustavnisud.ba/uploads/odluke/_en/U-5-23-1372632.pdf>.

9 For overview of decisions enacted by Christian Schmidt as HP, see https://www.ohr.int/decisions-of-the-high-representative/.

10 Office of High Representative. *Decision Enacting the Law on Amendments to the Election Law of Bosnia and Herzegovina,* dated 02 October 2022. Available at <http://www.ohr.int/decision-enacting-the-law-on-amendments-to-the-election-law-of-bosnia-and-herzegovina-8/>.

11 Delegation of the European Union to Bosnia and Herzegovina & European Union Special Representative in Bosnia and Herzegovina, *EU in BiH on the decision by the High Representative to amend the BiH Election Law and the Constitution of the Federation of BiH*, dated 02 October 2022. Available at <https://europa.ba/?p=76074>.

12 U.S. Embassy in Bosnia and Herzegovina, *Statement of the United States on the High Representative's use of Bonn Powers,* dated 02 October 2022. Available at <https://ba.usembassy.gov/statement-of-the-united-states-on-the-high-representatives-use-of-bonn-powers/>.

13 *Ambassador Reilly: UK supports role played by High Representative in Bosnia,* dated 02 October 2022. Available at <https://n1info.ba/english/news/ambassador-reilly-uk-supports-role-played-by-high-representative-in-bosnia/>.

14 Office of High Representative. *Measures to improve Federation Functionality*, dated 02 October 2022. Available at <http://www.ohr.int/measures-to-improve-federation-functionality/>.

amendments ensure that the Vital National Interest invocations are always reviewed by the Vital National Interest Panel of the FBiH CC to prevent misuse of this veto mechanism.

- *Ensuring adjudication of Vital National Interest invocations.* Amendments prescribe a new way of appointing members to the Vital National Interest Panel of the FBiH CC, by giving authority to the FBiH CC itself to appoint the panel from its members.
- *More inclusive FBiH Parliament.* Amendments oblige both Houses of FBiH Parliament to develop adequate procedures for considering citizen initiatives and other forms of their direct participation in matters that fall under FBiH Parliament's responsibilities. All levels of government shall ensure inclusive youth participation in matters of their future.
- *Clarifying distribution of key legislative and executive positions in FBiH.* Amendments harmonize the list of key positions to be occupied by a limited number of representatives of three constituent peoples in the FBiH executive, legislative, and judiciary.
- *Implementation of the BiH CC decision in the Ljubić case*, by improving the proportionality of representation of constituent peoples from each of the ten cantons in the House of Peoples of FBiH Parliament. First and foremost, every constituent people maintain the guarantee of at least one representative in the House of People. The number of seats in each constituent people's caucus has increased from 17 to 23. Also, the number of seats in the caucus of "Others" is increased from 7 to 11, giving "Others" in all cantons a chance for being represented in the House of Peoples. The amendment aims at preventing over-representation of constituent peoples from cantons with a small population of the respective people.
- *Preventing abuse in the election of delegates to the House of Peoples.* Amendments prescribe a timeline for electing delegates to the House of Peoples by cantonal assemblies. Failure to do so in a specific period triggers the authority of the BiH Central Election Commission to reallocate seats from such cantons.
- *Electing president and vice presidents of FBiH.* Amendments reframe the procedure of electing the president and two vice presidents of FBiH, by lowering the level of support needed in caucuses to nominate a president and vice presidents in successive rounds. Furthermore, a specific timeline and method of voting on slates in both Houses of FBiH Parliament have been amended.

The above OHR amendments were contested before CC BiH (Case No. U-27/22), which found them to be in line with the Constitution of BiH, article 1 of Protocol no. 12 to the ECHR, International Convention on the Elimination of All Forms of Racial Discrimination and International Covenant on Civil and Political Rights.[15]

In terms of substance, OHR decided not to include the judgments of ECtHR in *the Sejdić-Finch* group cases, but also a judgment of BiH CC in Case No. U-14/12 (see below and in 2022 report), in its amendments of the FBiH Constitution. This results in continuing discrimination of "Others' since they can neither nominate (through their caucus in the House of Peoples) nor be nominated for the president and vice presidents of FBiH.

15 BiH CC Decision on Admissibility and Merits in Case No. U-27/22. Available at < https://www.ustavnisud.ba/uploads/odluke/_en/U-27-22-1372210.pdf>.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. PREPARING A NEW CONSTITUTION: CASE OF REPUBLIKA SRPSKA

In December 2021, the RS NA adopted a Declaration on constitutional principles, expressing its belief that it was necessary to prepare a new Constitution for the RS.[16] Furthermore, the RS NA instructed the Government of RS in coordination with the President of RS, to draft a new Constitution. The RS NA provided two concrete instructions on its content. First, it shall confirm all responsibilities of RS, excluding the competencies that belong to BiH according to the letter of the BiH Constitution. Second, the new Constitution shall, among *other things,* designate Banja Luka as the capital of RS, and Pale as the seat of RS. But, as part of the constitutional review, BiH CC has quashed similar provisions on responsibilities as contrary to the rule of law principle and in violation of the principle of the normative hierarchy.[17]

According to public statements made by politicians and academics closely linked with RS, it indicates that the BiH CC decision was in vain and that the drafting process for a new RS Constitution continues, hidden from the public eye. RS President Milorad Dodik explained that since the current RS Constitution was desecrated by OHR, the only way to have an integral constitutional text is to create a new Constitution.[18] Dodik also added that there is a team of experts working on the new Constitution, but the process and that this process might take years.[19] RS authorities plan to publish and adopt a new Constitution within the current legislature (2022-2026).[20]

The preparation of a new Constitution has been justified by the necessity to adapt the Constitution to the current and future needs of RS.[21] Specifically, according to the authorities, numerous changes and other social circumstances require the adoption of a new RS Constitution.[22] Some academics have expressed opposition to this idea due to international circumstances, the general situation in the Balkans, as well as the relations between the peoples of BiH. These critics argue that these conditions are not suitable for such a constitutional process.[23]

16 Available at <https://www.narodnaskupstinars.net/?q=la/akti/ostali-akti/deklaracija-o-ustavnim-principima>.

17 BiH CC Decision on Admissibility and Merits in Case No. U-2/22, para 92. Available at < https://www.ustavnisud.ba/uploads/odluke/_en/U-2-22-1323203.pdf>.

18 *Dejtonski sporazum i danas „mjerač" za BiH: Dodik podsjetio koje skrnavio Ustav*, dated 19 November 2022. Available at <https://vecernjenovosti.ba/125148/vijesti/dejtonski-sporazum-i-danas-mjerac-za-bih-dodik-podsjetio-koje-skrnavio-ustav/>.

19 *Ibid.*

20 *Novim Ustavom RS-a Dodik pravi krupan korak ka urušavanju države i državnih institucija,* dated 06 March 2023. Available at <https://dnevni.ba/dnevni/novim-ustavom-rs-a-dodik-pravi-krupan-korak-ka-urusavanju-drzave-i-drzavnih-institucija/>.

21 *Dodik najavio: Mijenjaćemo Ustav u skladu sa potrebama Srpske,* dated 16 November 2022. Available at <https://noviglas.info/2022/11/16/dodik-najavio-mijenjacemo-ustav-u-skladu-sa-potrebama-srpske/>.

22 *Kuzmanović: Potrebno je donijeti novi Ustav Srpske,* dated 26 February 2023. Available at <https://www.nezavisne.com/novosti/bih/Kuzmanovic-Potrebno-je-donijeti-novi-Ustav-Srpske/760644>.

23 *Da li je pametno odreći se Ustava potvrđenog Dejtonom: Ponovo aktuelno donošenje novog najvišeg pravnog akta Srpske,* dated 28 February 2023. Available at <https://srpskainfo.com/da-li-je-pametno-odreci-se-ustava-potvrdjenog-dejtonom-ponovo-aktuelno-donosenje-novog-najviseg-pravnog-akta-srpske/>.

2. RULING PARTIES' COALITION AGREEMENT: WHAT IS IN THERE FOR BIH CONSTITUTIONAL REFORM?

At the invitation of EU officials, BiH political leaders and the members of the Presidency held a meeting on June 12, 2022, in Brussels. The meeting was followed by a political agreement.[24] Among other things, politicians agreed to *work decisively towards fulfilling the 14 key priorities of the European Commission's Opinion*, among which is constitutional reform. Furthermore, they agreed urgently and no later than within six months from the formation of all authorities to *adopt those limited constitutional reforms needed to ensure full compliance with the judgments of the ECtHR and the BiH CC, Venice Commission recommendations.*

Parties that formed a coalition government at the state level agreed (in December 2022) to *urgently implement, but no later than six (6) months from the establishment of government at all levels, limited changes to the Constitution of BiH and adopt amendments to the Electoral Law of BiH in accordance with the decision of the Constitutional Court of BiH and the judgments of the European Court of Human Rights.*[25]

None of those commitments, expressed in the agreements of June and December 2022, resulted in concrete reform action by April 2023.

3. CONSTITUTIONAL REFORM AS AN INTERNATIONAL OBLIGATION OF BIH

The scope of constitutional reform is influenced by an international obligation of BiH as well as BiH CC decision on the election of the President and Vice-Presidents of the entities. In Case No. U-14/12 (March 2015), the BiH CC found the provisions in entities' constitutions reserving those offices to members of the three constituent peoples contrary to the prohibition of discrimination, due to the exclusion of national minorities, "citizens," and "Others." The BiH CC did not repeal the provisions, nor expressly ordered parliaments to harmonize the provisions with BiH Constitution. This was justified by the fact that no political agreement was reached on the implementation of the ECtHR *Sejdić-Finci* case law has been reached. Nevertheless, this BiH CC judgment is an obligation to eliminate discrimination and amend the entities' constitutions.

When it comes to the international obligations of BiH that determine the scope of necessary constitutional reform, we hereby refer to the Opinion of the European Commission (EC) on BiH's application for membership in the EU, from May 2019. The EC has identified 14 key priorities, including the sixth which speaks about constitutional reform. This priority was discussed in detail in "The 2022 International Review of Constitutional Reform." In the 2022 Report on BiH, EC concluded that little to no progress has been made in implementing these (or any other) reforms.

24 *Political agreement on principles for ensuring a functional Bosnia and Herzegovina that advances on the European path,* dated 12 Juny 2022. Available at <https://www.consilium.europa.eu/hr/press/press-releases/2022/06/12/political-agreement-on-principles-for-ensuring-a-functional-bosnia-and-herzegovina-that-advances-on-the-european-path/>.

25 *Ibid.*

IV. LOOKING AHEAD

After BiH was granted EU candidate status in December 2022, greater pressure is expected to implement all EC priorities, including constitutional reform. Any progress will depend on the willingness of domestic political elites to make compromises as well as on the international community, which needs to adjust its policy of carrots and sticks since it is obvious that, so far, sanction policies do not have any effect. OHR will most probably enact additional amendments to the FBiH Constitution. Proposed amendments should introduce a new process of appointing the government in the FBiH in the case that one of the two vice presidents withholds consent to the proposal made by FBiH's president. Furthermore, 2023 might bring a decision of ECtHR in *the Begić*[26] case which could potentially reshape the power-sharing mechanism within the BiH PA.

V. FURTHER READING

EC Commission, Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union, Brussels, 29 May 2019 COM(2019) 261 final <https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-opinion.pdf>.

Faris Vehabović, *Models for the Constitutional Reform and the Reform of Election Law in Line with the Decisions of the European Court of Human Rights* (Initiative for Monitoring the EU Integration of Bosnia and Herzegovina, February 2022) <https://eu-monitoring.ba/site/wp-content/uploads/2022/02/HRP_inicijativa_eng_web.pdf>.

Maja Sahadžić, *The Bonn Powers in Bosnia and Herzegovina: Between a rock and a hard place* (Constitutionnet, November 2022) <https://constitutionnet.org/news/bonn-powers-bosnia-and-herzegovina-between-rock-and-hard-place>.

Jens Woelk, Maja Sahadžić, *Cutting the Gordian Knot in Bosnia and Herzegovina* (Verfassungsblog on matters constitutional, October 2022) <https://verfassungsblog.de/cutting-the-gordian-knot-in-bosnia-and-herzegovina/>.

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

Botswana

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I. INTRODUCTION

The year 2021 marked a significant milestone in the constitutional history of Botswana as a country. As a country that has largely been hailed as one of the shining examples of democracy in the African continent over the years, Botswana has never undergone major constitutional reform. As a country, it has the hallmarks of a stable and functioning constitutional democracy. It has held free, fair, and regular elections since independence in 1966, and its institutions of accountability are perceived by commentators to be relatively stable,[1] and at most, have a functioning judiciary.[2] However, there is a view across sectors of society that the Constitution of the Republic of Botswana, 1966 (hereafter "the Botswana Constitution"),[3] is no longer fit for purpose. It is against this backdrop that on 17 December 2021, His Excellency President Mokgweetsi Masisi announced the establishment of the Presidential Commission of Inquiry into the Review of the Constitution of Botswana (hereafter "the Commission"). This report provides an overview of the work of the Commission.

II. PROPOSED, FAILED, AND SUCESSFUL CONSTITUTIONAL REFORMS

1. THE PROPOSED REFORMS

The commission was established in terms of section 2 of the Commissions of Enquiry Act.[4] The Act empowers the President to appoint commissioners to inquire into any matters that are considered to be for the public welfare. The task of the commission was to *inter alia*:[5]

- Ascertain from the people of Botswana their views on the operation of the Constitution, its strength and weaknesses;
- assess the adequacy of the Botswana Constitution *vis-à-vis* Botswana's identity, principles, aspirations, and values, promoting and protecting people's rights, promoting equality, promoting national unity and democracy;
- articulate the concerns of the people of Botswana regarding the amendments that may be required;
- make any recommendation on the amendment or review of the Constitution, and
- upon completion of the inquiry, submit a report to the President no later than the end of September 2022.

The Botswana Constitution was adopted in 1966, the year the country attained independence.[6] Since then, it has undergone twenty-two amendments without any major review. Initially, there was resistance to the President's decision to establish a Commission. There was a view from opposition parties and some sectors of civil society movements that the President's decision was unilateral and that he did not engage in meaningful consultation.[7] Consequently, there were intimations of legal action against the establishment of the commission on this basis, which seemingly did not materialise, and the opposition parties have since denounced the commission's report.[8]

The report of the Commission identified several weaknesses that may require amendments within the Botswana Constitution, legislation, and other policies. According to the report, there are weaknesses regarding:

- Sections 77 and 78 of the Botswana Constitution pertaining to the composition of the House of Chiefs in that are perceived to promote tribalism;
- discriminatory laws such as the Tribal Territories Act[9] and the Tribal Land Act;[10]
- perceived abuse of powers by the Directorate of Intelligence and Security Services (DISS);

1 David Sebudubudu and Bertha Osei-Hwedie, "Pitfalls of Parliamentary Democracy in Botswana" (2006) Africa Spectrum 35.
2 Oagile Dingake, "The Role of the Judiciary and the Legal Profession in Protecting the Rights of Vulnerable Groups in Botswana" (2014) <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/3Dingake.pdf> accessed 2023-04-06.
3 The "Botswana Constitution" and "the Constitution" are used interchangeably.
4 The Commissions of Enquiry Act, 1962 (hereafter "the Act").
5 Bonolo Dinokopila, "Promise Fulfilled? Botswana's First Comprehensive Constitutional Review Process Gets Underway" (25 February 2022) <https://constitutionnet.org/news/promise-fulfilled-botswanas-first-comprehensive-constitutional-review-process-gets-underway> accessed 2022-06-07.
6 The *Secretariat Report of the Presidential Commission of Inquiry into the Review of the Constitution of Botswana* September 2022 (the "Presidential Commission").
7 Change.Org "Constitutional Review Process-Botswana" (27 January 2022) <https://www.change.org/p/the-government-of-botswana-constitutional-review-process-botswana > accessed 2023-04-06.
8 Mmegi Online "Opposition Denounces Constitutional Review Report" (08 December 2022) <https://www.mmegi.bw/news/opposition-denounces-constitutional-review-report/news> accessed 2023-04-06.
9 Tribal Territories Act, 1967.
10 Tribal Land Act, 1968.

- weak penalties for gender-based violence (GBV);
- unequal benefits resulting from different land tenure systems; and
- the restrictive Citizenship Act,[11] which limits the rights of people to choose their own citizenship.

The commission undertook a consultative exercise in which Batswana were invited to make submissions on what they would like to see included as part of the envisaged constitutional model. Many Batswana aired their views during the fact-finding mission, with some acknowledging that in terms of the current Botswana Constitution, the country has grown in terms of socio-economic development, rendering it inadequate.[12] They proposed *inter alia* that the Constitution should expressly declare Botswana as a Christian nation.[13] They also suggested the expansion of the Bill of Rights in terms of sections 3 to 15 to encompass second-generation rights such as those relating to health, employment, adequate wage, land ownership, decent housing, cultural rights, education, and the right to petition the government over poor service delivery.[14] There was also a proposal for the introduction of the office of the Public Protector through an Act of Parliament.[15] Members of the public raised concerns over the expansive powers of the Directorate of Intelligence and Security Services (DISS) and Special Support Group (SSG) for violation of the right to privacy. The tendency of members of these two agencies to target people and search their homes without search warrants was a core point of contention. To this extent, participants proposed that the law protects members of the public from arbitrary interference with their right to privacy.[16]

Regarding the presidency, there were proposals to revise section 33(1) of the Botswana Constitution.[17] The participants suggested that in order to qualify for election as Botswana President, one must be an indigenous Motswana.[18] Some participants submitted that the President's grandparents should also be Batswana. They argued that the current legal position, which allows election for President based only on the father's birthright and not the mother is discriminatory and should be reviewed for fairness.[19] Some Batswana also suggested that a purely presidential system should be introduced in Botswana, in that there should be a direct election of the President.[20] They averred that a direct election of the President would enhance Botswana's democratic dispensation by transferring power to the electorates.[21] There was a concern that the Constitution conferred excessive power upon the President and consequently set him up above the electorates.[22] There were also concerns raised regarding a sitting President's immunity from criminal prosecution and that provisions that permit measures for indictment and impeachment should be included in the reviewed Constitution.[23]

There was also a call for a reduction in the powers of the President. For instance, they argued that the President's power to appoint *inter alia* the Speaker and Deputy Speaker of the National Assembly, the Attorney General, the Chief Justice, the President of the Court of Appeal, and Judges should not be the President's responsibility.[24] While some favored independent Boards of the Judicial Service Commission, others proposed a Parliamentary Committee to make recommendations to the President.[25] There were also proposals that the President's power to appoint public functionaries such as Cabinet Ministers, Permanent Secretaries, and Ambassadors should be subject to parliamentary confirmation and that the President should merely nominate the appointees.[26] Regarding Cabinet appointments, it was argued that the dual membership of the Cabinet and Parliament is undesirable and should be abolished. This is because, as the argument goes, the current legal position enables neglect of constituencies and encroaches upon the doctrine of separation of powers, which is a foundational principle of Botswana's constitutional democracy.[27]

Contrary views regarding *inter alia*, the direct election of the President was that it has not worked in other democracies.[28] This is because the President's election takes place with the cooperation of other Members of Parliament, and difficulties will be encountered when the President has to work with an opposition-dominated Parliament.[29] Proponents of this view argued that this would lead to a delay in decision-making.[30] Suggestions were advanced to repeal section 58 of the Constitution, which positions the President as an *ex officio* member of the National Assembly in order to enhance Parliament's independence from the executive branch of the State.[31] Notably, there were proposals for the establishment of a Constitutional Court since the Court of Appeal does not have jurisdiction over matters emanating from section 69 of the Botswana Constitution[32] regarding determinations on questions of membership of the National Assembly.[33]

2. A BRIEF ANALYSIS ON THE FAILURE OR SUCCESS OF THE REFORMS

2.1 GENERAL REMARKS

As a point of departure, a brief note on the actual establishment of the commission deserves mention. The Botswana Constitution is silent on express measures that may be taken to carry out a comprehensive review of the country's constitutional framework. Section 89 of the Botswana Constitution only makes express reference to alteration of the Constitution.[34] Alteration in this context includes the amendment, modification, or re-enactment, with or without modification of that provision, suspension, or repeal, instead substituting the provision

11 The Citizenship Act, 1982.
12 The Botswana Constitution.
13 The Presidential Commission Report 15.
14 The Presidential Commission Report 18.
15 *Ibid.*
16 The Presidential Commission Report 19.
17 Which deals with the qualification for election as the Botswana President.
18 The Presidential Commission Report 26.
19 *Ibid.*
20 *Ibid.*
21 *Ibid.*
22 *Ibid.*
23 *Ibid.*
24 The Presidential Commission Report 27.
25 *Ibid.*
26 *Ibid.*
27 The Presidential Commission Report 32.
28 The Presidential Commission Report 29.
29 *Ibid.*
30 *Ibid.*
31 The Presidential Commission Report 33.
32 In terms of section 106 of the Botswana Constitution.
33 The Presidential Commission Report 38.
34 Section 89(1) of the Botswana Constitution.

concerned with a different one.[35] From the foregoing, none of the measures outlined in Section 89 of the Constitution were followed. Instead, the President used his power to establish a commission of inquiry as derived from the Constitution and the Commissions of Enquiry Act. The President exercises this power alone, seemingly without the constitutional obligation to consult any public body or functionary. The nature of the consultations was wide-ranging and broad.[36] Since the Presidential Commission Report has just been released, the proposed amendments to the Botswana Constitution are yet to be fully implemented. However, whether there will be *ex post facto* oversight over the process of establishing the commission, the actual work of carrying out the consultation and implementation of the recommendations remains to be seen.

The failure or success of the proposed reform will depend on how the relevant functionaries interpret the provisions of section 47, which governs executive functions. The executive authority vests in the President, who, subject to the applicable provisions of the Constitution, exercises them directly or through officers subordinate to him.[37] In the exercise of executive authority, the President acts in his own deliberate judgment and is not obliged to follow the advice tendered by any public institution or functionary.[38] However, section 47 does not prevent Parliament from conferring functions on other persons than the President.[39] This is because while the President underscored the need for consultation when he established the Commission, it is crucial to determine which institution will be responsible for carrying out the proposed reforms. Consultation in this context does not mean with Batswana only. It should also include other organs of the State. Ideally, Parliament should be responsible for implementing the proposed reforms. This calls for an amendment to section 89 of the Botswana Constitution, which empowers Parliament to alter the Constitution. In its current form, the provision is vague. The report noted in agreement with some of the contentions advanced by Batswana. For instance, the report found that the Tribal Territories Act, which defines tribal territories using the actual names of tribes, is discriminatory, as other tribes within Botswana are excluded.[40] The submissions relating to the executive branch of government are briefly discussed in paragraph (2) below.

2.2 PROPOSED REFORMS FOR THE EXECUTIVE ORGAN OF THE STATE

The report agreed with the view that the direct election of the President has not worked well in other countries and that the current model be retained to preserve the peace and stability that Botswana has enjoyed over the years. The Commission's view was that there would be a risk of paralysis in governance in cases where the President would be required to work with members of opposition parties in Parliament. It is submitted that this view is incorrect because the Commission did not cite examples of cases where such a model has not worked. If indeed there are such countries, it was incumbent upon the report to name such countries, in addition, the assertion of a risk of paralysis in governance is also difficult to sustain. This is because a comparative analysis of jurisdictions such as the French model will reveal a system of cohabitation where the President, the Prime Minister, and other members of Parliament can belong to different political parties. The system is so effective that the French President, Emmanuel Macron, recently bypassed Parliament and introduced reforms on pension payouts due to the risk that if he presented the proposals to the legislature, they most likely would have been rejected.[41] This has led to widespread protests across France. *Ex facie*, the events in France may point to an affirmation of a risk of paralysis in governance. However, it may also signal an effective system of parliamentary oversight to prevent executive misuse of public power. The President's powers can still be subject to parliamentary confirmation subject to enhanced parliamentary oversight mechanisms in the Constitution. Equally, the commission rejected the proposal that the President's power to appoint cabinet members should be subject to parliamentary confirmation and instead opted to retain the status *quo*.[42]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. BRIEF REMARKS

The decision to conduct a comprehensive review of the Constitution is technically speaking, much more than an amendment of the Constitution. Defining similar processes elsewhere, Albert[43] argues for a content-based approach to a constitutional amendment and offers the following interpretation:

> "the answer, I propose, is a content-based approach for defining an amendment. This approach offers a vocabulary and a conceptual foundation for explaining why the constitutional changes in Belize, Brazil, Canada, Ireland, Italy and Japan are not amendments but rather something qualitatively different from what we expect an amendment to accomplish. Each of these changes introduced a larger degree of change into its constitutional order than an amendment properly should".

He further adds that:

> "in this new content-based approach to constitutional change, these reforms are not constitutional amendments. These are transformative changes with consequences far greater than amendments. They do violence to the existing Constitution, whether by remaking the Constitution's identity, repealing or reworking a fundamental right, or destroying and rebuilding a central structural pillar of the Constitution".

35 Section 89(5)(b) of the Botswana Constitution.
36 See the terms of reference *supra*.
37 Section 47(1) of the Botswana Constitution.
38 Section 47(2) of the Botswana Constitution.
39 Section 47(3) of the Botswana Constitution.
40 This aspect forms part of a different work, and will not be dealt with in detail.
41 French Politics "Emmanuel Macron Holds Firm on Pensions Reform Amid Protests" (22 March 2023) https://www.ft.com/content/034128b7-780f-465c-9531-83454551942d accessed 2023-04-08.
42 This is discussed in detail elsewhere on the President's power to appoint Cabinet members. See in this regard Molefhi Phorego "Presidential Accountability for Cabinet Appointments in South Africa" (2021) LLD Thesis.
43 Richard Albert *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York, OUP 2019) 78.

Botswana has opted for a comprehensive constitutional review approach, covering all aspects of Botswana's legal system. Against the backdrop of the definition offered by Albert *supra*, the constitutional exercise Botswana engaged in by gathering the public's views on proposals for an alternative constitutional model was a step towards constitutional dismemberment. Section 89 of the Constitution should be viewed as the mechanism within which constitutional control of the proposed reforms in Botswana can take place. While it deals with the alteration of the Constitution, it is submitted that it applies *mutatis mutandis* to the current exercise. This assertion is supported by the fact that almost all proposals relating to *inter alia*, the executive branch of government, were rejected by the Commission, meaning they may not be considered during the parliamentary deliberation and final drafting phase.

Section 89 of the Constitution will, in the final instance; apply to the actual implementation of the proposed reforms. In terms of the provision, a Bill altering any provision of the Constitution shall not be introduced into the National Assembly unless it has been published in the Government Gazette.[44] In as far as the Bill alters a provision of Chapter 2 of the Botswana Constitution, it shall not be passed by the National Assembly. Instead, final voting must take place within three months after the previous parliamentary session.[45] In addition, it must be supported by at least two-thirds of the majority of the Members of the National Assembly.[46] Despite the provisions of section 89 and the Commission's recommendations to retain the current legal position concerning some of the proposals advanced by members of the public, the position remains that through the comprehensive constitutional review exercise, Botswana engaged in a process of constitutional dismemberment.

2. THE COURT'S ROLE *VIS-À-VIS* CONSTITUTIONAL CONTROL OF CONSTITUTIONAL REFORMS IN BOTSWANA

The role of the courts in the constitutional control of constitutional reforms in Botswana is at the mercy of the vague provisions dealing with the role of the courts in the interpretation of the Constitution, in particular, section 105. In terms of the latter, whenever a question arises involving the interpretation of the Constitution in a subordinate court, it must be referred to the High Court for a determination.[47] After the High Court has pronounced the issue, the court in which the matter arose, subject to any appeal, thereafter disposes of the case in terms of that decision.[48] Any *dictum* involving the interpretation of the Constitution from the High Court may be appealed to the Court of Appeal.[49]

As alluded to above, the provisions dealing with the role of the judiciary in Botswana are vague in structure and form. An amendment dealing with whether, for instance, a court of law may probe whether the exercise of public power is in line with the dictates of the Constitution is desirable. The Constitution should be amended to expressly state whether a court of law may interrogate the constitutionality of an Act of Parliament. The determination on the constitutionality of Acts of Parliament is accepted as part of Botswana's constitutional framework and does take place on occasion. A good illustration of the above assertion is *Motshidiemang v Attorney General*,[50] a case dealing with the constitutionality of sections 164(a), c, and 165 of the Penal Code, a provision criminalising same-sex relationships. The applicants sought an order from the High Court declaring the impugned provisions unconstitutional in that they amounted to unfair discrimination on the listed grounds in the Botswana Constitution.

The court found that the impugned provisions of the Penal Code are unconstitutional and should be struck down from the Constitution. This *dictum* of the High Court was later upheld by the Court of Appeal in *Attorney General v Motshidiemang*.[51] Consequently, President Mokgweetsi Masisi has indicated that he will uphold the rights of the LBGT, as affirmed by the court in the two *dicta*. In an earlier pronouncement in 2017, the Court of Appeal affirmed the independence of the judiciary and the Judicial Service Commission[52] in *Law Society of Botswana v The President of Botswana*.[53] In this matter, the court held that the President could not lawfully reject the recommendation of Judge Omphemetse Motumise by the Judicial Service Commission (JSC) for appointment as a Judge of the High Court. The two *dicta* illustrate that despite the absence of a clear constitutional injunction concerning the court's jurisdiction over matters involving the interpretation of the Constitution, the courts in Botswana are unwavering when it comes to pronouncements over such matters. However, the argument remains that there should be clear and concise provisions dealing with whether an Act of Parliament or executive conduct may be the subject of a judicial probe. This *applies mutatis mutandis* to the interpretation of a right in the Bill of Rights.[54]

3. THE JUDICIARY, ITS ROLE IN CONSTITUTIONAL REVIEW *VIS-À-VIS* THE POLITICAL ORGANS OF THE STATE IN BOTSWANA

The role of the judiciary in Botswana has, over time, witnessed an emergence and expansion of jurisprudence that touches on more than abstract legal questions. As a largely conservative country, it is rather interesting to note a steadily growing trend of liberal constitutionalism in Botswana. From the *Motshidiemang* and the *Motumise* judgments above, the courts are increasingly becoming bold in making pronouncements that involve the political organs of the State. While these are but one of a few illustrations of such judicial pronouncements, it is regrettable that these have not fed into any concrete steps toward constitutional reform. To this extent, the only reasonable conclusion to be drawn is that the judiciary plays a rather modest role in contributing to the control of constitutional reform in Botswana. There are no major

44 Section 89(2) of the Botswana Constitution.
45 Section 89(3)(i) of the Botswana Constitution.
46 Section 89(3)(ii) of the Botswana Constitution.
47 Section 105(1) of the Botswana Constitution.
48 Section 105(2) of the Botswana Constitution.
49 Section 106 of the Botswana Constitution.
50 MAHGB-000591-16 (unreported) (hereafter "*Motshidiemang*").
51 Court of Appeal Civil Appeal No. CACGB-157-19 (unreported).
52 A State entity entrusted with the constitutional responsibility to carry interviews and make recommendations for judicial appointment to the President.
53 Court of Appeal Civil Appeal No. CACGB-031-16 (unreported) (hereafter "*Motumise*").
54 *Cf* with the legal position in South Africa.

judgments that can be said to have drastically contributed to radical change in the legal landscape relating to, for instance, the abolishing of the death penalty. Arguably, the judiciary in Botswana increasingly engages in judicial activism.

An attempt to determine the general approach of the courts in matters involving conduct by the executive branch of government and the interpretation of the Constitution might not be satisfactory. This is because only a few matters involve issues relating to the interpretation of the Constitution. In addition, few matters deal with societal issues, such as the conflict between the law and the *boni mores*. To this extent, *Motshidiemang* presents a rarity. The approach followed by the court, in that case, illustrates that where an opportunity arises, the courts are prepared to uphold the fundamental rights enshrined in the Constitution. However, while there have been a few cases dealing with executive conduct the approach of the courts can be described as both counter-majoritarian and representative in character. In *Attorney General v Kgosi Mosadi Seboko*,[55] the Court of Appeal had to determine whether the Bamalete tribe had been lawfully divested of their land. The Court of Appeal upheld the rights of the Bamalete to the ownership of their land and found that there was no transfer of ownership to the State.

IV. LOOKING AHEAD

It remains to be seen how the implementation of the proposed reforms will unfold. Given the arguments against the manner in which the Commission was established, the role of Parliament will be central to ensuring the finalisation of the proposed reforms. This is in light of section 89 of the Constitution. Those who initially argued against the establishment of the Commission felt that the manner in which it was established was not inclusive and therefore lacked legitimacy. This has been a controversial aspect of the constitutional review process. Various issues await those who will partake in the final deliberations of the recommendations and the drafting of the revised Constitution. These include *inter alia*, issues relating to the independence of the judiciary, how to curtail the powers of the executive, and other concerns as raised by those who made submissions to the Commission. There might be controversy relating to the names of tribal territories, as efforts to rename them might be perceived as an attack on the autonomy that those tribes have enjoyed since independence. Going forward, the interests of Batswana and the country at large should guide the constitutional drafters in minimising the likelihood of conflict resulting from the implementation of the proposed reforms.

55 CACGB-153-21 (unreported).

V. FURTHER READING

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Molefhi Phorego "Presidential Accountability for Cabinet Appointments in South Africa" (2021) LLD Thesis.

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Brazil

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I. INTRODUCTION

2022 was a particularly busy year in the Brazilian political landscape as the country held one of the most meaningful general elections of its history. Most constitutional reforms—via amendments or judicial interpretation—were highly influenced by the political agenda, either preparing for the October election or in the aftermath of its results.

Changing the nation's fundamental law is an important and recurrent feature of the Brazilian political scenario since most fiscal and budgetary issues' limits and regulations are enshrined in the Constitution. As electoral necessities usually demand a heavy dose of public resources in ways that do not always adhere to established constitutional norms, changing these norms become a common part of the political game in Brazil. Political actors perform their roles knowing that the Constitution may not be as strong of a constraint as in some other parts of the world.

That was the case in 2022, when then-President Jair Bolsonaro adopted a myriad of measures— many of them via legislative proposals, including constitutional amendments—aimed at reelection. Alongside other legislative reforms and a handful of administrative instruments, these constitutional changes were designed to tilt the electoral playing field in Bolsonaro's favor. For instance, during the electoral year, there were tax cuts, greater fossil fuel incentives, and other victories for Bolsonaro and his party.

Brazil's Constitution was altered 14 times via formal amendments. However, the final account is even more impressive as we consider the use of the public machinery to help a sitting president win reelection, let alone redesign the rules (and costumes) disciplining the rights and duties of officeholders during elections. President Bolsonaro launched a series of relentless assaults on the judiciary, specifically targeting the Supreme Court and the Superior Electoral Court. The consequence was that judiciary, impacted by these actions, refrained from enforcing certain precedents concerning the removal of executive holders who abused their powers.

Similar to 2021, the Supreme Court and the Superior Electoral Court were also called upon more often to defend the Constitution from attacks in 2022, and the judiciary's relationship with the political environment was even more highlighted. This report discusses some leading cases related to constitutional rights. While trying to preserve its constitutional role, the Courts found themselves entangled in political calculations due to the country's legal landscape.

This report examines some constitutional amendments and landmark decisions of the Supreme Court (henceforth STF) that were introduced in 2022. It will also highlight that, in 2022, the dynamics between the STF and the President underwent a notable acceleration. This was primarily fueled by significant shifts in the country's "coalition presidentialism', the 2022 general elections, and the strategic calculations of a Supreme Court confronted by a would-be autocrat who employed all the means he could and could not to be re-elected.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Article 60 of the Brazilian Constitution states that constitutional amendments may be proposed by (I) one-third of the members of each chamber of Congress, (ii) the President of the Republic, or (iii) more than half of the State's Assemblies.

The first two are the most common ways of the proposition, and the broad legitimization indicates that the number of constitutional amendments currently discussed by Congress is enormous. A simple search on the Lower Chamber's website points to 800 active proposals in that very chamber (7 proposed in 2022). The Senate's website indicates 176 active amendment proposals (28 proposed in 2022).

Due to the enormous number of propositions, the variety of different subjects covered, and the non-existent correlation between a proposal and its failure or success, it is unrealistic to discuss all 2022 amendment proposals in depth, and we strongly believe that analyzing the ways in which the Constitution changed through the legislative process in 2022 is a matter of identifying what was supported by Congress that year.

So, we focus mainly on what was *approved* by Congress, because it is logically the best way to understand the changes that were made within the Constitution. Discussing rejected proposals of constitutional amendments is unnecessary and unworthy as there are multiple proposals—with different levels of importance to society—rejected each year. Additionally, the Constitution does not prohibit the same subject being presented again in the future after its proposal is rejected; it only forbids a new proposition within the same year.

This is why we opted to examine only two subjects: (a) the constitutional amendments that were approved in 2022; (b) some important STF's decisions, whose work highly shapes, interprets, and (for many) alters the Constitution.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. MODIFYING THE CONSTITUTION THROUGH CONGRESS: CONSTITUTIONAL AMENDMENTS OF 2022

At the end of 2022, the Brazilian Constitution had already featured 128 *ordinary* amendments plus six *revisional* constitutional amendments: a special type of modification that took place in 1993 as outlined in Article 3 of the Temporary Constitutional Provisions Act of the Brazilian Constitution.

The Constitution had an average of around 3.7 constitutional amendments per year in its 34 years of life. However, 2022 was atypical since 14 amendments were approved—115 to 128. Because several constitutional subjects must be approved months before the election, a higher rate of change is expected in an electoral year. Other constitutional amendments need further modifications, such as the ones regarding government transition. Yet, 14 constitutional amendments within a single year can be deemed excessively high by any standard. It is significant to note that President Bolsonaro's abuse of constitutional changes subverted the electoral process in 2022.

These are the constitutional amendments approved in 2022:

1.2. CONSTITUTIONAL AMENDMENT #115: PERSONAL DATA AS A FUNDAMENTAL RIGHT

As part of a global trend, the first Constitutional Amendment of 2022 (CA #115) included the protection of personal data as a fundamental right. This amendment conferred exclusive jurisdiction to the Union in legislating on the protection and treatment of it. A federal law (Law #13.709/2019) regulates general data protection in the country. However, it does not recognize personal data as a fundamental right nor regulates its protection. Therefore, CA #115 protects and grants a fundamental right that was already safeguarded by existing legislation and considered as inherent to every individual. On the other hand, by constitutionalizing this right, it assumes the status of a material limit to constitutional reform.

1.3. CONSTITUTIONAL AMENDMENT #116: TAX IMMUNITY TO RENTED PROPERTIES USED AS RELIGIOUS TEMPLES

The second Constitutional Amendment of 2022 (CA #116) added paragraph 1º-A to Article 156 of the Constitution. It establishes that temples of any cult are exempt from the Tax on Property and Urban Territorial Property (IPTU), regardless of whether the temples covered by tax immunity are only renters of the property. The Constitution already grants immunity to temples of any religious denomination (Article 150), but the amendment expanded this benefit to include *rented* properties by churches. The CA #116 shows the expansion and strength of the religious groups in Brazil's Congress, currently represented by several congresspeople across distinct political parties.

1.4. CONSTITUTIONAL AMENDMENT #117: INCENTIVES FOR THE PROMOTION OF WOMEN'S POLITICAL PARTICIPATION

CA #117 imposes certain obligations upon political parties regarding the application of resources from the Political Party Fund to promote women's political participation. It also determines the distribution of at least 30% of public funds and the division of free advertising time on radio and television for female candidates.

According to the Superior Electoral Court, "*encouraging the female presence in politics constitutes a necessary, legitimate and urgent affirmative action that aims to promote and integrate women into Brazilian party-political life, giving them opportunities to join parties and run for office, in order to ensure full compliance with the principle of gender equality.*" (04/19/2018 - Rapporteur Min. Jorge Mussi - Electronic Justice Journal, Volume 185, Date 09/14/2018). There are two noteworthy facts before CA # 117: 1) there was already an ordinary provision that obliged parties to allocate 5% of the resources of the Party Fund to programs for the promotion and dissemination of women's political participation, and 2) the STF's decision specifying that female candidacy must comprise at least 30% and that the minimum of Party Fund resources allocated to women must also be interpreted as 30% of the Fund's amount allocated to each party for both majority and proportional elections.

1.5. CONSTITUTIONAL AMENDMENT #118: PRODUCTION, COMMERCIALIZATION, AND USE OF RADIOISOTOPES

CA #118 amends Article 21, XXIII, 'b' and 'c', of the Federal Constitution, to authorize the production, commercialization, and use of radioisotopes for research and medical use by private initiative. It breaks the state monopoly regime in the manufacture of radioactive materials for medical use. The production and commercialization of radioisotopes in Brazil were carried out solely through the National Nuclear Energy Commission (Cnen) and its institutes, such as the Institute of Nuclear and Energy Research (Ipen). From now on, this initiative has been expanded to include the participation of the private sector as well.

1.6. CONSTITUTIONAL AMENDMENT #119: AMNESTY FOR FEDERAL UNITS AND THEIR PUBLIC AGENTS IN BUDGETARY MATTERS IN 2020 AND 2021

CA #119 changes the Temporary Constitutional Provisions Act to determine the impossibility of holding the States, the Federal District, the Municipalities, and the public agents of these federated entities accountable for non-compliance, in the budgetary years 2020 and 2021, with the provisions of Article 212 of the Federal Constitution. It grants amnesty to mayors and governors who failed to fully and properly allocate resources for education in 2020 and 2021, supposedly due to the difficulties posed by the COVID-19 pandemic. This amendment can be seen as a harmful postponement of the constitutional binding that supports education, thereby shifting the burden of the period's inflationary losses onto the school community.

1.7. CONSTITUTIONAL AMENDMENT #120: FINANCIAL RESPONSIBILITY OF THE UNION TOWARDS PROFESSIONALS COMBATTING ENDEMIC DISEASES

CA #120 adds paragraphs 7, 8, 9, 10 and 11 to Article 198 of the Brazilian Constitution, specifically addressing the financial responsibility of the Union, co-responsible for Brazil's universal health system (SUS), in the policy of remuneration and appreciation of professionals who perform activities as community health agents to combat endemic diseases.

1.8. CONSTITUTIONAL AMENDMENT #121: TAX EXEMPTIONS FOR INFORMATION TECHNOLOGY, COMMUNICATION, AND SEMICONDUCTOR SECTORS

CA #121 modifies paragraph 2 of Article 4 of CA #109, which, for its part, outlines transitory rules on the reduction of tax benefits and on the management of public funds and residual emergency aid due to COVID-19 pandemic. Previously, CA #109 exempted free trade areas and zones, including the Zona Franca de Manaus in the Amazon Region, from the gradual reduction plan of federal tax benefits and incentives. CA #121 also extends this exemption to include the industrial policy for the information technology and communication sector, as well as the semiconductor sector.

1.9. CONSTITUTIONAL AMENDMENT #122: RAISING THE MAXIMUM AGE FOR APPOINTED MEMBERS OF REGIONAL AND HIGHER COURTS OF JUSTICE

CA #122 raised the maximum age to 70 years for selection and appointment of members to the Federal Supreme Court, the Superior Court of Justice, the Federal Regional Courts, the Superior Labor Court, the Regional Labor Courts, the Accounts of the Union, and the Civil Ministers of the Superior Military Court. The rationale behind CA #122 was to adjust the provision with the terms of CA #88 of May 7th, 2015, which increased the age limit to compulsory retirement of justices of the Supreme Federal Court, Superior Courts, and the Federal Court of Auditors from 70 to 75 years.

1.10. CONSTITUTIONAL AMENDMENT #123: STATE OF EMERGENCY, TAX EXEMPTIONS ON FUELS AND EXPANSION OF SOCIAL BENEFITS

CA #123 modifies Article 225 of the Constitution to expand the competitiveness of biofuels. While the proposal initially seemed reasonable, it was one of the most subverted tools of constitutional change aimed at raising the odds of President Bolsonaro's reelection. The amendment laid down a very controversial state of emergency with the goal to combat the effects of an extraordinary and unpredictable surge in fuel prices and their derivatives—a flimsy cause for such a drastic measure. Based on this, a set of grants, tax exemptions, and social benefits were created or expanded, thereby avoiding the enforcement of Article 73 of Federal Law #9.504/97. This Article prohibits the distribution and grants and benefits within the electoral year, except for circumstances of public calamity and *state of emergency*.

Approved just three months before the election, the so-called "Kamikaze" constitutional amendment introduced many changes in Brazil. The constitutional amendment replaced the *Bolsa-Família,* a longstanding successful conditional cash transfer program for poor families, with the poorly designed *Auxílio-Brasil,* temporarily raising the benefit by over 50%. It also created a social benefit for truck and taxi drivers. The amendment implemented federal grant system to states that offered state tax credits to biofuel producers, expanded the so-called "Gás para Brasileiros" program, which reduced the price of gas used in households, and created grants for states that provided free public transportation. The "Kamikaze" amendment received support from opposition parties as they found themselves trapped. If they voted against the amendment, President Bolsonaro could use it as an argument to portray the opposition as not concerned about the welfare of those in need.

1.11. CONSTITUTIONAL AMENDMENT #124: MINIMUM WAGE FOR NURSES AND HEALTHCARE PROVIDERS

CA #124 introduced a minimum national wage for nurses, nursing technicians, nursing auxiliaries, and midwives in response to a Supreme Court ruling that had suspended the enforcement of a federal law regulating this matter. The court's decision was based on the argument that there was no budgetary allocation for such an expense. The amendment directs resources from the financial surplus of public funds and social funds, but its enforcement still demands the approval of a federal law by Congress. The amendment is currently on the deliberation agenda of Congress in 2023.

1.12. CONSTITUTIONAL AMENDMENT #125: RELEVANCE OF THE FEDERAL LAW ISSUE FOR APPEALS TO THE SUPERIOR COURT OF JUSTICE

CA #125 adds paragraphs 2 and 3 to Article 105 of the Constitution. It was a modification related to *recurso especial (REsp)*, a type of appeal to the Superior Court of Justice (STJ). STJ is the Federal Court that has the final word on the interpretation and adjudication of federal law (but not the Constitution), and REsp is the main appeal for such controversies. The amendment created the *relevance of the federal law issue*—like the general repercussion of the constitutional matter already existent in appeals to the Supreme Court—that shall be demonstrated by the petitioners as a prerequisite for the admission of the appeal. Paragraph 3 established a list of themes that are already considered by law as relevant. The primary goal of the amendment is to provide STJ with a new tool to alleviate the overwhelming caseload burden faced by the Court (for example, it judged 577,707 cases in 2022 alone, and received 399,455 new suits.)

1.13. CONSTITUTIONAL AMENDMENTS #126-128: TRANSITIONAL GOVERNMENT AMENDMENTS

CAs #126 to 128 were a set of amendments proposed by then President-elect Lula da Silva to deal with budgetary issues prompted by then President Jair Bolsonaro in his reelection bid. As we already discussed in Part 1 of this report, President Bolsonaro intended to win reelection by adopting a whole set of measures that distributed resources and benefits within the electoral year. The problem is that all those measures were designed to expire by the end of 2022, thereby raising difficulties for the new president.

CA #126 was the most important amendment for the new administration, as it modified various constitutional provisions related to public finances. One of the key changes was the elimination of spending caps for environmental and climate change projects, along with projects of federal education institutions (Article 155, paragraph 1, section V, of the Constitution). The amendment also established a framework for individual parliamentary amendments to the federal budget, its destination, limits, amounts, and execution (Article 166 of the Constitution). It also temporarily granted the federal government greater flexibility in the utilization of public resources, as outlined in Articles 76, 107, 107-A, 111, 111-A, 121, and 122 of the Temporary Constitutional Provisions Act of the Brazilian Constitution. With such an amendment, the federal government would be able to maintain some social benefits and programs throughout 2023. The amendment also raised incentives for drafting a new rule on public spending in place of the current one, which had long been an obstacle to public investment in Brazil. Despite the heightened political polarization, the amendment received large support in Congress, showing that the government was able to work with Congress to pass legislation.

CA #127 deals mainly with budgetary issues related to the federal funding of States and Municipalities regarding public health policies. By adding paragraphs 14 and 15 to Article 198 of the Constitution, it created a new federal duty of funding to some institutions. The amendment also altered several provisions of the Temporary Constitutional Provisions Act of the Constitution related to the financing of the public health system through changes made to Articles 38 and 107. Finally, CA #127 freed some budget space to pay for the support of the public health system through modifications to Articles 3 and 4 of the amendment.

CA #128 introduced paragraph 7 to Article 167 of the Constitution to prohibit the imposition and transfer, through legislation, of any financial burden associated with providing public service to the Union, the States, and Municipalities, unless there are sufficient budgetary and financial sources. The amendment states that personnel expenses and their charges, along with other costs associated with public services, cannot be imposed or transferred unless there is a provision of a budgetary and financial source necessary for carrying out the expense. However, the obligations assumed by federated entities and those resulting from the setting of the minimum wage, as established item IV of the Article 7 of the Brazilian Constitution, are not subject to this prohibition.

2. MODIFYING THE CONSTITUTION THROUGH THE JUDICIARY

2.1. THE LIMITS OF FREE SPEECH AND PARLIAMENTARY IMMUNITY

On April 20th, 2022, the STF decided that free speech is related to many forms of expression such as jocular, satirical, and even erroneous opinions. However, freedom of speech does not allow for criminal purposes, hate speech or attacks against the rule of law and democracy. According to the STF, the Constitution guarantees free speech, but with responsibility. Thus, free speech cannot be used for the practice of illicit activities or hate speech, nor against institutions or democracy. In other words, statements made on social media with the aim of abolishing the rule of law and impeding with threats the free exercise of powers and institutions are not admissible.

This decision was made in the trial of Congressman Daniel Silveira, who uploaded a video on YouTube attacking some Brazilian Justices with threats, offenses, propagation of anti-democratic measures against the STF, and encouragement of violent acts against some Brazilian Justices.

Silveira was criminally prosecuted, and his defense invoked his parliamentary immunity. However, the STF decided that free speech cannot support the practice of illicit activities or hate speech against institutions or democracy. Justice Nunes Marques, appointed by former President Bolsonaro, presented a dissenting opinion. For him, Silveira only harshly criticized the Supreme Court and a few Justices, and this cannot be considered a crime but the exercise of free speech. In this case, the Supreme Court took an important stride in framing free speech, especially concerning parliamentary immunity (STF. Plenário. Ação Penal 1.044/DF, Rapporteur Min. Alexandre de Moraes, decided on 20/4/2022).

2.2. THE LIMITS OF FREE SPEECH AND PARLIAMENTARY IMMUNITY (2)

The STF decided on May 3rd, 2022, that parliamentary immunity does not protect abusive statements made by a Senator on social media with the specific intention of destroying reputations. The Court's position is that free speech does not reach intentional speeches (actual malice) with manifestly defamatory intent, derogatory judgments of mere value, injuries, or demeaning criticism, even if made by a Senator protected by parliamentary immunity. So, parliamentary immunity must be understood as a protection of the popular mandate conferred to a Senator but not as freedom to freely offend people.

This case is about a Senator who uploaded videos on Twitter, Facebook, Instagram, and YouTube to accuse another Senator of being just a "silly billionaire" who "joined the Congress by business". The offender also said that a former Congressman was part of a gambling scheme and a "gang leader". The offended Senator and Congressman filed a criminal complaint against the offender, charging him of libel and defamation. The offender claimed that he did not commit a crime because his speeches were protected by free speech and by parliamentary immunity. However, according to the STF, these speeches were unrelated to the parliamentary mandate, content abusive and

deliberately aimed at tarnishing reputations without any supporting evidence. According to the STF, parliamentary immunity does not extend to speeches that are performed without a clear link between the speech and the performance of parliamentary duties. The Court mischaracterized immunity as a personal privilege and defined it as a protection of the popular mandate. (STF. 2ª Turma. Pet 8242, 8259, 8262, 8263, 8267 e 8366 AgR/DF, Rapporteur Min. Celso de Mello, Opinion of the Court by Min. Gilmar Mendes, decided on 3/5/2022).

2.3. THE EXTENSION OF MATERNITY LEAVE TO SINGLE FATHERS WORKING AS PUBLIC SERVANTS

The Constitution grants four to six months maternity leave to women (Article 7, XVIII) depending on the employer. The Constitution also grants integral protection of the child (Article 227). However, men who were single parents did not have the same right regarding the period of their leave. Depending on where they worked, single male parents only had five to twenty days of leave. Because of this, the STF decided that men who are single parents and public servants of the federal government deserve paternity leave as well. (STF. Plenário. RE 1348854/DF, Rapporteur Min. Alexandre de Moraes, decided on 12/5/2022 (Repercussão Geral – Tema 1182).

2.4. THE STATE HAS THE CONSTITUTIONAL DUTY TO ASSURE KINDERGARTEN/ PRESCHOOL TO ALL CHILDREN BETWEEN ZERO AND FIVE YEARS

The STF ruled that childhood education (kindergarten, preschool, elementary school, middle school, and high school) is a fundamental right of all children ensured by the Constitution which must be fully effective and immediately applicable. A mother tried to enroll her three-year-old daughter in a public preschool in her municipality, but there were no vacancies available. She then filed a lawsuit against the municipality. The municipality contended that the judiciary should refrain from intervening in municipal budget matters, asserting that it is not feasible to impose obligations on municipalities would result in increased expenses. The STF ruled that states and municipalities have the constitutional duty to assure preschool to all children between zero and five years. The decision also recognizes that the right to an education is one of the enumerated social rights in Article 6 of the Constitution. Furthermore, this ruling aligns with the United Nations (UN) Sustainable Development Goals. As one of its Sustainable Development Goals, the UN emphasizes the crucial relevance of ensuring integral development for all children between 0 to 5 years old. This includes providing them with access to quality care and education during their early childhood. (STF. Plenário. RE 1008166/SC, Rapporteur Min. Luiz Fux, decided on 22/9/2022).

2.5. THE SO-CALLED "SECRET PUBLIC BUDGET"

The Union's budget is proposed by the Executive Branch and voted for by the Legislative Branch. Congressional members can propose amendments to the Union Budget addressed to their political bases or states of origin for expenses with public health and education. The Union's budget rapporteur in Congress can amend the Union Budget to correct some items in the budget's text. However, in 2019, Congress approved new rules expanding the power of the Union's budget rapporteur to release budget amounts at the request of some members of Congress whose names would not be known. This is the case of "secret public budget." This practice generates an exchange of favors with public money, but without any transparency or control. The STF decided that such a practice is unconstitutional because it violates the republican principle upon which the public budget is based. This case highlights how former president Bolsonaro and his political supporters in Congress were able to amend the budgetary law for their interest. (STF. Plenário. ADPF 850/DF, ADPF 851/DF, ADPF 854/DF e ADPF 1.014/DF, Rapporteur Min. Rosa Weber, decided on 19/12/2022).

IV. LOOKING AHEAD

2023 is the first year of Lula da Silva's presidency, and its shift from the previous administration is quite radical. Under former President Bolsonaro, Brazil was visibly undergoing a rapid autocratization process, one that, if his reelection took place, would lead Brazil to a very difficult point of no return. Luckily, Brazil was one of the few countries that was able to remove a would-be autocrat from office through regular elections. This shift in political power showcases the strength of democracy in Brazil. For constitutional change, this implies a fundamental modification in the interpretation and understanding of the Constitution of 1988. Rather than amending it to disrupt its democratic and social core, under President Lula, Brazil's Constitution regains its role as the paramount symbol of social democracy and the foundation for public policies especially aimed at the most vulnerable and unprivileged sectors of society. This seems to be President Lula's agenda for constitutional change.

This important shift in the state of Brazil's democracy, however, does not imply that Brazil is out of risk of going through a new autocratization process. President Lula's election was very tight (50.90% v. 49.10%), showing how Bolsonaro was able to achieve an impressive support despite government mismanagement, continuous attacks on the country's democratic institutions, and inhumane and criminal handling of the COVID-19 crisis. Lula's presidency is thereby no typical government, whose failure may result in the election of an opposing political group. Rather, his failure may mean the disposal of the very democratic regime. Thus, the stakes are significantly high. While Lula is a clever and experienced politician, Congress is very divided and leaning to the right, so his bargaining skills—and the very survival of Brazil's coalition presidentialism—will continuously be under scrutiny.

Under such circumstances, constitutional reforms pose severe challenges, but they also offer hope that Brazil's Constitution can reclaim its core meaning of promoting the welfare of its citizens by addressing, even if incrementally, social inequality. The challenging scenario will certainly block more progressive agendas, so Lula's presidency tends to avoid battling on the ground of cultural wars and focus instead on: a) creating structural institutional design changes aimed at strengthening the mechanisms of civilian control over the military (who were largely immersed in Bolsonaro's government), even though not radically reshaping the longstanding troubling relationship between

presidents and the military; b) establishing mechanisms to strengthen accountability and checks and balances, especially after the extensive dismantling of several institutions during Bolsonaro's years; and c) laying the groundwork for reforms that may place Brazil back again on the track of development and economic growth.

At this very moment, proposals for constitutional amendment on such three grounds are either already under discussion in Congress or planned to be submitted for discussion in Congress soon. As some major constitutional reforms are being considered in 2023, the likelihood of these amendments being approved will highly depend on the bargaining capacities and compromise calculations of the new government with the other branches of power.

V. FURTHER READING

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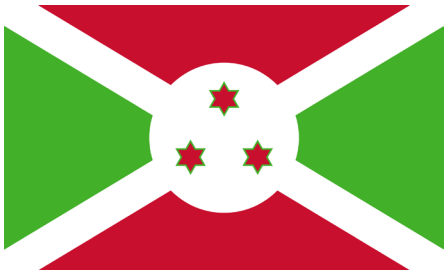
Burundi



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I. INTRODUCTION

Burundi's constitutional history starts with the constitutional act of the Kingdom of Burundi that was enacted on November 23rd, 1961, some months before Burundi became an independent State. It is important to note that the constitutional act was amended a year later in 1962. Following Burundi's independence, there were upheavals and military coups which contributed to a long time of constitutional instability and power vacuums in the country. In 2005, there was a referendum in Burundi which led to the adoption of a more stable Constitution. This Constitution was recently amended in 2018. The 2018 Constitution brought substantive changes to Burundi's political system. In order to understand the framework in which recent amendments have been proposed, it appears relevant to first talk about the main changes that were brought to the Burundi Constitution in 2018. After this discussion, the paper examines the 2022 amendments proposed by the Government whose adoption process was in motion at the end of the year. These changes pertain to the administrative organization of the Republic of Burundi. In the following section, there is information about the supporting reasons and opposing opinions.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The recent substantial constitutional reform in Burundi introduced several changes which included the harmonization with the East African Community rules regarding budget voting and parliamentary sessions. In fact, since Burundi adhered to the East African Community on July 1st, 2007, the Constitution had not been modified. Until 2018, there has not been any constitutional change implemented in Burundi. The official communiqué of the Council of Ministry was released on October 24, 2017, after an extraordinary meeting that analyzed the reports of the Commission and suggested changes that should be brought to the 2005 Constitution: "In fact, the 2005 Constitution has not so far been amended in any way despite the fact that it encompasses quite a number of obsolete provisions, unsuited to the post-transition context and to the Treaty of the East African Community that Burundi has ratified."[1]

The structure of the executive was among the main changes proposed that were accepted. As a matter of fact, the post-transition Constitution, which was implemented in 2005, established a hierarchical structure of the Executive with the President of the Republic at the top and two deputy presidents. While the first deputy president was in charge of political affairs, the second deputy president had oversight of all ministries handling social and economic affairs. The post-transition Constitution required that both the deputy presidents should be from different ethnic groups.[2] The key change in the way the superstructure of the State is organized occurred when the two deputy president positions were replaced with a prime minister, a change which was accepted and incorporated into the current Constitution. Therefore, all ministries report to the Prime Minister, the chief of the Government.[3] However, while eliminating the two-deputy-president system, the Constitution has included a position of the deputy President who assists the President of the Republic.

Other changes relate to the voting quorum for the adoption of the laws at the National Assembly. In fact, for ordinary laws, the 2018 Constitution moved from a two-thirds majority[4] to an absolute majority. For organic laws, while the 2005 Constitution has laid down a voting majority of two-thirds with the number of voting deputies not being less than the absolute majority of all members of the national assembly, the 2018 Constitution adopted a majority of three-fifth (or 60%) with the number of voting deputies being no less than the absolute majority of all members of the national assembly. In Burundi, an organic law is very significant as it allows the government to modify the number of provinces, municipalities (communes), districts, and hills.

Additionally, the reference to God was introduced for the first time in the Burundi Constitution. All of the oaths that are taken by high authorities before beginning their missions start with a new formula: "*Before Almighty God, before the people of Burundi…*"[5] A similar reference has been made in the preamble which starts with the following words: "*Conscious of our duties before God.*"

In a certain way, the principle of *the winner takes all* has been another substantial change introduced. In fact, the previous Constitutions—in line with the Arusha Agreement for peace and reconciliation in Burundi—had consecrated the principle of power-sharing among the country's political parties. Any political party which achieved a certain percentage of votes during an election had the right to a seat in the Government. For example, the 2005 Constitution has some principles of sharing seats in the Government between political parties that

1 Press release note, Council of Ministers, 24 October 2017

2 The Constitution of the Republic of Burundi, 2005, Article 124
3 The Constitution of the Republic of Burundi, 2018, Article 129
4 The Constitution of the Republic of Burundi, 2005, article 175,§1
5 Inter alia The Constitution of the Republic of Burundi, Article 107, 126

participated in the elections depending on the seats they held at the national assembly. However, this is not the case with the new Constitution which does not expressly stipulate that the winner takes all, nor does it say anything about the seat in the Government for political parties who did not attain victory in the election. The recent reform of Burundi's Constitution did not integrate such power-sharing principles. Hence, a winning political party is free to decide who they can nominate to the ministerial positions—the only limits being respecting the ethnic quotas and gender balances enshrined in the Constitution. Consequently, the reform has given more power to the President as he has the ability to remove a member of the Government. In this scenario, he does not need to consult the political party from which the members are a part.

The judiciary has been added to the agenda of constitutional reform. In fact, the reformed Constitution broadened the composition of the High Council of the Judiciary by opening it to the professional bodies linked to the judiciary. Since then, representatives of the bar associations are included among the members of the High Council. They make a total of four members carrying out legal professions in the private sector who are added to the council along with the traditional members who are judges.

Moreover, while keeping the two-term limit for any president of the Republic, the Constitution changed the duration of the presidential election. Instead of the five-year term that was enshrined in the post-transition Constitution, the new Constitution opted for a term of seven years (Article 97). This reform occurred after a consultation process that was initiated by the National Commission of National Dialogue (CNDI, French acronym) through which people who were reached suggested that the terms of the presidency should be taken out from the Constitution.[6] However, the idea that arose from CNDI's report, was deemed to be a setback regarding the nation's democracy. However, the idea included in the CNDI's report was rejected. Instead, the reform contributed to the presidential term being prolonged for up to seven years. It should be noted, however, that the five-year term was kept for the members of the parliament as well as the local authorities: administrators of districts and hills. The aforementioned changes were added to the constitution and incorporated into the 2018 Burundi Constitution.

On the other hand, there were a number of changes that were suggested but ultimately not added to the version of the Constitution that was submitted to the referendum. This report will highlight some of these reforms below.

In the framework of the 2018 review of the Burundi Constitution, it suggested that the power of the Senate to approve appointments for senior positions made by the President of the Republic should be removed If accepted, this reform would have unnecessarily consolidated the power of the President of the Republic and eliminated the Senate's mandate to control whether nominations to senior positions respect the quotas and balances enshrined in the Constitution. It is important to note that this power is among the ones entrusted to the Senate. Therefore, Article 112 of the 2018 Constitution has kept some of the values of the 2005 Constitution. As a result, the Senate currently keeps an eye on the appointments to the senior positions listed in the Constitution.

6 https://www.presidence.gov.bi/2017/05/12/la-cndi-a-presente-son-rapport-final-au-president-nkurunziza/, Visited on April 1, 2023

Another proposal was to increase the percentage required for a political party to get a seat in the Parliament. The Commission—which was tasked to suggest amendments to the 2005 Constitution—proposed that this percentage should be brought to 5% of the total votes at the national scale instead of the 2% which was included in the post-transition Constitution. This change was not kept in the final draft brought to the referendum. Ultimately, the 2018 Constitution kept the 2% as the percentage required nationwide for any political party to get a seat in the Parliament.[7]

It was also recommended to take away justice officials' right to organize strikes. Since the judiciary was the fourth power of the State, the justification for such a proposition was that the Power of the State should not delve into activities likely to jeopardize the normal functioning of the State. The 2018 Constitution, like the previous Constitution, integrates the amendment, which states that the right to strike may be forbidden to some categories of employees by law. It clarifies that this right is in all the ways forbidden to members of the national defense corps.[8] If this amendment were adopted, this would clearly appear, as it is the case for national defense forces.

The above description of change brought during the 2018 Burundi Constitutional review attempts to help the reader understand the recent changes in the Burundi constitutional system before dealing with the most recent change with a constitutional height.

As Richard Albert pointed out, "The subject of constitutional amendment is a higher law, whether what counts as a higher law is codified in a unified master text or disaggregated across different sites of significance."[9] Last year, the government initiated an organic law that served to modify the administrative structure of Burundi. The proposed reform related to subdivisions and namings of provinces, municipalities, districts, and hills. According to this organic law, the number of provinces of Burundi will be reduced from eighteen to five while the number of municipalities (communes) has decreased from over a hundred and twenty-nine to forty-two. There has also been an increase in the number of zones, districts, and hills in the country. This reform which had been accepted at the Council of Ministers level was awaiting to undergo a legislative process at the end of the year. It follows that at the time of writing this report, the reform had been voted on by the Parliament (both chambers) and promulgated by the President of the Republic under Organic Law n°1/05 of March 16, 2023.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. SCOPE OF THE REFORMS

After 2000, all of the Constitutions which were adopted were inspired by the Arusha Agreement for Peace and Reconciliation, an important agreement that helped restore peace after decades of wars. It is in this framework that the 2005 Constitution was called a post-transition Constitution as it was adopted after a four-year transition period. The main purpose of the 2018 reform was to mark the end of the post-transition period while keeping the spirit of the Arusha agreement.

7 The Constitution of the Republic of Burundi, 2018, Article 174.
8 The Constitution of the Republic of Burundi, 2018, Article 37
9 R. Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (OUP, 2019), 79

Therefore, the reform preserved the Arusha core values, especially the necessity to safeguard social cohesion among Burundians and ensure peace. This is why the amendments did not touch the provisions pertaining to defense, security forces, ethnic quotas, and the integration of women in politics. Henceforth, the main review as described above relates to the state's institutional structures and how they are connected.

In the explanatory memorandum, it is stated that the modifications made to the 2005 Constitution were not substantial. Therefore, this led to the 2018 reform being considered as amendments after taking into account how Richard Robert differentiated amendments from dismemberments of the Constitution.[10] It is the same with the 2022 reform which was recently passed through the organic law voted by the parliament. In fact, in the Constitution, the numbers of provinces, municipalities, districts, and hills are not clearly defined. Article 3 of the Constitution gives the leeway to a law to modify the limits and number of those entities. According to a press release that was made public by the Secretary of the State, the organic law which modifies the limits and number of provinces, municipalities, districts, and hills is based, in particular, *on the implementation of the national decentralization policy, on harmonization with the administrative organizations of the countries of the sub-region, on the creation of financially viable territorial entities, on a local administration at the service of the citizen, on a reduction in the State's charges to the municipalities, on a reduction in the charges of the municipalities and an increase in the tax base*.[11] It was alleged that it would improve accessibility to administrative services. However, some members of the public are skeptical as to how this law will enable access to public services to the population as the distance to the chief towns of provinces and municipalities will have steadily increased for many ordinary citizens. On the other hand, past reforms of the administration led to an opposite situation whereby the number of provinces and municipalities had gradually increased. An eighteenth province, the Rumonge Province, was created by Law N°1/10 on March 26, 2015, with a period being no more than 10 years. The motivation for the creation of Rumonge was quite the same as the one used today to justify the reorganization of the administrative structure of Burundi: to improve the accessibility of the population to public services.

It is evident that this reform has a significant influence on electoral aspects. Undoubtedly, the electoral code must be reformed accordingly. It follows that the number of MPs per province and the computing of votes will take into consideration the new administrative structure. In addition, the power of political parties will also be evaluated based on the number of votes they get in provinces.

The proposed change regarding the terms of the president in power followed tensions around presidential terms that emerged in 2015. It has been suggested to include in the constitution a renewable presidential term without any limitation of the terms which could undermine democratic principles. Not only had tensions already erupted, but if it was pushed forward, it would threaten national reconciliation efforts. This is perhaps the main reason which contributed to the rejection of the proposed amendment.

10 R. Robert, Idem, 77

11 Burundi Eco, https://burundi-eco.com/nouveau-decoupage-territorial-quelle-est-la-plus-value/#.ZGJcd3ZBw2w

2. CONSTITUTIONAL CONTROL

Constitutional control is undertaken by the Constitutional Court, a sui generis court of the State regarding constitutional matters. The Constitutional Courts adjudicate on the constitutionality of laws and interpret the Constitution.[12] The functions of the courts include ruling on the constitutionality of laws and other regulatory acts that fall outside the domain of the law, ensuring respect for the Constitution, such as the charter of fundamental rights, by state bodies and other institutions, and interpreting the Constitution…[13] When ruling on the constitutionality of laws, for organic laws, the constitutionality check must intervene *a priori* before the law is promulgated by the President of the Republic. For other laws, it can be done *a posteriori* depending on the willingness of the body that has the power to refer a case to the Constitutional Court.

Similar to other Burundian judicial bodies, the Burundi Constitutional Court faces many challenges including questionable independence. As this has been pointed out by the Peace and Justice Commission of the Belgium Francophone which said, "*The Burundian judicial system is characterized by three flaws: a serious lack of training for the staff, total lack of equipment and particularly lack of an independent judicial machine*."[14] However, this contradicts the theory in paragraph 1 of Article 214 of the Constitution which states: "*The judicial power is impartial and independent from the legislative and executive power. In the exercise of his functions, the judge is only subject to the constitution and the law*."[15]As this has been pointed out by Dr. Aimé Parfait NIYONKURU, "*the independence of the magistracy (in Burundi) is a constitutional principle which does not have a practical translation*."[16] In a recent case on the interpretation of the Constitution regarding the question of whether the "third term" of the Late President Pierre NKURUNZIZA was considered constitutional, the court, through RCCB 303 of May 4, 2015, and while interpreting Article 96 and Article 302 of the 2005 Constitution, reached a conclusion that a third term was "not contrary" to Article 96 of the Constitution which stated President NKURUNZIZA Pierre's first term was "an indirect suffrage term which had nothing to do to do with the terms described in Article 96."[17] A few years after, in Appeal N°1 of 2020, the Appellate Division of the East African Court of Justice (EACJ) ruled that the RCCB303 violated the East African Community Treaty when the EACJ concluded the following: "*After a careful consideration of the rival submissions of the parties we are of the considered view that the decision of the Constitutional Court of Burundi was in violation of the above-mentioned Articles of the East African Community (Articles 5(3) (f), 6(d), 7(2), 8(1) (a) and (c) and 8(5) of the EAC Treaty)*."[18]

Thus, the East African Court of Justice overturned a decision that, in a national order, was rendered by a body deemed to be independent. In other words, the reasoning of the Burundi Constitutional Court was a violation of the Constitution itself since the Constitution has to comply

12 The Constitution of the Republic of Burundi, 2018, Article 231.

13 The Constitution of the Republic of Burundi, 2018, Article 234.

14 The Commission Justice et Paix belge francophone, Le long chemin du Burundi vers la paix et la démocratie, mai 2006, p.4.

15 The Constitution of the Republic of Burundi, 2018, Article 214, §1

16 A. Parfait Niyonkuru, *The independence of the judiciary vis-a-vis the executive*, https://www.hamann-legal.de/upload/7Aime-Parfait, visited on April 07, 2023

17 RCCB 303, Constitutional court, May 04, 2015.

18 EACJ, Appeal N° 1 of 2020

with the East African Community Treaty, which shall have precedence over the national laws.

As reported by "The Guardian" and other media sources, one of the Judges of the Constitutional Court, the Deputy President of the Court, Justice Sylvère Nimpagaritse, fled the country due to the pressure, including death threats, at a time when the Court had to rule on the constitutionality of the third term of Late President Nkurunziza Pierre. He reported that *"only a minority of the constitutional court judges agreed until they came under intense pressure after they met on April 30, 2015."* Justice Sylvère also added, *"Two who had held that a third mandate would violate the Arusha accords and the constitution were scared and changed their mind" and "that they told him that if they didn't change their minds they would humiliate the president and that they were taking a big risk, that they were risking their lives."*[19] This example gives an idea as to what extent the Burundi Constitutional Court is truly an independent institution. It leads critical opinions to question at what level such a court can fulfill a counter-majoritarian role, a representative role, or an enlightened role. The Burundi Constitutional Court has had to work in a very difficult environment from the time of its establishment in 1992. Due to the main operational challenges that the Court went through, this makes it difficult to understand which role is played by our court. The Court's evolution over time will tell us more about such an aspect.

IV. LOOKING AHEAD

The administrative structure has an important influence on many legal aspects including the election process. Even though it has been made known to the public that administrative changes in Burundi service streamline decentralization and redefine the country's economic growth, one cannot neglect the electoral ambitions that can be behind these changes. If this hypothesis proves to be true, it is important to closely follow how the electoral code will accommodate the new changes. How will ordinary citizens of all regions of the country be represented in the parliament? Will the number of MPs be determined per province or per municipality (communes)? If electoral constituencies are determined according to the number of Provinces, how many MPs will each of the five provinces get?

On May 20th, 2019, law N°1/11 modified law N°1/20 on the Electoral Code, which fixed electoral constituencies according to the number of provinces.[20] Additionally, the number of deputies is determined by taking into account the number of citizens of each province,[21] while Senators are equally represented by all of the provinces. [22] Perhaps the upcoming electoral code will use the same formula with a reduced or increased number of MPs. Let us wait how the aforementioned question will be answered.

Another constitutional issue that lies ahead is how the Burundi Constitution will accommodate a planned political confederation within the East African Community scheduled to take place in the upcoming years. As a matter of fact, Article 5 (2) of the EAC Treaty states that: "*(...) the (EAC) Partner States undertake to establish among themselves and in accordance with the provisions of this Treaty, a Customs Union, a Common Market, subsequently a Monetary Union and ultimately a Political Federation (...)*"[23] Consultations for the drafting of the EAC Political Confederation Constitution have been conducted within the Partner States. If a political federation is approved and the Constitution of the Confederation is adopted, this could bring significant changes within the different Partner States such as Burundi. These changes will depend on the powers that have been delegated to the Confederation, and as a result, the national Constitution will be amended accordingly.

V. FURTHER READING

OTIENO-ODEK, Proposed confederation of East Africa (2020), EAC Law Journal: Vol.1, No.1

University of Antwerp, Centre des Grands Lacs, *Droit, pouvoir et paix au Burundi (*last update 13 february 2023) https://www.uantwerpen.be/en/projects/centre-des-grands-lacs-afrique/droit-pouvoir-paix-burundi/

Richard Albert, *Constitutional Amendments: Making, Breaking and Changing Constitutions* (OUP, 2019)

19 https://www.theguardian.com/world/2015/may/05/senior-burundi-judge-flees-rather-than-approve-presidents-candidacy, visited on April 07, 2023

20 Law N°1/11 of May 20, 2019 modifying the law N°1/20 on Electoral Code, Article 105, §2

21 Idem, Article 107

22 Idem, Article 142

23 EAC Treaty, Article 5 (2)

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I. INTRODUCTION

By Canadian standards, 2022 has been a momentous year for constitutional amendments, with at least five formal amendments to the Constitution[1]. Provincial legislatures in Quebec, Alberta, and Saskatchewan have all initiated unilateral challenges to the constitutional *status quo*, which carry further some of last year's initiatives, and which should continue to be carefully monitored in 2023.

In Canada, formal constitutional amendments are quite rare due in large part to the high degree of rigidity of the amendment formula outlined in Part V of the *Constitution Act, 1982*,[2] which contains five different amending procedures.

Three of those are multilateral and require the support of the two houses of the federal Parliament and of several or specific provinces. Some amendments require the unanimous consent of all provinces, as well as of the federal Parliament.[3] Others require the consent of at least seven provinces, which tally at least 50% of the Canadian population (the 7/50 procedure),[4] while some necessitate the support only of the province(s) directly affected by an amendment, both in addition to the House of Commons and the Senate.[5]

The last two amending procedures are unilateral. They allow the federal[6] and provincial[7] parliaments to amend, autonomously and entirely on their own, various elements of the Constitution that only concern them. These include *minor* changes to federal institutions (the government, the Senate, or the House of Commons) for the federal Parliament, and modifications of "provincial constitutions" in the case of provinces.

The high degree of consent required to multilaterally amend the Constitution partly explains the failure to realise major formal constitutional reforms since 1982. Instead, constitutional change occurs in more informal, indirect, and incremental ways, mostly through unilateral action by members of the federation or through intergovernmental agreements.[8] In this respect, 2022 was a constitutionally effervescent year with five formal amendments to the Constitution, including an unprecedented number of province-initiated unilateral amendments.

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

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. NEW CONSTITUTIONAL INITIATIVES

1.1. MULTILATERAL OR BILATERAL AMENDMENTS

Of the two multilateral amendment procedures initiated by provinces in 2021, only Saskatchewan's attempt to retroactively repeal an ancient tax exemption for the Canadian Pacific Railway was successful. Under the "bilateral" procedure set out in section 43 of the *Constitution Act, 1982*, the Saskatchewan Legislative Assembly's amendment was formally proclaimed by the Governor General on May 9, 2022,[9] after receiving the support of both houses of the federal Parliament. It thereby repealed section 24 of the *Saskatchewan Act, 1905*. Let us note here how unusual it is for a constitutional amendment to have a retroactive effect. While it is limited in that case, this could be problematic if it were to become a precedent.

2. UNILATERAL FORMAL AMENDMENTS

2.1. QUEBEC

The Quebec National Assembly's Bill 96, tabled in 2021, was enacted on June 1, 2022 as an *Act respecting French, the official and common language of Québec*. Among several things, it purports to unilaterally amend the *Constitution Act, 1867*—one of Canada's main constitutional texts—by formally inserting in it the two following provisions:

1 The authors would like to thank Professor Johanne Poirier for her careful reading and her always relevant comments.
2 *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
3 *Ibid.*, s 41.
4 *Ibid.*, s 38.
5 *Ibid.*, s 43.
6 *Ibid.*, s 44.
7 *Ibid.*, s 45.
8 See Johanne Poirier and Jesse Hartery, "Para-Constitutional Engineering and Federalism: Informal Constitutional Change through Intergovernmental Agreements," (2022) *International Journal of Constitutional Law* 758-787.
9 *Constitution Amendment, 2022 (Saskatchewan Act)*, Proclamation, 9 May 2022, SI/2022-25, (2022) C Gaz II, 1430.

"FUNDAMENTAL CHARACTERISTICS OF QUEBEC

"90Q.1. Quebecers form a nation.

"90Q.2. French shall be the only official language of Quebec. It is also the common language of the Quebec nation."

The Quebec government claims that the amendment is valid under section 45 of the *Constitution Act, 1982*, which allows a province to amend its own constitution. It maintains that the amendment concerns Quebec alone and adds those provisions under Part V of the *Constitution Act, 1867*, entitled "Provincial Constitutions." Some constitutionalists have debated this thesis, and questioned whether a province can lawfully change the text of the country's Constitution Acts on its own[10]. Quebec has previously amended provisions of the *Constitution Act, 1867* concerning the province when, in 1968, it abolished its legislature's upper house.[11] As we anticipated last year, a legal challenge by an English-language school board on this issue is pending before the Quebec Superior Court.

Another unilateral amendment to the *Constitution Act, 1867* was enacted in December 2022 by the Quebec National Assembly. It began with an unexpected controversy at the swearing-in of the 44th Legislature, when members-elect from the sovereigntist (and republican) Parti Québécois refused to take the constitutionally required oath of allegiance to King Charles III. The President of the National Assembly stressed the mandatory character of the oath prescribed by section 128 of the *Constitutional Act, 1867*, and accordingly refused to allow dissenting members to take up their seats without swearing it.[12]

Largely considered a non-issue until then, the three Parti Québécois members of the National Assembly (MNAs) succeeded with little difficulty in convincing their colleagues to expedite a constitutional amendment exempting Quebec from the application of section 128.[13] The Act that effected this amendment passed unanimously just eight sitting days after the opening of the parliamentary session. As a result, only the oath of loyalty to the people of Quebec, prescribed since 1982 by the provincial *Act respecting the National Assembly*,[14] is now required to be sworn in as MNA.

Like the former, the amendment consisted of an added section in Canada's *Constitution Act, 1867*. Interestingly, previous bills tabled by the opposition and proposing to make the oath facultative without directly amending the text of the *Constitution Act, 1867* had died twice on the order paper.[15] The approach chosen by the Legault government—consistent with that of Bill 96—no doubt signals its willingness to assert its competence to unilaterally amend the Constitution under section 45 of the *Constitution Act, 1982*. The ultimate validity of this unilateral amendment has scholars equally divided.[16]

2.2. SASKATCHEWAN

In November, the Saskatchewan government tabled its Bill 88, entitled *The Saskatchewan First Act*, whose express purpose is to "assert Saskatchewan's exclusive legislative jurisdiction and to confirm the autonomy of Saskatchewan."[17]

Following Quebec's example, the Saskatchewan Legislature also purports to add an unusual new section, in the same wording, to both the *Constitution Act, 1867* (as s. 90S.1) and the *Saskatchewan Act, 1905* (as s. 3). The latter can be considered Saskatchewan's "provincial constitution."[18] The new sections read as follows:

"(1) Saskatchewan has autonomy with respect to all of the matters falling under its exclusive legislative jurisdiction pursuant to this Act.
(2) Saskatchewan is and always has been dependent on agriculture, and on the development of its non-renewable natural resources, forestry resources and electrical energy generation and production.
(3) Saskatchewan's ability to control the development of its non-renewable natural resources, its forestry resources and its electrical energy generation and production is critical to the future well-being and prosperity of Saskatchewan and its people".

The section's reiteration in both constitutional Acts—which have equal constitutional standing— appears legally redundant. Indeed, its first subsection merely reasserts the legislative competence already granted to the province by the Constitution of Canada. As for the last two subsections, they use language more akin to political statements than to law. The amendment is thus primarily symbolic: it is a political response to what the Saskatchewan Legislature deems to be "harmful" federal intrusions into its jurisdiction, which in its view, undermine the province's status as an equal partner in the federation.

In that sense, the proposed amendment does not substantively change the existing constitutional arrangements, but it does serve as a vocal legislative protest to the current dynamics of Canadian federalism. Paradoxically, the amendment's constitutionality might rest upon this very ineffectiveness: the province cannot renegotiate the terms of the federal distribution of powers without a multilateral procedure. If the amendment were to have this effect, then it would not be valid.

10 See Emmet Macfarlane, "Quebec's attempt to unilaterally amend the Canadian Constitution won't fly", *Policy Options* (14 May 2021), online: <https://policyoptions.irpp.org/magazines/may-2021/quebecs-attempt-to-unilaterally-amend-the-canadian-constitution-wont-fly/>. For the contrary view, see Daniel Turp, "La validité de la proposition du Québec de modifier sa « constitution provinciale »", *Policy Options* (30 June 2021), online: <https://policyoptions.irpp.org/magazines/june-2021/la-validite-de-la-proposition-du-quebec-de-modifier-sa-constitution-provinciale/>.

11 *Act respecting the Legislative Council of Quebec*, SQ 1968, c 9.

12 Quebec, National Assembly, *Journal des débats*, 43-1, vol 47 no 3 (1 December 2022) at 29.

13 *An Act to recognize the oath provided in the Act respecting the National Assembly as the sole oath required in order to sit in the Assembly*, SQ 2022, c 30.

14 *Act respecting the National Assembly*, CQLR c A-23.1.

15 Bill 192, *Loi visant à reconnaître le serment des députés envers le peuple du Québec comme seul serment obligatoire à leur entrée en fonction*, 1st Sess, 42nd Leg, Quebec, 2019 and Bill 190, *Loi visant à reconnaître le serment des députés envers le peuple du Québec comme seul serment obligatoire à leur entrée en fonction*, 1st Sess, 43rd Leg, Quebec, 2022.

16 Sidhartha Banerjee, "Quebec adopts law making oath to King optional for elected members", *CBC News* (9 December 2022), online: <www.cbc.ca/news/canada/montreal/quebec-oath-king-law-1.6680764>.

17 Bill 88, *The Sakatchewan First Act*, 3rd Sess, 29th Leg, Saskatchewan, 2022 (as passed by the Legislative Assembly on 16 March 2023), preamble.

18 As Saskatchewan joined the Canadian federation as a province in 1905, its "provincial constitution" is not included in the *Constitution Act, 1867* as is partly the case for the original four provinces (Quebec, Ontario, Nova Scotia and New Brunswick).

The legislation comes amidst a judicial dispute over environmental jurisdiction[19] and is likely a response to a perceived bias in case law favouring the federal government. The bill was eventually enacted in April 2023.

2.3. FEDERAL PARLIAMENT

For its part, the federal Parliament unilaterally amended the threshold for provincial representation in the House of Commons set out in section 51 of the *Constitution Act, 1867*[20]. In Canada, the distribution of seats in the House is based on the principle of representation by population and is therefore revised after each decennial census using a preset method. This year's revision threatened to cause certain provinces to lose seats in absolute numbers. The "grandfather clause" setting the threshold at the *status quo* of 1985[21] was therefore updated so that no province would end up with fewer seats under the recalculation than it had during the preceding 43rd Parliament.

The amendment is enacted as a simple Act of Parliament, under section 44 of the *Constitution Act, 1982*, which allows the federal Parliament to make amendments concerning the House of Commons. The threshold had already been changed unilaterally by the Parliament in 2011[22] and has no bearing on the relative weight of the provinces in the House.

3. UNILATERAL INFORMAL AMENDMENTS

3.1. ALBERTA

Alberta engaged in a political exercise similar to Saskatchewan's, with its much-publicised *Alberta Sovereignty Within a United Canada Act*,[23] the new government's flagship legislation, which was rapidly passed in December 2022. It introduced a novel procedure empowering the Legislative Assembly of Alberta, by resolution on the motion of a Minister, to declare a "federal initiative"[24] to be unconstitutional or harmful to Albertans on the grounds that it interferes with provincial jurisdiction or Albertans' *Charter* rights.[25] One of the effects of such a parliamentary resolution is to enable the Albertan cabinet to issue binding directives to any provincial public body[26]—which could be to disregard federal law entirely.[27] This "power" is valid for two years, renewable once following the resolution.[28] Although s. 2(a) provides that no order-in-council made under the Act can be contrary to the Constitution, the actual constitutionality of such an order will be contingent on whether or not the Legislative Assembly's view that a federal initiative is constitutional or not ultimately withstands judicial examination.

As a government MLA stated in the House, the Act plainly "gives the authority to decide if something is constitutional or unconstitutional to the Members of the Legislative Assembly, [...] [including whether] a bill that's been passed through the federal Parliament is actually unconstitutional."[29] In other words, should they deem a federal law unconstitutional, the Alberta Legislature and executive would unilaterally provide their own remedy rather than petitioning the courts for a declaration of invalidity. It would then be up to the federal government to take Alberta to court to force it to comply with federal law.[30] That suggests an attempt to circumvent the usual process of constitutional review of legislation by the judiciary.

Like the *Saskatchewan First Act*, this is first and foremost a political expression of dissatisfaction with the current state of Canadian federalism and of the sentiment that federal actions "have infringed on [Alberta's] sovereign provincial rights and powers with increasing frequency and have unfairly prejudiced Albertans."[31] It is also an attempt to draw a parallel with Quebec's nationalist claim for special status within the federation: the Act's preamble evokes as justification the idea that "Albertans possess a unique culture and shared identity within Canada."[32] "What we are simply asking for is to have the same power and the same respect that Ottawa gives to Quebec. Nothing more, nothing less," stated Alberta's Premier in parliamentary debates.[33]

The *Alberta Sovereignty Act* has not been challenged in court so far, with the federal government stating it had no intention of doing so.[34] We may thus have to wait until the statute is put into use to find out if it is constitutional and what impact it will ultimately have on the Canadian constitutional order.

4. FAILED (OR ABANDONED) ATTEMPT

4.1. ALBERTA

In last year's report, we discussed Alberta's proposed abolition of the Canadian equalization system in response to long-standing grievances and a provincial referendum. The proposal has yet to receive any support from the federal or provincial legislatures. Some referendum campaigners had pinned their hopes on Ontario and British Columbia—the other two net losers from current equalization arrangements—to support the amendment bid.[35] The 2021 resolution has just under two years left to be passed by Parliament and the legislatures of at least 6 other provinces before the deadline set out by section 39(2) of the *Constitution Act, 1982*

19 *Reference re Impact Assessment Act*, 2022 ABCA 165, on appeal to the Supreme Court of Canada.
20 *An Act to amend the Constitution Act, 1867 (electoral representation)*, SC 2022, c. 6.
21 *Constitution Act, 1985 (Representation)*, Part I of the *Representation Act, 1985*, SC 1986, c 8.
22 *Fair Representation Act*, SC 2011, c 26, s. 2.
23 *Alberta Sovereignty within a United Canada Act*, SA 2022, c A-33.8.
24 Defined as any "law, program, policy, agreement or action" per s. 1(c).
25 *Alberta Sovereignty Act*, *supra* n. 23, s. 3
26 *Ibid.*, s. 4 and s. 6
27 Government of Alberta, *Alberta Sovereignty within a United Canada Act: Information sheet for Albertans* (Edmonton: Alberta Justice), online: <https://www.alberta.ca/assets/documents/alberta-sovereignty-within-a-united-canada-act-info-sheet.pdf>
28 *Alberta Sovereignty Act*, *supra* n. 23, s. 5.
29 "Bill 1, Alberta Sovereignty within a United Canada Act," 2nd reading, *Alberta Hansard*, 30-4 (30 November 2022) at 33 (Mark Smith).
30 Government of Alberta, *Information sheet for Albertans*, *supra* n. 27.
31 *Alberta Sovereignty Act*, *supra* n. 23, preamble.
32 *Ibid.*
33 "Bill 1, Alberta Sovereignty within a United Canada Act," 2nd reading, *Alberta Hansard*, 30-4 (30 November 2022) at 22 (Hon Danielle Smith).
34 "Trudeau says Ottawa to work constructively with Alberta after sovereignty act passes," *CTV News* (8 December 2022), online: < https://www.ctvnews.ca/politics/trudeau-says-ottawa-to-work-constructively-with-alberta-after-sovereignty-act-passes-1.6186414>.
35 Fairness Alberta, "BC & Ontario," online: *Equalization Referendum.ca* < https://www.equalizationreferendum.ca/bc-and-on/>.

expires. Since there is no sign that the other members of the federation will follow through on this initiative, we consider that we can categorize this attempt as a failed one, at least for now.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. THE 2022 CONSTITUTIONAL REFORMS IN CANADA: AMENDMENTS OR DISMEMBERMENTS?

Trying to qualify constitutional reforms as amendments or as dismemberments is a challenging undertaking. It requires looking into a society's pre-existing constitutional architecture and anticipating the effects of a given reform. While amendments build on an existing constitution, dismemberments break up with a pre-existing constitution. As Richard Albert writes: "A dismemberment of a constitutional structure entails a clear break from how the constitution organizes the allocation of power, how it balances competing claims to and the exercise of authority, or how its public institutions function."[36]

In our opinion, while some of the initiatives discussed above may have been unprecedented, most still qualify as amendments. For instance, the federal statute changing the threshold for representation in the Commons and the bilateral amendment to remove the Canadian Pacific Railway tax exemption from the *Saskatchewan Act, 1905* constitute standard—and largely uncontroversial—uses of established constitutional amendment procedures.

Quebec's additions to the *Constitution Act, 1867*, while contested as to their validity under the unilateral amendment procedure, are nevertheless consistent with both the recognition by the House of Commons in 2006 that Quebec forms a nation[37] and the long-standing, legally-protected status of French as the province's official language. As such, they arguably do not break with the established constitutional order. The abolition of the oath to the Sovereign, whose obsolescence was a matter of consensus in Quebec society, does not mark a fundamental shift either. These changes remain, in our view, amendments, even if some might argue they are *unconstitutional* amendments.

On the opposite end of the spectrum, the *Saskatchewan First Act* and *Alberta Sovereignty Act* are more disruptive of the constitutional *status quo* and thus, harder to qualify. Both acts stretch constitutional boundaries in a way that, when read in conjunction with Quebec's own unilateral amendments, might suggest a pattern toward dismemberment. With these novel initiatives, the three provinces are legislatively voicing their dissatisfaction with the current federal constitutional settlement—or at least with aspects of its implementation. And by providing their own remedies, legislatures also exhibit distrust in the ability of the courts to police them. After the decades of constitutional fatigue that followed the failed Meech Lake and Charlottetown accords, we may be witnessing a paradigm shift. Provinces now seem more willing to reopen the constitutional Pandora's box, but also to break with the multilateral approach to constitutional reform that had previously prevailed. If it were to continue unhindered, this new trend of unilateral provincial amendments of constitutional texts might lead to some inconsistencies, judicial challenges, and an even more confusing constitution. Could that cumulatively result in gradual dismemberment, or will the implications of those amendments prove to be merely symbolic? Only time will tell.

2. CONTROLLING CONSTITUTIONAL REFORMS: THE ROLE OF THE COURTS

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

Such control can be *ex-ante* if a provincial or federal executive requests an advisory opinion from a provincial court of appeal or the Supreme Court of Canada. For instance, judges could be asked which procedure should apply to a given amendment.[38] The control can also be *ex-post* if the validity of an amendment is challenged once it has already occurred.[39] In such a case, the Court's role is to determine whether the procedure used to implement the amendment was the correct one. Although the *ex-post* review is usually done through a normal judicial review procedure initiated before a tribunal of first instance, it can also be done through a reference (advisory opinion) procedure at the request of the provincial or federal government.

Whether the control is *ex-ante* or *ex-post*, courts may also have to determine whether an ordinary statute is, in fact, a unilateral constitutional amendment subject to a formal amendment procedure.[40] While courts may review compliance with the rules set out in Part V, they are unwilling to add additional requirements based on principles or structural analysis of the Constitution.[41] It is also important to note that there are no unamendable rules in the Canadian Constitution. Accordingly, as long as a change complies with Part V, the courts cannot place any material limits on the power to amend the Constitution.[42]

Of all the constitutional changes enacted last year, only Quebec's amendment of the *Constitution Act, 1867* has so far been challenged in court. Yet this very model of constitutional review also appears to be contested. Indeed, the Alberta and Saskatchewan initiatives reveal some degree of distrust of the courts' role as constitutional arbiters, as both operate to circumvent the process in their own way.

The *Alberta Sovereignty Act* is the most striking departure in this regard: the Alberta Legislature seems to want to bypass judicial review by taking it upon itself to declare unconstitutional the federal laws that it perceives as undue interferences and remedy them as it sees fit. Arrogating this essential function assigned to the judiciary by the Canadian Constitution would appear to be a challenge to both the separation of powers and the rule of law.

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

37 Canada, House of Commons, *Vote No. 72 – Government Business No. 11 (Nation of Québécois within a united Canada)*, 1st Sess, 39th Parl, 27 November 2006.

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

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

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

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

42 See *ibid*, 69-70.

And with the *Saskatchewan First Act*, the Saskatchewan Legislature is trying to unilaterally substitute its own interpretation of some of its legislative powers for that of the courts. In other terms, the provincial legislature is likewise attempting to redefine its relationship with the federal government on its own, without resorting to judicial arbitration to mediate disputes over perceived encroachments.

IV. LOOKING AHEAD

Now that two provinces have formally inserted new sections into the *Constitution Act, 1867*, we will have to see whether the federal Department of Justice agrees to include them in its official administrative codification. The House of Commons had previously passed a resolution stating that Quebec had indeed the power to amend its Constitution under section 45 of the *Constitution Act, 1982*[43]. Despite this fact, the province's additions (sections 90Q.1 and 90.2) though enacted last June have yet to be added to the *federal* codification. Meanwhile, the Government of Quebec has issued its own administrative codification of the Constitution Acts, which includes its recent amendments.[44]

The federal government has also signaled[45] it might seek an advisory opinion from the Supreme Court of Canada to clarify the conditions for invoking section 33 of the *Canadian Charter of Rights and Freedoms*.[46] Commonly known as the "Notwithstanding Clause," the provision allows an enactment to have effect notwithstanding a number of protected constitutional rights, and thus permits a legislature (federal or provincial) to partially derogate from the *Charter*. The Court's case law has admitted since 1988 that recourse to section 33 need only comply with the prescribed formalities to be valid, without any other substantive conditions.[47]

Recent uses of the notwithstanding clause to shield provincial legislation from constitutional review in Quebec[48] and Ontario[49] have been criticized for being pre-emptive and trivialized. Some have long argued for the clause to be used only after a judicial declaration of unconstitutionality, as part of a dialogue between the judiciary and legislator.[50] It remains an open question whether the federal government proceeds with its reference and, if so, whether the Supreme Court will agree to overturn the long-standing precedent of constraining the application of section 33.

V. FURTHER READING

Richard Albert & Leonid Sirota, eds, *A Written Constitution for Quebec?* (Montreal: Mc Gill-Queen's University Press, 2023).

Bryan P. Schwartz & Darcy L. Macpherson, eds, *Underneath the Golden Boy,* (2022) 45:2 Manitoba Law Journal.

Dave Guénette, *Le fédéralisme consociatif et la révision constitutionnelle. Perspective comparative sur la Belgique, le Canada et la Suisse* (Québec: Presses de l'Université Laval, 2023).

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

44 Quebec, Secrétariat du Québec aux relations canadiennes, *Codification administrative de la Loi constitutionnelle de 1867 et du Canada Act 1982*, 2nd ed, (Quebec : Ministère du Conseil exécutif, 2022).

45 "Justin Trudeau is (rightly) courting a fight over the notwithstanding clause," *The Globe and Mail* (25 January 2023), online : <https://www.theglobeandmail.com/opinion/editorials/article-justin-trudeau-is-rightly-courting-a-fight-over-the-notwithstanding/>.

46 *Canadian Charter of Rights and Freedoms*, s. 33, Part I of the *Constitution Act, 1982*, *supra* n. 2.

47 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712.

48 *Act respecting the laicity of the State*, CQLR c L-0.3, s. 34 and *An Act respecting French, the official and common language of Québec*, SQ 2022, c 14, s. 121.

49 *Protecting Elections and Defending Democracy Act, 2021*, SO 2021, c 31, s. 53.1(1) and *Keeping Students in Class Act, 2022*, SO 2022, c 19, s. 13(1) (since repealed).

50 See Hon. Peter Lougheed, "Why a Notwithstanding Clause ?", (1998) *Points of View*, no 6.

Cape Verde

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I. INTRODUCTION

There were no major changes in 2022 to the Cabo Verde Constitution (BL) which was adopted in 1992. This year's political agenda was not marked using the formal procedure of constitutional reform. The Constitutional Convention and Revision Commission (CCVV) did not recognize any constitutional convention, nor did it incorporate previously non-included rights in the bill of rights. Furthermore, there were no clear informal changes to the constitutional norms. However, at the academic level, at least one publication addressing questions or domains relevant to constitutional reform was published. With this general assessment in mind, this report—the third in this global review of constitutional reform—presents proposed, failed, and successful constitutional reforms (II), discusses the scope of those reforms and the role of the constitutional jurisdiction in ensuring control of the enactment of amendments (III), and finally gives an outlook on constitutional reform for the next year (IV).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. FORMAL CONSTITUTIONAL REFORMS

1.1 CONSTITUTIONAL REFORM BY PARLIAMENT AS THE REFORMING POWER

As emphasized in the 2020 Report,[1] under the concentration model, which characterizes the CV constitutional amendment legal regime, proposals are made by a parliamentary faction or a single Member of Parliament (MP) through a constitutional amendment bill. This bill covers a myriad of amendments to different articles of the Constitution and is subsequently discussed alongside other constitutional amendment bills proposed by their pairs. For this reason, CV formal constitutional amendment procedures can remain dormant for years—the last one being carried out in 2010. Over time, informal proposals and discussions on possible amendments to the Constitution occur in both political and academic circles. Some of those were discussed in the CV public sphere in 2022. Thus, while there was no formal constitutional amendment implemented that year, political actors proposed and discussed some ideas regarding constitutional amendments that could be obtained in the years ahead.

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

In a formal sense, no non-enumerated right was recognized by the CCCV in 2022. However, in one instance, mentioned in *J-50-2022, of 22 December*, written by the current CJ Pina-Delgado, para. 9.2.2-9.2.3,[2] it underscored that even if one could not infer a right to be judged by an impartial court from the independence of the court's clause, under Article 17, paragraph 1, of the Constitution, it could be possible to incorporate that right from article 14, paragraph 1, of the International Covenant on Civil and Political Rights, as well as from Article 26 of the African Charter on Human and People's Rights.

2. INFORMAL CONSTITUTIONAL CHANGE

In 2022, the CCCV didn't recognize constitutional customs or conventions that changed other rules of the BL. Additionally, most constitutional challenges can lead to informal constitutional changes, depending on the manner they are articulated by the plaintiffs and defendants and decided on by the courts. In 2022, a plaintiff's claim that the Constitution allowed him to submit a constitutional complaint to a court of appeals was dismissed by the CCCV with the argument that Article 20 of the BL was absolutely clear when establishing that "to all individuals is recognized a right to petition the CCCV, thorough a constitutional complaint (...)" (*J-36-2022, of 12 August, Ramiro Oliveira v. Barlavento Appeals Court*, written by current CJ Pina-Delgado, para. 5.1.1), which means that no possibility of submitting a constitutional complaint to another court was recognized by the legislation.

The most radical assertion was made by another plaintiff who, appealing to the scholarship of German publicist Otto Bachof, stressed that the fact that the Constitution didn't recognize the possibility of

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

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

arguing a constitutional omission would lead to an incompatibility between the Constitution and "higher laws," namely the Natural Law. The CCCV rejected that claim (*J-50-2022, of 22 December*, *Aniceto dos Santos v. SC,* written by the current CJ Pina-Delgado, para. 3.2.3. and ff), underlining that, even though the Constitution is a repository of innumerous moral values cherished by the Community (para. 3.2.6) it is a self-sufficient instrument that has nothing above it (para. 3.2.5). For the plaintiff's claim to be considered acceptable, it was necessary that the specific moral norm invoked be recognized by the BL (para. 3.2.5). For that matter, the CCCV said that the only parameter of control that could be invoked in such cases had to be constitutional (para. 3.2.5). Regarding the possibility of a constitutional omission being illicit, the CCCV found the idea itself to be absurd. According to the CCCV's reasoning, the option to exclude the possibility of constitutional review of legislative omissions was rather a fundamental option of the drafters unsuitable for any sort of scrutiny (para. 3.2.6).

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. THE SCOPE OF THE (PROPOSED) REFORMS

In 2022, conditions to discuss eventual formal reforms to the Constitution could not be more ideal as it was the year in which public institutions such as the Parliament, the President of the Republic (PR), the Cabinet, and academia commemorated the 30th anniversary of the Constitution.[3] In a certain context the case for constitutional reform was not unanimously supported by all actors. For example, some of these actors such as the Prime Minister (PM),[4] the former President (PR),[5] and the majority party whip,[6] were more inclined to highlight the importance and role of the BL in guaranteeing political stability and basic constitutional rights. However, there were others who emphasized the need of the materialization of the Basic Law in its current form as the current PR[7] and influential constitutional scholar Mário Silva.[8] With the exception of this Public Law Professor, the vast majority that made their voices heard understood that at least minor adjustments would be necessary in due time, and some expressed more enthusiastically about the need of reforming the Constitution. This was the case for one of its main drafters, Professor Wladimir Brito,[9] and to some extent, the Chairperson of the National Assembly,[10] and the Minority Whip.[11]

Most constitutional reform ideas were not new since they were already proposed in different manners in the previous years as reported in this publication. These ideas were also taken up without adding further details or nuances. This was the case of ideas involving the officialization of the native tongue, acceptance of dual-national citizen's candidacies for PR, possibility of submission of candidacies in parliamentary elections by groups of citizens, and the possibility of creating a parliamentary group with three MPs. A few recurrent ideas as the one underlined in the last report regarding the adoption of a presidential system of government or a semi-presidential system with a strong presidency[12] were criticized, namely by former President Jorge Carlos Fonseca, a public law and criminal law scholar, who said that they were "a mixture of illusion and lack of serious, objective and comprehensive assessment".[13] While most constitutional reform ideas were presented with changed configurations or in a more expanded manner, many other ideas were put forward for the first time, at least if one considers the two previous reports. The latter will be addressed in the following segment of this report.

1.1. CHANGES TO THE CONSTITUTIONAL RIGHTS REGIME

1.1.1. INSERTING A CLAUSE TO PRESERVE THE CENTRALITY OF THE CRIMINAL CODE

This proposal was advanced by former PR and former criminal law professor, Mr. Fonseca, who retrieved[14] a recommendation previously presented by him in 1999.[15] The purpose of this proposal is to limit the approval of new incrimination norms only to cases aimed at replacing an existent criminal code norm or to cases in which incrimination norms are integrated in an act that comprehensively regulates a certain domain. According to the *rationale* used to justify the proposal, it "could guarantee more reflection, balancing, and moderation in the use of the *jus puniendi* of the State, *rectius*, of the legislator."[16]

1.1.2. INSERTING A CLAUSE TO RECOGNIZE A PRINCIPLE OF THE CRIMINAL LAW OF THE 'HARM' (*BEM JURÍDICO*)

Additionally, former President Fonseca proposed the inclusion of a rule in recognizing a principle of the 'Criminal Law of the Harm.' This principle argued that acts or omissions should only be considered crimes when they cause harm. Likewise, this proposal was already made by

3 See: https://expressodasilhas.cv/politica/2022/09/24/especial-xxx-aniversario-da-constituicao-da-republica-cinco-personalidades-analisam-os-30-anos-de-vigencia-da-constituicao-da-republica/82195

4 https://inforpress.cv/30-anos-da-constituicao-primeiro-ministro-entende-que-nao-e-urgente-revisao-da-constituicao/

5 https://inforpress.cv/nao-ha-nenhuma-urgencia-para-a-revisao-constitucional-em-cabo-verde-jorge-carlos-fonseca/.

6 https://expressodasilhas.cv/politica/2022/10/08/paulo-veiga-apela-aos-deputados-a-discutirem-ideias-e-politicas-e-nao-pessoas-e-coisas/82398.

7 https://expressodasilhas.cv/politica/2022/10/15/30-anos-da-constituicao-pr-defende-profundas-mudancas-e-pm-entende-que-revisao-nao-e-urgente/82514.

8 https://expressodasilhas.cv/politica/2022/09/24/mario-silva-o-nivel-de-consenso-hoje-e-elevadissimo-gracas-a-reconciliacao-constitucional/82167.

9 José Vicente Lopes, 'Wladimir Brito: Não podemos continuar com uma Constituição pensada em 1992 e esquecer que o mundo mudou', *A Nação*, N. 789, Sup., 2.

10 https://inforpress.cv/30-anos-da-constituicao-presidente-da-an-aponta-questoes-a-serem-debatidas-no-ambito-da-revisao-da-constituicao/.

11 https://inforpress.cv/30-anos-da-constituicao-paicv-defende-avaliacao-das-praticas-dos-actores-politicos-na-aplicacao-da-constituicao/.

12 *The International Review of Constitutional Reform [IRCR] 2021*, L.R. Barroso and R. Albert (eds.) (Program of Constitutional Studies at the University of Texas at Austin/International Forum for the Future of Constitutionalism 2022), 47.

13 https://expressodasilhas.cv/politica/2022/09/24/jorge-carlos-fonseca-nos-ultimos-anos-se-tem-assistido-a-uma-visivel-extensao-e-fortalecimento-do-que-podemos-chamar-cultura-da-constituicao-no-pais/82166

14 https://expressodasilhas.cv/politica/2022/09/24/jorge-carlos-fonseca-nos-ultimos-anos-se-tem-assistido-a-uma-visivel-extensao-e-fortalecimento-do-que-podemos-chamar-cultura-da-constituicao-no-pais/82166

15 'Súmula das Principais Sugestões e Propostas Feitas Durante o Colóquio da Praia, Organizado pela *Direito e Cidadania*, e o Ciclo de Conferências sobre a Revisão Constitucional em Cabo Verde, Organizado pela *Direito e Cidadania*, em Colaboração com a Associação dos Magistrados de Cabo Verde a Secção Nacional da *Ad-Jus*', Special Number: Revisão Constitucional, *Direito e Cidadania* (1999), 151-156, para. 4.

16 *Id.*

former President Fonseca in 1999,[17] with a construction which suggested the following: "Crimes should be only established when there is a situation that violates a legal value of constitutional relevance, not being punishable in any situation where there is a behavior that does not cause harm." As presented in 1999, this proposal was presented as a manner of sending a message to the legislator that the "incrimination weapon" should solely be used to defend fundamental values enshrined in the Constitution rather than for "promotional purposes."[18]

1.1.3. STRENGTHENING THE CONSTITUTIONAL PROTECTION OF THE FREEDOM OF THE PRESS

Apparently, the motivation behind the requests to reinforce the constitution protection of the freedom of press was the launching of criminal probes against journalists who allegedly published information and materials that were still under investigation by the Public Prosecutors Office.[19] Both the Speaker of the House[20] and the Minority Whip,[21] without much refinement, stressed the need to discuss and reinforce the constitutional protection of the freedom of the press, respectively.

1.1.4. RESTRICTION OF RIGHTS DURING PANDEMIC PERIODS

As the former Health Minister has already suggested in 2020,[22] Mr. Casimiro de Pina stressed the need to revisit some aspects of constitutional exception,[23] namely its proposals of 2021 of a constitutional mention to mandatory isolation of persons with infectious diseases.[24]

1.2. CHANGES TO THE POLITICAL AND ELECTORAL SYSTEM

1.2.1 REPEAL OR CLARIFICATION OF THE REGIME OF SUBSTITUTION OF THE PR

Article 141 of the Constitution establishes that when the PR is temporarily absent abroad, as well as in cases of the office being vacant, he/she shall be replaced by the Speaker of Parliament (SoP) or, if the SoP is prevented from doing this, by the Deputy SoP. In 2017, the CCCV ruled that the SoP violated the Constitution—namely the separation of powers principle. The reasoning behind the CCCV's decision was that while assuming *ad interim* the role of Acting PR, he presided over parliamentary sessions (J-27/2017, written by then CJ Semedo). In doing so, the CCCV rejected the idea that it was suitable to promote an interpretation of that clause adapted to alleged political and technological developments. The court emphasized that it was no business of the courts to repeal that rule, namely because no constitutional custom was recognized to state otherwise. As reported in 2020, the UCID, a political party, proposed the insertion of a norm in the Constitution to state that the Acting PR is prevented from performing acts that are manifestly incompatible with the functions of PR.[25] Currently, other political actors, namely the former PR Mr. Fonseca,[26] the PM,[27] and the Chairperson of the Parliament,[28] are entertaining the idea of repealing that clause with the argument that it is unsustainable and illogical to have two presidents in functions simultaneously, one abroad representing the State and the other—the acting one—in CV, promulgating and vetoing laws.[29]

1.2.2. REDUCTION IN THE NUMBER OF MEMBERS OF PARLIAMENT

The reduction in the number of MPs, which is a recurrent theme in constitutional reform discussions in CV,[30] was raised again by MPD back-bencher and party leader hopeful, Mr. Dias, who expanded on his idea of reducing the number of MPs by proposing a specific number of 52 representatives.[31]

1.2.3. RECOGNITION OF ADDITIONAL ELECTORAL DISTRICTS IN EACH ISLAND

This proposal was made by scholar Brito, who argued that in order to promote territorial and communitarian cohesion in an Archipelagic State, it would be adequate to establish an electoral system with an additional district in each Island to represent it as a whole.[32] These positions should only be open to independent candidates selected in a separate electoral list and that, once elected, should be held accountable directly to the electorate and sit with them regularly. In order to avoid an increase in the total number of MPs, the seats reserved to political parties' lists should be reduced proportionally.[33]

1.2.4. LIMITATION OF TERMS OF OFFICE OF OTHER PUBLIC OFFICIALS

In his broad program to reform the State, Mr. Dias also proposed the adoption of rules to limit the time in office of the PM to ten years and of mayors to three mandates, which would lead to a maximum of twelve years in this position.[34] The current text of the Constitution has no rule to limit the duration of the mandates of holders for both offices.

17 *Id.*, para. 5.
18 *Id.*
19 https://www.dw.com/pt-002/liberdade-de-imprensa-amea%C3%A7ada-em-cabo-verde/a-60640360
20 https://inforpress.cv/30-anos-da-constituicao-presidente-da-an-aponta-questoes-a-serem-debatidas-no-ambito-da-revisao-da-constituicao/.
21 https://inforpress.cv/30-anos-da-constituicao-paicv-defende-avaliacao-das-praticas-dos-actores-politicos-na-aplicacao-da-constituicao/.
22 *ICRC 2020*, 1.2. A, 61.
23 https://expressodasilhas.cv/politica/2022/09/24/o-proprio-poder-judicial-ainda-nao-assumiu-na-plenitude-a-supremacia-da-constituicao/82189
24 C. de Pina, *Textos sobre Direito de Emergência e outros Estudos* (Chefia do Governo 2021) 44.
25 *IRCR 2020*, 62, 1.3. F.
26 https://expressodasilhas.cv/politica/2022/09/24/jorge-carlos-fonseca-nos-ultimos-anos-se-tem-assistido-a-uma-visivel-extensao-e-fortalecimento-do-que--podemos-chamar-cultura-da-constituicao-no-pais/82166
27 https://www.asemana.publ.cv/?PM-de-Cabo-Verde-aponta-aspetos-para-possivel-revisao-da-Constituicao-ainda&ak=1.
28 https://inforpress.cv/30-anos-da-constituicao-presidente-da-an-aponta-questoes-a-serem-debatidas-no-ambito-da-revisao-da-constituicao/.
29 https://expressodasilhas.cv/politica/2022/09/24/jorge-carlos-fonseca-nos-ultimos-anos-se-tem-assistido-a-uma-visivel-extensao-e-fortalecimento-do-que--podemos-chamar-cultura-da-constituicao-no-pais/82166
30 *IRCR 2020*, 62.
31 https://www.asemana.publ.cv/?Parlamento-Deputado-do-MpD-defende-contencao-das-despesas-publicas&ak=1
32 W. Brito, *Que Constituição para a Sociedade Complexa?* (Presidência da República 2022), 31-32.
33 Id., 33
34 https://www.asemana.publ.cv/?Parlamento-Deputado-do-MpD-defende-contencao-das-despesas-publicas&ak=1

1.2.5. SUPPRESSION OF THE PLURALITY REQUIREMENT IN ORDER FOR THE PR TO CHOOSE MEMBERS OF THE COUNCIL OF THE REPUBLIC

Under Article 253, the Council of the Republic is established as a PR consultancy organ. Besides being composed of holders of other public offices and former PRs, the Council also consists of five citizens. Three of these citizens must be chosen by the PR considering the different political sensibilities represented at Parliament and cannot be holders of national offices or elected local officials. Former PR Fonseca stressed that such a conditionality should be removed. With the argument presented by scholar Brito that in his understanding, the requirement is innocuous because it was very difficult to scrutinize if it is duly fulfilled by the Head of State.[35]

1.2.6. CLARIFICATION OF THE DIVISION OF POWERS BETWEEN THE PR AND THE CABINET

Professor Brito has also highlighted the need for the clarification of the division of powers scheme between the PR and the Cabinet in order to prevent constitutional conflicts between these two branches of Government. In that sense, according to his ideas, the PR should have the exclusive power to appoint the Attorney-General, the President of the Court of Auditors, the Chief of Staff, and the Vice-Chief of Staff of the Armed Forces.[36] Additionally, the Constitution should be reformed to establish a monopoly of the external representation of the State in the benefit of the PR and a duty of the Cabinet to inform him of any foreign policy initiatives put forward by the State.[37]

1.2.7. CLARIFICATION OF POWERS BETWEEN PARLIAMENT AND THE CABINET IN CONSTITUTIONAL EXCEPTION PERIODS

Ms. Ligia Dias Fonseca, former CV Bar Association President and former First Lady, underscored the need to outline the powers of the State towards individuals in situations of pandemic crisis and limit what seems to be an allegation of usurpation of Parliamentary Power by the Cabinet in such periods of constitutional exception.[38] Professor Brito also underlined the importance of constitutional regulation of what he referred to as "the state of health and environmental emergency." Professor Brito stated that this would essentially mirror the state of siege and the state of emergency regimes recognized by the Constitution.[39]

1.2.8. PUBLIC CONTRACTS PUBLICITY

Professor Brito also proposed a rule aimed at conditioning the validity of any contract concluded in the framework of public procurement to its publicity.[40] The requirement of publicity would be the same as the one applied to the legislation.[41]

1.2.9. CHANGES IN THE CONSTITUTIONAL REGIME OF THE ECONOMIC, SOCIAL AND ENVIRONMENTAL COUNCIL AND OF THE COMMUNITY'S COUNCIL

This matter was raised by Ms. Dias Fonseca during her discussion about constitutional reform, in which she called for a change in the process of how members of the two advisory councils are selected. However, there was little development regarding her proposal.[42] Professor Brito also stressed the need to constitutionalize the rules on the composition of the same organs.[43] Specifically, Brito proposed that Article 258, paragraph 1, of the BL, according to which "[t]he Council of the Communities shall be an advisory body for affairs related to CV communities abroad" adopts the following wording: "[t]he Council of the Communities shall be an advisory body of the PR and the Cabinet for affairs related to the interaction between the CV communities abroad and in the country."[44]

1.2.10. REPEAL OF THE REDUCTION OF DIASPORA VOTE CLAUSE

Professor Brito criticized Article 113, paragraph 2, of the Constitution which states: "If the sum of the votes of voters registered abroad exceed one fifth of the votes counted within the national territory, the votes shall be converted into a number equal to that limit and the number of votes received by each candidate shall be equally converted into the respective proportion." Professor Brito also stressed that for all electors to be treated equally, this clause should be eliminated.[45]

1.3. CHANGES RELATED TO THE JUDICIAL SYSTEM

1.3.1. POWERS OF THE PR TO SELECT THE SUPREME COURT (SC) PRESIDENT AND THE JUDICIAL COUNCIL PRESIDENT

Professor Fonseca highlighted that the constitutional regime of the selection process for the Supreme Court (SC) President and Judicial Council President should be changed. This would allow the PR to freely choose the holders of those offices, without the current constraints that arguably imposes upon him the candidate elected by their respective peers, as respectively established by Article 216, paragraph 4, and Article 223, paragraph 6, of the Constitution.[46]

35 https://expressodasilhas.cv/politica/2022/09/24/jorge-carlos-fonseca-nos-ultimos-anos-se-tem-assistido-a-uma-visivel-extensao-e-fortalecimento-do-que-podemos-chamar-cultura-da-constituicao-no-pais/82166
36 W. Brito, *Que Constituição para a Sociedade Complexa?*, 32-34.
37 Id., 34-35.
38 https://expressodasilhas.cv/politica/2022/09/24/hoje-o-cidadao-tem-maior-e-melhor-acesso-a-justica-do-que-tinha-ha-30-anos/82188
39 Wladimir Brito, *Que Constituição para a Sociedade Complexa?*, 43.
40 Id., 37.
41 Id.
42 https://expressodasilhas.cv/politica/2022/09/24/hoje-o-cidadao-tem-maior-e-melhor-acesso-a-justica-do-que-tinha-ha-30-anos/82188
43 W. Brito, *Que Constituição para a Sociedade Complexa?*, 43.
44 Id., 42.
45 Id., 43.
46 https://expressodasilhas.cv/politica/2022/09/24/jorge-carlos-fonseca-nos-ultimos-anos-se-tem-assistido-a-uma-visivel-extensao-e-fortalecimento-do-que-podemos-chamar-cultura-da-constituicao-no-pais/82166

1.3.2. STRENGTHENING THE MECHANISM OF CONSTITUTIONAL REVIEW

Mr. de Pina, a former presidential candidate in the 2021 elections, spoke in favor of strengthening the system of constitutional review, but without much further explanation by simply stressing its necessity to control "unjust or arbitrary acts" and to improve the protection of constitutional rights of citizens.[47] In contrast, Ms. Fonseca put forward a concrete proposal by stating that the Constitution should recognize standing to the CV Bar Association to refer cases to the CCCV for the review of legislation.[48]

1.3.3. EXTENSION OF THE DEADLINE TO REQUEST A PREVENTIVE REVIEW OF CONSTITUTIONALITY OF A NORM

As reported last year, former President Mr. Fonseca complained that the eight days deadline established by Article 278 (3) of the BL to refer a case to the CCCV to review the constitutionality of a legal norm included in a bill sent to him for promulgation purposes was manifestly inadequate in situations where he simultaneously "received dozens of legal diplomas (...)"[49] and proposed that it should be extended to "ten or twelve days." Alternatively, the proposal could exclude non-working days when counting court deadlines. This year, he proposed an extension to ten or eight business days specifically.[50]

1.3.4. POSSIBILITY OF SELECTING MEMBERS OF THE SC THAT ARE NOT CAREER JUDGES

Mr. Casimiro de Pina, a lawyer, and opinion-maker, proposed a change to Article 216, paragraph 3, of the Constitution that limits access to the SC only to career judges. If implemented, this proposal would open the institution to other jurists specialized on the subjects regarding the competence of the court, namely criminal law.[51]

1.3.5. ADDITIONAL PROPOSALS RELATED TO THE FUNCTIONING OF THE JUDICIAL SYSTEM

Professor Brito also offered ideas related to the reform of the judicial system, which could lead to certain constitutional changes. The first idea is to grant a budgetary initiative to the Judicial Council.[52] Brito's second proposal is to establish an obligation of the President of that same organ to present and debate the Report of the State of Justice in Parliament, after being submitted to the PR.[53] The third idea related to judicial reform is to recognize the possibility of the PR to present his view on the state of justice in the Opening of Judicial Year Ceremony.[54] Finally, Professor Brito proposed to insert an injunction directed at Parliament to approve a Judges Deontological Code in the Constitution.[55]

1.4. EVALUATION AND EFFECTS OF THE PROPOSED REFORMS

Despite the discussions that can be held on their necessity and merits and of their political feasibility, most of the proposed reforms of the BL would fall under the constitutional reform power of Parliament and would not raise much debate. However, there are some proposals that could be very consequential. Specifically, Professor Brito's proposals on the division of powers between the PR and the Cabinet would tilt the system of government in favor of the PR in a manner that could be at odds with local political traditions. This proposal could be an increasing factor of political tension as far as it would recognize the legitimacy of the Chief of State to actively intervene in most businesses of the state and the functioning of other branches of government, namely the judiciary. These proposals which are designed to change the political system should be carefully discussed to avoid significantly altering the model that guarantees governmental stability – one of its main assets – that is the result of a system dominated by two political parties. Certain matters addressed by the proposals are already covered by the Constitution or could be better dealt with by courts through judicial review and the application of the BL. These and other proposals would have at best a symbolic effect. Likewise, with the proposals that are designed for the constitutionalization of questions that are regulated by ordinary legislation. In a constitutional system marked by over-constitutionalization, any addition to the text should be well thought out. Perhaps the timeliest proposals relate to the necessity of legitimizing personal liberty restrictions for public health reasons and the possibility of non-career judges applying for a position at the SC, that could assure the necessary plurality of that organ and, at the same time, provide the court with potentially specialized expertise in core domains including criminal law, civil law, and administrative law.

2. CONTROL OF CONSTITUTIONAL REFORM

Even though no specific challenge against a constitutional reform act was brought in 2022, the CCCV,[56] by means of an *obiter dictum (J-50-2022, of 22 December, Aniceto dos Santos v. SC,* written by the current CJ Pina-Delgado, para. 3.2.5), reaffirmed its power to exercise constitutional control when two situations are present. Firstly, the CCCV affirmed its authority if the norm is inserted in the Constitution by an amendment act that does not follow one of the limits on constitutional reform, namely by the eternalization provision. Secondly, the CCCV asserted that it can exercise constitutional review if the amendment is marked by an "intrinsic incompatibility" with the "set of values and principles recognized by the Basic Law itself that fix the identity of the Constitution" (para. 3.2.5), adding that in this last circumstance, the "constitutional review is always possible as a way to protect the Constitutional core from disfiguring reforms."

47 https://expressodasilhas.cv/politica/2022/09/24/o-proprio-poder-judicial-ainda-nao-assumiu-na-plenitude-a-supremacia-da-constituicao/82189
48 https://expressodasilhas.cv/politica/2022/09/24/hoje-o-cidadao-tem-maior-e-melhor-acesso-a-justica-do-que-tinha-ha-30-anos/82188
49 *IRCR 2021*, 49, 1.3 A.
50 https://expressodasilhas.cv/politica/2022/09/24/jorge-carlos-fonseca-nos-ultimos-anos-se-tem-assistido-a-uma-visivel-extensao-e-fortalecimento-do-que-podemos-chamar-cultura-da-constituicao-no-pais/82166
51 https://expressodasilhas.cv/politica/2022/09/24/o-proprio-poder-judicial-ainda-nao-assumiu-na-plenitude-a-supremacia-da-constituicao/82189
52 W. Brito, *Que Constituição para a Sociedade Complexa?*, 40.
53 Id., 39-40
54 Id., 40.
55 Id., 40.
56 See J. Pina-Delgado, "Constitutional Court of Cape Verde", *MPECCol* (OUP 2022), available at https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e825.

IV. LOOKING AHEAD

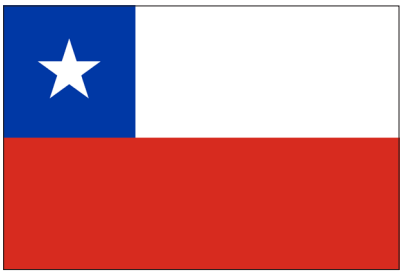
While it is possible that the formal procedure for constitutional reform will be triggered in 2023, it is uncertain that this will happen in Cape Verde. In addition, it is rare that the parliamentary factions could agree on a text that could command the required majority. On the other hand, it is always possible that the CCCV recognizes the incorporation of a treaty or statutory rights into the Constitution and constitutional changes operated by constitutional customs.

V. FURTHER READING

Brito, W, *Que Constituição para a Sociedade Complexa?* (Presidência da República 2022).

Pina-Delgado, J, "Constitutional Court of Cape Verde", *MPECCol* (OUP 2022), available at https://oxcon.ouplaw.com/display/10.1093/law-mpeccol/law-mpeccol-e825

Chile



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I. INTRODUCTION

In our last report on constitutional change in Chile, we argued that the most significant constitutional milestone in our country, since the return of democracy, would be the constitutional referendum held on September 4, 2022. On this day Chileans had to approve or reject the constitutional draft proposed by the Constitutional Convention of 2021. The result was categorical: 62% rejected the proposed Constitution for reasons still under discussion[1].

We concluded the 2021 report by saying: "It could even happen, although unlikely, that the rejection of the new Constitution could prevail." And then we added: "If the rejection triumphs, the Convention will have failed, and a new political agreement will probably be necessary to overcome the still unsolved constitutional challenge."[2] Precisely, this is what has happened. As such, in the words of Richard Albert (2019), the year 2022 was characterized by a constitutional making process but also breaking and amending our current fundamental law.

The following pages will delve into how this process unfolded in 2022 and what has meant reaching Chile's third constitutional process. We will also discuss the fact that after several reforms, we currently are under a transitional constitutional text and other constitutional amendments and their debates that occurred parallel to the discussion of the possibility of having a new constitution.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

There were two significant focuses of constitutional change in the Chilean jurisdiction during 2022. On the one hand, the constitution-making process of 2021-2022 underwent the final phases of citizen participation, discussion of the overall draft, and delivery of the proposal. It finally ended with a ratifying compulsory referendum necessary to enact the new text. We will discuss this further, but for now, we can state in advance that the proposed Constitution did not conceit the majority approval. On the other hand, Congress and the representatives continued legislating and discussing constitutional amendments. Four of the proposed reforms failed, while the other four were ultimately successful.

Over 120 constitutional reform bills were proposed in Congress on various subjects in 2022. Several of the proposed amendments were even questionably matters of constitutional reform and were related mainly to the contingent situation of the country. During the past few years, Chile has suffered institutional erosion that has considerably impacted the Constitution. To some extent, it has meant diluting the boundaries of what constitutes a constitutional matter and what can be constitutional reform. In this scenario, many amendments were presented through the undermining of procedural rules stated by the Constitution itself (*v.g.,* the Executive's exclusive initiative). This process started with a pressured discussion generated during the 2021 period; due to the political, social, and economic crisis that unfolded crossed with the COVID-19 pandemic, which later crystallized in 2022.

Furthermore, the proposed constitutional reforms can be categorized into four main topics relating to the country's overall situation. Firstly, Congress and the Executive presented a set of constitutional reforms related to the (i) rising security crises in the North and South of Chile. A complex migratory crisis developed in northern Chile with an unexpected and unprecedented overflow of the border. This situation produced subsequent humanitarian issues (on housing, health, and labor) that were also related to new endangerment situations (higher crime rate and rising immigrant population in prisons).[3] On the other hand, there is a very complex ongoing situation related to arson attacks on property and industries, illegal land takeovers, and roadblocks in the south of Chile. This situation led to several constitutional amendments proposed that intended to increase public safety by furthering the emergency powers of the Executive and giving additional faculties to the Armed Forces (such as border patrol). Nevertheless, only the reform that allows the Armed Forces to help in the custody of "critical infrastructure" for national security was ultimately successful, having been approved in January 2023.

Secondly, constitutional amendments related to the Chilean (ii) economic situation were proposed. Considering Chile was slowly exiting the pandemic and starting to pull off financial incentives, inflation and unemployment were some of the public's primary concerns. This

1 SERVEL, 'Plebiscito 2022' (2022) https://historico.servel.cl/servel/app/index.php?r=EleccionesGenerico&id=. Accessed on April 30, 2023.

2 Sebastián Soto and Magdalena Ortega, 'Chile', in Luis Roberto Barroso and Richard Albert (eds), *The 2021 International Review of Constitutional Reform* (Published by the Constitutional Studies Program at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism 2022).

3 There isn't conclusive evidence to support the claim that immigration is the main cause of higher crime rates.

economic situation translated into proposed amendments that created tax exemptions on consumption or even real estate, also amendments that sought to allow further social security withdrawals through constitutional reform[4]. See, for example, bill Nº15.549-07, 15.404-07, or 15.441-07. These were all unsuccessful constitutional reforms.

Thirdly, significant reforms were proposed regarding the (iii) political establishment. For example, many sought to modify aspects of the appointment process of some authorities (such as the Head of the National Prosecution's Office[5]), change faculties of the Legislative's oversight on the Executive, or modify the grounds for loss of citizenship, amongst others. These were all motivated by the social and political scenario of the country, which has remained critical of the work and actions of different political actors. However, they were unsuccessful (see, for example, bill Nº15348-07).

Many constitutional reforms were also proposed concerning the (iv) ongoing 2020-2021 constitution-making process. Two proposed reforms were ultimately successful concerning institutional design aspects of the process and elections. First, an amendment introduced modifications to the polling places assignation process, seeking to privilege the proximity between the electoral domicile and the polling place. This new proximity sought to encourage electoral participation for the mandatory referendum and the future as it will apply to every election. Second, an amendment that allowed the resignation of the Convention members, that is, the representatives of the citizens in the constitutional process of 2021-2022. This reform occurred in response to the scandal caused by a lie discovered regarding one of its most notorious members. Both were widely successful.

Furthermore, many amendments related to substantive constitutional issues were raised once the reject option won the mandatory referendum. Thus, rejecting the proposed constitutional text provoked a discussion based on two main axes. On the one hand, some sought to amend the current constitutional text to include aspects of the rejected Constitution. They were related to introducing new rights, such as the right to housing (see bill Nº15.333-07) or the political recognition of indigenous people (see bill 15508-07). These kinds of constitutional amendments were the most proposed in 2022. On the other hand, some sought the continuity of the process: lowering the voting quorums of the current Constitution and enabling a new constitutional process. Both were ultimately successful.

Finally, the mandatory referendum at the end of the Constitutional process raised an intense debate on the need to return to compulsory voting in Chile.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. ON SECURITY CRISIS

Due to the extenuating circumstances, the proposed reforms sought to widen the scope of the current faculties of the Executive and the Armed Forces regarding security. This situation is incredibly delicate, where the security concerns collide with necessary checks on discretionary faculties of the Executive and widen the scope of duties of the armed forces. Furthermore, extending the Armed Forces' responsibilities in public security tasks that are proper for the police and crime control is also problematic. While the increasing attacks in Araucanía, drug trafficking, and illegal immigration in northern Chile are a considerable security challenge, involving the Armed Forces in its combat isn't the most reasonable way forward. The augmentation of the power and control of the State has lowered the democratic constraints, as it has been discussed worldwide due to the COVID-19 pandemic[6].

2. ON ECONOMIC REFORM

After three pension fund withdrawals were approved in 2021, in 2022 a new attempt was made to move forward with a new withdrawal. Having had elections that changed the composition of Congress and with a new Government, the bills were rejected in the first discussion. This rejection entailed closing the debate on the matter for at least one year, significantly closing the constitutional key that allowed representatives to legislate on this issue.[7]

As said, these bills raised discussion on their constitutionality and suitability. Later the insurance companies made an appeal of inapplicability for unconstitutionality against them. This inapplicability sought to declare a constitutional reform precept as unconstitutional in the specific case of life annuities. Seven petitions reached the Constitutional Court through the action of inapplicability[8].

The discussion revolved around formal and substantive aspects. On the formal side, it was debated whether a constitutional reform could be declared unconstitutional through an appeal of inapplicability. By express mandate of the Constitution, this action can only be directed against legal precepts (see current Art. 93 Nº6). However, a majority of the Constitutional Court held that it was possible to challenge the constitutionality of a constitutional rule since, in this case, the rule had a "legal nature" even though it was part of the Constitution[9]. It also added that reviewing the legislative procedure using inapplicability was possible.

Regarding the substantive issue, the Constitutional Court, also by the majority, affirmed that the constitutional reform that allowed withdrawing a percentage of the money destined for life annuities from insurance companies was contrary to the Constitution because it violated the right to property. However, without elaborating in depth whether it was or was not a regulatory taking, the ruling held that there is intangibility in the clauses of these contracts.

The most surprising thing, however, was that this claim was used to declare a constitutional reform unconstitutional for the first time since

4 Sebastián Soto and Magdalena Ortega, 'Chile', in Luis Roberto Barroso and Richard Albert (eds), *The 2021 International Review of Constitutional Reform* (Published by the Constitutional Studies Program at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism 2022).

5 In Spanish "Fiscal Nacional".

6 Alan Greene *Emergency Powers in a Time of Pandemic* (1st ed., Bristol University Press, 2020).

7 Sebastián Soto and Magdalena Ortega, 'Chile', in Luis Roberto Barroso and Richard Albert (eds), *The 2021 International Review of Constitutional Reform* (Published by the Constitutional Studies Program at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism 2022).

8 One of us, Sebastián Soto, must disclose that he was on the legal team representing the State in these cases. The State was defeated in up to five of the seven cases before the Constitutional Court.

9 Renta Nacional Compañía de Seguros de Vida S.A. v. Consejo de Defensa del Estado [2022] STC Nº 11350-2021.

the creation of inapplicability in 1925. However, this one did not deal, as in other countries, with the protection of democracy or the independence of the Judiciary[10]. Instead, the issue was the protection of the property rights of some insurance companies.

It still needs to be made clear the actual effect that these rulings of the Constitutional Court will have since the lawsuits they affect are still being processed in the ordinary justice system. However, what is certain is that this ruling reviewed a constitutional norm as equal to a legal precept in an unprecedented form and then decided against it. Moreover, the contradiction grows further if we consider that in 2021 the constitutional reform was first declared unconstitutional, and later, an equivalent reform was declared constitutional. As such, the inapplicability ruling held a counter-majoritarian role[11].

3. ON CONSTITUTIONAL CHANGE REFORMS

3.1 COMPULSORY VOTING

One of the controversial characteristics of the 2020-2021 constitutional process was the strange combination of having a voluntary entry referendum and a mandatory exit one. After the unprecedented and unpredicted by the polls result of the exit referendum, the public debate about the nature of the right to vote was raised. As a result, representatives presented a bill to modify the constitutional text to return to compulsory voting after ten years of automatic registration in the electoral roll and voluntary balloting. This reform was voted on in 2023 and approved by a comprehensive political majority. This reform was not subject to the Constitutional Court review, as it is not mandatory, nor was it requested by those withstanding to make such a request.

3.2 LOWERING CONSTITUTIONAL QUORUMS

The most relevant constitutional reform was directly related to the need to reassure the continuity of the process. Before rejecting the proposed constitutional text, there was great uncertainty about whether a new constitutional process would be advanced in such a scenario. During this discussion, and before the rejection of the project, a constitutional reform was presented that reduced the supermajority quorums of the current Constitution reforms, from 3/5 or 2/3 of Congress, depending on the chapter of the Constitution, to only 4/7 of the quorum. This new threshold was meant to show that it would be easy to reach an agreement and approve the necessary constitutional reforms for the continuity of the process. This change meant officially, and no longer only symbolically, it had initiated the period in which this jurisdiction is in an *interregnum*, in a constitutional transition period[12].

For this reason, this is a constitutional dismemberment reform. A high supermajority quorum for the Constitution and some specific and relevant laws (subsequently lowered in 2023 as a result of this amendment) were part of the identity of the Chilean Constitution. The supermajority quorums sought to promote the search for broad consensus prior to its modification and thus promote stability. With this modification, the identity of the 1980 Constitution ended. This reform was not subject to the Constitutional Court review, as it is not mandatory, nor was it requested by those withstanding to make such a request.

3.3 THE REJECTION OF THE CONVENTION'S CONSTITUTION AND A NEW CONSTITUTION-MAKING PROCESS

The constitutional referendum on September 4, 2022, overwhelmingly rejected the text proposed by the Constitutional Convention. It was declined all over Chile, in every region, with 85% of the electoral registry participating in the referendum. Even though this option had led the polls since March of 2022, no one could have foreseen the conclusiveness of these results. Moreover, this is highly exceptional in constitutional replacement ratification processes. In fact, from the review of 179 referendums ratifying new constitutions or package reforms around the world, only eleven of them were rejected[13]. Twelve, now that we can count the Chilean referendum.

The reasons behind these results cannot have solely one explanation. However, the radical nature of the proposed text, the complex political and economic situation, the rapid loss of support of the recently elected President Boric, the exclusion of a political sector (the right and center-right), the disdain for the role of political parties, the rise of a populist *ethos*, the poor design of the rules of procedure, the growing loss of legitimacy of the Convention itself, the absence of internal leadership, have been factors highlighted by various studies[14].

Considering this, the triumph of the rejection option is likely due to a confluence of factors. A highlighted aspect was the poor evaluation of the Convention's work. A political scandal that led to the resignation of one of the representatives and the tone of the discussion surrounding the Convention led it to squander its prestige. In the beginning, the problem was the impossibility of condemning violence. Later came the moralizing discourses, the cancellation of adversaries (*v.g.*, the episode in which the names of the members of the Congress who voted against the environmental proposal were read out to the media), and the polarizing friend-enemy logic. All this consolidated a belief that the Convention had not been up to the task. As a result, there was not a deliberative culture worthy of being applauded.

The failure of the Convention was also due to its design and rules of procedure. First and foremost, creating *ad hoc* electoral rules

10 See, for example, David Landau, Rosalind Dixon, and Yaniv Roznai, 'From an Unconstitutional Constitutional Amendment to an Unconstitutional Constitution? Lessons from Honduras' (2019) 8 Global Constitutionalism 40, and Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press 2019), amongst others.

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

12 Regarding constitutional rigidity and an average high threshold for constitutional change, see for example George Tsebelis and Dominic J. Nardi, 'A Long Constitution is a (Positively) Bad Constitution: Evidence from OECD Countries' (2014) British Journal of Political Science.

13 Elkins, Zachary, and Alexander Hudson, 'The Strange Case of the Package Deal: Amendments and Replacements in Constitutional Reform', in Richard Albert, and Richard Stacey (eds), The Limits and Legitimacy of Referendums (Oxford, 2022).

14 See, amongst others, Samuel Issacharoff and Sergio Verdugo, 'The Uncertain Future of Constitutional Democracy in the Era of Populism: Chile and Beyond' (2023) NYU School of Law, Public Law Research Paper, Forthcoming; Eduardo Alemán and Patricio Navia 'Chile's Failed Constitution: Democracy Wins' (2023) Journal of Democracy 34, No. 2, 90; Jennifer Piscopo and Peter M. Siavelis 'Chile's Constitutional Chaos' (2023) Journal of Democracy 34, 1, 141; Guillermo Larraín, Gabriel Negretto, and Stefan Voigt 'How not to write a constitution: lessons from Chile' (2023) Public Choice Vol, 194, 233.

strengthened the power of independents and weakened the representation of political parties in the Convention. These rules considerably eroded the internal discipline of the different factions within the Convention, encouraging a text that gradually added content, sometimes highly detailed, to gain support. There was also a strict procedure that replicated all the debates in the plenary without the committees being able to become an authentic negotiation space. Thus, for example, it was expected that after weeks of intense work, the committees would send their reports to the plenary, only to have them massively rejected. This situation was not only caused because the majority required for approval in the commissions differed from that of the plenary (a simple majority and super majority of 2/3, respectively). Nevertheless, the committees were also understood not as engine rooms but as spearheads to pressure the plenary to approve norms. In addition to other problems, the inability to manage success in the participatory process led to considerable disappointment.

A third relevant factor, possibly the result of the design problems, was the project's content: the text written by the Convention was extensive and did not concede the necessary support. For example, the new political system was questioned because it did not encourage political coalitions, was silent on the electoral and party system, and gave more power to the lower house to the detriment of the President and the Senate; the latter, with 200 years of history, disappeared to make way for a "Chamber of Regions." Moreover, the proposal failed to allay common fears in the Latin American region, such as the risk of democracy being destroyed by a populist leader. There was also an excessive catalog of rights (more than one hundred explicitly recognized), a long list of constitutional principles (*v.g.* seven for international relations, eleven for the new national health system, nine for social security, among others), and many highly specific clauses (firefighters, night sky, rurality, etc.).

In this line, a recent study combining survey data and analysis through digital techniques of their open responses on the options of Approve and Reject indicate that the semantics around the Reject option is structured around a generalized disappointment, a substantive criticism of the normative overload of the proposal and the conduct of the conventions. Even though concepts familiar to those who supported the Approval option also derive from it, such as the aspiration for change[15].

The new constitutional process began to be forged days after the plebiscite. The center-right parties had announced during the electoral campaign that, in case the rejection succeeded, they were committed to initiating a new process to change the Constitution that would correct the defects of the previous one. Thus, on December 20th, 2022, the *Agreement for Chile* was signed, establishing the guidelines to carry out a new process. This political agreement was then presented via constitutional reform and incorporated into the Constitution in January 2023 (Law Nº 21.533) and will be conducted throughout 2023. This reform was not subject to the Constitutional Court review, as it is not mandatory, nor was it requested by those with a stand to make such a request.

15 Aldo Mascareño, Juan Rozas, Benjamín Lang y Pablo A. Henríquez, 'Apruebo y rechazo en septiembre 2022 Expectativas, decepciones y horizontes comunes para el nuevo proceso constitucional' (Punto de Referencia CEP, January 2023) < https://www.cepchile.cl/wp-content/uploads/2023/01/pder643_mascarenoetal.pdf>

IV. LOOKING AHEAD

The new process starts with an Experts Committee that must elaborate a preliminary draft (March 6 - June 6). The Committee will be followed by an elected council of 50 people that, in five months, must review and modify the text (June 7 to November 7). Finally, there will be a mandatory referendum to approve or reject the new text on December 17, 2023.

One can quickly notice that each of the provisions of the new process is a response to the shortcomings of the previous one. For example, if the first process was developed in an assembly of 155 mostly independent people, the second process opted for an elected council of 50 people without lists of independents. If under the first process, the first four months of the discussion were dedicated solely to its internal organization and the procedures to approve a new text; the second process preferred to entrust that task to a commission of experienced officials of Congress who proposed to the Congress itself an operating regulation before the beginning of the process. While in the first process citizen participation could make proposals on any issue, in the second process, citizens can only make specific proposals to the preliminary draft prepared by the Expert Commission. If in the first process, the aim was to *refund* Chile[16], in the second one, twelve *institutional bases* (principles) were agreed upon and written so that essential elements would not be altered (*v.g.*, the rule of law, separation of powers, fundamental rights), and an *ad hoc* body to make them enforceable. If the Convention had 12 months to debate, the Council has only 5.

The year 2023 will be the year of the second opportunity for the constituent process in Chile. This report is being written while the Expert Commission is in operation, yet to learn about the integration of the Council nor the most intense debates the elected councilors will have. For now, the Expert Commission (of which one of us –Sebastián Soto– is its vice president) has worked according to the deadlines and in a tone of dialogue and mutual respect, elaborating a text that shows continuity and changes. However, evaluating the text as a whole is not yet feasible, as there is still a long time to go.

Despite everything, there are risks ahead: disenchantment and fatigue with the constitutional discussion can be seen in the polls. One showed that, even before writing a single word, 44% of citizens thought the new text should be rejected[17]. The economic situation and the daily problems, especially the feeling of insecurity and political disorder, have also tended to generate a reaction against the government and politics in general. Contrary to what Elster announced[18], this time, there has not been much attention on the constitutional discussion, and the work of the Commission does not arouse the passions of the previous process. Maybe this is good news, but if this distance from the citizenry is continuedly maintained, the outcome of the December referendum could once again be negative.

16 This intent was abundantly clear. See, for example, Claudia Heiss, 'Latin America Erupts: Re-founding Chile' (2021) 32 N3 Journal of Democracy 32, where the author states, "Chile's re-foundational moment appears as a great challenge, but also as an opportunity to democratically and peacefully resolve a long-running political conflict."

17 CADEM. Plaza Pública 480. https://cadem.cl/wp-content/uploads/2023/03/Track-PP-480-Marzo-S4-VF-1.pdf. Accessed on April 30, 2023.

18 Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 Duke LJ 364.

V. FURTHER READING

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China

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I. INTRODUCTION

Constitutional reform is about constitutional innovation and innovative constitutionalism. It goes beyond ideological perspectives. Because of its significance, focusing on constitutional reform is the genius of this international review journal.

The year 2022 marks the 40th anniversary of China's 1982 Constitution. It is indeed a year of constitutional reform for China, but this approach to reform is not court centered. That said, it does not imply constitutional reform has been disregarded in China.

For the past four decades since 1982, China has been pursuing an opening-up and reform of the Constitution, with emphasis on state capacity and an efficient government. The 1982 Constitution receives orderly updating for practical reform purposes through five rounds of constitutional amendments: non-public sectors of the economy (1988), market economy (1993), the rule of law (1999), human rights and property rights (2004), and socialism for a new era (2018) have been embedded into the Constitution as the guiding principles for China's national development. For instance, the "great rejuvenation of the Chinese nation" is now the constitutional mandate. In a nutshell, constitutional reforms in China have been wide-ranging, progressive, and consequential.

In 2022, a commemorative discourse emerged regarding the 40th anniversary of China's Constitution and Chinese constitutionalism. President Xi Jinping's personal and public address in reflection of China's Constitution and constitutionalism provided the keynote. This report will provide a summary of President Xi's address in Section II.

There was one landmark constitutional reform in China's governmental system in 2022. It was about the institution of a new fourth governmental branch, i.e., the establishment of the Chinese pattern of ombudsmanship: the supervisor (jianchaguan). Section III of this report highlights the new law on this significant constitutional change.

In March 2023, both the Standing Committee of the National People's Congress (hereafter NPCSC) and the Supreme People's Court (hereafter SPC) produced their respective work reports for the first session of the 14th National People's Congress meeting. Section IV of this essay surveys the key findings in the two work reports.

In Section V, we provide some thoughts on the prospects of Chinese constitutionalism.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. THE 40TH ANNIVERSARY OF CHINA'S REFORM CONSTITUTION: TWO ESSENTIAL DOCUMENTS IN 2022

Since China's Constitution has endured for four decades, it has surpassed the average "longevity" of constitutions (Ginsburg, 2011). Compared to post-1990 new constitutions which adopted court-centered new constitutionalism up to date, China's Constitution provides a relatively wider perspective for constitutional reform. Above all, China's 1982 Constitution is an "opening-up and reform" constitution, under which China has witnessed record economic growth in world history. The Constitution may not be something else, but it must be a national development constitution. There need to be development matters for both a reform constitution and a constitutional reform. An efficient China's Constitution measured by national development, at a minimum, is not a "sham constitution" (Law, 2013), or a "fig leaf" (Ackerman, 2019). However, far different from the ideal type of Western constitutional laws, China's Constitution is a reform constitution that works for both the rich and poor, as well as capitalists and socialists.

In 2022, two documents—a brief essay plus a short paragraph of a report from President Xi Jinping—jointly provided an official overview and outlook of constitutional reforms in China.

1.1. CHINESE MODERNIZATION: "CONSTITUTION AT ITS CORE"

In his report to the 20th National Congress of the Communist Party of China (hereafter CPCNC) on October 16, President Xi Jinping pronounced the following characterization of the success of China's national reform as "Chinese modernization":

> [S]ince the founding of the People's Republic of China in 1949, especially since the launch of reform and opening-up in 1978… we have succeeded in advancing and expanding Chinese modernization.
> Chinese modernization… contains elements that are common to the modernization processes of all countries, but it is more

> characterized by features that are unique to the Chinese context. It is the modernization of a huge population. It is the modernization of common prosperity for all. It is the modernization of material and cultural-ethical advancement. It is the modernization of harmony between humanity and nature. It is the modernization of peaceful development.
> The essential requirements of Chinese modernization are as follows: [U]pholding the leadership of the Communist Party of China (CPC leadership is embedded in Article 1 of the Constitution) and socialism with Chinese characteristics, pursuing high-quality development, developing whole-process people's democracy, enriching the people's cultural lives, achieving common prosperity for all, promoting harmony between humanity and nature, building a human community with a shared future, and creating a new form of human advancement.

Connected to an implicit understanding in Chinese modernization, President Xi emphasizes "the comprehensive advancement of law-based governance has been a profound revolution in China's governance." It starts from the emphasis of "revolution in China's governance" that President Xi calls for "improving the socialist legal system with Chinese characteristics with the Constitution at its core."

President Xi sets out one paragraph to elaborate on the meaning of China's legal system "with the Constitution at its core":

> Law-based governance and law-based exercise of state power begin with compliance with the Constitution.
> We must remain firmly committed to…all of which are mandated by the Constitution.
> We will better implement the Constitution and conduct constitutional oversight, and we will improve the systems for ensuring full compliance with the Constitution, to give better play to the Constitution's important role in China's governance and uphold its authority.

By emphasizing "the Constitution at its core", China is to "give better play to the Constitution's important role in China's governance and uphold its authority." Doing so demands "full compliance with the Constitution", "firmly committed to" all constitutional mandates, "better implement[ing] the Constitution and conduct[ing] constitutional oversight."

To summarize, the goal of constitutional reform in China in the foreseeable future will be the enhanced and ascending role of the Constitution in the country's national governance system. This is good news for a world that is currently troubled by the symptoms of "constitutional alienation" and "constitutional decay" (see e.g., Sunstein 2018; Ackerman, 2019).

1.2. IMPLEMENTING THE CONSTITUTION: THE GOAL OF CONSTITUTIONAL REFORM

In his brief essay commemorating the 40th anniversary of the enforcement of the 1982 Constitution, President Xi reiterates the term "implementation of the Constitution" (xianfa shishi) 16 times. He urges the Chinese people to "raise awareness of the Constitution, carry forward the spirit of the Constitution, facilitate the implementation of the Constitution, and better enhance its important role in governing the country."

While recognizing constitutions as the universal symbol of "the progress of human civilization" and "the pillar stone for modernization," President Xi's report underscores the achievement of the socialist Constitution in China as "a democratic constitution in the original sense." Additionally, the Chinese Constitution represents a constitutional innovation, "providing the Chinese wisdom and approach to the progress in the law and civilization."

Particularly for the recent decade (2012-2022) that features a new era for socialism with Chinese characteristics, President Xi wrote:

> [China has] comprehensively enforced and implemented the constitution. China does not hesitate from pursuing innovations in constitutional theories and practices. China has accumulated many fresh experiences, which deepened China's basic knowledge of constitutional institution-buildings."

According to President Xi's essay, there are seven principles of particular importance that have guided constitutional development for the past four decades.

To translate and paraphrase the main points:

> 1. The constitutionality of the Communist Party of China (CPC)'s leadership is the most "marked" characteristic of the Chinese Constitution. (CPC leadership is constitutionalized by Article 1 of the constitution.)
> 2. Popular sovereignty must be abided by all, with clear emphasis on the "people-centered" development of whole-process democracy.
> 3. To exercise the law-based governance of China, we must first exercise governance of the country based on the Constitution. To exercise state power on the basis of the law, we must first exercise state power on the basis of the Constitution.
> 4. The Constitution is the fundamental law of China which unifies the nation, the legal system, and the regulation system.
> 5. In order to maintain the life and authority of the Constitution, it is necessary to institutionalize and legalize constitutional practices and constitutional supervision.
> 6. The authority and dignity of the Constitution must be safeguarded.
> 7. Whenever necessary, the Constitution needs to be amended and improved in line with national development.

By reaffirming the agenda set out in the 20th CPCNC report, President Xi highlights five goals for constitutional reform in the coming decade:

> (1) To enhance the comprehensive leadership of the CPC in implementing the Constitution.
> (2) To fully implement the Constitution through the whole process of state governance.
> (3) To improve the constitution-centered legal system.
> (4) To improve the institutional system that ensures full implementation of the Constitution and to continually raise the level of constitutional enforcement and supervision.

(5) To augment constitutional theoretical studies and public education and to continually augment the persuasion and influence of China's constitutional theories and practices.

Overall, the essay serves as a public declaration that China and the Chinese government are determined to implement the Constitution on a national scale.

There is room to debate the meaning of a constitution and the pathways toward an efficient constitution. What is beyond question is the fact that China is currently in the process of national constitutional reform with the express goal of fully implementing the constitution. The future will be a story of "Chinese constitutionalism" based on China's national development "in the new era." It leaves ample room for imagination in a world that demands renewed constitutionalism.

2. A FOURTH BRANCH IN PLACE: CONSTITUTIONALIZING THE SUPERVISORY POWER

The enforcement of China's Law on Supervisors (jianchaguan fa) on January 1, 2022, signifies the completion of the legal construction of the new and fourth government branch in China. The other three branches on the central government level are the State Council, the Supreme People's Court, and the Supreme People's Procuratorate. This law, together with Article 52 of the Constitutional Amendment 2018 (included in Section 7 of Chapter III of the current Constitution), the Supervision Law of China (2018), and the Law of the People's Republic of China on Administrative Discipline for Public Officials (2020), provides the legal framework for the biggest constitutional reform on China's government structure in the 2020s. As of 2022, China officially established its fourth constitutional government branch, which is composed of resourceful supervisors, similar to the ombudsman in many other countries, who are privileged with the paramount power and authority in combating governmental corruption.

Under Section 7 of Chapter III of the current Constitution, Commissions of Supervision at all levels—central and local—are the supervisory organs of the state (Article 123). There is a National Commission on top of a tier of the local commissions at three levels (provincial, regional, and county levels). A commission of supervision shall be composed of a team of supervisors with a chairperson as the head. The chairperson shall hold the same term of office as that of the People's Congress at the same level and shall serve no more than two consecutive terms (Article 124).

The Constitution requires enacting a national law to prescribe the organization, functions, and powers of the commissions of supervision (Article 124). To enforce this constitutional mandate, three laws have been enacted related to the commission of supervision in the subsequent four years.

China's supervision system observes a hierarchy of authorities: (1) the National Commission of Supervision (responsible to the National People's Congress) as the highest supervisory organ to direct the work of local commissions of supervision at all levels; and (2) commissions of supervision at higher levels which shall direct the work of those at lower levels (Articles 125 -126).

Article 127 of the Constitution attaches necessary restraints on the commissions of supervision in line with the rule of law principle:

> "Commissions of supervision shall, in accordance with the provisions of law, independently exercise supervisory power, and shall not be subject to interference from any administrative organ, social organization, or individual.
> The supervisory organs, in handling cases of duty-related malfeasance or crime, shall work together with adjudicatory organs, procurator organs, and law enforcement departments; they shall act as a mutual check on each other."

Based on the Constitution, Article 3 of the 2018 Supervision Law stipulates:

> The Supervision Commissions of all levels are the ad hoc institution for the exercise of state supervision functions and are to follow this Law to conduct supervision of all public employees exercising public power (hereinafter public officials), investigate public office violations and crimes, carry out efforts to establish a clean government and fight corruption, and preserve the dignity of the Constitution and laws.

The investigation is the major tool for the supervision of Commissions, according to Article 4 of the Supervision Law:

> [Commissions] exercise supervision power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, social group, or individual. Commissions of supervision handling cases of violations or crimes abusing public office, shall mutually cooperate and constrain each other with the courts, procuratorates, and other law enforcement departments.

Article 5 of the law demands the Commission of Supervision to strictly abide by the Constitution and applicable laws, seeking truth from facts, the principle of equality and lawful right protections, and the balance between punishment and education.

Article 6 further demands China to "strengthen oversight and accountability, and strictly punish corruption, to deepen reforms and improve the rule of law, to effectively restrain and oversee power..... and establish long-term and effective mechanisms making it so that no one dares to be corrupt, no one is able to be corrupt, and no one wants to be corrupt."

To achieve this goal, the law confers a wide range of supervision authority (Articles 18-34), including in exceptional cases the power to hold questionable public officials in custody. According to Article 22 of the Supervision Law:

> Where the public officials under investigation are suspected of serious public office violations or crimes such as corruption, bribery, or dereliction of duty, and the commissions of supervision already have collected the facts and evidence on the violations or crimes, but have important reasons for further investigation, then after review and lawfully approved by the commission, they

may be held in custody at a designated location in any of the following circumstances:(1) the case is major or complicated; (2) they might flee or commit suicide; (3) They might collude testimony or fabricate, conceal, or destroy evidence; (4) They might have other conduct obstructing the investigation.

With the principles and goals mentioned above, as well as the wide scope of authorities related to the commissions of supervision, the law creates the necessity for a high-quality bureaucracy for the efficiency and function of the commissions of supervision. Therefore, Article 14 of the Supervision Law presses China "to institute the Supervisors" across the country. This outlines the legal foundation for the enactment of the Law on Supervisors in the commissions of all governmental levels.

Briefly put the Law on Supervision consists of 68 articles divided into nine chapters. These articles provide the required legal framework that establishes and protects the authority of the new elites in the fourth governmental branch in China.

According to Article 3 of this law, "supervisors" (jianchaguan) in China include a list of personnel in diverse governmental offices: (1) the director, deputy director, and members of commissions of supervision at all levels; (2) other supervision officials within all levels of commissions of supervision; (3) supervision officials or Supervision Commissioners stationed or dispatched by the commission in other governmental agencies or CPC party branches; (4) other supervision personnel lawfully exercising supervision authority in other supervision organs; and (5) supervision personnel in state-owned enterprises is regarded equally as supervisors in governmental branches.

To get a sense of the supervisor's duties, obligations, and rights, we will quickly scan the three articles of Chapter II of this law:

Above all, prima facie, the law prioritizes duties and obligations for those in the supervisors' office over their rights.

The duties of supervisors include: (1) to expand the education of clean government for all public employees; (2) to oversee and inspect public personnel's overall performance; (3) to conduct investigations of violations and crimes abusing public office; (4) to provide opinions on punishment based on oversight and investigations in supervision matters; and (5) to participate in international cooperation against corruption; and (6) other duties as provided for by law (Article 9).

The law imposes nine obligations on supervisors, which they are required to fulfill when performing their duties. Simply put they are: (1) to uphold the leadership of the Communist Party of China; (2) utmost obedience to the Constitution and laws; (3) to safeguard the national and people's interests; (4) to safeguard the lawful rights and interests of the investigated persons; (5) the qualify and efficacy of work; (6) to protect state secrets, commercial secrets, personal privacy, and personal information; (7) to strictly observe the professional ethics and social mores; (8) to accept oversight from without; and (9) other obligations provided by law (10).

With the goal of promoting the fulfillment of duties and obligations, the law specifies a brief list of rights for the supervisors: (1) the authority and working conditions required to perform their duties; (2) job security and welfare benefits; (3) to receive lawful protection for the security of their person, property, and residences; (4) to raise complaint petitions or make accusations; and (5) rights provided by China's Civil Servant Law and other laws.

For a general impression of the work done by the supervisors, we have the latest work report from the Supreme People's Procuratorate published on March 7, 2023. According to the work report, between 2018 and 2022, the commissions of supervisors at all levels conducted investigations into 88,000 government officials for abuse of power. These cases were then passed on to the Procuratorates for formal prosecution, which subsequently brought 78,000 cases to the court for adjudication. Among this large group, 104 held the provincial or ministerial rank or above. Additionally, the National Commission of Supervision also works with the Supreme Procuratorate to provide guiding cases related to bribery.

In a nutshell, the Commission of Supervision is an efficient fourth government branch that has both the authority and capacity to operationalize anti-corruption governmental functions. To implement the Constitution and restrain the supervisory power, China enacted and enforced the above-mentioned triple laws. The enforcement of the Law on Supervisors was the last step in establishing a full legal system governing the creation and functionality of this fourth government branch in China.

3. A SNAPSHOT OF THE 2022 DATA: A STRONGER NPCSC AND A BUSY SPC

To ensure an understanding of the progress of constitutional reform in China, it is essential to have some knowledge of the NPCSC and the SPC's work. In early March of 2023, the 14th National People's Congress convened for its first session, which heard and reviewed the work reports respectively from its Standing Committee (NPCSC) and the Supreme People's Court (SPC). The two work reports, among others, provide the essential data needed to reflect on what the NPCSC and SPC have done in 2022 and previous years.

3.1. NPCSC: BUSIER AND STRONGER

Over the past five years, NPC/NPCSC has enacted 47 laws, revised 111 laws, issued 53 legal interpretations and decisions, and ratified or acceded to 36 treaties and other important agreements. In 2022, NPCSC formulated 5 laws, amended 9 existing laws, passed 4 decisions on legal issues and major issues, made 1 legal interpretation, considered 487 bills and 9,349 suggestions from the NPC representatives, and ratified or joined 14 treaties and other important agreements.

In China, the filing and review of legal and regulatory documents such as administrative regulations, judicial interpretations, and local laws of special administrative regions are the exclusive power vested to the NPCSC by the Constitution and laws. The SPC does produce its own interpretations but must submit them to the NPCSC for statutory and constitutional review. For example, between 2018 and 2022, the NPCSC received filings for review of a total of 7,261 normative documents, of which 346 came from the SPC's judicial interpretations.

For the past five years, NPCSC significantly strengthened its constitutional review practice and improved the quality of filing-and-review work. NPCSC reviewed one by one, 7,261 normative documents submitted for file and considered 17,769 review petitions from individual citizens and organizations. Among those review petitions from citizens and organizations, there were 1,229 in 2018, 226 in 2019, 5,146 in 2020, 6,339 in 2021, and 4,829 in 2022.

Therefore, we can see a tangible growing trend over the past five years for Chinese citizens, individuals, and organizations alike to come to NPCSC for constitutional and statutory review.

3.2. SPC: BUSY AND EFFICIENCY

From 2018 to 2022, the SPC accepted 149,000 cases and concluded 145,000 cases, which is close to a 100 percent conclusion rate. For the same five years, SPC formulated 114 judicial interpretations and publicized 119 guiding cases. Clearly, SPC is a busy and efficient court. Furthermore, in 2022 alone, the SPC accepted 18,547 cases and concluded 13,785 cases.

Across the nation, courts accepted a total of 147 million cases and concluded 144 million cases involving an overall amount of 37.3 trillion yuan (RMB). Specifically, China's courts nationwide adjudicated and concluded a substantial number of cases in the past 5 years. During these years, the courts had trials for 5.9 million first-instance criminal cases and over 24.7 million first-instance commercial cases. Among these commercial cases, 2.2 million were intellectual property cases. In 2022, courts other than SPC accepted 33.7 million cases and concluded 30.8 million cases settling a total of 9.9 trillion RMB.

Based on the data mentioned above, China has a very active court system, with a busy SPC, which is fortunately very efficient. The NPCSC is also a busy institution that has been vested with constitutional and statutory reviews. The conjunction of a busy and efficient SPC with a busy and strong NPCSC has institutionally prepared China for future constitutional reforms centering around the goal of implementing the Constitution and developing Chinese constitutionalism.

IV. LOOKING AHEAD

China's pattern of modernization, the latest Chinese expression of its national pathway toward the success of reform, has been the result of the national development under the guidance of China's reform Constitution. The national economic and social reforms have shored up China's rise over the decades, which has not been left untouched by constitutional reforms.

China has solidified Chinese modernization in terms of national development. As a result, a different form of constitutionalism arises in the nation. However, some comparative constitutional law scholars may disregard this at their own cost. State capacity, efficient government, and a continued opening-up-and-reform constitution will very likely continue to take center stage in China's constitutional reform in the future. Achievements such as gradual constitutional reform, steadfast policy support, a busy and efficient court system, and a growing NPCSC with the constitutional review power have manifested the institutional preparedness for Chinese constitutionalism in the 2020s and years after.

V. FURTHER READING

Ngoc Son Bui, Stuart Hargreaves, Ryan Mitchell (eds.), Routledge Handbook of Constitutional Law in Greater China, Routledge, 2022.

Colombia

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I. INTRODUCTION

In terms of political representation, 2022 was a period of important changes in Colombia. It was an interesting election year, characterized by both a change in the members of Congress and a transition to a new national government. Due to both changes, a historical event happened in which the left became the largest political force in the country. It achieved considerable representation in the parliamentary scenario while occupying the presidency of the Republic.

This shift in political power implies significant change, as the proposal of the new government implies rethinking several paradigms about the State, its relations with citizens, the environment and nature, and the historical debts owed to certain sectors of the population. The new government's proposal means that this is likely to be the beginning of a four-year period in which numerous constitutional reforms will surely be pursued. However, because the traditional sectors still maintain a wide representation in the government, it will undoubtedly be difficult to approve and implement these reforms.

In fact, the initial months of the new government and Congress have provided us with some clues about their approach to constitutional reform in Colombia. The second semester of 2022 was particularly intense regarding the initiatives of constitutional reform projects in Congress. However, almost all these initiatives ended up being filed due to the lack of deliberation required by the Constitution. Although there were many reformist intentions, the results for the time being are null. During the entire year, not a single constitutional reform was approved, and of those that were proposed, only six projects from the period observed by this report are still being processed for 2023.

This implies that the activity of the constitutional court in terms of deciding the constitutionality of constitutional reforms has been minimal. Throughout the entire year, the court only analyzed the constitutionality of a single constitutional reform that had been adopted the previous year.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Throughout 2022, 66 constitutional reform projects were presented in Colombia. While four of the reforms were presented during the last legislature of the Congressional four-year term from 2018 to 2022, the remaining 62 constitutional reform projects were submitted in the first period of sessions of the Congress from 2022 to 2026. It is important to note that, in the 2022 parliamentary elections, an important change regarding political representation in Congress took place. For the first time in the country's recent history, political parties and movements that were traditionally opposition parties became the most represented in both chambers. And in turn, with the election of Gustavo Petro as President of Colombia in October, these political parties and movements that were traditionally opposition parties would become "parties of the Government.".

However, nearly 95% of the projects were proposed exclusively by members of Congress: 28 bills were proposed by members of the Senate, 24 by House Representatives, and 14 by members of both chambers. The remaining 5% of the proposed constitutional reforms originated in the national government and were supported by a considerable group of Congressional members belonging to the Government Coalition. The latter corresponds to structural proposals related to the following: the constitutional recognition of peasants as subjects of special protection (PAL 019/22S and P 254/22C), a political reform (PAL 026/22S and P 243/22C), and the creation of the Agrarian and Rural Jurisdiction (PAL 35/22S and P 173/22C).

Within the framework of the 66 bills, the intention was to reform at least 72 articles of the Constitution and to add 17 more. Likewise, two of the draft legislative acts were intended to clarify the interpretation of a specific provision of a constitutional amendment enacted the previous year: paragraph 2 of Article 5 of Legislative Act 02 of 2021.

In substantive terms, 50% of the constitutional reform proposals responded to organic issues, almost 35% focused on matters related to fundamental rights, and the remaining 15% pertained to changes that, despite being strictly organic, had a direct impact on fundamental rights. Let us take a closer look at the content and scope of these reform projects:

The three areas which had the greatest interest concerning reform during 2022 included parliamentary issues, territorial organization, and control bodies, including other constitutional entities outside the three branches of public power. In this sense, 16 of the projects were aimed at modifying the parliamentary regime, the composition of Congress, the minimum ages for members of Congress to be elected, the salary regime for congressmen, and the creation of special electoral constituencies. Another 12 bills were related to the territorial

organization of the country. Most of these bills sought to convert some municipalities into special districts. To a lesser extent, other bills aimed to create new territorial entities or the development of a special regime for the metropolitan region. Additionally, at least seven projects suggested some changes to the control bodies and other constitutional entities regarding their form of election, the structure and operation of the electoral organization, and the fiscal control system.

There were also reform attempts related to the right to food (six), the right to education (five), political reform (three), the elimination of compulsory military service (two), the right to vote for members of the public forces (one), the adult use of cannabis (three), the rights and protection of nature (two), constitutional protection of the peasantry (two), the right to freedom (one), the right to water (one), the creation of a new Superintendence of Education (one), the right to the internet (one), and the interpretation of other constitutional reforms (two).

However, it is important to point out that due to the fact that there were bills addressing the same subject matter in 16 cases, there were several bill accumulations—seven cases. As a result, of the 66 original bills, only 50 legislative procedures were formally advanced.

By January 1, 2023, almost 88% of the constitutional reforms had failed. Six of them were withdrawn by their authors and 38 more reform initiatives were filed. Regarding the cause of the filing, it is important to note that five initiatives were decisions made by Congress, and the remaining thirty-three were by explicit constitutional mandate. Article 375 of the Colombian Constitution establishes formal limits for the legislative procedure of constitutional amendments, from which the *principle of consecutivity* is derived. For illustrative purposes, we can say that it suggests that the constitutional reforms process in the Congress of the Republic shall overcome "(...) eight debates, in two ordinary and consecutive periods; four in each of them, two in each chamber, which must be carried out in their entirety given that for the processing of constitutional reforms, neither the Constitution nor the law has provided for any exception."[1] Consequently, if the constitutional reform projects fail, they get filed. In the case of these 33 projects, they were filed because they did not reach the constitutionally required number of debates during the first period of Congressional sessions. Regarding these 33 projects, they were filed as they did not get past the second debate in the vast majority of cases.

This means that to date, only six constitutional reform projects presented in 2022 are still being processed. These include the reform to Article 65 of the Constitution, on the right to food (PAL 01/22S and P 269/22C), the modification of Congressional sessions (PAL 002/22S -accumulated with PAL 003/22S and 011/22S- and P 260/22C), the political reform (PAL 006/22S and P 243/22), the peasantry's status as a subject of special constitutional protection (PAL 019/22S and P 254/22C), the adult use of cannabis (PAL 033/22S and P 02/22C), and the creation of the Agrarian and Rural Jurisdiction (PAL 033/22S and 173/22C).

Furthermore, it is important to point out that in 2022, there were not any successful constitutional reforms.

1 Colombian Constitutional Court. Judgement C-033 of 2009.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Given that no new constitutional amendments were approved in 2022, it is difficult to speak of the control of constitutionality that corresponds to the Constitutional Court. However, during the first quarter of the year, the Court did exercise this competence regarding a constitutional reform enacted in 2021. In sentence C-089 of 2022, the Court declared the constitutionality of Legislative Act 2 of 2021, which established the creation of 16 Special Transitory Districts for Peace in the House of Representatives for the periods 2022-2026 and 2026-2030.

Regarding this constitutional amendment, it is important to clarify that it is an exceptional case as it was adopted by explicit order of the Constitutional Court within the framework of a *tutela* action. To that extent, it is necessary to point out that the Legislative Act 02 of 2021 underwent most of the legislative process in 2017. At that time, Congress discussed, within the strict legal terms regarding the draft legislative act PAL 05/17S and P 017/17C. These acts sought to create 16 Special Transitory Districts for Peace in the House of Representatives for the periods 2018-2022 and 2022-2026. The purpose was to comply with the commitments agreed upon by the Government in the Final Peace Agreement concluded with the former FARC guerrilla. The goal of creating these districts was to ensure the respect and fulfillment of the rights of the victims of the armed conflict. However, within the framework of this constitutional reform procedure, the President of Congress ordered the bill to be filed as he considered that it had not obtained the constitutional majorities needed to become a constitutional reform.

In 2019, a senator of the Republic filed a *tutela* action seeking the protection of the fundamental rights to equality, due process in the legislative process, and the right to participation of the victims. This action was later consolidated with two other *tutela* actions. In that proceeding, the Court considered, in judgment SU-150 of 2021, that the bill had met the required majority. By applying the figure of the "empty chair" to several congressmen absent in the deliberation and voting, the Court was able to reach its decision. This created a variation in the composition of Congress which led to the number of votes required for the approval to be lowered. Therefore, the Court ordered that the Legislative Act should be enacted once the versions approved in both the Senate and the House of Representatives were reconciled and the temporary adjustment of the transitory districts was made for the periods of 2022-2026 and 2026-2030. Thus, on August 25, 2021, the Congress of the Republic issued Legislative Act 02 of 2021. This was sent to the Constitutional Court to carry out the automatic control of constitutionality. It is worth noting that this control is limited to the procedural defects in the formation of the constitutional reform and to the assumptions of substitution of the Constitution.

Now, despite these two characteristics of the control of constitutionality of constitutional amendments, it is of significance that in the case of Legislative Acts such as the one analyzed in judgment C-089 of 2022, such control varies to a certain extent. This is because it is a constitutional amendment that was processed and enacted within the scope of the Special Legislative Procedure for Peace, which by virtue of Legislative Act 01 in 2016, relaxed the formal requirements for

constitutional reforms related to the Final Peace Agreement. Hence, the constitutionality control carried out by the Court, in this case, was subsequent and automatic, taking place after the amendment was enacted. It was also a procedural process that was unique since the Court's decision on the matter becomes an absolute constitutional *res judicata*. Additionally, the Court process was also conducted in a participatory and abbreviated manner. The latter is particularly important, since, in the words of the Court itself, "the control process reduced to one-third of the ordinary one."

Beyond this, the judgment itself is interesting for several reasons, of which we will highlight only two. The first reason is that, although the formal control of the reform procedure was rigorous with respect to the legislative procedure carried out in 2017, it neglected to address the anomaly produced by the enactment of the amendment because of the order of the *tutela* judge, which occurred almost four years later of the legislative procedure. To clarify, the Constitutional Court overlooked the analysis regarding the constitutional requirement of prior consultation with indigenous peoples and Afro-descendant communities.

Secondly, it is also worth calling attention to one of the elements used by the Court in the framework of the constitutional substitution (replacement) test applied to verify that the Legislative Act did not introduce a constitutional dismemberment. Specifically, we refer to the fact that the constitutional judge considered it appropriate to carry out flexible judicial scrutiny in this case. The judge made this decision since the reform would have temporary effects—only eight years—and a restricted application that was directed to a particular group of people in specific territories.

This decision sheds important light on the role played by the Constitutional Court in our jurisdiction. In this sense, Judgment C-089 of 2022 contains important clues as to how the constitutional judge, supported by the purpose pursued by Legislative Act 02 of 2021 and its material and teleological connection with the Final Peace Agreement, assumes a representative and to some extent enlightened role within the categories of Barroso.[2] However, it is also necessary to understand this in light of judgment SU-151 of 2021. In this judgment, the Court itself was the one that ordered the adoption of the constitutional reform. This action was seen as a counter-majoritarian rule by some people as it invalidated the decision of the President of the Senate to file the case.

IV. LOOKING AHEAD

Although constitutional reforms did not materialize in 2022, the upcoming years seem to be crucial for change. The national government and Congress are undoubtedly motivated to promote structural change in our country. As a result, multiple reform projects are being prepared in both spheres. These projects intend to shape those new paradigms we discussed at the beginning of the report. As an example, it is important to point out that, of the reforms that began to be processed in 2022 and are still being processed during 2023, there are substantially important issues such as political reform and the creation of the Agrarian and Rural Jurisdiction. These two projects are intended to respond to cross-cutting and structural problems of our society that have been the underlying causes of violence and inequality throughout our national history.

Indeed, in this changing scenario that can be seen in the near future, the Constitutional Court will play a particularly active role. As there are more constitutional amendments proposed, the Court will have to be more careful when analyzing each of these amendments. Due to the scope and nature of the changes being promoted by the government and the Government Coalition, the Constitutional Court will have to carry out an adequate constitutional substitution test, in which the Court e will have to be able to understand the purpose of the amendments. However, the Court must analyze the proposed amendments without disregarding the fundamental pillars established by the 1991 Constituent Power and therefore preventing any type of constitutional dismemberment.

V. FURTHER READING

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Paula Robledo Silva. Cuatro sentencias hito para las elecciones del año 2022. Jurisprudencia constitucional colombiana del año 2021 en materia electoral' (2022) 26(2) *Anuario Iberoamericano de Justicia Constitucional, https://doi.org/10.18042/cepc/aijc.26.21,* accessed 28 March 2023, 643-658.

2 Luis Roberto Barroso, 'Countermajoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies' 67 *The American Journal of Comparative Law,* 109 – 143.

Croatia

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I. INTRODUCTION

In this Report, we will look at the most significant events of 2022 when it comes to constitutional changes in the Republic of Croatia. First, we will describe the failed attempt to change the Constitution through the citizen-initiated constitutional referendum "Let's decide together," launched in the Fall of 2021. As we will show below, although the referendum had sufficient support from the electorate, it was declared unconstitutional by the Constitutional Court on May 16, 2022. The Court found that a referendum may not result in an amendment to the Constitution unlikely to achieve its proclaimed effect. In addition, 2022 was marked by the start of two constitutional amendment procedures, which were initiated by representatives of the Croatian Parliament. In what follows, we will detail both the content of these proposals and summarise the stages of the procedure that have been completed at the time of writing. We will then canvas the broader context of the 2022 events.

II. PROPOSED, FAILED, AND SUCCESSFUL REFORMS

The first significant event of constitutional reform is the constitutional referendum we included in the last year's report. The outcome of the referendum initiative only became evident in 2022, which is why we summarise it here. In the spring of 2022, a citizen-initiated referendum was proposed under the slogan "Let's decide together!" The aim of the project was an amendment to Article 17, paragraph 1 of the Constitution. This provision lays down conditions under which the state may limit human rights in states of emergency. The key precondition for limiting constitutionally guaranteed rights in such situations is a qualified, two-thirds parliamentary majority. Although the Constitution provides that states of emergency requiring such a heightened consensus include "natural disasters," the governing majority decided to interpret the pandemic as a normal situation and enacted ordinary legislation in response to it. The referendum was a reaction to this. Spearheaded by a part of the parliamentary opposition, the referendum was to add to the Constitution two terms, "pandemic" and "epidemic," as additional states of emergency. It was hoped that this would force the Parliament to change course.

After the collection of signatures was completed, the Ministry of Justice and Public Administration announced that at least 10% of the entire electorate supported the initiative, which is a prerequisite for a referendum.[1] However, the Croatian Parliament exercised its power to submit the case to the Constitutional Court,[2] requesting that the Court examine whether the referendum question was in accordance with the Constitution. While the Court found that the proposed amendment "in itself is not against the Constitution,"[3] it concluded that the question advancing it contains "inaccuracies and causes doubts."[4] This was because those supporting the referendum assumed that adding two words to a constitutional provision would force the Parliament to limit fundamental rights with a two-thirds majority. However, this assumption flew in the face of the Court's earlier decision, which we have covered in the last year's report. There the Court found that the Parliament has the power to decide whether to limit human rights by a two-thirds or a less demanding majority.[5] Although criticized,[6] this reasoning was why the Court found that the proposed constitutional change would "not achieve its proclaimed goal"[7] and that "citizens gave their signatures motivated by the expectation of effects that cannot be realized."[8] In essence, the Court considered that the amendment would not remove the Court's earlier interpretation of the Constitution. For these reasons, the Court concluded that allowing the referendum under the circumstances would be contrary to the rule of law, one of the highest values of the Croatian constitutional order.[9] Three judges dissented from this finding, [10] one filed a concurring opinion,[11] and the decision caused ripples in the public space, provoking strong reactions from statespersons and academia.[12]

1 'Process of Checking the Number and Authenticity of Collected Signatures of Voters of the Civic Initiative "Let's Decide Together" Completed' (Webpage of the Croatian Ministry of Justice and Public Administration, 2022), available at: https://mpu.gov.hr/vijesti/dovrsen-postupak-provjere-broja -and-credibility-of-the-collected-signatures-of-voters-of- the-citizen-initiative-let's-decide-together/25994 accessed 26 February 2023.
2 In accordance with Article 95 of the Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette 99/1999, 29/2002, 49/2002.
3 Decision of the Constitutional Court of Croatia in case no. U-VIIR-2180/2022 of 16 May 2022, Official Gazette Nr. 61/2022 (hereinafter: The Decision of 16 May 2022), para 16.
4 The Decision of 16 May 2022, para15.
5 Decision of the Constitutional Court of Croatia in case no. U-I-1372/2020 and ors. of 14 September 2020, Official Gazette Nr. 105/20, para 28.
6 Đorde Gardašević, '"Business as Unusual": Pandemic Concentration of Executive Powers in Croatia' (2021) 12 Pravni zapisi 91, 102 <https://scindeks.ceon.rs/Article.aspx?artid=2217-28152101091G>.
7 The Decision of 16 May 2022, para 16.
8 The Decision of 16 May 2022, para 15.1.
9 The Decision of 16 May 2022, para 17.
10 Dissenting opinions of the Judges Kušan, Selanec and Abramović available at: <https://narodne-novine.nn.hr/clanci/sluzbeni/2022_06_61_888.html> accessed 27 February 2023.
11 Concurring opinion of the Judge Brkić available at: <https://narodne-novine.nn.hr/clanci/sluzbeni/2022_06_61_888.html> accessed 27 February 2023.
12 https://www.predsjednik.hr/vijesti/predsjednik-milanovic-o-odluci-ustavnog-su-

As we have already indicated, two new procedures for changing the Constitution of the Republic of Croatia were initiated in 2022, both in the Croatian Parliament. The first proposed change to the Constitution aimed at adding an explicit constitutional guarantee of the right to abortion: "A woman has the right to freely and independently decide on childbirth. The state ensures the prerequisites for exercising this right."[13] The amendment was a response to a growing right-wing campaign against women's freedom of choice.[14] At the time of writing, the addition to the Constitution has not received the support of the governing majority, and its fate remains unclear.

The second proposed change to the Constitution has referendums as its subject matter. The amendment involves three constitutional articles. The first changes the number of voters required to launch a citizen-initiated referendum. Thus, the current requirement of 10% of the total number of voters in the Republic of Croatia would be replaced by a threshold of 250,000 signatures. Furthermore, the amendments provide a quorum for a valid referendum decision. According to the proposal, for the decision to be made at the referendum, quorums have to be met that have been defined in accordance with the object of the referendum. If the referendum involves a constitutional amendment or an organic law, at least thirty percent of voters must vote for the proposal. All other referendum questions must receive the affirmative vote of at least a quarter of the participating voters. Finally, a referendum concerning Croatia's accession to unions with other states requires the participation of the majority of the total number of voters in the Republic of Croatia. In addition to setting out the new preconditions for a valid referendum decision, the amendments would explicitly authorize the Constitutional Court to resolve disputes arising during the state referendum procedure.[15]

This proposal to amend the Constitution of the Republic of Croatia was adopted by the Croatian Parliament on July 15, 2022. Based on this, a draft amendment to the Constitution of the Republic of Croatia[16] was prepared on November 30, 2022, and the Draft Amendment to the Constitution of the Republic of Croatia was also adopted by the Croatian Parliament on December 16, 2022.[17] The described changes thus practically reached the last stage of the parliamentary procedure. It is still necessary for the Croatian Parliament to adopt them with a two-thirds majority, and in the event of such an outcome, the amendments will enter into force after they are promulgated by the Croatian Parliament.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The constitutional changes that have almost reached the final stages of the amending procedure all address the referendum. They are relatively narrow in scope, substantially affecting only the number of signatures required for a citizen-initiated referendum and the thresholds for a valid decision. Their significance can only be fully appreciated in the context of a broader effort to regulate referendums in Croatia. During the past two decades, there have been many attempts to call for a referendum on multiple topics. While only some of them embodied constitutional amendments, and most of them were to some extent unsuccessful, all attempted referendums played out against a skeletal legal framework.

In brief, the constitutional amendments of 2000 have introduced a citizen-initiated referendum but have not substantively restricted the new decision-making procedure, and the Parliament failed to enact a law that would provide a more detailed framework for referendums. In the circumstances, almost every attempt to call for a referendum was accompanied by constitutional controversies of one kind or another. Some referendums aimed at affecting subject matters that should not be subjected to a simple majority vote, such as the rights of minorities. Others have suffered from formal shortcomings. In all cases, however, referendums were plagued by issues attached to their legality, legitimacy or both. It is by responding to these controversies that the Constitutional Court developed a substantive case law concerning referendums.[18]

The constitutional amendments of 2022 are part of a broader response to regulate the exercise of referendums. They come two years after the initiation of a large-scale legislative project to enact a new law on referendums, still in progress at the time of writing. This new legislative framework and the voluminous case law of the Constitutional Court shaped the debate surrounding the referendum-related constitutional amendments.[19] Thus, the amendment procedure did not only involve a future-oriented series of constitutional changes but was an opportunity to reflect on Croatia's experience with referendums.

Other than the formal preconditions for referendums, the Parliament also addressed the scope of referendums. The Croatian Constitution currently does not define the issues that may not be subject to a referendum. Some parliamentarians argued that the Constitution should prohibit any referendum that may impact constitutionally guaranteed rights, while others suggested that a broader gamut of issues should be immunized from referendums, such as issues with budgetary implications.[20] The concern was that any codification may not decisively set the meaning of matters included in it, leaving the Constitutional Court too much discretion in prohibiting referendums for their unconstitutionality. The fear of an overly active Court stems from some of the Court's earlier decisions, which have restrictively interpreted the scope

da-to-je-gazenje- ustava-drzavni-udar/, https://teleskop.hr/hrvatska/ustavna-strucnjakinja-sokirana-odlukom-ustavnog- suda-o-mostovom-referendumu-krivo-su-procitali/ <accessed 27 February 2023>.

13 Proposal for a decision on accession to the amendment of the Constitution of the Republic of Croatia, with a proposal for a draft amendment to the Constitution of the Republic of Croatia from July 11, 2022 (Webpage of the Croatian Parliament), available at: https://www.sabor.hr/sites/default/files/uploads/sabor/2022-07- 11/105302/PO_PROMJENA_USTAVA_40_ZASTUPNIKA.pdf <accessed 27 February 2023>.

14 Ibid.

15 Proposal for a decision on accession to the amendment of the Constitution of the Republic of Croatia from July 11, 2022, available at <https://www.sabor.hr/sites/default/files/uploads/sabor/2022-07- 11/105305/PO_PROMJENA_USTAVA_92_ZASTUPNIKA.pdf> accessed 28 February 2023.

16 See webpage of the Croatian Parliament, available at: <https://www.sabor.hr/sites/default/files/uploads/sabor/2022-11- 30/155605/NACRT_PROMJENA_USTAVA_RH.pdf> accessed 28 February 2023.

17 See webpage of the Croatian Parliament, available at: <https://www.sabor.hr/prijedlog-nacrta-promjene-ustava-republike-hrvatske-predlagatelj-odbor-za-ustav-poslovnik-i?t=136309&tid=211155> accessed 28 February 2023.

18 An overview of some of the Court's case law in English is available in Đorđe Gardašević, 'Constitutional Interpretations of Direct Democracy in Croatia' (2015) 7 Iustinianus Primus Law Review 1.

19 This is reflected in the suggested draft of constitutional amendments, available (in Croatian) at: <https://www.sabor.hr/hr/radna-tijela/odbori-i-povjerenstva/prijedlog-za-utvrdivanje-nacrta-promjene-ustava-republike-0> accessed 20 March 2023.

20 Dragan Grozdanić, 'Ustavni Ping-Pong' (*Novosti*, 2022) <https://www.portalnovosti.com/ustavni-ping-pong> accessed 19 March 2023.

of referendums.[21] In particular, the Court's decision on the "redundancy" of a constitutional amendment may have been fresh in the memory of parliamentary representatives.

Nevertheless, changes to the Constitutional Law on the Constitutional Court of the Republic of Croatia were suggested alongside the new constitutional amendments. The Constitutional Law is an act with the force of the Constitution that, among other matters, regulates the powers of the Court. Its provisions empower the Court to ascertain whether a referendum question interferes with an "exclusive power" of the legislature or the executive or if a question in a constitutional referendum violates "general principles and highest values of the constitutional order of the Republic of Croatia." Questions set in other non-constitutional referendums must also abide by the Constitution.[22] Furthermore, in case the referendum is citizen-initiated, the amendments authorize the Court to decide on the question's constitutionality before the signature-gathering phase is complete, a welcome change from the current state of the law, where the Court may decide only after signatures have been gathered and there is substantial political pressure for the referendum.

In addition to the referendum, abortion was the topic of interest for Croatian constitutional reform in 2022. The right to reproductive self-determination was explicitly included in the text of the constitution Croatia had as a member state of Yugoslavia from the 1970s, and it was also recognized by the federal Yugoslav constitution at the time.[23] The 1990 Constitution, enacted by the Croatian Parliament to serve as the fundamental act of a newly independent country, did not contain an explicit provision to the effect.[24] Nevertheless, the new constitution did not prohibit abortion, and Croatia retained the law its Parliament enacted in 1978 while the country was still within Yugoslavia.[25] A range of applicants disputed the constitutionality of the inherited legal framework, initiating a controversy that the Constitutional Court resolved more than two decades after it received the first submissions. In its decision, the Court found that the Croatian Constitution still guarantees the right to abortion as an aspect of the woman's right to privacy.[26] Pointing out that "[m]oral duties cannot be the exclusive basis for legally regulating a specific issue,"[27] the Court found that the legislator is constitutionally obligated to establish a proportionate balance between "women's rights and the interest to protect an unborn being."[28] Having found that the law Croatia retained from its Yugoslav days did establish a constitutional balance between the two interests and refusing to find abortion unconstitutional, the Court warned that the Parliament must update the current law. In addition to removing aspects of the framework made obsolete by Croatia's secession, the Court found that the legislature should provide "educative and preventive measures" to make abortion "an exception."[29] At the time of writing, however, the Parliament has not adopted the new law.

The constitutional amendment related to abortion proposed the return of a constitutional guarantee of the women's right to reproductive self-determination. Some of the political parties in the opposition tabled the amendment as a response to the growing right-wing movement opposed to abortion and gender equality in general.[30] It should be noted that representatives of conservative social movements have earlier responded to the Constitutional Court's decision by suggesting a referendum that would constitutionally prohibit abortion.[31] Those more recently intending to enshrine the right the abortion in the Constitution have suggested that they may call for a referendum if the Parliament fails to support the amendment effort to achieve this. The initiative is in part motivated by the continuous conservative effort against gender equality and in part by the ruling of the Supreme Court of the United States in *Dobbs*.[32] The worry is that the impact of such an influential judicial instance may spill over into the Croatian legal order. Thus far, the response of the governing majority in the Parliament to explicitly enshrining the right to abortion has been lukewarm at best.[33] In the circumstances, a referendum may be the instrument of choice for textually reinforcing the right to abortion, but it remains to be seen whether it will be activated.

Although the governing majority was not welcoming of the attempts to tie in the abortion-related constitutional amendment with the constitutional amendment on referendums, the public consultation process revealed that a range of civil society actors and citizens are open to the idea.[34] The parliamentary majority, however, refused all such suggestions with a dubious justification. It was argued that abortion cannot be introduced into the text of the Constitution because it is a legislative and not a constitutional matter. Invoking the Constitutional Court's earlier interpretation that the Constitution cannot be amended so as to "systematically constitutionalize" legislative issues, the majority identified a single amendment with an ostensible broad exclusion of issues from ordinary politics. Other than broadly reading the Court's decision that was in itself grounded in weak constitutional interpretation, finding its basis only in Venice Commission's opinion on Hungary,[35] the majority's interpretation demonstrates how the Court's case law may be instrumentalized for obstructing a more participative and progressive interpretation of the Constitution's amendment provisions. It also reveals a democratically very unsatisfactory understanding of political representation, where the parliamentarians refuse to countenance a broader debate on the constitutional meaning and amendments on an issue affecting a broad swathe of the population.

21 Ana Horvat Vuković, 'Ustavni Sud Republike Hrvatske i Referendumi Narodne Inicijative 2013.-2015.' (2016) 37 Zbornik Pravnog fakulteta Sveučilišta u Rijeci 805 <https://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=246502>.

22 See Article 1 of the Suggested draft of the amendments to the Constitutional Law on the Constitutional Court of the Republic of Croatia, < https://www.sabor.hr/hr/pristup-informacijama/savjetovanja-s-javnoscu/20-rujna-20-listopada-2022-informacija-o-0> accessed 20 March 2023.

23 Nenad Hlača, 'Zakon o "Pobačaju" Republike Hrvatske 1978. - 2008.' (2009) 45 Medicina 142, 143.

24 Katarina Brečić, 'Kada Je Izbačeno i Je Li Realno Da Se Pravo Na Pobačaj Vrati u Ustav?' (*N1*) <https://n1info.hr/vijesti/kada-je-izbaceno-i-je-li-realno-da-se-pravo-na-pobacaj-vrati-u-ustav/> accessed 20 March 2023.

25 Zakon o zdravstvenim mjerama za ostvarivanje prava na slobodno odlučivanje o rađanju djece, Official Gazette no. 18/78, 88/09.

26 Decision of the Constitutional Court of the Republic of Croatia in U-I-60/1991 and ors. Of 21 February 2017, Official Gazette no. 25/2017-564, para 44.1.

27 Ibid., para 22.

28 Ibid., para 33.

29 Ibid., para 49-50.

30 Mirela Holy, 'O Molitvenim Sačekušama' (*Zarez*, 2016) <http://www.zarez.hr/clanci/o-molitvenim-sacekusama> accessed 20 March 2023.

31 CROL, 'Referendum o Pobačaju, Čini Se, Ipak Nije Isključen' (*CROL - LGBT news portal*, 2016) <https://www.crol.hr/index.php/politika-aktivizam/8326-referendum-o-pobacaju-cini-se-ipak-nije-iskljucen> accessed 20 March 2023.

32 Dragan Grozdanić, 'Zajednički Stav - Pobačaj u Ustav' [2022] *Novosti* 4, 5.

33 Enis Zebić, 'Hrvatska Na Putu Referenduma Za Povratak Pobačaja u Ustav' (*Radio Slobodna Evropa*, 2022) <https://www.slobodnaevropa.org/a/hrvatska-pobačaj-referendum-ustav/31924963.html> accessed 20 March 2023.

34 See the summary of the public consultation process, available in the proposed draft of constitutional amendments <https://www.sabor.hr/hr/prijedlog-nacrta-promjene-ustava-republike-hrvatske-predlagatelj-odbor-za-ustav-poslovnik-i> accessed 20 March 2023.

35 See the Court's Communication on the popular constitutional referendum on the definition of marriage, SuS-1/2013 of 14 November 2013, Official Gazette 138/2013-2966, para 9.1.

The use of the Constitutional Court's reasoning in the two debates on constitutional amendments brings us to the Court's role in the 2022 developments. Although its previous decisions were invoked at different junctures in the amendment procedures, the Court did not have an opportunity to intervene. This may change if the referendum is initiated, as the decision-making procedure was often subject to Court's constitutional interpretation. One can only hope that its future interventions will signal an abandonment of some of its most recent additions to the constitutional repertoire, most notably the idea that a constitutional amendment may be redundant and thus unconstitutional. Such innovations have signaled a troubling departure of the Court from any salutary role in the constitutional order. It is difficult to justify them by a representative, enlightening, or counter-majoritarian role. Instead, their use allows the Court to invoke the exceptional control of a constitutional amendment's constitutionality while diluting its exceptionality to fit the needs of the day. Should the Court adhere to this, it may produce more arsenal for those political actors unwilling to abide by the Constitution or respond to citizens' attempts to advance its mandates.

IV. LOOKING AHEAD

We concluded last year's report by suggesting that the Croatian Constitution is overdue for an overhaul, particularly concerning its openness to popular engagement. The developments in 2022 have vindicated our opinion, as constitutional amendments concerning referendums and abortion bring the same issue to the forefront. Popular sovereignty makes an appearance with the increased relevance of referendums, both in the current debate on constitutional amendments and the issue of codifying reproductive self-determination. The amendment provisions of the original 1990 Constitution have been written and constructed to make the Parliament the central bearer of constitutional reform. However, the increased relevance of the referendum since 2000 and the unresponsive practices of some of the dominant political parties in Croatia continuously raise the role of the Croatian demos. With the new legal framework of referendums on the cusp, the use of the procedure in interpreting and amending the Constitution may change. Nevertheless, with the struggle over some of the fundamentals of the Croatian constitutional order, the referendum and political representation will remain important points of contention for constitutional reform in Croatia.

V. FURTHER READING

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Matija Miloš, 'The clarity of referendums: an instrument for managing the (dis)continuity and perception of change' [2022] Pravni zapisi 388.

Cuba

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I. INTRODUCTION

During 2022, Cuba experienced economic stagnation that resulted in a new energy crisis and aggravated the overall crisis of the Cuban development model. This led to a fresh wave of popular protests, particularly during the summer. Those popular protests prompted another round of repression by the Cuban regime.

Moreover, the Cuban government persisted in selectively implementing the Legislative Schedule it had originally approved in December 2019. The government prioritized the enactment of laws intended to develop the institutional framework that supports repression while delaying the approval of those that regulate fundamental rights.

As part of that process in 2022, the National Assembly of People's Power (NAPP) approved a new Penal Code[1] which, along with the Family Code[2] and the Law on the Process of Protection of Constitutional Rights,[3] constitute some of the main constitutional milestones of the country in the year.

Experts and members of Cuban civil society have labeled the Penal Code as a regulation that imposes new and severe restrictions on the exercise of human rights recognized in the Constitution.[4] Meanwhile, the new Family Code includes provisions that recognize same-sex marriage for the first time in Cuba. This regulation puts an end to one of the central debates that had arisen during the constitutional reform process that began in 2018.

In 2022, the approval of the Families Code created opportunities for two exercises related to the mechanisms of «direct democracy» provided for in the Cuban Constitution: the popular consultation and the referendum. These were organized by the National Electoral Council, a permanent electoral body established under the 2019 Constitution. In 2022, the Council was also responsible for conducting the first local electoral process based on the new constitutional provisions and the 2019 electoral law.

Also, in 2022, after a long waiting process, the NAPP approved the Law on the Protection of Constitutional Rights. The regulation complements Article 99 of the Constitution, which established Ðfor the first time since 1976Ð the possibility of resorting to the courts to claim possible violations of constitutional rights.

1 https://www.tsp.gob.cu/sites/default/files/documentos/goc-2022-o93_0.pdf
2 https://www.minjus.gob.cu/sites/default/files/archivos/publicacion/2022-09/goc-2022-o99.pdf
3 https://www.gacetaoficial.gob.cu/sites/default/files/goc-2022-o74.pdf
4 https://eltoque.com/entra-en-vigor-nuevo-codigo-penal-cuba

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

At the end of December 2019, the ANPP approved the Legislative Schedule (Schedule)[5] that this body should follow until April 2023. It included 39 laws and 31 Decree-Laws. The Schedule, designed mainly to complement the Constitution, has undergone significant changes since then.

Under the original Schedule, a Decree-Law regulating the constitutional rights of peaceful demonstration and assembly, as provided for in Article 56 of the Constitution,[6] was supposed to be published in 2020. These rights were recognized in the 1976 Constitution but were never specifically regulated. Despite the Schedule, the regulation that was meant to govern the rights of demonstration and assembly was not approved in 2020 and has yet to be approved. The Cuban authorities have not provided any indication of when or if it will be enacted.

Towards the end of 2020, an official media outlet announced that the regulation would be postponed until 2021 but did not specify the month in which it might be discussed or approved. In July 2021, Cuba experienced its largest popular protests since 1959. Many of the protesters were tried and punished[7] for exercising what the Constitution recognizes as a right but which is subject to the conditions established in a regulation that the Cuban government has refused to enact.[8] The regulation that outlines the requirements for the exercise of the rights of demonstration and assembly was removed from the schedule after adjustments were made in 2021. To date, even the official press has not mentioned that the regulation remains pending approval in future legislative sessions.

However, Cuban civil society has articulated to demand a statement from the NAPP regarding this matter. Two opposition political platforms, the Council for the Democratic Transition of Cuba and D'Frente, formulated a petition[9] to the NAPP to pronounce or approve the regulation on the right of demonstration and assembly.

In response to the petition, the NAPP replied Ðreferring to the bill on demonstration and assembly—: «the possibility of its discussion

5 https://www.gacetaoficial.gob.cu/sites/default/files/goc-2020-o2.pdf
6 https://eltoque.com/es-imperativo-contar-con-una-ley-sobre-el-derecho-a-manifestacion-y-reunion
7 https://eltoque.com/represion-continua-nuevo-juicio-a-manifestantes-11j
8 Article 56 of the Constitution establishes that the state recognizes the rights of assembly, demonstration, and association for lawful and peaceful purposes, «provided that they are exercised with respect for public order and compliance with the provisions established by law».
9 https://diariodecuba.com/derechos-humanos/1675342150_44973.html

is postponed to an indefinite date, and the rights to legitimate legislative action exercised by a growing number of citizens are included and recognized».

After receiving an unsatisfactory response, both organizations initiated a campaign to collect 10,000 signatures to trigger a popular legislative initiative mechanism regulated under Article 164 section k) of the constitutional text.[10]

Another noticeable exclusion that supports the notion that the Cuban government has selectively prioritized regulations is evidenced by the fact that, as of the end of 2022, the Associations Law has yet to be approved. According to the Schedule, it should have been approved in July of that year. This regulation was intended to govern one of the political rights that the Cuban regime is most stringent about limiting: freedom of association.

Following the 2021 Schedule adjustments, the priorities of the NAPP were primarily focused on enacting laws that established the action frameworks of state institutions recognized by the Constitution or provided tools for repression. This was evidenced by the approval of laws such as the General Comptroller Law, the Attorney General's Office Law, and the Penal Code.

Likewise, after a controversial referendum provided by the Eleventh Transitional Provision of the Constitution, the new Families Code was enacted in 2022. The Families Code, among other provisions, complements the institution of marriage regulated in Article 82 of the constitutional text.

The primary discussions surrounding the referendum centered on the viewpoint that it was merely a tool for plebiscite human rights, which could potentially enable «alleged majorities» to limit the rights of minorities. Additionally, concerns were raised that the provisions of the Code could be exploited by the regime as a means of repressing dissidents and human rights defenders.

The Families Code establishes a novel regulatory framework for family matters but does not reach certain constitutionally drawn minority rights, which have not been complemented to this day.

For example, in the original Schedule, the government had committed to issuing Đbefore 2023Đ laws that would regulate issues of identity and civil status of individuals. However, by the end of 2022, no regulatory norms had been implemented that would allow Cubans to homogenize their legal records with their gender identity. Among the 16 laws planned to be approved in the next legislative session, according to Justice Minister Oscar Silvera, there is also none that can contribute to this regard.[11]

The Cuban LGBTIQ+ community has continued to push for actions to demand the approval of these regulations, understanding that without them, articles 42 and 48 of the constitutional text are empty statements.[12] Both articles acknowledge the right of individuals to be free from discrimination based on their gender identity and to have their self-identification honored. In addition to the Penal Code and the Family Code, the NAPP also passed the Law on the Process of Protection of Constitutional Rights in 2022. This regulation marked the first time in over four decades that Cuban citizens were given the opportunity to claim in court for potential violations of constitutional rights. Despite the Law's limited scope, some Cubans were eagerly anticipating its approval, as it had been unjustly delayed, contravening the provisions of the Twelfth Transitional Provision of the Constitution.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The regulations with the greatest constitutional scope approved in Cuba in 2022 are the Family Code, the Penal Code, and the Law on the Process of Protection of Constitutional Rights. For didactic purposes, we can analyze the influence of each of them separately in a constitutional context.

1. FAMILIES CODE

The NAPP approved the Code and the regulations for its referendum on July 22, 2022, thereby fulfilling the constitutional mandate of the Eleventh Transitional Provision of the Constitution. This mandate arose from the public discourse during 2018 and 2019, which centered around whether to include same-sex marriage in the constitutional text.

The 2019 Constitution eliminated the implicit prohibition contained in its predecessor from 1976, which legally prevented the recognition of equal marriage through lower-level regulations. The 1976 text established that marriage was the union between a «man» and a «woman».

The first version of the Constitution, which was released in 2018, removed the restriction and subjected a generic and unappealable formula to a popular consultation. In Article 68 of the first constitutional draft, marriage was defined as the union between «two *persons*». In addition, the article established that a subsequent regulation would determine how marriage could be established and dissolved. Following the popular consultation results, the commission responsible for drafting the constitutional text amended Article 68 and transformed it into Article 82 of the current text. Article 82 of the current Constitution recognizes that marriage is a legal and social institution based on «free consent and equality of rights, obligations, and legal capacity of the spouses».

By eliminating the term «*persons*» to indicate who could be contracting parties and replacing it with «spouses», the drafters of the Constitution annulled a fundamental constitutional protection for those advocating for the recognition of equal marriage. The term «*person*» is not subject to further interpretation because it applies to all members of the human species. Therefore, gender would not be a limiting factor for the State to recognize homosexual unions as marriage.

Although less restrictive than the formula used in the 1976 Constitution, Article 82 of the current Constitution does not explicitly acknowledge equal marriage, unlike Article 68 of the initial draft. The term «spouses», while generic, is closely tied to the traditional notion of marriage as a union solely between a man and a woman. Furthermore, it necessitated subsequent reinterpretation Đunlike the term «*person*»Đ to offer unambiguous protection for equal marriage. Constitutional Article 82 is a contentless article and dependent on complementary family provisions that, as established by the Eleventh

10 https://www.14ymedio.com/cuba/Piden-cubanos-refrendar-reunion-manifestacion_0_3470652910.html

11 https://eltoque.com/las-leyes-no-son-para-el-pueblo

12 https://www.redsemlac-cuba.net/redsemlac/diversidad-sexual/cambiarse-el-nombre-y-otros-derechos-a-la-identidad-de-las-personas-trans/

Transitional Provision of the Constitution, should define the «way of constituting marriage».[13]

The Families Code came to fulfill that requirement, and in its article 201,[14] it rescued the term «*persons*» to refer to the subjects who could contract marriage, thus allowing Cuba to become the 34th country in the world to partially or fully legalize marriage between same-sex persons.[15]

2. PENAL CODE

The Penal Code approved by the NAPP in May 2022 maintains several crimes that have been habitually used by the Cuban government to restrict the exercise of the right to free expression recognized unrestrictedly in Article 54 of the Constitution.[16] Among these crimes are propaganda against the constitutional order and contempt. The code also imposes serious restrictions on the occupation of public space and limits the right to peaceful demonstration through the modification of crimes such as «public disorders».[17]

It also restricts freedom of expression in electoral spaces and «democratic participation» through the inclusion of a series of crimes, such as the prohibition of election campaigns or the criminalization of promoting abstentionism during electoral processes, even though voting is not mandatory in Cuba. It also establishes the prohibition of disseminating «by any means, (...) expressions that denigrate the electoral councils or other electoral structures and their authorities». The penalization of these types of behaviors prevents the free and contrasting exchange of public information and, consequently, popular control over the work of electoral institutions and authorities.

On the other hand, although the Constitution recognizes the right of all persons to life,[18] the Penal Code maintains the death penalty as a sanction for a significant number of crimes. The text recognizes the possibility of applying the death penalty in 24 criminal offenses, four more than its predecessor from 1987.

Furthermore, the recently enacted Penal Code retains the prohibition of unlawful associations and meetings that were inherited from the 1987 code. However, the new regulation not only continues to criminalize those who promote or participate in unregistered associations but also increases the penalties for such offenses compared to its predecessor.

The aggravation is both quantitative and qualitative: the new code introduces the possibility of confiscating assets in cases where a person has been sanctioned for this crime. This possibility, absent in the 1987 Code, demonstrates the Cuban government's intention to dismantle opposition organizations by imprisoning their promoters and eliminating their sources of material support, including any assets they may have accumulated over time.

3. LAW ON THE PROCESS OF PROTECTION OF CONSTITUTIONAL RIGHTS

Despite many of the aforementioned provisions being in conflict with what is outlined in the Constitution, there are no effective avenues for challenging their constitutionality through discussion.

The responsibility for ensuring the constitutionality of laws and regulations in Cuba lies solely with the NAPP, the country's legislative body. As per Article 126 of the Law on the Organization and Functioning of the NAPP,[19] the Constitutional and Legal Affairs Commission of the assembly, in practice, provides opinions on the constitutionality of laws. There is no option in Cuba for judicial oversight of the constitutionality of the laws.

This is an idea that was ratified in the Law on the Process of Protection of Constitutional Rights approved in 2022. The approval of that law was unjustifiably delayed, contrary to what was established by the Twelfth Transitional Provision of the Constitution. According to that Provision, the bill on the Constitutional Protection Process should have been presented to Parliament in October 2020. But that never happened.

Then, in July 2021, the largest anti-government protests since 1959 took place in the country, and those events further delayed the approval of a law that could have been a legal tool used by victims to channel the multiple complaints of violations of constitutional rights that occurred within the framework of the protests.[20]

The Law on the Process of Protection of Constitutional Rights constitutes an essential complement to the Constitution. However, its design and the results of its application demonstrate that its effectiveness is very limited. The following could be considered weighty reasons to support the previous assertion: *The protection designed by the law cannot be used as a resource against judgments of other courts*. In general, remedies for constitutional protection can be employed to contest rulings issued by other tribunals that are deemed to contravene or infringe upon constitutional rights.

However, the Cuban Law on the Process of Protection of Constitutional Rights explicitly prohibits the use of this recourse to challenge decisions issued by other courts, thereby hindering judicial discussion of constitutional rights violations arising from criminal jurisdiction rulings. Criminal judgments rely primarily on the Penal Code, which includes criminal offenses that may be unconstitutional and should be subject to scrutiny.

The remedy for protection cannot be utilized to address situations that have alternative judicial solutions. The Law on the Process of Protection of Constitutional Rights stipulates that the protection

13 The eleventh transitional provision of the Cuban Constitution establishes that: «Taking into account the results of the Popular Consultation, the National Assembly of People's Power shall order, within the two years of the Constitution's validity, the initiation of the process of popular consultation and referendum on the Family Code project, in which the form of constituting marriage must be included».

14 Article 201 of the Families Code establishes that: «marriage is a voluntary union between two persons who have the legal capacity to do so, for the purpose of living together based on affection, love, and mutual respect».

15 https://www.bbc.com/mundo/noticias-america-latina-63038003

16 Article 54 of the Constitution establishes that: «the State recognizes, respects, and guarantees to individuals the freedom of thought, conscience, and expression».

17 https://www.amnesty.org/es/latest/press-release/2022/12/cuba-el-nuevo-codigo-penal-presenta-un-panorama-aterrador-para-2023-y-anos-posteriores/

18 Article 46 of the Constitution establishes that: «all persons have the right to life, physical and moral integrity, liberty, justice, security, peace, health, education, culture, recreation, sports, and comprehensive development».

19 https://www.gacetaoficial.gob.cu/sites/default/files/goc-2020-ex6_0.pdf

20 https://periodismodebarrio.org/2021/07/por-que-le-creo-a-leonardo-romero-por-que-creer-en-el/

procedure cannot be employed to challenge violations of constitutional rights that can be resolved through other judicial mechanisms. This provision specifies that administrative sanctions - even if they entail violations of constitutional rights - cannot be subject to scrutiny via the protection process.

In Cuba, a specific judicial process (the administrative process) has been established to contest decisions made by the administration. However, the Cuban administrative process is designed in such a way that courts only examine the administrative act's legality, unlike the protection process. Consequently, they are constrained to focus their analysis on the legality of the administrative act and are unable to adjudicate the material actions and omissions that the administration may have committed.

In Cuba, administrative measures have been put in place in recent years that curtail constitutional rights, including freedom of expression and access to information. Regulations like Decree-Law 370 and Decree-Law 35 have introduced a system of penalties to regulate citizens' online content and expressions on the internet and social media. Even United Nations Special Rapporteurs have criticized these regulations.[21]

However, despite the harmful effects that decisions derived from these regulations may have on fundamental rights, the design of the Cuban constitutional protection remedy obstructs any judicial discussion of their constitutional basis.

The Law on the Process of Protection of Constitutional Rights establishes a single exception that could be used to attempt a protection remedy even if other judicial remedies exist. But this exception is entirely discretionary. The law acknowledges that a protection remedy may be admitted if, due to the «legal-social significance of the alleged violation», urgent and preferential action is required. However, the determination of the significance and urgency reasons is left to the judges.

The law on the process of protection of constitutional rights violates one of the mandates of Article 99 of the Constitution. This constitutional provision establishes that the law implementing constitutional protection should define the rights that would be protected by that guarantee. This approach seemed destined to restrict the judicial protection of certain rights. Many interpreted it as a risk that the complementary norm would produce gradations of human rights according to the interests of the State.

Despite the initial concerns that this approach would limit the scope of constitutional protection, the Law on the Process of Protection of Constitutional Rights turned out to be much broader than the final regulation. Rather than explicitly specifying which constitutional rights may be defended through the protection remedy, the Law grants judges the power to make that determination. This means that judges not only have the authority to decide when and under what circumstances a constitutional protection remedy may be used, but they can also do so without requiring the proposed evidence and without providing a detailed explanation of their decision.[22]

21 https://eltoque.com/relatores-onu-expresan-preocupacion-sobre-libertad-de-expresion-reunion-cuba

22 https://jovencuba.com/burla-amparo-constitucional/

IV. LOOKING AHEAD

The Cuban constitutional reform issue is fundamentally affected by the existence of an inviolability clause that was introduced in 2003, following a modification to the 1976 constitutional text, and continues to be unchanged in the 2019 Constitution's Article 4.

This inviolability clause in the Cuban Constitution is not designed to protect rights but rather to safeguard a political model that is explicitly called "socialism" in the Constitution. Article 4 of the Constitution explicitly acknowledges that the "socialist system endorsed by this Constitution is irrevocable."

The Cuban authorities used that inviolability clause as a legal justification to exclude any topic related to changes in the political model from the popular consultation and constitutional reform called in 2018. A model that, as Article 5 of the Constitution establishes, recognizes the Communist Party of Cuba as the only political party allowed in Cuba and the "superior guiding force of society and the state."

The inviolability clause and the position taken by the Cuban authorities in its defense have conditioned the debate around constitutional reform in Cuba. The question that drives this debate is: is it possible, using the current constitutional framework, to modify the Cuban political model?

The answer seems evident: No.

In 2021, the Cuban government denied a request made by a group of citizens to hold a peaceful anti-government march. The legal argument used by the Cuban authorities is illustrative of the debate around constitutional reform. They considered that the march could not be authorized because the request was unconstitutional. According to the Old Havana Intendant, the demonstration did not pursue a "lawful" purpose, as established by the Constitution, since under Article 4 of the constitutional text in Cuba, no action can be taken that aims to promote or advocate for a change in the political model on the island.[23]

On the other hand, the Constitution itself recognizes that constitutional reform can only be approved by the National Assembly of People's Power. The Cuban Constitution acknowledges that the constitutional authority does not rest with the citizenry acting as a Constituent Assembly but rather with the representatives in parliament. A parliament controlled by the Communist Party and the bureaucracy associated with it.

All of these reasons have hindered the efforts of civil society and citizens to promote constitutional modifications as mechanisms for political transformation. Nevertheless, in some sectors of intellectuals and activists, there is still a belief in a constitutional modification that would stem from a Constituent National Assembly.[24]

V. FURTHER READING

Eloy Viera, Johanna Cilano, Valentina Cuevas, 'El ABC de la consulta popular en Cuba' (*DemoAmlat*, Feb. 2022) https://repositorio.4metrica.

23 https://www.facebook.com/cubadebate/videos/no-se-reconoce-legitimidad-en-las-razones-que-se-esgrimen-para-la-marchael-inten/569865834247169/

24 https://diariodecuba.com/derechos-humanos/1681914651_46591.html

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Johanna Cilano, "¿Qué tan democrático es el Código de las Familias?" (*El Toque*, 16 August 2022) https://eltoque.com/que-tan-democratico-es-el-referendo-del-codigo-de-las-familias-en-cuba accessed 24 March 2023.

Eloy Viera, "Cuba: el imperio de la ley vs el imperio del Partido Comunista" (*El Toque,* 26 de octubre 2022) https://eltoque.com/cuba--el-imperio-de-la-ley-vs-el-imperio-del-partido-comunista accessed 20 March 2023.

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Cyprus

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I. INTRODUCTION

During 2022 the Cyprus House of Representatives amended the Cyprus Constitution on two separate occasions: On May 20, it approved the amendment of Article 3 of the Constitution to allow the use of the English language in the newly established Admiralty Court;[1] and on July 12 and August 5 respectively, it approved amendments to Articles 136, 144, 146, and 155 of the Constitution, which along with the amendment of Law No. 33/64,[2] will on July 1st, 2023 implement the restructuring of the judicial system.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The amended Article 3.4, of the Cyprus Constitution now provides: "that the Commercial and the Admiralty Court and a higher court thereof, when considering or reviewing a decision or order of the first instance Commercial or Admiralty Court, *may allow* the use of the English language in proceedings before it, including the filing of a written address or a pleading or of a document or evidence in English."

Greek remains the official Court language, but a Judge of the Commercial or Admiralty Court may, when the interest of justice so requires, allow the legal proceedings to be conducted and the documents to be filed, in English, at the request of one of the parties. In such a case, the Judge shall specify that English is the language in which the proceedings are conducted and in which the judgment of the Admiralty Court will be issued.[3] The amendment was considered necessary to promote the Republic as a center of service providing internationally and encourage its economic development.

The 17th amendment and the laws enacted for its proper implementation constitute part of the long overdue response to the enormous delays in the administration of justice and the great backlog of cases in the courts' dockets both at first instance and on appeal. The resulting restructuring of the courts (along with the establishment of specialized courts already effected) is expected to contribute significantly towards the overall enhancement of the efficiency of courts operating in the Republic.

The main legal reforms introduced include the establishment, for the first time, of a Court of Appeal dealing with civil, criminal, and administrative cases at second instance (16 Judges); and providing for the operation of two supreme courts, i.e., the Supreme Constitutional Court (composed of 9 judges) and the Supreme Court (composed of 7 Judges) additional third-degree jurisdiction to these two courts. These courts will begin operating on July 1st, 2023.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Supreme Constitutional Court will have jurisdiction to review the constitutionality of laws, but it will also act as the supreme administrative court ("on referral from the Court of Appeal, an appeal against a decision of the Administrative Court on a matter of public law of major public interest or of general public importance" (Article 9 (b) Administration of Justice (Miscellaneous Provisions) Law). Constitutional review cases, notably from the civil and criminal courts, can reach the Supreme Constitutional Court via a system of leave to appeal by referral from an ordinary court of "questions of constitutionality which are essential to the determination of the case pending before it" (Article 9 (a) Administration of Justice (Miscellaneous Provisions) Law). This ensures that all courts - and indirectly - individuals have access to the Supreme Constitutional Court.

The legal reform of the judiciary introduces a Judicial Advisory Council, the purpose of which is to advise the President of the Republic regarding the appointment of judges to the Supreme Constitutional Court and to the Supreme Court; and the composition of the existing Supreme Council of Judicature has been expanded to include the Attorney General, the President of the Cyprus Bar Association and

1 The Law entitled Law of 2022 on the Sixteenth Amendment to the Constitution (Law 67(I)/2022).

2 Following the intercommunal troubles of 1963-64 in Cyprus and the mass exit of Turkish Cypriot representatives from the institutions of the state, the Administration of Justice (Miscellaneous Provisions) Law (Law No. 33/64) was enacted in order to address the constitutional difficulties that arose from that situation. This Law also made several changes to the justice system, most notably the amalgamation of the Supreme Constitutional Court and the High Court in the present Supreme Court exercising the powers of the previous courts. The Supreme Court also acts as the Supreme Council of the Judicature, dealing with judicial appointments, promotions, transfers, and disciplinary matters.

3 The Admiralty Court will consist of two judges with broad knowledge of admiralty affairs and/or proven experience in handling court cases that fall under the jurisdiction of the Admiralty Court, having also very good knowledge of the English language.

two advocates of highest professional level, qualified to be appointed as judges on the Supreme Court. The advocates are to be appointed on recommendation by the Cyprus Bar Association and upon approval of the Supreme Court.

However, the procedure for the appointment of the judges of the future Supreme Constitutional Court and High Court has raised significant concerns. The relevant legislation provides that the decisions on the appointment of the judges and the Presidents of the new courts would be solely taken by the President of the Republic.[4] It also provides that a separate Advisory Judicial Council would be set up - different from the Supreme Council of Judicature - responsible for preparing a list of the most suitable candidates for appointment. However, this list will not be binding on the President. The participation of the Attorney General in the Advisory Council without a voting right is considered an improvement on the previous position since the Attorney General, an independent officer, is not only the prosecuting authority but also the Government's Legal adviser.

Further concerns remain regarding the fact that candidates are not given the option to challenge a decision of the Advisory Judicial Council, especially troublesome in the absence of clear pre-established criteria for the appointments.

On 22 September 2021, the Cypriot authorities requested an opinion from the Venice Commission while the three Bills reforming the Judiciary were still pending.[5] On 13 December 2021, the Venice Commission made several recommendations regarding the draft legislation, especially in respect of the composition of the Advisory Judicial Council and the procedures for the appointment of the judges to the two highest courts.

The Venice Commission of the Council of Europe recommended that the Advisory Judicial Council should provide a graduated recommendation to the President, that the reasons for the decisions of the Council should be made available to applicants on request, and that an unsuccessful candidate should have the right to challenge the decision of the Advisory Judicial Council. In addition, the Venice Commission highlighted the importance of pre-existing, clear, and transparent criteria to apply in proposing any appointment which would be binding on the Council. Finally, the Venice Commission suggested as a further improvement that the President would need to give reasons in writing when he takes any decision which does not follow the recommendation of the Advisory Judicial Council.

These recommendations were not incorporated into the relevant legislation as it was finally passed by the House of Representatives. It is notable that an essential recommendation made by the Venice Commission, i.e., that judicial members should be elected by their peers instead of being selected on the basis of seniority, was completely ignored.

IV. LOOKING AHEAD

Overall, the amendments to the Cyprus Constitution and the relevant legislation implementing them constitute a step forward for the judicial system in Cyprus, which has been stagnating under the doctrine of necessity for decades.[6]

The reforms may not have ushered in a new era, as the socio-cultural constraints are deeply entrenched, but it could yet prove to be a beginning towards a system better aligned with European standards as articulated both by the Venice Commission of the Council of Europe[7] and the EU Rule of Law Commission.[8]

V. FURTHER READING

European Commission for Democracy through Law (Venice Commission), Cyprus, Opinion on the three bills reforming the Judiciary, adopted by the Venice Commission at its 129th Plenary session (10-11 December 2021, Venice and online), CDL-AD(2021)043, Opinion 1060/2021, Strasbourg, 13 December 2021.

2022 Rule of Law Report, Country Chapter on the rule of law situation in Cyprus, SWD(2022) 513 final, Luxembourg, 13.7.2022.

4 Currently, Supreme Court Judges are appointed by the President of the Republic from the ranks of the judiciary and upon recommendation of the Supreme Court, which the President is not obliged to follow. However, according to established practice, the President of the Republic follows the recommendations of the Supreme Court, which, based on seniority, proposes the oldest judge in service for each vacancy. The same practice applies to the appointment of the President of the Supreme Court, for which the President of the Republic always follows the recommendation to appoint the oldest judge in service in that Court.

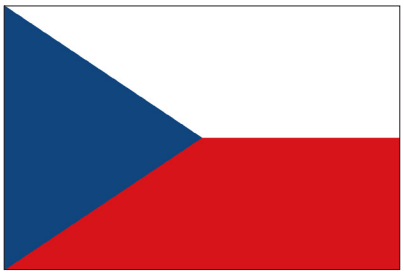
5 The Bill entitled The Law of 2021 on the Sixteenth Amendment to the Constitution (CDL-REF(2020)091), the Bill entitled Law amending the Laws relating to the Courts 1960 to (no 3) 2020 5 CDL-REF(2020)092) and the Bill entitled Law amending the Regulations on the Acquisition of the Justice (Miscellaneous Provisions) Laws of 1964 to 2015 (CDL-REF(2020)093).

6 It should be noted that, as a rule, the (re-)establishment of a Constitutional Court should be conducted by a constitutional amendment. However, amending the Cypriot Constitution is extremely difficult. The Constitution of Cyprus was ratified on 16 August 1960 following the so-called London and Zürich Agreements between Turkey, Greece, the United Kingdom, and Cypriot community leaders (Archbishop Makarios III for the Greek Cypriots and Dr. Fazıl Küçük for the Turkish Cypriots) on which basis a constitution was drafted and Cyprus was proclaimed an independent state. The 1960 Constitution divided the Cypriot people into two communities, based on ethnic origin, and sought to balance the rights and interests of both communities, *inter alia* by providing an intricate and detailed system of mixed representation in state organs. As the text of the Constitution was a delicate compromise, Article 182 of the Constitution provided for a long list of unamendable provisions of the Constitution. Some of those unamendable provisions concern the judiciary. Following the intercommunal troubles of 1963-64 and the mass exit of Turkish Cypriot representatives from the state institutions, the constitutional dilemma was how to ensure the continued functioning of a state based on a constitution premised on the cooperation of the two communities. The Supreme Court attempted to solve this dilemma in the case of *The Attorney General of the Republic v. Mustafa Ibrahim and others* [1964] CLR 195, by deciding that the 'doctrine of necessity' or 'law of necessity' as it is called in Cyprus could be used to essentially amend or disapply constitutional provisions that could no longer be complied with. For the application of the doctrine of necessity, the following prerequisites must be satisfied: 1. An imperative and inevitable necessity or exceptional circumstances should exist; 2. There should be no other remedy available; 3. The measure taken should be proportionate to the necessity, and finally 4. The measure must be of a temporary character limited to the duration of the exceptional circumstances. Since 1964 the doctrine has been invoked many times. It is also invoked in the preamble to the laws amending the Cypriot Constitution in 2022. The doctrine of necessity has become the unwritten cornerstone of the Cypriot legal order and is – also after 60 years – nearly undisputed. This is undoubtedly related to the fact that the authorities of the Republic of Cyprus wish to expressly demonstrate that the state does not acquiesce or accept the current factual situation.

7 European Commission for Democracy through Law (Venice Commission), Cyprus, Opinion on the three bills reforming the Judiciary, adopted by the Venice Commission at its 129th Plenary session (10-11 December 2021, Venice and online), CDL-AD(2021)043, Opinion 1060/2021, Strasbourg, 13 December 2021.

8 2022 Rule of Law Report, Country Chapter on the rule of law situation in Cyprus, SWD(2022) 513 final, Luxembourg, 13.7.2022.

Czech Republic



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I. INTRODUCTION

The Czech Republic has a pluralist constitution[1] that is rather a rigid one.[2] Due to the political fragmentation,[3] it is relatively rare that an amendment is passed. In 2022 there were only a few proposals that were already rejected or are still pending.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

As already mentioned, there were not any successful proposals in 2022. Four proposals are still pending and will be discussed by the Parliament, and one proposal has already been rejected.

The already rejected bill proposed to introduce the right to pay with cash as a new human right into the Charter. This proposal has been introduced by senators and required a different procedure to be put in place as unlike individual deputies or groups of deputies, only the Senate as a whole can propose a new act of parliament. Therefore, the Senate held a vote on this proposal on the 15th of February, 2023. As the majority of senators rejected this proposal, it never became an official bill to be discussed by the Chamber of Deputies.

Two proposals from the SPD party, often labelled as populist or even far-right,[4] were submitted in October 2021, right after the general elections.[5] These proposals belong to the "evergreens" proposed in almost every term of the Chamber of Deputies. They seek to introduce the nationwide general referendum, direct elections, and recall of town mayors and regional council presidents. Neither of these two bills made it past the first reading in the Chamber of Deputies so far.[6]

One governmental proposal that already passed through the first two readings out of three is dealing with the competence of the government to send military forces abroad or host foreign military forces in the Czech territory. Currently, such competence already exists for three possible aims (international obligations, natural disasters, and military exercises); in all other situations, it is necessary for the government to ask for approval from the Parliament. The new bill proposes to add another situation when the government can act on its own. It is formulated as a necessity to "protect lives, health, property or public security of the Czech Republic." The main aim is to allow the participation of Czech military forces in missions to rescue Czech citizens who were kidnaped or are being held hostage. For tactical reasons, it is disadvantageous to announce such plans publicly when asking the Parliament for permission.

The newest bill submitted by a group of deputies that is still waiting for its first reading is aiming to constitutionalize the definition of marriage as a union of man and woman. The aim of this bill clear is to block another pending bill that seeks to introduce marriage for same-sex couples (currently, there is only the option of registered partnership available for these couples).[7]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The unsuccessful initiative to introduce a human right to pay with cash could be seen as an elaborative amendment. The idea was to immunize current legislation from the possible introduction of compulsory card payments in the future. Similar could be said about the proposal to constitutionalize the current definition of marriage.

The governmental proposal on military operations abroad can be seen as a corrective amendment, given that the current legislation effectively prevents such operations aiming at rescuing hostages, given the necessity to publicly ask the Parliament for permission.

The proposals made by the SPD party (nationwide general referendum, direct elections, and recall of town mayors and regional council

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

2 D Kosař and L Vyhnánek, *The constitution of Czechia: a contextual analysis.* (Hart 2021), 196.

3 M Brunclík and M Kubát 'Czech Parliamentary Regime After 1989: Origins, Developments and Challenges', (2016) 8:2 Acta Politologica, 19.

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

5 Each Chamber of Deputies elected every four years is considered to be separated from its predecessors; therefore, proposals not approved by the "old" chamber cannot be further discussed.

6 Every bill goes through three readings in the Chamber of Deputies, and it has to be approved by the qualified majority (3/5 of all deputies, i.e. 120 deputies out of 200). Then the bill continues to the Senate where it has to be approved by a differently constructed qualified majority (3/5 out of senators present).

7 For a comparison of these two legal regimes, cf. M Sekerák and L Novotný, 'Legislation on Same-Sex Partnerships in the Post-Communist Area: Case Study of the Czech Republic' (2021) 46:3-4, Review of Central and East European Law, 374-399. doi: https://doi.org/10.1163/15730352-bja10054.

presidents) can be seen as dismemberments as they try to shift the current balance of power.

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

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

IV. LOOKING AHEAD

During 2023 the governmental proposal will most likely get approved as the coalition currently has a majority in both houses. On the other hand, bills that are not supported by the government will most likely fail.

V. FURTHER READING

Právnická Fakulta MU. *The Atlas of the Czech Constitutionalism*. 2015. <http://czecon.law.muni.cz/content/en/>. Accessed 14 March 2023.

D Kosař and L Vyhnánek, *The constitution of Czechia: a contextual analysis*. Hart, 2021.

8 Article 9 section 2 of the Czech Constitution.

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

10 H Smekal, J Benák & Ladislav Vyhnánek, "Through selective activism towards greater resilience: the Czech Constitutional Court's interventions into high politics in the age of populism", (2022) 27:2 The International Journal ofHuman Rights, 1239.

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

Democratic Republic of Congo

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I. INTRODUCTION

The Democratic Republic of the Congo (DRC) is currently governed by the 2006 Constitution. It was formally revised once in January 2011.[1] Several other amendments were suggested but failed between 2007 and 2020.[2] This appears in itself to be a performance compared to the DRC's traditional constitutional instability since independence in 1960, with a record of seventeen revisions held by the Constitution of 24 June 1967.[3] However, if no formal constitutional reform was adopted in 2022, it does not mean that the 2006 Constitution is necessarily stable or resists any modification of its provisions. Practices rather show that only methods of change have evolved. Instead of formally reforming the constitutional text, amendments rules are circumvented in favor of informal revisions. As a method of constitutional reform, informality implies that state government does not necessarily follow the formal constitutional provisions but conforms to practices that may be viewed as remote compared to the original constitution. Yet, whilst formally revising a constitution is quite a normal phenomenon within a state because any constitutional text can be updated and adapted to societal evolutions,[4] informal change through practices that circumvent established written rules is, in principle, unconstitutional. Such practices are, however, meaningful because they are followed, or accepted by state institutions or given a judicial stamp or approved by courts' decisions.

This report, therefore, focuses on constitutional reform through judicial decisions and legislative intervention in areas that would normally require the formal revision of the 2006 Constitution. It examines three cases of informal change by the Constitutional Court (CC) and one draft law that was proposed in 2022, explains their scope, and how they interfere with the Constitution. It also underlines the role that the CC may play to review a law that would likely clash with the Constitution. Finally, this report warns against the adverse effect of these informal changes insofar as some of them have the potential to provoke political tension and instability ahead of the 2023 general elections and before recommending several publications for further reading.

1 Law No.11/002 of 20 January 2020.
2 See Balingene Kahombo, 'Les fondements de la révision de la Constitution congolaise du 18 février 2006'(2014) 1 *KAS African Law Study Library* 428, 428-429 and 452
3 Marcel Wetsh'okonda Koso, *Les textes constitutionnels congolais annotés* (Campagne pour les Droits de l'Homme au Congo 2010), 7.
4 Evariste Boshab, *Entre la révision de la constitution et l'inanition de la nation* (Larcier 2013), 31.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The previous report on the DRC presented a list of four amendments proposals, including Article 3(2) on the list of territorial decentralized entities, Article 10 (1) on the exclusive character of the Congolese nationality, article 71 on the direct election of the President of the Republic by a majority in one round-ballot, and article 198 (2) on the election of governors of provinces by members of the provincial assemblies.[5] Until the end of 2022, none of them was formalized in terms of initiatives for constitutional reform in order to be adopted, probably because of a lack of sufficient popular and political support. There were calls for more cautiousness and scrutiny before amending again the Constitution.[6] Instead, informal changes prevailed, as evidenced by CC's decisions between 2020 and 2022 and a proposed legislative Act to modify conditions to run for presidential elections.

1. CASES OF INFORMALITY THROUGH JUDICIAL DECISIONS

A case in point is the modification of the scope of the *parliamentary mandate*. The issue stemmed from the need to identify the opposition and a new majority in the National Assembly. The objective was to replace the coalition between CACH (*Cap pour le Changement*) of President Félix Antoine Tshisekedi Tshilombo and FCC (*Front Commun pour le Congo*) of former President Joseph Kabila with a new one named *Union Sacrée de la Nation* (USN). As a matter of law, the DRC defines itself as a democratic state.[7] Parliamentary chambers (National Assembly and Senate) are, on their side, temples of this democracy. In the National Assembly, in particular, applicable rules indicated that political parties and groupings must submit a declaration to the Office of the Chamber at the beginning of each legislative term that they belonged to the opposition and not to the ruling majority.[8] However, following the President of the National Assembly's request for constitutional interpretation, the CC

5 See Balingene Kahombo, 'Democratic Republic of the Congo' » in Louis Roberto Barroso and Richard Albert (eds.), *The 2020 International Review of Constitutional Reform,* Program on Constitutional Studies at the University of Texas, in collaboration with the International Forum on the Future of Constitutionalism (Austin, 4 September 2021) 91-94.
6 Ibid., 92-93.
7 Constitution of the Democratic Republic of the Congo of 18 February 2006 (revised in 2011), article 1.
8 Rules of the DRC National Assembly (2019) art.26 (3).

modified the meaning of the national character of parliamentarian term and the prohibition of an imperative mandate as provided for in article 101(5) of the Constitution. In its judgment R.Const.1453/1463/1464 of 15 January 2021, the CC granted to any member of parliament a license to behave freely in the National Assembly without any intermediation of his or her political party or grouping.[9] But something was forgotten, that is, the effect of article 110(6) of the same Constitution, which provides that any parliamentarian who willfully leaves their political party or grouping shall be deemed to have renounced their parliamentary term. As members of parliament can now behave as they want and even leave their political parties or groupings within the National Assembly, Article 110 (6) has been modified or at least neutralized.

This controversial jurisprudence generated passionate political debates throughout 2022. These debates were the result of another crisis that occurred when Moise Katumbi, one of the DRC's prominent political leaders, left the coalition *Union Sacrée de la Nation* to prepare himself for the upcoming 2023 presidential elections. However, several members of his party, *Ensemble pour la République* (Together for the Republic), vowed their fidelity to President Thisekedi to maintain their positions both in the government and parliament. Some have even created their own political parties, which now belong to the ruling majority.[10]

However, constitutional change through judicial neutralization of constitutional provisions was not new. The CC had already modified the 2006 Constitution with respect to modalities for the President to declare a *state of emergency or a state of siege*. The issue emerged in the context of the Covid-19 pandemic. Once the first cases of COVID-19 were diagnosed in DRC, the government wanted to introduce extraordinary measures to prevent the disease. However, questions emerged regarding the legal framework under which such measures could be taken and which institutions had the power to participate in decision-making processes. On 24 March 2020, the President of the Republic declared a state of emergency on the basis of Article 85 of the 2006 Constitution. The Head of the Senate argued, however, that article 119 (2) of the Constitution required the prior authorization of Parliament sitting as Congress. The controversy over the role of the Congress led to an institutional crisis between the President of the Republic and Parliament. While the President thought he had the legal power to decide alone, the President of the Senate argued that he had violated the Constitution. In its judgment R.Const.1200 of 13 April 2020, upon President Tshisekedi's request for constitutional review of his ordinance declaring the state of emergency, the CC held that the Head of State had the option to either decide unilaterally or to request parliamentary authorization.[11] As a commentator argues,[12] the CC modified or at least neutralized article 119 (2) of the Constitution inasmuch as a Head of State who knows that he is allowed to decide unilaterally will not likely request the intervention of Congress. In its judgment R.Const.1550 of 6 May 2021 in which the CC reviewed the constitutionality of the presidential ordinance declaring the state of siege in Ituri and North-Kivu provinces in eastern DRC, in order to combat armed groups and impose peace and security, it even abandoned the said optional regime and replaced it by a mere mandatory consultation with other state institutions as provided for in article 85 of the Constitution.[13]

More interesting is the CC's reversal of its case law concerning its jurisdiction over the constitutional review of decisions of other courts and tribunals, whilst it had held that such review, which was previously opened only against decisions of the High Military Court, had been implicitly abrogated by article 121 of the Constitution.[14] Now, in its judgement R.Const.1800 of 22 July 2022, the Court has affirmed its jurisdiction more broadly and declared unconstitutional a decision delivered by the State Council, the highest administrative Court, on the ground that it had violated, among others, rights of the citizens enshrined in the Constitution.[15] To review judicial decisions, the CC has held that it suffices for the petitioner to claim for the violation of their fundamental right and that the matter does not fall within the competence of another tribunal. This jurisprudence has been confirmed in several other cases, especially in the CC's judgment R.Const.1830 of 12 November 2022. In this decision, the CC declared it unconstitutional and therefore void a judgment delivered by a trade tribunal that had authorized the sale of a building owned by a bank in Kinshasa.[16]

Through this jurisprudence, the CC has consolidated a range of decisions amending rules applicable to *individual petitions for constitutional review* pursuant to Article 162(2) of the Constitution. The latter provides that every person has the right to submit an application before the CC to seek constitutional review of legislative or regulatory acts. In other words, article 162 (2) allows for an individual request for the benefit of every person (question of *locus standi*) against legislative or regulatory acts (question of jurisdiction *ratione materiae*). This provision was first modified by the legislature, which expanded it to other legal acts, namely, the rules of parliamentary chambers, the congress, and institutions of support to democracy, such as the Independent National Electoral Commission.[17] But the radical modification came from the CC when it sought to review parliamentary acts (acts of assembly in Congolese law) other than laws following individual challenges against a motion of censure or non-confidence against provincial executives or ministers, as well as internal resolutions adopted to dismiss presidents of provincial assemblies or members of their bureau, or again to invalidate a member of parliament. In this

9 *CC, 15 January 2021, R.Const.1453/1463/1464, Requête en interprétation de l'article 101 alinéa 5 de la Constitution telle que modifiée par la Loi n°11/002 du 20 janvier 2011 portant révision de certains articles de la Constitution de la République démocratique du Congo du 18 février 2006* (On File with the Author).

10 Radio Okapi, 'RDC: Muhindo Nzangi lance son propre parti politique, AVRP' (20 July 2022)<https://www.radiookapi.net/2022/07/20/actualite/politique/rdc-muhindo-nzangi-lance-son-propre-parti-politique-avrp>09 April 2023.

11 *CC, 13 April 2020, R.Const.1200, Requête du Président de la République en appréciation de la conformité à la Constitution de l'Ordonnance n°20/014 du 24 mars 2020 portant proclamation de l'état d'urgence sanitaire pour faire face à l'épidémie de Covid-19* (On File with the Author).

12 See Ngondankoy Nkoy-ea-Loongya, 'De la constitutionnalité de l'état d'urgence sanitaire proclamé par l'ordonnance présidentielle du 24 mars 2020: termes du débat et observations constitutionnelles', *Revue de droit africain*, n°94, 2020, pp.277-322.

13 *CC, 6 May 2021, R.Const.1550, Requête du Président de la République en appréciation de la conformité à la Constitution des Ordonnances n°21/016 du 03 mai 2021 portant mesure d'application de l'état de siège sur une partie de la République démocratique du Congo* et n°21/018 du 04 mai 2021 portant nomination des membres des gouvernements provinciaux militaires dans les provinces de l'Ituri et du Nord-Kivu (On File with the Author).

14 *CC, 4 December 2020, R.Const.1272, Requête de Monsieur Wanyanga Muzumbi Jean-Israël, général de brigade, en inconstitutionnalité de la procédure et de l'arrêt de la Haute Cour Militaire du 2 juillet 2020 sous RP015/2020 (On File with the Author).*

15 *CC, 22 July 2022, R.Const.1800, Requête de la Commission Electorale Nationale Indépendante, CENI en sigle, en inconstitutionnalité des arrêts sous REA 183 du 27 mai 2022, sous REA 189/182/190 du 02 juin 2022 et sous REA 179/188/180/184/185 rendus par le Conseil d'Etat en matière de contentieux des résultats des élections des Gouverneurs et Vice-gouverneurs respectivement des Provinces de la Mongala, du Maniema et de la Tshopo (On File with the Author).*

16 *CC, 12 November 2022, R.Const.1830, Requête en inconstitutionnalité de la décision rendue sous ROLE 069/AE/RH 1976 par le Tribunal de commerce de Kinshasa/Gombe, introduite par la Société Equity Banque commerçiale du Congo SA (On File with the Author).*

17 Organic Law No.13/026 of 15 October 2013 Laying down the Organisation and the Functionning of the Constitutional Court, articles 43 et 48.

vein, in its judgment R. Const.1133 of 7 February 2020, the CC reaffirmed its jurisprudence, stating that it has jurisdiction over parliamentary acts if they violate fundamental rights which it has the duty to guarantee in order to protect the rule of law, in accordance with articles 1 and 150 (1) of the Constitution, provided that there is no other competent court.[18]

2. LEGISLATIVE INTERVENTION TO MODIFY CONDITIONS TO RUN FOR PRESIDENTIAL ELECTIONS

President Tshisekedi came to power in January 2019 following his controversial victory in the 30 December 2018 elections. He still has the right to run again and secure a second term out of the 2023 elections. But the President is not sure whether he will win because of his poor socio-economic realizations and failure to restore peace in the whole country, as well as the ambitions of other important figures in Congolese politics, such as Moise Katumbi and Martin Fayulu.

In 2021 a former candidate for the 2018 presidential elections, Nöel Tshiani, who is from the same region of Kasai as President Tshisekedi, suggested strengthening conditions for the presidential race. For him, the DRC President must have a Congolese nationality of origin; he must be born to both a Congolese father and mother. Article 72 (1) of the Constitution only requires to be Congolese of origin, which means that a candidate may simply hold the Congolese nationality of origin because their father or mother is Congolese or if they belong to one of the ethnic groups forming the DRC in 1960, pursuant to the 2004 law on Congolese nationality. In other words, Congolese whose parents, father or mother, are not Congolese, although they are Congolese by origin, will no longer be able to stand in the presidential elections or be allowed to hold high ranking positions within the state.[19] Noël Tshiani contends that this would preserve the sovereignty and the security of the DRC because, in the past, many Congolese betrayed the country and destroyed it in collaboration with foreign nations and powers, notably Rwanda and Uganda, which arguably succeeded to infiltrate Congolese institutions, security forces, and intelligence services.

His idea was endorsed by a member of parliament, Nsingi Pululu, who belongs to the ruling majority, which supports President Tshisekedi. But Nsingi's proposal was politically rejected before Moise Katumbi left the President's coalition *Union Sacrée de la Nation*. It was not included among the modifications of the electoral law promulgated on 29 June 2022. But, Nsingi submitted his proposal to the National Assembly only in March 2023, some months after Moise Katumbi had left the President's coalition. He seeks to amend not the recent electoral law but to modify the law on Congolese nationality. Observers believe that the draft law aims to exclude serious contenders in the presidential elections, mainly Moise Katumbi, whose father is not Congolese, against the outgoing Head of State.[20] If the law is passed, the scope of Article 72 (1) of the Constitution will be significantly modified.

18 *CC, 7 February 2020, R. Const.1133, Monsieur Jean Bamanisa Saidi c. L'Assemblée provinciale de l'Ituri (On File with the Author).*

19 See Radio Okapi, 'Noel Tshiani Muadiamvita, ancien candidat président en RDC : « Il faut conditionner l'accès a la magistrature suprême en RDC par la détention de la nationalité congolaise de père et de mère. » »' (16 April 2021) <https://www.radiookapi.net/2023/04/07/emissions/regard-sur-lactualite-de-la-semaine/polemique-autour-de-la-proposition-de-loi>9 April 2023.

20 See Radio Okapi, 'RDC : la loi sur la nationalité congolaise met à mal l'unité et la cohésion nationales, selon Ensemble' (9 July 2021) <https://www.radiookapi.net/2021/07/09/actualite/politique/rdc-la-loi-sur-la-nationalite-congolaise-met-mal-lunite-et-la>10 April 2023.

III. SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In two instances, articles 119(2) and 110 (6) of the Constitution were neutralized by the CC, as stated above, but principles on declarations of states of emergency or siege and parliamentary mandate, respectively, were violated. It goes without saying that the aforementioned CC's judgment R.Const.1453/1463/1464 on the scope of the parliamentary mandate is likely to weaken parliamentary democracy, which is essentially party-centered or partocratic. The incumbent President was able to reorganize the political landscape in his favor as the Court seemed to have allowed political debauchery, which is often an immoral practice fueled by corruption. The Head of State emerged cheered, benefiting from the support of courtesans ready to accept a retrograde authoritarian presidentialism. As a consequence, members of the same party or political grouping now paradoxically belong to both the opposition and the majority coalition. The purpose of Article 110(6) of the Constitution, namely, to prevent (immoral) political vagabondage,[21] was overlooked by the CC.

Likewise, by sidelining the prerogative of the Congress to give prior leave to the Head of State before any declaration of the state of emergency or the state of siege, the CC, through its aforementioned judgments R.Const.1200 and R.Const.1550, missed an opportunity to clarify how political institutions could work together in the context of exceptional circumstances during which the risk of abuse of power is obvious. This can hardly be considered democratic or in line with the principle of the rule of law enshrined in Article 1 of the Constitution.

However, the problem is that there is no upper instance that can review the CC's judgments contrary to the Constitution. Pursuant to Article 168 of the Constitution, the CC's judgments are final and not susceptible to recourse.

Moreover, the extension of the CC's jurisdiction to review decisions of other courts in order to protect fundamental rights and the rule of law raises a real problem of confusion between the substantive rules and the rules of jurisdiction. The violation of a constitutional provision or principle does not automatically imply the CC's jurisdiction to examine the case, the jurisdiction being of explicit constitutional or legislative attribution. The extension of the CC's jurisdiction is also problematic regarding the admissibility of individual petitions insofar as, concerning its new material competence, the Court was not opened to every person. The lack of *locus standi* should inevitably strike any applicant who would introduce a petition on such a dubious basis. Incidentally, direct action to protect fundamental rights is rather an exclusive prerogative conferred on the General Prosecutor before the CC. The expansion of the latter's jurisdiction may be tolerated only because it extends the right of citizens to challenge the state's acts and protect themselves against abuses of judicial authority.

As to the legislative modification of conditions to run for presidential elections, the draft law is in breach of Article 5 (3) of the Constitution because it has been introduced in the form of amendments to the law on Congolese nationality which is an organic law, pursuant to Article 10 (4) of the Constitution, whereas the former leaves the matter of elections regime to be organized by a special ordinary law. On this basis,

21 Eugène Banyaku Luape Epotu, *Perversion du jeu démocratique congolais par les mégas-groupements politiques: inconstitutionnalité et disproportionnalité du poids politiques* (CEDIS 2021) 8.

the legislature is incompetent to amend the rules on elections by an organic law. The reason is that an organic law must only deal with issues that the Constitution itself has designated. Another difference with an ordinary law lies in the procedure of adoption, which is more drastic in the case of organic laws.[22] Worse, this draft law violates 12 and 13 of the Constitution, which guarantee, respectively, equality before the law between Congolese and the right to non-discrimination, particularly concerning accessing positions in public affairs. Inequality does exist in the present case because the draft law discriminates between Congolese by origin, while the Constitution does not, by giving more rights to those who are born of both Congolese fathers and mothers. It would not be possible to pass it unless the Constitution is foremost revised to allow a sort of positive discrimination in favor of some Congolese.

The major obstacle to this constitutional revision stems from Article 220 of the Constitution, which provides for unamendable clauses as follows:

The republican form of the State, the principle of universal suffrage, the representative form of the Government, the number and duration of the terms of office of the President of the Republic, the independence of the judiciary, political and trade union pluralism, shall not be subject to any constitutional revision.

Any constitutional revision that has as its object or effect the reduction of human rights and freedoms, or the reduction of the prerogatives of provinces and decentralized territorial entities, is strictly prohibited.

The second paragraph, which prohibits by way of revision the reduction of the minimum of human rights and freedoms standards guaranteed by the Constitution, is pertinent. If the object or the effect of the constitutional amendment is to give more rights to some Congolese by origin and therefore to reduce the right of others, then it would infringe the principle laid down in Article 220(2) of the Constitution.

Overall, only the informal revision of the Constitution aimed at changing the conditions for being a candidate in the presidential elections presents the risk of dismemberment since it has the potential to repudiate or destroy the foundation of the 2006 Constitution as laid down in Article 220(2). If the said draft law is adopted, constitutional issues could be submitted to the Constitutional Court. The latter has jurisdiction over the constitutional review of laws. If it is an organic law, prior judicial review is mandatory at the request of the Head of State. It would be interesting for judges to demonstrate that the CC is independent enough to censure a legislative Act which is supported by the ruling majority and President Tshisekedi himself.

IV. LOOKING AHEAD

The DRC is still a fragile state. It has suffered from continuous armed conflicts for 30 years. The current presumed democracy was established by the 2006 Constitution in order to pacify struggles to access or maintain political power, build an inclusive society, and improve state governance for the welfare of the Congolese people. But DRC is so far unstable, mainly because of persistent activism of armed groups, the expansion of terrorism in eastern provinces, unconsciousness of the national political leadership, and rampant corruption. Provoking regular political crises that can further destabilize institutions is to run the risk of total state disintegration. In this regard, the controversial proposed amendment to the organic law on Congolese nationality is an important setback. In the past, political exclusion was one of the root causes of armed conflicts in the country between 1996 and 2002. Thus, a parliamentarian, Delly Sesanga, pertinently reminded us as follows:

The question of nationality is one of the subjects that must be handled with great political caution and legal dexterity. This is an issue that we must never forget was at the heart of the conflicts that have shaped our country's history. The risk to our country is to be governed from now on the basis of the personal memory of the leaders of the majority, of their whims and fantasies. Instead of the collective memory and the past of our institutions and their roots, the leaders of the current regime are freeing themselves from archives and looking at history only to find the art of reconstructing the disasters of the past. In order to opt for personal satisfactions, they transgress the rules, patiently built for national cohesion and our desire to live together, to the detriment of the general interest and the sense of the common good.

The so-called 'father and mother' bill is a nationalist initiative whose purely electoral stakes are far from national. This is the approach of a private group, which has ravaged the institutions and is no longer exploiting their remains for unstated purposes of conservation of power through the restriction of political space. But the threat is national.[23]

The last resort to stop this threat to political stability and national security before and probably after elections is the CC since it has jurisdiction to censure such a retrograde law. But the Court's independence is problematic since new judges were appointed by the President of the Republic in 2020 in total disregard of the law and constitutional requirements. This was one of the bones of contention which precipitated the disbanding of the FCC-CACH coalition in 2021. Concerns are very high as the Court now has an expanded jurisdiction, such as reviewing decisions of other courts. It is feared that if the CC does not become fully independent, it can be used to rig election results or censure those of provincial and local elections, which are to be finally delivered by other tribunals, to secure a majority at all levels for the outgoing Head of State. A high degree of personal integrity in judges is required to resist political pressure and to consider only facts and law in examining cases.

V. FURTHER READING

Ngondankoy Nkoy-ea-Loongya, 'De la constitutionnalité de l'état d'urgence sanitaire proclamé par l'ordonnance présidentielle du 24 mars 2020: termes du débat et observations constitutionnelle' (2020) 94 *Revue de droit africain*, 277-322.

Balingene Kahombo, 'La Cour constitutionnelle de la République démocratique du Congo six ans après' (2020-2021) 5 *Annuaire Congolais de Justice Constitutionnelle*, 41-62.

Balingene Kahombo, 'La pérennité de l'identité de l'ordre constitutionnel congolais: réflexions sur les dispositions intangibles de la Constitution du 18 février 2006' (2021)24 *Law in Africa*, 68-95.

22 Constitution of the Democratic Republic of the Congo of 18 February 2006 (revised in 2011), article 124.

23 Delly Sesanga, 'Extrait de ma tribune : ma vision de l'unité nationale contre une loi scélérate de discrimination', March 2023 (On File with the Author).

Dominican Republic

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I. INTRODUCTION

The Constitution of the Dominican Republic had 17 reforms in the 19th century, 19 reforms in the 20th century, and 3 reforms so far in the 21st century. Since 2021, the Dominican Republic has been immersed in a constitutional reform process that seeks to modify the constitutional text with the purpose of continuing to strengthen the institutions of the democratic and justice system, especially those related to the High Courts, the Judiciary, and the Public Ministry. Although the reform of the constitutional text is under discussion by the social actors in the plenary session of the Economic and Social Council (CES), an important aspect to highlight of this reform process that distinguishes them from others; is the intervention of an external body for social agreement that seeks the greatest integration of the different points of view in the reform of the Constitution of the Dominican Republic, without detriment to the exercise of constitutional control. What makes it a unique reform process, which differs from previous procedures that have qualified previous constitutional amendments in the Dominican State, with initiatives from the Executive Power without prior dialogue and with a focus on the prerogatives of the exercise of the Executive Power.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The last constitutional reform of the 20th century materialized with the proclamation of the Political Constitution of the Dominican Republic on August 14, 1994. This reform has stood out in Dominican constitutional history for the strengthening it gave to the independence of the Judiciary Power within the Dominican State, printing important transformations in the modernization and strengthening of the institutions of the justice system, with the formation for the first time of the National Council of the Magistracy for the election of the judges of the Supreme Court of Justice. Also, establishing the constitutional principle of immobility of judges.

Prior to the constitutional reform of 1994, the appointment of the Judges of the Supreme Court of Justice and the other judges of the Justice System was carried out by the Senate of the Republic, subjugating the Judicial Power to the Legislative Power and preventing the existence of a material division and independence of state powers. With the 1994 Constitution, said attribution of the election of judges passed to the Supreme Court of Justice, and the election of the Judges of the Supreme Court of Justice was left to the National Council of the Magistracy, which was made up of the President of the Republic, the presidents of the Senate and the Chamber of Deputies, a senator and a deputy of party affiliation different from that of said presidents, the President of the Supreme Court of Justice and a judge of that same Court elected by their peers, who will serve as Secretary.

The constitutional reform of 1994 occurred through the Pact for Democracy and the promulgation of Law no. 16-94 that declared the need to reform the Constitution of the Republic in its Articles 11, 23, 49, 52, 63, 64, 67, 68, 89, 90, 107, 121, 122, 123 and 124; within the framework of a deep political crisis in the Dominican Republic that caused changes in the Executive Power and the political system in the Dominican State; shortening the presidential term from four (4) to two (2) years with the holding of elections in 1996, the prohibition of immediate presidential re-election, and a full presidential term must elapse to be able to run for office again. The creation of the double electoral round, which implied that if no candidate for the presidency achieved more than half of the votes cast, a new election had to be held, to which only the candidates who reached first and second place in the First choice. The separation of the elections so that the legislative and municipal ones took place in different years from the presidential ones, which meant that every two years, there would be general elections, one presidential and two years later, the legislative and municipal ones. The establishment of the so-called "closed schools."

On July 2, 2002, Law no. 73-02 declared the need to reform articles 49, 89, and 90 of the Constitution of the Republic. Said reform materialized with the proclamation of the Constitution of the Dominican Republic on July 25, 2002, where only article 49 was modified so that "The President of the Republic may opt for a second and only consecutive constitutional term, never being able to run for office. to the same position, nor to the Vice Presidency of the Republic," the constitutional provision of closed polling stations that were found in article 89 was suppressed, and article 90 was not modified; maintaining the double electoral return for the elections.

On August 3, 2006, Decree no. 326-06 prepared, through the necessary consultations, a document containing the proposals and recommendations for the modification of the Constitution. The enactment of Law no. 70-09, dated February 27, 2009, declared the need to reform the Dominican Constitution, a fact that materialized with the proclamation of the Political Constitution of the Dominican Republic on January 26, 2010.

In the 2010 Constitution, the Council of the Judiciary was created, to which the administrative and disciplinary functions of the Supreme Court of Justice were transferred. In the same sense, the Constitutional Court was created as a judicial body specialized in constitutional matters, with the quality of maximum interpreter and guarantor of the Constitution. The concentrated control of constitutionality that the Supreme Court of Justice (Judicial Power) had was transferred to the Constitutional Court without detriment to the diffuse control of constitutionality that all jurisdictional bodies must carry out when administering justice.

The constitutional reform of 2010 also made a reconfiguration in the members of the National Council of the Magistracy, adding the Attorney General of the Republic as one of the members of said body. It should be noted that the figure of the Ombudsman was also created; with the function of safeguarding the fundamental rights of the people and the collective and diffuse interests established in this Constitution and the laws in case they are violated by officials or State bodies by providers of public or private services that affect collective interests and diffuse. However, in terms of presidential re-election, non-immediate presidential re-election was once again established, very similar to the provision in the 1994 constitutional reform.

Five years later, with Law no. 24-15, promulgated by the Executive Power on June two (2), two thousand and fifteen (2015), the need to modify the Constitution of the Dominican Republic was declared with one purpose: to allow the President of the Republic to opt for a second consecutive constitutional term and may never run for the same position or the Vice Presidency of the Republic (Article 124 of the Magna Carta) and a subsidiary purpose: that in the event that the President of the Republic corresponding to the period constitutional 2012-2016 is a candidate for the same position for the constitutional period 2016-2020, he may not run for the following period or any other period, nor the Vice-Presidency of the Republic.

Said reform was voted on and proclaimed by the National Assembly on June thirteen (13), 2015, becoming the thirty-ninth modification made to the Dominican constitutional text. With this reform, the same wording contained in the 2002 constitutional reform was replaced in the constitutional text. During the 2018-2019 period, there were several debates and crises regarding a possible constitutional reform of Article 124; but this did not come to fruition because a Law had not been promulgated declaring the need to amend the Constitution and convening all legislators in the National Review Assembly (or Constituent Assembly, as it is called in other legal systems).

It is important to highlight that the constitutional reform of 2015, expressed through Law no. 24-15, was the subject of two direct actions of unconstitutionality before the Dominican Constitutional Court on June 3, 2015: (i) the first contained in file TC-01-2015-0023 and which was rejected by ruling TC /112/05 and the (ii) second contained in file TC-01-2015-0024 and which was rejected by judgment TC/0224/17. These actions sought to declare Law no. 24-15, and therefore, the constitutional reform, be stopped in 2015.

Indeed, the last constitutional reform of the 20th century materialized with the proclamation of the Constitution of the Dominican Republic on June 13, 2015. In 2021, the Executive Power presented, through a national dialogue table in the Economic and Social Council (CES), a proposal for constitutional reform with improvements in the framework of the system of separation and organization of powers and certain democratic exercises.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The current epicenter of the discussion and dialogues of the current constitutional reform is the Economic and Social Council. This is a body that was created by Decree No. 13-05 of January 25, 2005, initially calling itself the Economic, Social, and Institutional Council of the Dominican Republic. In the constitutional reform of 2010, said body was elevated to the constitutional body in accordance with the provisions of article 251 of the Constitution, calling itself the Economic and Social Council, as an advisory body of the Executive Branch in economic, social, and labor matters, with the main function of promoting social agreement as an essential instrument to ensure the organized participation of employers, workers and other organizations of society in the construction and permanent strengthening of social peace.

Subsequently, with the promulgation of Law no. 142-15 dated August 20, 2015, the different functions of the Economic and Social Council were established by Law, among which stands out: examining and studying draft laws related to economic, social or labor aspects and policies that could affect Dominican society, at the request of the President of the Republic (...) (numeral 2 article 5 of the Law No. 142-15). In its capacity as a Center for the discussion of the constitutional reforms proposed by the Executive Power in the draft Law for the constitutional reform.

The current constitutional reform seeks to strengthen the justice and democratic system in the Dominican Republic by establishing modifications in the National Council of the Magistracy, the High Courts (Supreme Court of Justice, Constitutional Court, and Superior Electoral Court), and the Power Judicial, Public Ministry, the representation of the Public Administration, the electoral system, the process of formation of laws and the control of public funds.

Hand in hand with the above, in the constitutional reform proposal, the National Council of the Magistracy would be reformed, excluding the Attorney General of the Republic. This reconfiguration would be the same as the one initially proposed in the constitutional reform of 1994. With it, it would be guaranteed that with a composition of seven (7) members, the decision quota would be redistributed by each branch of the State, giving greater legitimacy to the actions of this constitutional body. In addition, improvements are established in terms of the operation of the National Council of the Magistracy, which would meet regularly every three years and extraordinarily as many times as necessary after the convocation of the president of the Council or, failing that, of all the representatives of the Legislative Branch. With this, the convocation of the National Council of the Magistracy would not be an exclusive attribution of the Executive Power.

The High Courts and the Judiciary would be subject to a reorganization. The judges would be appointed for unique 9-year terms, and the plenary sessions would be gradually renewed every 3 years; for its part, the ostentation of the presidency of these high courts would be alternated every 3 years, and from the judges, they are already part

of it. Likewise, it would be included as a requirement for the judges of these high courts that during the 5 years prior to their appointment, they have not been registered in a political party or have carried out political proselytizing activities in a notorious, recognized, and constant manner.

As for the Constitutional Court, the qualified majority of nine (9) votes that currently govern decision-making regarding direct actions of unconstitutionality, preventive control of international treaties, and conflicts of competence would be maintained. However, the majority required by law would be adopted for the adoption of certain decisions that are within its competence for constitutional procedures, such as the review of amparo sentences or the provisional suspension of jurisdictional sentences, thereby seeking to speed up the jurisdictional work of this High Court. On the other hand, the adoption of a Law would be delegated to regulate the functioning of the Council of the Judiciary.

With regard to the Public Ministry, its functions would be defined, as specializing in the investigation and prosecution of punishable acts and transferring some of its current functions, such as the formulation and implementation of the State's policy against crime and the management of the system penitentiary, to an entity of the Executive Branch in accordance with the law. Likewise, the Attorney General of the Republic would be included in the invitations to the legislative chambers and the interpellations of the National Congress. In this same context, the current General Prosecutor of the Republic would be renamed the Attorney General of the Republic. Likewise, the following denominations would be replaced: Deputy General Prosecutor to the General Prosecutor of the Republic by Deputy Attorney General to the Attorney General of the Republic, General Court Prosecutor for Regional Prosecutor.

As for the law formation process, the popular legislative initiative would be allowed to be presented by a minimum of 25,000 citizens registered in the voter registry instead of the current 2% required by Article 97 of the Dominican Constitution. In the same way, the right of the legislative initiative would be extended to the constitutional bodies exclusively with regard to the process of formation of their respective organic laws. The terms of observation and promulgation of laws available to the Executive Power would also be increased in attention to the reasonableness of the complexities or urgency that may arise.

Regarding public funds, the bodies in charge of external and internal control would be reorganized: the Chamber of Accounts and the Comptroller General of the Republic. In the Chamber of Accounts, it would be established as a requirement to be a member that, during the five years prior to his appointment, the person has not been registered in a political party or has not carried out political proselytizing activities in a notorious, recognized, and constant manner. As for the Office of the Comptroller General of the Republic, attributions would be established with the purpose of strengthening its role of control of the public funds of the Executive Power.

The scope of the reform is broad, with a focus on strengthening the justice system and the democratic system in the Dominican Republic, with substantial changes in the form of an amendment due to the impact they have. It should be noted that the Constitution of the Dominican Republic is rigid, "since its reform can only be done in the manner indicated by it and can never be suspended or annulled by any power or authority, nor by popular acclamation (article 267 of the Dominican Constitution)," not being able to escape this process of reform to the control of constitutionality.

It is important to note that the application of this control of constitutionality has been in force in the different constitutional reform processes that have been mentioned above. In 2002, the Plenary of the Supreme Court of Justice heard a direct action of unconstitutionality against the Law that declared the need for constitutional reform. The same happened in 2015, with the Law that declared the need for constitutional reform but before the Constitutional Court. Even in 2014, almost twelve (12) years after the constitutional reform of 2002, The Constitutional Court was empowered with direct action of constitutionality against Law no. 73-02, of July two (2), two thousand two (2002), which declared the need to amend the Constitution of the Dominican Republic of August fourteen (14), nineteen ninety-four (1994). This action was declared inadmissible for lack of purpose.

Currently, the exercise of constitutionality control related to the Laws that declare the need to amend the Constitution as established in the Constitution in its article 270, falls within the scope of the Constitutional Court, which by virtue of Article 184 of the Constitution is an Organ Constitutional that is called to guarantee the supremacy of the Constitution, the defense of the constitutional order and the protection of fundamental rights. Its decisions are final and irrevocable and constitute binding precedents for public authorities and all State bodies.

Within its powers, the Constitutional Court is competent to hear in a single instance: 1) Direct actions of unconstitutionality against laws, decrees, regulations, resolutions, and ordinances, at the request of the President of the Republic, of a third of the members of the Senate or the Chamber of Deputies and of any person with a legitimate and legally protected interest (...) (article 185 numeral 1). This power to exercise concentrated control of constitutionality is what allows this Court to have an active participation in the processes of constitutional reform.

In this order of ideas, due to constitutional rigidity, there are certain limitations established by the Dominican Constitution regarding constitutional reforms: (i) no modification to the Constitution may deal with the form of government that must always be civil, republican, democratic and representative (article 268) and (ii) the Constitution may be amended if the reform proposal is presented in the National Congress with the support of a third of the members of one chamber or another, or if it is submitted by the Executive Power (Article 269).

The other body called upon to play a preponderant role in the constitutional reform process is the National Congress of the Dominican Republic, meeting or convened as the National Review Assembly through the Law that declares the need to reform the Constitution. Once the National Congress meets as the National Review Assembly, it is the one that has the power to "know and decide on constitutional reforms" (numeral 1 of article 120 of the Dominican Constitution), having to meet with the presence of more than half of the members of each of the chambers and the decisions will be made by a majority of two-thirds of the votes.

However, when the constitutional reform is seen "on rights, fundamental guarantees and duties, territorial and municipal ordering, the nationality, citizenship and immigration regime, the currency regime,

and on the procedures of constitutional reform," it will require the ratification of the majority of citizens with electoral rights, in an approval referendum called for this purpose by the Central Electoral Board, once voted and approved by the National Review Assembly" (Article 272 of the Dominican Constitution).

What, additionally, enables popular participation through the approval referendum carried out by the Central Electoral Board to decide on a constitutional reform in case it deals with any aspect related to "rights, fundamental guarantees and duties, territorial ordering and municipal, the regime of nationality, citizenship and foreigners, the currency regime, and on the procedures of constitutional reform."

IV. LOOKING AHEAD

Due to the rigidity of the Dominican constitutional text, the processes of reforming the Constitution require the intervention of different constitutional bodies and State powers, as well as political actors. By placing the center of the dialogue in the Economic and Social Council (CES), an innovative step forward has been taken to allow the greatest possible consensus to be reached with all the actors in this process of constitutional reform. However, the intervention of citizen participation through an approval referendum has not been foreseen, in the understanding that it could be interpreted that some aspect of the current constitutional reform process implicitly sees or deals with important aspects related to rights, fundamental guarantees, and legal obligations.

Along the same lines, the Dominican State does not have a Law that regulates the different referendum procedures, especially for the approval referendum. This could imply certain difficulties in the event that it is necessary to carry out said approval referendum and the impact it would have on the approval or not of the constitutional reform, despite the fact that initiative No. 05308-2020-2024-CD, containing the Organic Bill of Consultative Referendum and Approval Constitutional Referendum, introduced by the Executive Power on March 5, 2021, is in the National Congress.

Although both the Legislative Power and the Executive Power have initiatives to declare the need to reform the Constitution through a Law that clearly establishes the scope of said reform, in the course of previous reform processes, it has been possible to actively perceive the intervention of the Dominican Constitutional Court through the exercise of concentrated control of constitutionality, knowing the direct actions of unconstitutionality by people with a legitimate and legally protected interest; on the Laws that are promulgated for the purpose of convoking the National Review Assembly and establishing the need for constitutional reform.

V. FURTHER READING

Wenceslao Vega, *Historia Constitucional Dominicana* (1st edn, Editora Buho 2022)

Justo Pedro Castellanos Khoury y Leonor Tejada, *La Constitución Dominicana y sus Reformas (1844-2015)* (Tomo I, 2nd. edn, Editora Buho 2021)

Justo Pedro Castellanos Khoury y Leonor Tejada, *La Constitución Dominicana y sus Reformas (1844-2015)* (Tomo II, 2nd. edn, Editora Buho 2021)

Domingo Gil, *La Tutela Jurisdiccional de los Derechos de los Trabajadores,* (1st edn, Editora Amigos del Hogar 2022)

Juan Jorge García, *Derecho Constitucional Dominicano* (first published 1984, 3rd edn, Editora Corripio 2016)

Ecuador

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I. INTRODUCTION

In 2022, the Ecuadorian Constitution underwent several reform attempts, as the Constitutional Court (CCE or the Court) approved ten. One of the most salient modifications included an amendment package aimed to alter essential elements such as the appointment system for high authorities, the composition of the National Assembly (NA), and the elimination of the Council for Citizen Participation and Social Control (CPCCS), among others. In February 2023, the national referendum held to decide on these issues resulted in a narrow vote against the proposal.

The amendatory activity of NA, in contrast, has been quite limited. The NA has not passed any amendment, although four proposals are under discussion. Reasons for this extend to other priorities on the legislative agenda, legislative and executive relations, and problems in reaching a consensus over such issues.

Among all these modification efforts, we further study two that are close to their final stage in the amendment process. We argue that expanding the role of the armed forces to address internal security issues is a dismemberment since it interferes with the actual role of the police. Additionally, we could be categorized either as an amendment, if one considers the economic stability that the country has experienced during the last twenty-three years or as a dismemberment, if one considers the loss of monetary sovereignty. Furthermore, we discuss how the failed referendum reform to the CPCCS could fit into the amendment or dismemberment categories.

This report unfolds as follows: (1) a preliminary review of constitutional modification procedures in Ecuador, (2) amendment proposals submitted and discussed in 2022, (3) the scope and classification of cases as amendment or dismemberment, and (4) upcoming events.

1. THE ECUADORIAN CONSTITUTIONAL AMENDMENT SYSTEM

The Ecuadorian Constitution encompasses a three-track system of constitutional change: constitutional amendment, partial reform, and constitutional replacement. Citizens, a group of legislators, or the President are entitled to introduce modification proposals. An *amendment* can be approved through a simple majority in a referendum or through a two-thirds majority of the NA[1]. The *amendment* cannot (a) alter the fundamental structure of the Constitution, (b) change the state's constituent elements, (c) limit constitutional rights and guarantees, or (d) alter the constitutional modification procedure. It is important to note that *partial reform's* limits extend only to (c) and (d). For its approval, it requires the support of at least two-thirds of the NA within two debates and a majority vote in a referendum[2]. Finally, *constitutional replacement* is the most demanding procedure. The proposal should outline the selection process for drafters, and a majority in a popular referendum must approve the resulting Constitution.

The Constitution grants the CCE authority to determine the appropriate mechanism for each case[3]. The Court has established three stages in which judicial review applies. First, as the proponents must recommend one of the procedures, the Court will decide whether the proposal shall be passed or not. The second stage involves approval through a referendum, in which the Court reviews the proposal's constitutionality. In this stage, the Court determines whether the questionnaire and recitals follow electoral principles such as fidelity and clarity to the electors. Additionally, the Court also assesses whether the proposal content conforms to constitutional validity. The third stage involves a retrospective judicial review of constitutional changes. Within 30 days after the modification comes into effect, anyone can file an *"acción pública de inconstitucionalidad"* to evaluate compliance with procedural requirements. Overall, this system ensures that constitutional changes adhere to the country's legal provisions.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In September, President Lasso filed a petition seeking to amend several constitutional provisions. This section covers these modifications that were part of a popular consultation process in February 2023. In addition, we review other modification attempts and the amendatory activity at the NA.

1. COUNCIL FOR CITIZEN PARTICIPATION AND SOCIAL CONTROL

Institutional rearrangement of the CPCCS has been a hot topic within Ecuadorian politics. There have been many attempts to modify its

1 Constitution of the Republic of Ecuador (CRE) [2008], art 441.

2 *Ibidem*, art 442.

3 *Ibidem*, art 443.

attributions or even eliminate this organism (cases 4-19-RC/19, 5-19-RC/19, 7-19-RC/19, 8-19-RC/19)[4]. On this occasion, the proposed reform is twofold. First, the reform aims to strip high authorities' appointment power in favor of the NA and secondly, the proposal seeks to modify the selection mechanism of CPCCS counselors.

The modification of the appointment mechanism extends to high authorities such as the (a) Comptroller General, (b) Prosecutor General, (c) Ombudsman, (d) Public Defendant, (e) Electoral Council, (f) Electoral Court, (g) Attorney General, (h) Superintendencies, (i) Judicial Council. All these authorities are currently selected using a national contest managed by the CPCCS (except for the Judicial Council). In general terms, the proposed appointment process requires (1) the President, (2) the appointee's institution, and (3) a third institution (related to the mission of the latter) to nominate two or three candidates for the post. Then, a committee appointed by the President and overseen by citizens screens all the candidates. Finally, the NA is responsible for selecting candidates with a majority vote ranging from the simple to the qualified majority.

In case 4-22-RC/22, the CCE argued that the proposed new mechanism creates an unduly imbalance in favor of the executive power to appoint authorities beyond the president's purview. Furthermore, the CCE added that this procedure did not include any mechanism to guarantee citizen participation in the selection process. For these reasons, the proposal might alter the state's and the Constitution's fundamental structure, thereby affecting the separation of powers, checks and balances, and participation rights. In this sense, the Court ruled (7 vs. 2) that such a modification requires a *partial reform* instead of an amendment.

Following this ruling, the President introduced a modified version of the question, devising alternative appointment mechanisms. The modified version consists of the following changes: (1) Authorities from (a) to (f) are to be selected by the NA (with an absolute majority vote) from a shortlist provided by an *ad-hoc* technical commission that is appointed by the NA. Citizens that comply with the requirements might apply for these posts. (2) Authorities in (g) and (h) are to be selected by the NA (with an absolute majority vote) from candidates nominated by the president. (3) Authorities of the Judicial Council (i) are to be selected following a similar process as number (1), but shortlisted nominees shall come from current nominators[5]. In all cases, the selection commissions include the participation of citizen overseers. In the ruling 6-22-RC/22, the CCE reasoned that since these mechanisms do not affect the separation of powers, limited government, or fundamental rights, the suitable modification mechanism was the *amendment*.

Regarding the selection of the CPCCS, the modification attempts to replace the current popular vote mechanism with a procedure that follows a similar rationale to that for other high authorities. The Prosecutor General, the President, and the Ombudsman each nominate six candidates. After a special committee that is appointed by the Prosecutor General screens all 18 candidates, the NA appoints seven councilors with an absolute majority vote. In case 4-22-RC/22, the CCE ruled that such modification does not alter the Constitution's basic structure, the constitutive elements of the state, or any citizen's participation right; thus, the modification process could be passed through *amendment*. Ruling 6-22-RC/22 ratified this stance. During the second stage of constitutional control as discussed in decision 6-22-RC/22A, the CCE analyzed the content of the recitals, introduction, questions, and annexes of the proposed reforms. The Court concluded that these factors comply with the requirements of not being misleading, suggestive, or biased, thereby guaranteeing the voter's freedom.

2. NATIONAL ASSEMBLY

The low levels of public acceptance and disproportionality of the seats allocated to the NA motivated the President to file a motion seeking to reduce its membership. The legislative body now consists of 137 members of Congress which are selected using a triple-tier system. The amendment proposes that the first tier selects one member of Congress for each province (24 provincial districts) plus one for every 250,000 inhabitants. The second tier (national level district) selects two Congressional members for every million inhabitants, and the third tier (international level district) selects one Congressional member for every 500,000 inhabitants. The estimated composition of the new NA would be 118 members. When analyzing case 4-22-RC/22, the Court found that such a proposal does not alter the state's fundamental structure nor violates any fundamental rights. As a result, in an 8 versus 1 ruling, the Court ruled that the adequate modification mechanism was the *amendment*. During the second stage of constitutional control, in decision 4-22-RC/22A, the CCE declared that the introduction, some recitals, the question, and the annex's content were constitutional. However, the Court also eliminated four recitals on the basis that they contained misleading information that could deceive voters.

3. POLITICAL PARTIES

Regarding Ecuador's political parties, the President proposed a modification that compels parties to maintain a minimum membership threshold equivalent to 1.5% of the legal voting population of each jurisdiction. Currently, the Constitution only requires support rather than the membership of 1.5% of the legal voting population. In addition, the National Electoral Council shall register and periodically oversee party membership. Since the pretended modification did not alter the structure of the Constitution nor wane any fundamental right, the CCE unanimously ruled in decision 4-22-RC/22 that the adequate modification procedure is the *amendment*. In a subsequent ruling (4-22-RC/22A), when analyzing the content of the question, the CCE removed one recital and amended another recital. Additionally, the CCE deemed the other recitals, the introduction, the question, and the annexes as constitutional.

4. ARMED FORCES

Amid a growing insecurity crisis, the president filed a question to alter the Armed Forces' role. Their main attribution is limited to defending the country's sovereignty and territorial integrity. The Constitution forbids the President to command the Armed Forces into internal public safety issues without declaring a temporary state of emergency beforehand[6]. Hence, the amendment intended to allow the Armed

4 See reports for 2020 and 2021.

5 National Court (Supreme), Prosecutor General, Public Defendant, President, National Assembly.

6 CRE, art 158.

Forces and the Police to contribute to internal security duties without such declaration.

In a majority opinion (cases 4-22-RC/22 and 7-22-RC/22), the Court ruled that the amendment procedure, initially requested by the president, was not the appropriate procedure to undertake such modification. A constitutional reform to militarize public security, the Court reasoned, would affect the structure of the Constitution and the state's constitutive elements. According to the Court, using the Armed Forces for public security matters must be extraordinary and have strict civilian oversight and accountability mechanisms. Besides, the Court considered that such an amendment would undermine the system of checks and balances by significantly strengthening the executive branch. Therefore, the Court concluded that the principle of minimal intervention of the Armed Forces in contexts other than states of emergency is a fundamental value of the Constitution that cannot be changed via amendment procedure.

In a subsequent petition, the president proposed a partial reform instead of an amendment procedure. In the case 7-22-RC/22, the majority of the Court ruled that allowing additional support from the Armed Forces to combat organized crime along with the Police does not set restrictions on constitutional rights and guarantees. The Court, nevertheless, considered that the convenience of such reform had to be debated by the legislature. The NA s debate over this partial reform proposal is still pending.

5. EXTRADITION

The Ecuadorian Constitution prohibits extradition for all crimes. The presidential proposal sought to allow the extradition of Ecuadorians involved in transnational organized crime. The debate on the Court centered on whether such an amendment would restrict constitutional rights. According to the Court, rights could be limited through amendment only if these limitations are proportional. The majority of the Court considered that extradition does not restrict the right to due process of law. Instead, the proposed change regulates the possibility of extraditing Ecuadorians involved in transnational organized crimes. The CCE concluded that the *amendment* procedure was adequate for the proposed change.

6. ENVIRONMENTAL PROTECTION

Two additional proposals addressed environmental protection issues. One sought to incorporate a water protection subsystem under the National System of Protected Areas. The second aimed at amending Article 74 so that compensation duly regularized by the state could be provided for individuals, communities, peoples, and nationalities for their support when providing environmental services. In both cases, the CCE considered the amendment procedure suitable for modifying Articles 74 and 405 of the Constitution.

7. CONSTITUENT ASSEMBLY

In 2022, the Court analyzed two constitutional replacement petitions in cases 1-22-RC/22 and 5-22-RC/22. While case 1-22-RC/22 pursued the installation of a constituent assembly aiming for a new Constitution, the latter aimed at granting full powers to this assembly not only to draft a new Constitution but also to change the institutional setting of the state.

In case 1-22-RC/22, the CCE ruled that the proposed procedure is suitable for redrafting the Constitution[7]. However, at the second constitutional control stage, the CCE denied the request arguing that the recitals and the question were deceptive to the voter as they needed to be more consistent. The recitals and questions also provided superfluous information that precluded understanding the purpose of this reform[8].

In case 5-22-RC/22, the CCE ruled that the constituent assembly procedure was unsuitable for installing an assembly with "full powers." The decision reasoned that "full powers" are considered unlimited, extraordinary, and against fundamental rights, their guarantees, and the nature of the constituted power.[9] Beyond this ruling, the court has issued conflicting decisions regarding the feasibility of calling a "full powers" constitutional assembly. In some cases, the CCE ruled that such a call corresponded to the constituent assembly itself.[10] In other situations, the CCE has denied this proposal since it would galvanize the concentration of power and arbitrariness[11]. In short, the CCE has not issued a definitive opinion on whether calling a "full powers" constituent assembly[12] is possible.

8. ECONOMIC SOVEREIGNTY

Ecuador adopted the dollar as the national currency in 2000, amid a severe economic crisis caused by rampant inflation and the depreciation of the national currency, *sucre*. While dollarization re-stabilized the economy, the process was unplanned, and unconstitutional according to provision 264 of the 1998 Ecuadorian Constitution. In 2022, the NA proposed a modification to establish the dollar as the official tender through an amendment procedure. The majority of the Court considered (case 3-22-RC/22) the proposed change as suitable since it did not exceed any constitutional limit. However, dissenting opinions from Justices Cárdenas and Escudero argued that such an amendment would affect Ecuador's economic sovereignty leading to the country losing control over monetary policy. According to these Justices, economic sovereignty is a constitutive element of the state and cannot be amended[13].

9. OTHERS

The citizenry also pursued three modifications concerning: (1) oil revenue redistribution, (2) modifying the preamble of the Constitution, and (3) conditions for getting married, which were addressed in the ruling 2-10-RC/22. The first proposed allocating 25% of oil revenues through unrestricted loans for poor people and encouraging different means of production. The CCE ruled that the proposal's text was not specific enough and wasn't an actual modification to the Constitution.

7 CRE, art 444.
8 Ruling 1-22-RC/22 was unanimously approved with a concurring vote of Justice Salazar.
9 In a dissent opinion, Justice Corral argued that at the first stage of constitutional control, the Court should limit itself to assessing whether the proposed modification mechanism is adequate and abstain from analyzing the proposal's substance.
10 CCE, ruling 3-20-RC/20.
11 CCE, ruling 5-20-RC/21.
12 For additional details, see the Report for 2021.
13 CRE, arts 261.5 and 284.

The second sought to modify the preamble of the Constitution declaring the name of Jesus Christ as the father of the Ecuadorian people. The Court ruled that the Constitution recognizes the preamble as an element that embodies the state's political purpose and Ecuadorian identity. The CCE emphasized the secular character of the state,[14] which comprises one of its constituent elements. The ruling highlighted that such a proposal restricts religious freedom; therefore, the modification would not be suitable through an amendment.

The third proposal sought to condition marriage to be born a man or woman, specifically that an individual must be born a man or woman to enter a marriage. The CCE ruled that such a proposal restricts the right to marriage and equality, which constitutes a limit to the amendment procedure. Consequently, it ruled that the amendment was unsuitable for processing any proposed changes.

10. NATIONAL ASSEMBLY

In November 2022, after receiving a favorable decision from the CCE, ruling 2-20-RC/20,[15] an occasional committee at the NA debated an amendment proposal. [6] The committee recommended not approving the reform proposal that served to (1) eliminate the president's responsibility regarding public administration and (2) limit the destination of the public budget. The NA stated that eliminating the phrase regarding the president's responsibility over public administration would not imply any change since it encompasses the nature of the duties executed by the president. On the other hand, the second proposal would imply attributing competencies that the constitution does not grant to the NA. The date for the first debate on the floor has not been scheduled yet.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In this section, we briefly discuss whether some of the most important reported modifications such as (1) the complementary use of the Armed Forces and (2) establishing the dollar as the official currency might be classified as an amendment or dismemberment. The first falls clearly within the dismemberment category whereas the second modification might fit either as an amendment or a dismemberment, depending on the interpretation of this constitutional modification. We close this section with a brief review of the results of the failed constitutional referendum.

1. AMENDMENT OR DISMEMBERMENT?

The main difference between amendment and dismemberment is that while the former *"keeps the Constitution coherent with itself,"* the latter *"marks a fundamental break with the core commitments or presuppositions of the Constitution."*[16] Amendment expresses constitutional-project continuity; dismemberment alters the constitution's essential features, such as fundamental rights, a load-bearing structure, or a core feature of the identity of a constitution.

2. ARMED FORCES

As described in the previous section, a partial reform proposal endorsing the complementary use of the Armed Forces for maintaining domestic public order will be discussed by the legislature during the next months. This reform might put an end to the strict separation imposed by the Constitution between the police and the military, responsible respectively for public internal security and the defense of national sovereignty. Now, the Police remain under the authority of the Ministry of Government, whereas the military is under the supervision of the Ministry of Defense. Although both institutions share responsibility for border enforcement, the Armed Forces have limited internal security duties. In fact, the military may complement police duties to control public order only when a state of emergency is declared. This means that military intervention must be carried out in strict adherence to the law and under the orders of the president of the Republic.

It is hard to imagine a proposal aiming at the militarization of internal security as anything other than a constitutional dismemberment, as the Court has put it (case 4-22-RC/22), allowing the military and the executive power a wide leeway to intervene in law enforcement activities compromises the Ecuadorian constitutional identity. Not only does Article 158 explicitly establish internal protection as an exclusive responsibility of the Police, but the CCE has also interpreted that the Armed Forces can only intervene in domestic public order tasks under exceptional circumstances. Following Inter-American standards, the Court has held that the Armed Forces' involvement in law enforcement tasks should be extraordinary, subordinate, complementary and have adequate civilian controls and accountability mechanisms (see cases 33-20-IN/21, 1-21-EE/21, 9-21-EE/22 and 5-22-EE/22). In addition, international organizations and human rights defenders have raised multiple concerns regarding this reform proposal, claiming that the ongoing militarization poses a serious threat to the exercise of human rights.

If approved by the NA, the partial reform proposal would be subjected to a referendum. Hitherto this seems highly unlikely, as partial reform requires a two-thirds majority vote following two plenary session debates, where President Lasso holds only a weak minority of the seats, close to 9%. Furthermore, the government has been unable to negotiate any agreement with the main opposition parties.

After the government lost the last constitutional referendum, it is unlikely that the government would back another one. With presidential popularity hovering at about 15 % and repetitive clashes with the opposition-controlled NA, another electoral defeat would further weaken the President's eroded political support.

3. ECONOMIC SOVEREIGNTY

As previously discussed, this proposal creates a tradeoff between economic sovereignty and stability. On one hand, recognizing economic sovereignty would eliminate any traces of economic subordination and is a fundamental aspect of Ecuador's Constitution. Furthermore, economic sovereignty implies rejecting historical economic and social crises characterized by increased poverty, migration flows, and deteriorating labor market conditions caused by dollarization.

14 CRE, art 1.
15 See the Report for 2020.
16 Richard Albert, *Constitutional Amendments. Making, Breaking and Changing Constitutions* (2019).

The Constitution only allows the law to determine the liberatory power of currencies to maintain the state's economic sovereignty[17]. Adopting the dollar as the official legal tender is not merely a change in the physical currency as dollarization affects the recognition of external self-determination and would subject Ecuador's economic policy to the decisions of other states. Regarding the constitutional project, this change in Ecuador's economic policy modifies its values, leading to its dismemberment.

On the other hand, it is important to acknowledge that dollarization has also brought benefits to Ecuador, including economic stability, reduced inflation risk, decreased international trade costs, and increased confidence in the currency among citizens. The Association of Private Banks of Ecuador reported that in 2020, 88.7% of Ecuadorians supported dollarization. Therefore, the proposed constitutional change could be understood as an effort to align the Constitution with the reality of the country's monetary policy and the citizens' expectations.

Since the dollar has been the official currency, the modification may be considered a corrective amendment rather than a break with its continuity. However, the potential implications of the proposed change should be carefully examined to ensure that they do not compromise the country's constitutional values and principles.

This proposal highlights the tensions between economic stability and sovereignty. While the adoption of dollarization addressed the banking crisis and stabilized the economy, the proposed amendment could lead to the loss of economic sovereignty. Ultimately, the decision on the proposed change will depend on a delicate balance between these competing interests.

4. FAILED REFERENDUM

Despite being reformed several times over the past 14 years, the 2008 Constitution has yet to generate a national consensus. The introduction of institutions that deviate from the classic three-branch system, such as the CPCCS, has sparked numerous modification attempts. During his campaign, current President Lasso proposed holding a national referendum to eliminate the CPCCS. However, upon assuming office, he restrained his stance and instead proposed that appointment authority be transferred from the CPCCS to the NA, as discussed in the previous section. The referendum, held in February 2023, resulted in an unfavorable outcome for the president. Although the CPCCS had come under national rejection due to corruption scandals and poor performance, the population did not support the president's proposed amendment.

If passed, the modification could be categorized as either an amendment or a dismemberment. Proponents of the former would argue that it does not fundamentally alter the continuity of the constitutional project as it only seeks to transfer appointment procedures from one organ to another. Moreover, since the NA is the most representative branch, its appointments would be more legitimate and would strengthen the constitutional project. However, proponents of the dismemberment classification might argue that stripping the CPCCS of its appointment authority would render it a mere rubber stamp. As a result, this would compromise the CPCCS's constitutional mission and alter the structure of the Transparency and Social Control branch. Furthermore, such dismemberment could have deleterious effects on participation rights. Despite this debate, the CPCCS will remain a contentious issue, and politicians will continue to attempt to modify its institutional design.

IV. LOOKING AHEAD

Although there have been several constitutional modification attempts, these proved to be unsuccessful this year. The Court approved the presidential amendment package, but during the referendum, there was a backlash against such modification proposals. On the other hand, the NA has not had a final debate over the two amendments under discussion in that arena.

Current political crises and instability make it hard to predict the success of the amendments that the NA is currently processing. Under normal conditions, there is no stable majority within the NA, and the atomization of parties prevents the legislature from reaching the qualified majority required to pass reforms. Nonetheless, the generalized insecurity sense across the population might be a powerful incentive for legislators to gather a 92-vote-qualified majority to pass the partial reform aimed at using the armed forces to complement the police's internal security duties.

Regarding the economic implications of Ecuador's constitutional reforms, the future of the amendment related to including the dollar as the official currency is unlikely to pass. The topic is politically charged and divisive; thus, the legislators might struggle to come to an agreement due to the reasons that we outlined above. In this case, the most likely outcome is preserving the status quo.

Finally, the Court has established a series of precedents that serve as guidelines for future proponents on the minimum standards that the modification proposals should meet to be approved. These precedents should provide some certainty and clarity to the proponents about introducing potentially successful proposals.

V. FURTHER READING

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17 CRE, art 303.

Egypt

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I. INTRODUCTION

The Supreme Constitutional Court has established many constitutional principles that could be considered constitutional rules in Egypt. For instance, the competence to issue executive regulations for laws is an inherent capability for those in the public sector only. According to the Supreme Constitutional Court, being able to issue executive regulations for laws is an ability only the Prime Minister has. However, if the law specifies another person, it is considered authorizing the exercise of jurisdiction, and this should only be for the subjects of public law. Only certain individuals such as those involved in the public sector should be able to issue executive regulations for laws as assigning this authority to any person in the private sector contradicts the principles of the Egyptian Constitution.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The constitutional reforms implemented by the Egyptian Sports Law include assigning the organization and laying down of sports settlement and arbitration rules to the Egyptian Olympic Committee. This is an example of amending the competence to issue executive regulations from the Prime Minister, who is a person of public law, to the Egyptian Olympic Committee, which is a person of private law. These reforms are considered a form of Constitutionalism that has occurred for the first time in the history of the Egyptian constitutional system from 1923 until now.

In Egyptian history, the task of organizing any legislative issues has never been assigned to a person of private law as it has always been an inherent competence for those in the public sector.

According to the Egyptian Sports Law issued in 2017, the Egyptian Olympic Committee became responsible for organizing the settlement of sports disputes by establishing the rules of work for the Egyptian Sports Settlement and Arbitration Center.

In accordance with the provisions of the Egyptian Constitution promulgated in 2014, regulating the settlement of any kind of dispute such as civil, criminal, commercial, sports, etc., is within the jurisdiction of the legislative authority known as the "House of Representatives." Assigning this jurisdiction to another person or legislative body would be unconstitutional.

On the other hand, the Sports Law did more than just deprive the legislative authority of its jurisdiction overregulating the adjudication of sports disputes. The legislative authority assigned this competence to a private entity, namely the Egyptian Olympic Committee.

By considering an amendment to a constitutional constant and ignoring what is stated in the Egyptian document, the Sports Law has disrespected established constitutional competencies which have been present for over a century.

Although the establishment of the Egyptian Sports Settlement and Arbitration Center has solved many issues such as the adjudication of sports disputes, the establishment of the center and the setting of rules for its work has completely violated the provisions of the Egyptian Constitution—a failure in regard to constitutional reforms.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Issued in 2017, Article 69 of the Sports Law stipulated the competence of the Egyptian Olympic Committee to issue regulatory rules for sports settlement and arbitration. Since the Sports Law does not change the fundamental structure or principles of the Constitution, the ability to regulate the adjudication of sports disputes and part of the judicial authority is implicitly considered a constitutional amendment. The law is not considered a constitutional chapter as it does not impact the fundamental amendments that led to the destruction of many of the foundations upon which the Constitution was built.

The Supreme Constitutional Court decided that the Egyptian Constitution entrusted the Parliament alone with the authority to regulate how to adjudicate sports disputes, which entails several consequences, namely:

- The constitution does not intend for the legislator to derogate from the constitutional controls established in regulating the adjudication of sports disputes, which is "arbitration."
- When the constitution assigns Parliament to organize a subject exclusively, this regulation is limited to Parliament only, so Parliament cannot delegate one of the authorities, even if it is from a public law person, to exercise this jurisdiction instead of it, which is what is known as the phenomenon of legislative usurpation. It is not permissible for the executive authority to organize the issue of adjudicating sports disputes even if the law provides for that. Rather, it is not

acceptable to assign jurisdiction to persons of private law, as this is considered a fundamental abandonment of his competence, which is stipulated in the constitution, and he must exercise it himself.

The legislator in Sports Law No. 71 of 2017 established an independent center called the "Egyptian Sports Settlement and Arbitration Center" to handle sports disputes arising from the application of the provisions of the Sports Law. Article 69 of the law stipulates that the Egyptian Olympic Committee can set rules and procedures for mediation, conciliation, and arbitration in this center by international standards. The legislator here is violating the constitutional jurisdiction entrusted to him according to the provisions of Article 84 of the Constitution: "The law shall regulate the affairs of sports and civil sports bodies in accordance with international standards, and how to settle sporting disputes." "The Center for Sports Settlement and Arbitration" did not complete the rest of the regulatory conditions for these means, but rather delegated the Egyptian Olympic Committee. By organizing these means to resolve sports disputes, the legislator committed a clear constitutional violation, disregarded his constitutional obligation, which was entrusted to him alone, and this is what is known as legislative abuse.

In addition, the Egyptian Olympic Committee, which is charged—by delegation—with regulating the conditions for settling sports disputes, is one of the private entities which is not qualified to issue any general regulations, whether organizational or executive, and should not be entrusted with issuing any of these regulations. Accordingly, in Article 69 of the Sports Law, the legislator has gone too far in depriving the committee of its constitutionally mandated jurisdiction. For instance, organizing the settlement of sports disputes is one of the matters the Constitution reserves for the legislator alone. Therefore, the contract of competence for the Egyptian Olympic Committee to issue arbitration rules and procedures at the Center for Settlement and Sports Arbitration violates the provisions of Articles 84, 101, and 170 of the Constitution.

The Supreme Constitutional Court's judiciary has established that the principle in the executive regulations is that it details what is generally stated in the texts of the law in a manner that does not involve modification, suspension, or exemption from its implementation. The primary purpose of issuing the executive regulations is to complete the law by putting the rules and details necessary for its implementation while maintaining its original borders without the slightest prejudice. The issuer must also not exceed the constitutional jurisdiction entrusted to him as these executive regulations should also not infringe on the legislative authority by adding provisions that distance from the legislation's true spirit.

The court also decided that the executive authority's purpose is to enforce laws rather than create them. However, there is an exception to this principle. To achieve the cooperation and support of the authorities, the constitution entrusted the executive authority in specific cases to issue the regulations necessary to implement the laws. Article 170 of the constitution stipulates that the Prime Minister issues the regulations necessary to enforce laws, but he may authorize others to issue them unless the law specifies who issues the required regulations for their implementation. Consequently, it does not fall within the executive authority's competence to regulate matters other than the law by stating the general framework that governs them. Otherwise, this would be legislation for new provisions that cannot be attributed to the law, which in this case, takes the regulation outside the limits set by the Constitution.

Although the referred text was issued within the framework of the legislative mandate contained in the text of Article 69 of the Sports Law which gives the Egyptian Olympic Committee the authority to issue a decision by the statute of the Egyptian Sports Distortion and Arbitration Center. The rules and procedures for mediation, authorization, and arbitration are regulated by this center. By international standards, however, the phrase rules and procedures mentioned in this article apply to the field of sports arbitration related to the arbitration dispute, which is followed by the arbitral tribunal, until the issuance of a ruling ending the subject matter of the arbitration dispute. The executive authority cannot regulate the methods of appealing the arbitral award beyond what is already specified in the country's law.

By introducing a regulation to challenge the invalidity of arbitrations issued by the Egyptian Center for Settlement and Sports Arbitration, Article 69 is a blatant constitutional violation that has undermined the power of Egyptian courts to decide on these matters. Ultimately, Article 69 is an unconstitutional piece of text that has ignored the separation of powers and is considered a clear usurpation of judicial authority.

IV. LOOKING AHEAD

The ruling of the Supreme Constitutional Court in question is considered one of the decisive constitutional reforms in defining the scope of competence of each authority (executive, judicial, and legislative). Where the task of the executive authority is to implement laws without transgressing them and becoming legislative, and the legislative authority must exercise its legislative jurisdiction to enact laws and not give up this jurisdiction in favor of the executive authority; as for the judicial authority, specifically the Supreme Constitutional Court, it preserves the constitution from any violation issued by any authority.

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Kingdom of Eswatini

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I. INTRODUCTION

The last remaining absolute monarchy in Africa, Eswatini, is a unitary, sovereign State ruled since 1986 by King (Ngwenyama) Mswati III, who governs predominantly through decree. The Constitution of the Kingdom of Swaziland (the Constitution) was adopted in 2005 by the iNgwenyama–in-Council, acting in the capacity of the Swazi National Council.[1] The Constitution remains in force and has not been amended since.[2] During the celebrations of the nation's 50th independence anniversary, in 2018, King Mswati III signed Legal Notice No. 80, renaming the country from the Kingdom of Swaziland to the Kingdom of Eswatini.[3] The act states that any reference in written law, international agreement, or legal document to Swaziland shall be read and construed as referencing Eswatini.[4] The constitutional legitimacy of this name change, however, has been challenged by some sections of civil society who argue that the legislative process prescribed in the Constitution was not followed.

Serving as the Head of State, the king holds the executive authority in Eswatini, which can be exercised directly or via his Ministers.[5] He enjoys civil, criminal, and taxation immunity, and his succession is hereditary.[6] The king has the power to appoint the Prime Minister from among the members of the House[7] and possesses the authority to dissolve Parliament at his discretion.[8] The ultimate legislative authority lies with the King-in-Parliament.[9] This implies that a bill, even if passed by the Parliament, only becomes law upon the king's assent and signature. The Parliament of Eswatini is bicameral, encompassing a Senate and a House of Assembly. Of the thirty senators, a third are elected by House members, while the king appoints the remaining two-thirds.[10] Similarly, out of the seventy-six House members, the king nominates ten.[11] Eswatini's Supreme Court, comprised of a Chief Justice and four additional Justices, holds appellate, supervisory, and review jurisdiction, serving as the highest judicial authority.[12]

The Constitution provides for fundamental human rights and freedoms. Notably, it explicitly safeguards the rights to life, personal liberty, and equality before the law. It also ensures the right to a fair hearing, along with preserving the freedoms of conscience, religion, expression, assembly, association, and movement. Slavery, forced labor, and any form of inhuman or degrading treatment is forbidden, and the Constitution further protects against deprivation of property and arbitrary searches. Special protections are afforded to families, women, children, and people with disabilities. Furthermore, the Constitution acknowledges the right to abortion under certain exceptional circumstances, which include cases of rape, serious fetal malformation, and risks to the health or life of the pregnant woman.[13]

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The year of 2022 was characterized by the continuation of the socio-political and constitutional crisis that initially erupted in 2021. This period witnessed a surge of pro-democracy protests, riots, looting, and confrontations with police and military. The national unrest is largely understood, as it is driven by mounting frustrations over the absence of significant political reforms spanning several decades. Troubling developments in this period include the banning of political parties, escalating crackdowns on dissent, and an increase in discriminatory practices targeting women and minorities.

In the aftermath of a mission by the Southern African Development Community (SADC) to the Kingdom of Eswatini in late 2021, the government acknowledged the necessity for a national dialogue encompassing a range of stakeholders, including the Cabinet, members of Parliament, civil society organizations, and trade unions, in order to address the reach of the king's powers and the need for enhanced democratization.[14] There has not been any progress in the direction of constitutional reform, however, since the dialogue format proposed by the king was rejected as undemocratic by the other stakeholders.

Notwithstanding, there have been transformative interpretations of constitutional provisions related to the freedom of expression and freedom of the press by the judiciary. On the other hand, freedom of association and the rule of law have been undermined by court rulings.

1 Constitution, preamble.
2 Elkins, Zachary, Tom Ginsburg, James Melton. Constitute: The World's Constitutions to Read, Search, and Compare. Online at constituteproject.org.
3 Eswatini means "land of the Swazis" in the Swazi language.
4 Phephile Motau. Kingdom of Eswatini Change Now Official. Times of Swaziland. 18.5.2018. http://www.times.co.sz/news/118373-kingdom-of-eswatini-change-now-official.html
5 Constitution 64 (1)(3).
6 Constitution 5(1), 10, 11.
7 Constitution 67(1).
8 Constitution 64(4)(b), 134(1)(b).
9 Constitution 106(a)(b).
10 Constitution 94(3).
11 Constitution 95(1)(b).
12 Constitution 147, 148.
13 Constitution, Chapter III.
14 H.E. Matamela Cyril Ramaphosa. Chairperson of the SADC Organ on Politics, Defence and Security Cooperation. PRETORIA, SOUTH AFRICA 22 OCTOBER 2021. https://www.sadc.int/latest-news/statement-chairperson-sadc-organ-politics-defence-and-security-cooperation-his-3.

1. RESTRICTIONS ON FREEDOM OF ASSOCIATION.

On April 29, 2022, despite acknowledging LGBTQ+ rights, the Eswatini High Court imposed limitations on the Freedom of Association. It upheld the refusal to register Eswatini Sexual and Gender Minorities (ESGM), an organization dedicated to advancing the protection of human rights of lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) people within the Kingdom of Eswatini. In the case of *Melusi Simelane & 5 Others v. Minster for Commerce and Industry & 2 Others* [(1897/2019) 2020 SZHC 66], the plaintiffs contested the Registrar of Companies' decision to decline the registration of their Association. The court, however, refused to review the Registrar's decision, arguing that it was neither discriminatory based on sex, nor did it intrude into the domain of the rights to privacy or life. According to the court, the Constitution and statutes of Eswatini did not preclude the Registrar from deciding the way it did. In its reasoning, the High Court assumed that the association for which the applicants were seeking registration aimed to promote same-sex intercourse, which is currently a criminal offense in Eswatini. Therefore, the denial of registration was justified on the grounds that the association's objective could be understood as endorsing an "illegal activity." Despite the appeal process still being underway, the ruling had the immediate effect of restricting the right of association within the country.

While the High Court of Eswatini upheld the refusal to register the association, it simultaneously acknowledged that "LGBTs have the rights conferred by section 14 of the Constitution." These rights encompass equality before the law and equal protection under the law. The High Court specifically singled out that members of the LGBTQ+ community, as human beings, are entitled to fundamental rights, including freedom of expression and non-discrimination. The court's opinion explicitly states, "They have a right to life, liberty, privacy, or dignity. They have a right not to be discriminated against or be subject to inhumane and degrading treatment," thereby reinforcing the recognition of these inherent human rights.

2. ABUSE OF ANTI-TERRORISM LAWS.

The government of Eswatini has strategically leveraged anti-terrorism laws to label those advocating for judicial independence, pluralism, and participation as terrorists. This response to perceived terrorism has served as a convenient smokescreen for authoritarian regimes to target their critics under the pretense of a legitimate objective, a tactic clearly evident in Eswatini.

In the case of *Thulani Maseko and Others v. Prime Minister of Swaziland and Others* (2016), Eswatini's High Court declared both Sections 28 and 29(4) of the Suppression of Terrorism Act (STA) (2008) as unconstitutional. The Court found these sections incompatible with sections 23, 24, and 25 of Eswatini's Constitution. The Court maintained that constitutionally protected freedoms, including those of conscience or religion, expression, assembly, and association, could only be legitimately curtailed for reasons related to "defense, public safety, public order, public morality or public health, or the other interests enumerated under section 24(3) or 25(3) of the Constitution." The Court's reasoning underscored the government's failure to justify that the restrictions imposed on the applicants' freedom of speech or expression were either reasonable or justifiable.

Sections 28 and 29(4) of the STA were declared unconstitutional to the extent that they deny individuals the opportunity to be heard either before or after they, or an organization to which they belong, support, or are affiliated with, are designated as a specified entity. The Suppression of Terrorism (Amendment) Act of 2017 slightly modified the wording of section 28, yet the provision's unconstitutionality persisted.

On June 26, 2022, in a press conference, Prime Minister Cleopas Dlamini cautioned that the country would "not hesitate to respond with the necessary force to protect our national security as a sovereign State in the face of these brutal crimes that are being committed under the pretext of pursuing democracy."[15] The government further issued an ambiguous statement regarding the use of social media on matters critical to the State, thereby threatening the rights of access to information and freedom of expression.[16]

However, the State escalated matters further by designating a journalist as a terrorist entity. On July 1, 2022, Prime Minister of Eswatini, Cleopas Dlamini, officially classified journalist Zweli Martin Dlamini and his publication, Swaziland News (PTY) (LTD), as "specified entities" that "knowingly facilitate the commission of terrorist acts." The categorization of Zweli Dlamini and Swaziland News as terrorist entities coincided with fears of renewed protest activities to mark the June 2021 uprising. In anticipation of the commemoration, police issued search warrants against political party leaders and discouraged citizens from participating in protests or discussions on social media.

Significantly, the declaration fails to specify the grounds on which journalist Zweli Martin Dlamini and the newspaper Swaziland News are labeled as "specified entities" under the STA. Specifically, the act does not detail any activities allegedly constituting the "knowing facilitation of terrorist acts." For this reason, this declaration is incompatible with fundamental standards of fairness, equality under the law, and due process of law.

The Suppression of Terrorism Act defines an "entity" as a person, group, trust, fund, or organization. Section 28 of the Act addresses the powers of the Attorney General and the Minister to declare an organization a "specified entity." The low threshold – "reasonable grounds to believe" – on which the Attorney General and Minister can base their decision to designate an organization as a terrorist is concerning. Given the severe consequences of such a declaration, including potential criminal charges against the entity members, this threshold is undeniably low. This section was deemed unconstitutional by the High Court in 2016 and was subsequently amended to allow a judge to order the Minister to revoke a designation. However, section 28 still retains other problematic clauses, including permitting the High Court to accept evidence that would otherwise be inadmissible during a review hearing.

Beyond targeting activists and journalists, the State also maintains the detention of two members of parliament. These MPs were arrested in July 2021 under the Suppression of Terrorism Act for allegedly inciting civil disobedience. The MPs were additionally charged under the Sedition and Subversive Activities Act, provisions of which had been declared unconstitutional by the High Court in 2016, for inciting disaffection against the king. After the State closed its case against the two

15 Sifiso Dlamini. PM CONDEMNS SENSELESS KILLINGS, ARSON. Eswatini Observer. 2022-06-27. https://new.observer.org.sz/details.php?id=18439

16 https://twitter.com/EswatiniGovern1/status/1542871723430842369.

MPs, the Crown attempted to amend the charges against them, significantly altering the case they needed to defend. The High Court rejected this application to amend the charge on June 30, 2022. To date, the MPs have been in custody for over a year.

3. RULE OF LAW THREATENED.

On the morning of June 10, 2022, the Supreme Court of Eswatini conducted a hearing concerning interlocutory questions connected to the State's appeal against the High Court's ruling of September 16, 2016. This ruling deemed certain provisions of the Sedition and Subversive Activities Act (1938) and the Suppression of Terrorism Act (2008) unconstitutional. Section 24 of Eswatini's 2005 Constitution asserts that "a person has a right to freedom of expression and opinion," encompassing "freedom to hold opinions without interference," and "freedom to communicate ideas and information without interference." Despite these provisions, the Eswatini government has recurrently employed the Sedition and Terrorism Acts to suppress dissent and mute criticism. Many of the respondents were members of the People's United Democratic Movement (PUDEMO), which the Eswatini government has considered a terrorist organization since 2008.

While the court did not delve into the merits of the appeal during this hearing, the issues raised highlighted the absolute importance of due process to the effective protection of fundamental human rights by Eswatini's courts. The right to a fair, speedy, and public hearing within a reasonable time frame by an independent and impartial court is encapsulated in section 21 of Eswatini's Constitution. Nonetheless, six years later, some of the respondents have passed away without receiving a definitive response from the judiciary, while the remaining ones continue to await justice. On September 22, 2022, the Supreme Court of Eswatini issued a ruling permitting the State's appeal to proceed.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As previously mentioned, the Constitution has remained formally unaltered since its enactment in 2005. A successful outcome of the proposed national dialogue on limiting the king's power would likely result in a reformative amendment. A reformative amendment that revises the king's absolute power would not necessarily *undermine* the monarchy. Instead, it could potentially bring about stability within this institution. Given that the Constitution has never been altered, the extent of the courts' jurisdiction to exercise constitutional control over such reforms remains unclear.

Within Eswatini's constitutional framework, the Constitutional Court has demonstrated a counter-majoritarian role in several notable cases. This capability is evident in the aforementioned ruling recognizing LGBTQ+ rights. However, its failure to acknowledge their right to association in the same case may reflect hesitation or limitations in its counter-majoritarian role rather than the exercise of a supposed representative role. It certainly does not suggest an enlightened role. When the court adopts a representative role, it typically advocates for the interests of the Crown against individuals, such as when it undermined the rule of law to admit a government's appeal. This scenario signifies a low level of judicial independence from the executive branch. The misuse of judicial procedure, by State or private entities, often coexists with a tolerance for rights violations. Under the rule of law, meticulous and rigorous observance of procedural rules is never optional but instead serves as a shield against arbitrary measures. It guarantees that laws will be properly applied as intended.

IV. LOOKING AHEAD

Eswatini's political landscape is currently at a critical turning point, characterized by growing challenges. Yet, it is difficult to envision a positive future, when citizens advocating for constitutional reform are met with killings, arrests, and physical violence. The government consistently overlooks constitutional provisions that protect human rights, and it systematically treats any attempts to debate constitutional reform as a threat. Its use of law enforcement and legal instruments to suppress demands for justice and democratic reform raises serious questions about the State's commitment to safeguarding its citizens' rights and freedoms.

For an extended period, there have been widespread calls for political reforms in Eswatini, particularly concerning the lack of political freedom. This deficit is exemplified by the inability to elect a head of government, such as the Prime Minister. As Eswatini gets closer to the 2024 elections, however, members of parliament are chosen through a "meritocracy" system that explicitly bars political parties like the proscribed People's Democratic Movement (PUDEMO). Moreover, the Electoral Board directs citizens and, indirectly, the legislature to avoid engaging in or discussing significant political subjects, such as the institution of the monarchy. These actions only serve to perpetuate the political and constitutional uncertainty prevalent in Eswatini.

V. FURTHER READING

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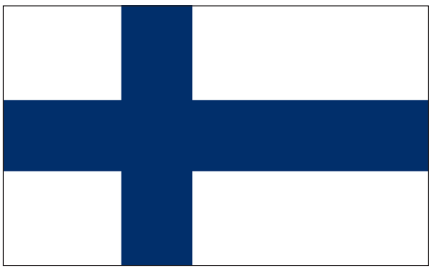
Finland



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I. INTRODUCTION

The Constitution of Finland of 2000[1] is still relatively new, including a broad catalogue of fundamental rights, and being quite well-equipped to address contemporary challenges. Since it entered into force on 1 March 2000, the formal amendments to the Constitution have remained rare and relatively minor by their scope, the latest amendment of 2012 mainly bolstering constitutional arrangements regarding Finland's EU membership.[2]

In 2022, no formal constitutional amendments were either adopted or pending. However, both the Covid-19 pandemic and Russia's aggression against Ukraine brought about a domestic discussion on the need to improve the Emergency Powers Act (Act No. 1552/2011) and other domestic regulation to handle better new and unprecedented threats to national security, public order, public health, and other comparable risks for the functioning and well-being of the Finnish society.

Russia's aggression against Ukraine has had a major impact on constitutional and legal developments in 2022 by profoundly altering the security-political landscape of Finland, which shares a 1340-kilometer-long land border with Russia, and which still very well recalls the horrors of the Winter War of 1939 and the Continuation War of 1941-1944 against the Soviet Union.

While geopolitical and security developments by Russia's aggression against Ukraine may not have a direct impact on fundamental rights or the domestic distribution of powers between state organs, they nonetheless have significant constitutional implications, especially insofar as the protection of fundamental and human rights is concerned. Below, the human rights implications of the rapid amendments to the Border Guard Act (Act no. 578/2005) and the Emergency Powers Act are discussed in more detail.

In the wake of the events of 2022, the Finnish foreign and security policy underwent a very rapid historic turn: the era of Finnish military non-alignment took an end as Finland decided to seek membership in NATO, together with Sweden, which also has a very long tradition of being a neutral and non-aligned country regarding foreign and security policy. As with other transformations of Finland's security landscape, Finland's NATO membership will surely bring about constitutional implications, as the membership of NATO represents a wholly new form of international cooperation for Finland.[3]

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. THE COMPREHENSIVE REFORM OF THE EMERGENCY POWERS ACT

A total reform of the Emergency Powers Act is currently under consideration by a working group of the Ministry of Justice. Several flaws in the Emergency Power Act had already been identified before the Covid-19 pandemic, such as the tension with the definition of the emergency conditions in Section 23 of the Constitution. However, during the pandemic, the deficiencies of the Emergency Powers Act received considerable attention, and it became clear that the Emergency Powers Act needed a total revision. One of the reform's major aims is to comply with the Constitution, especially to the extent that the derogation clause under Section 23 is concerned. Section 23 of the Constitution defines the scope of exceptional circumstances in which constitutional rights may be derogated from through an ordinary Act of Parliament or through delegated legislative powers specifically authorized in an Act of Parliament.

Section 23 of the Constitution provides as follows:

> *"Such provisional exceptions to basic rights and liberties that are compatible with Finland's international human rights obligations and that are deemed necessary in the case of an armed attack against Finland or in the event of other situations of emergency, as provided by an Act, which pose a serious threat to the nation may be provided by an Act or by a Government Decree to be issued on the basis of authorisation given in an Act for a*

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

2 For the overview of the past reforms and amendments of the Finnish Constitution, see Tuomas Ojanen and Janne Salminen, 'European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism', in Anneli Albi, Samo Bardutzky (eds.), National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law (The Hague: T.M.C. Asser Press 2019) 359, 362. See also last year's report on Finland: Eveliina Ignatius and Tuomas Ojanen, 'Finland' in Luis Roberto Barroso and Richard Albert (eds), The 2021 International Review of Constitutional Reform (2022) 84-88.

3 Constitutional Law Committee Opinion 80/2022 para 41.

special reason and subject to a precisely circumscribed scope of application. The grounds for provisional exceptions shall be laid down by an Act, however.

Government Decrees concerning provisional exceptions shall without delay be submitted to the Parliament for consideration. The Parliament may decide on the validity of the Decrees. Since then, some inconsistencies have been identified, and the Act is no longer considered to meet modern needs."

The current Emergency Powers Act conflicts with the Constitution and, therefore, it has been adopted by taking advantage of the institution of exceptive enactments, which enables the adoption of legislation that in substance conflicts with the Constitution without amending the text thereof, subject to the provision that such legislation be approved, per the procedure for constitutional enactments.[4] The Constitutional Law Committee of Parliament has underlined that the current status of the Emergency Powers Act as an exceptive enactment is constitutionally a very unsatisfactory situation.[5]

Aside from achieving constitutional compliance with Section 23 of the Constitution and international human rights treaties binding on Finland, the main objective of the reform is to update the Emergency Powers Act to respond appropriately to new forms of security threats.

2. THE AMENDMENTS TO THE BORDER GUARD ACT AND THE EMERGENCY POWERS ACT

Following Russia's war of aggression against Ukraine from February 24 onwards, the Finnish Government quickly began to prepare rapid legislative amendments to the Border Guard Act and the Emergency Powers Act.[6] These swift amendments, which aimed to respond to the altered security situation and the threat of so-called "hybrid threats" and "hybrid influence activities," have had significant implications for human rights. Especially the rights of refugees and, accordingly, the right to asylum and protection in the event of removal, expulsion, or extradition, as well as the rights of vulnerable groups, are affected. Hence, the affected rights also include such rights as equality before the law, non-discrimination, and rights of the child and persons with disabilities.

The Border Guard Act was amended to include more extensive possibilities to restrict cross-border movement during exceptional circumstances. The Amendments include a provision that grants authorities an option to centralize border reception of asylum applicants to a single crossing point of the Finnish border in situations when it is deemed necessary due to risk to public order, national security, or public health. Although these urgent amendments were primarily aimed at enhancing the state's capability to respond effectively to the possible instrumentalization of migration, the centralization of the reception can also take place in cases of an exceptionally large number of migrants entering in a short period of time.

The Emergency Powers Act was amended with an extension of the definition of exceptional circumstances, with the purpose that the severe hybrid influence operations could trigger activation of the exceptional powers under the Emergency Powers Act. As the Emergency Powers Act has originally been adopted as a so-called exceptive enactment, this gave it nuance for its ex-ante constitutional review by the Constitutional Law Committee of Parliament during its legislative process in Parliament.[7] As the Constitutional Law Committee – the main authority of constitutional review in Finland – took the view that the proposed change of the Emergency Powers Act conflicted with the Constitution due to the formulations of the provisions and the generality of the powers to be conferred, the changes to the Emergency Powers Act were enacted through the adoption of exceptive enactment, [8] requiring that the enactment had to be per the constitutional enactment procedure provided in Section 73 of the Constitution.

The rapid transformations in the security environment undoubtedly called for action, and the Finnish legislator's capacity to react to these changes reflects Finland's capability and determination. Nonetheless, the rapid amendments made to the Border Guard Act and the Emergency Powers Act have also been subject to a great deal of criticism for their negative implications on human rights, particularly the right to asylum and protection in the event of removal, expulsion, or extradition. Moreover, certain new provisions within both Acts are ambiguous and vague, thereby enabling a potentially excessive level of discretion and flexibility in their interpretation to authorities. Indeed, these new provisions are so general and vague that they may be applied to various contexts, thereby potentially lending themselves even to misuse and serious human rights violations. Soon after the adoption of these amendments, Finland received critical feedback from the Council of Europe Commissioner for Human Rights, who called for human rights safeguards, especially regarding the Border Guard Act.[9] The Commissioner emphasized especially the risk of violation of the principle of non-refoulment.

3. THE ACT ON THE SÁMI PARLIAMENT

In Fall 2022, a bill amending the Act on the Sámi Parliament (Act no. 974/1995) was submitted to Parliament. The bill aims at implementing the rights of the indigenous Sámi people that are enshrined in the Constitution of Finland. According to Section 17.3 of the Constitution, "*The Sámi, as an indigenous people, as well as Roma and other groups, have the right to maintain and develop their own language and culture.*" Moreover, Section 121.4 of the Constitution provides that the Sámi have linguistic and cultural self-government, as provided by an Act. The Sámi people are the only indigenous people in the European Union, including Finland. Their distinctive way of life is based on language, a range of nature-based livelihoods, artefacts, and customs and traditions; especially, reindeer herding is at the core of the Sami culture, along with fishing and hunting.

4 In general, the enactment of exceptive enactments has been approached with caution, especially since the entry into force of the current Finnish Constitution. On exceptive enactments, see Ojanen and Salminen 2019 (n 2) 367-368; See also last year's report on Finland: Ignatius and Ojanen (n 2) 84, 85.

5 Constitutional Law Committee Opinions 6/2009 and 29/2022 para 50.

6 Government Bill 63/2022. Also, for example, YLE News, 'Parliament approves border law change to thwart hybrid attacks' (7 July 2022) < https://yle.fi/a/3-12527252 > accessed 1 April 2023.

7 About exceptive enactments see for example Ojanen and Salminen (n 2), 367-368.

8 Constitutional Law Committee Opinion 29/2022 para 38

9 Council of Europe Commissioner for Human Rights, 'Finland: amendments to Border Guard Act must be accompanied by clear human rights safeguards' (2022), <https://www.coe.int/en/web/commissioner/-/finland-amendments-to-border-guard-act-must-be-accompanied-by-clear-human-rights-safeguards> accessed 1 April 2023.

In addition, the reform of the Sami Parliament Act seeks to achieve compliance with human rights obligations binding upon Finland. In 2019, the UN Human Rights Committee gave two decisions in which the Committee found the current Act and its application practice to be in violation of the Sami political rights.[10] Thus, the Committee requested Finland to review the Sámi Parliament Act so that the criteria for eligibility to vote in Sámi Parliament elections are defined and applied in a manner that respects the right of the Sámi people to exercise their right to internal self-determination per Articles 25 (the right to participate in public life) and 27 (minority rights) of the International Covenant on Civil and Political Rights, which Finland ratified in 1975.

Attempts to amend the Act on the Sámi Parliament to address some concerns and shortcomings of its current form and aiming to align with the obligations deriving from the international human rights obligations have spanned three parliamentary terms.[11] However, all attempts to reform the Act on the Sámi Parliament have been subject to a great deal of political controversy, especially to the extent that the proposed law aimed to clarify the criteria for determining who has the right to vote and is eligible — and who is not — in the elections of the Sámi Parliament.

Even this time, the bill eventually lapsed in Parliament. As a result, as the Act on the Sámi Parliament still fails to ensure the right of the Sámi people to exercise their right to internal self-determination in accordance with the Constitution and human rights treaties binding on Finland, Finland continues to violate the rights of the Sámi.

4. OTHER TOPICS

Aside from legislative reforms resulting from the aftermath of the Covid-19 pandemic and Russia's aggression against Ukraine, Finland adopted the Act on Parenthood (Act no. 775/2022), which provides that a child can have a maximum of two legal parents but can have two mothers or two fathers. At the same time, the Act on Assisted Fertility Treatment (Act No. 1237/2006) was amended so that a female couple can use gametes from a donor who has consented to confirmation of paternity. If it cannot be confirmed that the donor is the child's father, the other female partner may be confirmed as the child's mother.[12]

In addition to the domestic developments described above, the United Nations Committee on the Rights of the Child (CRC Committee) found a serious human rights violation by Finland.[13] In its decision, the CRC Committee stated that Finland's failure to repatriate children from refugee camps in the Syrian Arab Republic constituted a violation of the right to life and the right to be free from inhuman and degrading treatment. This is the first time that Finland has been found to violate such inviolable rights, which constitute the core of systems of protection of fundamental and human rights. The CRC Committee's decision revolved around a topic that had been at the centre of heated political debate in Finland, including tensions between national security concerns and the protection of human rights.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

While 2022 did not bring about any formal reforms to the Finnish Constitution, this section will discuss the constitutional review of the topics dealt with in Section II above.

1. IN BRIEF: THE FINNISH SYSTEM OF CONSTITUTIONAL REVIEW

The Finnish system of constitutional review constitutes a combination of abstract ex ante and concrete ex post mechanisms of review in which various organs of the state are charged with the review of the constitutionality of ordinary legislation. Hence, the Finnish system is essentially decentralized and pluralist by nature.[14] Moreover, the contemporary system of constitutional review is openly political since *ex ante* review by the Constitutional Law Committee of the Parliament assumes a principal role in this review system. Section 74 of the Constitution provides 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."*

Consequently, the Committee's opinions and reports play a major role, and the views of the Committee are considered binding on other parliamentary committees and Parliament. By contrast, *ex post* judicial review by courts is restrained and features as a weak-form judicial review.

As with other Nordic countries, Finland has no centralized system of constitutional review by a constitutional court. In addition, *ex post* judicial review by courts is restrained and features as a weak-form judicial review addressing only individual cases with a mandate that is limited to only evident conflicts with the Constitution. The current mandate of the courts to review Acts of Parliament for compatibility with the Constitution is provided in Section 106 of the Constitution as follows:

> *"If in a matter being tried by a court, the application of an Act of Parliament would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution."*[15]

The wording of this provision displays that judicial review of the constitutionality of legislation enacted by Parliament under Section 106 is

10 *Käkkäläjärvi v. Finland* (2 November 2018) Communication No. 2950/2017 CCPR/C/124/D/2950/2017; *Sanila-Aikio v. Finland* (1 November 2018) Communication No. 2668/2015 CCPR/C/124/D/2668/2015.

11 Government Bill 274/2022, 46.

12 Government Bill 132/2021.

13 UN Committee on the Rights of the Child (CRC), *'P.N. et al v. Finland'* (12 September 2022) Communication No 100/2019 CRC/C/91/D/100/2019; see also Finnish Government, 'Views of the UN Committee on the Rights of the Child on a matter concerning Al-Hol camp', (12 October 2022) <https://valtioneuvosto.fi/-/yk-n-lapsen-oikeuksien-komitean-ratkaisu-al-holin-leiria-koskevassa-asiassa?languageId=en_US> accessed 1 April 2023.

14 The Finnish system of constitutional review is further described in last year's report on Finland (n 2). For overview of the Finnish system see e.g., 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; Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, 'Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice', in John Bell and Marie-Luce Paris (eds.), *Rights-Based Constitutional Review: Constitutional Courts in a Changing Landscape* (Edward Elgar Publishing 2016) 218.

15 On Section 106 of the Constitution, see Tuomas Ojanen, 'From Constitutional Periphery toward the Center – Transformations of Judicial Review in Finland' (2009) 27(2) Nordic Journal of Human Rights 194, 202-206.

decentralized to all courts and intended to be exercised at the level of a particular case in light of its specific circumstances. The power of judicial review is also very restricted. Especially the criterion of an 'evident conflict' is deliberately designed to guarantee the authority of the Constitutional Law Committee in constitutional interpretation and review.[16]

2. *EX ANTE* REVIEW BY THE CONSTITUTIONAL LAW COMMITTEE OF PARLIAMENT

Similar to other parliamentary committees, the Constitutional Law Committee is composed of members of Parliament and serves as an integral component in the legislative process. However, although the Committee is a political organ, its review function is shaped by legal argumentation. Additionally, the Committee's members are expected to exercise a 'quasi-judicial function' when reviewing legislative proposals. The Committee also has the practice of aiming at unanimity when issuing its opinions and reports. As a result, political party affiliations or daily politics tend to be largely, if not exclusively, absent from the Constitutional Law Committee's review function.[17] However, there have repeatedly been discussions, occasionally even accusations, of the potential politicization of the constitutional review by the Constitutional Law Committee. In recent years, the potential risk of politicization and political maneuvering has become more prominent, leading to an intensified debate concerning the role of the Committee.[18] Among other factors, a significant cause for the heightened speculation regarding the politicization of the Committee's review function is the increase in dissenting opinions within the Committee's decisions. In 2022, the Committee issued several opinions and reports with dissenting opinions.[19]

As discussed above, Russia's aggression towards Ukraine accelerated controversial changes to the Border Guard and Emergency Powers Acts. These rapid amendments were reviewed by the Constitutional Law Committee, whose constitutional mandate includes assessing the compatibility with the Constitution as well as international human rights treaties. The amendments were subject to debate due to human rights concerns related to the principle of non-refoulment and the observation of the right to asylum. The Constitutional Law Committee had to balance between closing the borders based on national security and other security interests, on the one hand, and the international protection of asylum seekers and the observance of fundamental and human rights in general on the other hand. The outcome was a halfway house between security interests and human rights as the Committee's Opinion concluded, for instance, as follows: *"The Constitutional Law Committee believes that a temporary, full border closure may be possible under extremely exceptional circumstances, provided that such a strictly time-limited measure is necessary to ensure the proper conduct of the entry procedure."*[20] This level of ambiguity leaves a strong degree of discretion on such an important matter.

The Committee's decision was not unanimous, and three members submitted their dissenting opinion specifically underlining the human rights concerns originating in the above-quoted finding by the Committee. In addition, it is worth noting that after the opinion by the Constitutional Law Committee, the Administration Committee of the Parliament significantly re-drafted the wording of the proposed Border Guard Act (specifically Section 16 of the Act) without allowing the Constitutional Law Committee to review whether the re-drafted version complies with fundamental and human rights.[21]

Then again, the Constitutional Law Committee failed to achieve consensus regarding the legislative proposal on the Act on the Sámi Parliament. The Committee continued to deal with the proposal at the beginning of 2023, but the bill eventually lapsed due to the end of the parliamentary term. Later, the Committee's Chair explained that there was not enough time to reach unanimity on the bill.[22] Hence, the reform of the Act on the Sámi Parliament must wait until the next Parliamentary term. Given that this was already the third time during the last ten years when the reform of the Act on the Sámi Parliament failed, this amplifies serious concerns about the willingness of Finland to observe the rights of the only indigenous people living in Finland and the EU in general. These concerns transcend the Finnish political system to include the system of constitutional review with the Constitutional Law Committee of Parliament at its apex.

Furthermore, the CRC decision, which found very serious violations of children's rights, demonstrates that there is a risk of perceiving legally binding obligations under international human rights as such matters of daily and party politics that can be subjected to political contention. The conflation of these obligations with political considerations may undermine human rights and state obligations, as these legal obligations may then be disregarded or inadequately addressed.

3. PLUGGING POSSIBLE LOOPHOLES: THE COURTS AND THE LIMITED *EX POST* REVIEW

In 2022, the Supreme Court applied Section 106 in the case of KKO 2022:26, in which the court assessed the Sámi persons' possible fishing violations, which relate to the constitutional rights of the Sámi people provided in Section 17 of the Finnish Constitution. The Supreme Court ruled that the separate fishing license, as stipulated in the Fishing Act (Act no. 379/2015), along with its associated licensing practices, imposed such significant restrictions on local Sámi people that the application of the provision would conflict with the Section 17 of the Constitution. Hence, the relevant provision of the Fishing Act was not applied, and the charge of unauthorized fishing was dismissed.

The Covid-19 pandemic exemplifies the possible higher importance of the court's *ex post* review. Due to the pandemic, various restrictive measures were implemented, and the preparation of legislation and other regulation faced a lot of criticism. Consequently, the role of judicial review of restrictive measures may become significant. One example is the Supreme Administrative Court's decision in case KHO 2022:140, which represents one of the first higher court judgments on Covid-19 pandemic-related issues. In this case, the court assessed

16 Government Bill 1/1998, 164.

17 Tuomas Ojanen, 'The Finnish Constitutional Exceptionalism: the pluralist system of constitutional review combining ex ante and ex post functions of review' in Miroslaw Granat (eds.), *Constitutionality of Law without a Constitutional Court* (Taylor & Francis Ltd, 2023) [forthcoming]; Ojanen and Salminen (n 2) 360.

18 For an overview of strengths and weaknesses and recent developments of the Finnish system of constitutional review of legislation see Ojanen (n 17).

19 See for example Constitutional Law Committee Opinions 1/2022, 15/2022, and 37/2022.

20 Constitutional Law Committee Opinion 37/2022 para 30. (Unofficial English translation by Authors of this report)

21 Administration Committee Report 16/2022.

22 YLE News, 'Controversial Sámi bill runs aground in parliamentary committee' (24 February 2023) <https://yle.fi/a/74-20019662> accessed 1 April 2023

whether the ban imposed by the regional authorities on organizing public events and general meetings was necessary to prevent the spread of the pandemic. In particular, the court assessed the ban's significance on electoral and participation rights (Section 14 of the Constitution), as the ban was targeted at a period when regional elections were approaching. The statement by the Supreme Administrative Court defines the limits of the core area of electoral and participation rights, stating that while the ban had an impact on the practical implementation of election campaigning, it did not impact the core of these rights, such as the right to vote or stand as a candidate in elections. Hence, according to the decision, the ban was deemed proportionate to its purpose and did not infringe on the constitutional rights protected in Section 14 of the Constitution. Some other rulings involving issues related to the Covid-19 pandemic were also issued in 2022, and there are currently several others pending before the courts.

In addition to these, the courts have impacted constitutional developments in other contexts as well, for example, by banning police officials from conducting ethnic profiling (KHO 2022:106), demonstrating the court's ability and willingness to address contemporary issues with a rights-based approach. However, due to the limited role of the courts, the overall impact of judicial review remained modest in 2022.

IV. LOOKING AHEAD

NATO membership and other recent profound changes in Finland's foreign policy and security landscape may warrant the need to start pondering the necessity for constitutional reform, especially to the extent that the domestic distribution of powers between Parliament, the Government, and the President is concerned.

Under the Constitution of Finland of 2000, the Finnish constitutional-political system is based on the Parliament-the Government axis system, but the President of the Republic is still a significant authority, especially in the foreign policy of Finland. According to Section 93.1 of the Constitution, foreign policy is directed by the President "in cooperation with the Government" in pursuance of Section 93, subsection 1 of the Constitution. Thus, while binding the President operatively to the cooperation with the Government, the Constitution still acknowledges the role of the President as the ultimate authority in foreign policy. As the Government is simultaneously responsible for the national preparation of the decisions to be made in the European Union, including the Union's common foreign and security policy under Section 93, subsection 2 of the Constitution, the constitutional solutions in the area of foreign policy affairs have continuously given rise to debate over the relationship between the Government with the Prime Minister at its apex and the President in the area of foreign policy matters, including those falling within the framework of the EU's Common Foreign and Security Policy of the Union is concerned. In practice, it is difficult, in fact almost possible, to draw an unambiguous distinction between EU policy and foreign policy matters. Strong and multifilament links between EU policy and foreign affairs make such categorizations inherently ungovernable because national foreign and security policies are increasingly influenced by coordination processes and policy choices at the level of the European Union.

Now, due to Finland's accession to NATO, as well as other recent changes in Finland's foreign policy and security landscape, the constitutional pendulum has started swinging back toward stronger leadership of the President of the Republic. Therefore, it is quite likely that sooner or later, preparation for constitutional reform will begin for adjusting the powers of the Parliament, the Government, and the President to the new foreign and security policy landscape of Finland. Especially the effective participation of Parliament in foreign policy affairs may warrant entirely new constitutional solutions.

In addition, there have been calls for strengthening constitutional safeguards for the rule of law, human rights, and democracy, for example, by reforming constitutional provisions on the judiciary, especially to the extent that the selection and nomination of judges is concerned. Similarly, there have been calls for strengthening the role of courts in the system of constitutional review by abolishing the criterion of 'evident' conflict from Section 106 of the Constitution.[23]

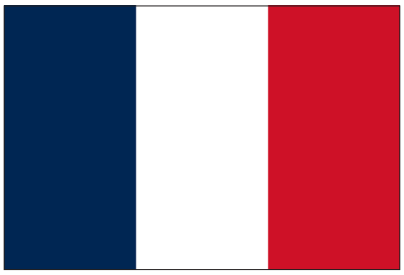
Occasionally, too, there have also been some odd efforts to launch a discussion of the need to establish a centralized system of constitutional review by establishing a constitutional court, but these calls have almost immediately faded away.

V. FURTHER READING

Martin Scheinin, 'Is Finland Joining the Backsliding Trend in Europe?' (*Verfassungsblog*, 10 July 2022) <https://verfassungsblog.de/is-finland-joining-the-backsliding-trend-in-europe/ > accessed 1 April 2023.

23 In 2010, a governmental commission with a parliamentary composition considered the need for a reform of the Constitution of Finland. Among various questions on the agenda was the issue whether the criterion of evident conflict should be removed from Section 106. A clear majority of constitutional law scholars were in favour of eliminating the criterion for the purpose of giving the courts a stronger constitutional mandate to guarantee the observance of the Constitution. However, the commission ended up concluding that Section 106 should remain intact. In particular, a clear majority of politicians entertained doubts as regards any extension of the scope of judicial review. See also Government Bill 60/2010.

France



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I. INTRODUCTION

For the French constitutional scholar studying constitutional reforms, the years pass and seem to resemble one another, as if each year we woke up with *I got you babe* on Groundhog Day. 2021 saw some failed reforms, as we explained last year, and the same can be said for 2022: no formal constitutional reform took place.

It is no surprise, as we had predicted last year that the year 2022 would be cannibalized by the presidential and legislative elections that happened respectively in late April and mid-June. While Emmanuel Macron was comfortably reelected, he still lost his absolute majority in the National Assembly, becoming the *weakest* President in terms of majority granted right after his election (his contender being President François Mitterrand after the 1988 election). While the long-term effects of this relative majority are still to be pinpointed, it could very well impact future constitutional amendment proceedings.

It does not mean that nothing of interest happened from a constitutional point of view: a bill was introduced, discussed, and adopted in 2022 and is still underway as of writing, and the complicated political situation put in place after the elections has brought unforeseen developments akin to either an informal constitutional reform or a change of two constitutional conventions.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2022 no constitutional reform was formally adopted, but that does not mean that the Constitution did not change or was not modified. The 2021 project about environmental protection, fully explained last year[1], can be considered to have failed since there has not been any political will to bring it back for another round of parliamentary debate, either on its own or embedded in a larger reform project. However, there has been a proposed constitutional reform about the right to abortion, and two constitutional conventions seem to have been changed.

To be sure, *Dobbs v. Jackson Women's Health Organization*[2] was a nationwide, shattering decision, but it also resonated with the entire world. While abortion rights are nowhere near as threatened in France as in the United States, the realization that they are not untouchable triggered no less than six different parliamentary propositions of constitutional amendments, including one at the Senate in early September. All of them were either rejected or not discussed, except for the bill put forward on the 7th of October by a group of members of the left-wing coalition and the presidential majority deputies. While we will focus on this constitutional amendment bill in this paper, it is worth mentioning that since abortion was legalized in 1975[3], abortion rights only get extended with each reform (the last being in 2022, where abortion was made possible up until fourteen weeks).

Furthermore, following the reelection of Emmanuel Macron in April 2022, two constitutional conventions seem to have been either repelled or profoundly modified. Both of them relate to the relationships between a newly elected National Assembly and the Prime Minister. The first one is that following a legislative election the Prime Minister must resign, and the President must accept the resignation. In May 2022, although Prime Minister Elisabeth Borne resigned, President Emmanuel Macron did not accept the resignation, and E. Borne remained Prime Minister with the same government. The second convention is that the newly appointed Prime Minister must ask for investiture to the National Assembly. Following the second round of the legislative elections, in June 2022, Prime Minister E. Borne did not ask for investiture to the National Assembly.

The "success" of such reforms is wholly debatable. Indeed, it depends on what one considers a constitutional rule, and it also depends on the future. The practice might revert to the original convention, or the new practice might become the new rule or lack thereof.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The scope of these three constitutional reforms is limited. They are still worthy of a bit of detailing, as the three of them have their particularities: the constitutional amendment bill on abortion rights, while being well underway, has faced critics and changes throughout the procedure (1) and the altered or repelled constitutional conventions can only be understood by keeping in mind the complex nature of the French political regime (2).

1 Camille Bordere, Sacha Sydoryk, "France" [2022] IRCR 89.

2 *Dobbs v. Jackson's Women Health Organization*, nº 19-1392, 597 U.S., ___ (2022), 2022 WL 2276808; 2022 U.S. LEXIS 3057.

3 Law nº 75-17 of 17th of January 1975 *on the voluntary interruption of pregnancy.*

1. ABORTION RIGHTS

The constitutional amendment bill, put forward in October 2022, was not guaranteed to go as far as it did. A large fraction of the French political spectrum was not convinced of the necessity or otherwise benefits to be drawn from the insertion of abortion rights into the Constitution for reasons that can be traced back to two main points. The first, and possibly the least interesting, is that the French Constitution is not meant to encompass all the specific rights drawn from the more general rights and liberties protected by its preamble,[4] especially as the Constitutional Council has already considered abortion rights to be guaranteed by article 2 of the *Déclaration des Droits de l'Homme et du Citoyen*[5]. Our remarks here are twofold: considering that the Constitution has already been amended to include the prohibition of the death penalty in 2007 and to protect gender equality in political (1999) and professional (2008) environments, the first argument seems to have little to no practical groundings. As for the second, we might point back to where this project started: the ultimate failure of judicially created and enforced constitutional rights.

More interestingly, politics and academics consider that the American crisis on abortion rights has little to do with the French abortion rights situation and question whether the French Constitutional is meant to be the vessel for fears created abroad but with no hold on France. As delicate as the opinion polls' interpretation might be, it is unquestionable that French citizens widely support abortion rights: 81 % support the right to free abortion, 88 % consider that it is not even a matter for debate, and only 15 % morally condemn it.[6]

In any case, the October bill meant to add a new article 66-2 to the Constitution, which would ensure that "No one shall violate the rights to abortion and contraception. The law guarantees free and effective access to these rights to any person who so wishes". Two things were questioned with this bill, the first being its placement and the other being its wording. Its placement was meant to imitate the prohibition of the death penalty (art. 66-1 of the Constitution), but created a coherency problem: article 66 is found in the title of the Constitution entitled "On judicial authority." While the prohibition of the death penalty could find its natural place there, abortion rights have little to do with the judiciary. Other placements had been imagined through the years (including placing it at the first article of the Constitution[7]), but the bill was adopted by the National Assembly without changing it. The wording, however, was simplified: the bill that was adopted on the 24th of November 2022 ensured that "the law guarantees an effective and equal access to abortion," stripping the amendment from the mention of contraception.

Without being too precise on the rest of the procedure (as it happened in 2023), we can still mention that both of these aspects were altered by the Senate when it also adopted the bill on the 1st of February 2023: the wording was changed to "the law determines the conditions in which the woman exercises her liberty to abort," and it was moved to the preexisted article 34 that lists the domain in which the legislative power can enact laws. Needless to say, these changes are already abundantly discussed.[8]

2. CONSTITUTIONAL CONVENTIONS

The two repelled constitutional conventions can lead to uncertainty as to how they were made possible in the first place. To understand these conventions and the chronology of what happened, one must understand how the French institutional system works. The French system is an odd parliamentary system, where the executive branch of the government consists of a President that is directly elected but irresponsible before the Parliament, and a Prime Minister, appointed by the president and responsible before the Assembly. While the latter holds most (if not all) of the political power and controls executive powers in traditional parliamentary systems, the French parliamentary system makes it possible for the *former* to take the lead.

To concentrate the power in the President's hands, the President and the members of the National Assembly served a five-year term since the 2002 presidential election. The presidential election usually occurs in April and the legislative elections in June. Following the presidential election and the beginning of the new presidential term, Prime Minister Jean Castex resigned. The resignation was accepted, and President E. Macron appointed E. Borne in May 2022, roughly one month before the legislative elections. Right after the National Assembly was newly elected, E. Borne presented her resignation, as dictated by the convention. The political fact that E. Macron got a relative majority – but a majority nonetheless – is not relevant here. The convention dictated that E. Borne had to resign, and the President was at liberty to appoint her back right after. However, the President never accepted her resignation. There goes the first convention.

As for the second convention, it relies on the fact that after the legislative elections, the (newly appointed) Prime Minister has to present a general policy speech to the National Assembly, asking for investiture in the form of a vote of confidence. This is based on Article 49, § 1 of the Constitution, but the provision only *allows* the Prime Minister to ask for a vote of confidence. A constitutional convention was forged, making the use of this provision mandatory after a legislative election. And yet, in July 2022, Prime Minister E. Borne did not ask for a vote of confidence. She used another provision, article 50-1 of the Constitution, allowing her to present the same general policy speech without such a vote.

These specific constitutional reforms, if indeed reforms, could be seen as constitutional dismemberments. First, one should be very careful when talking about constitutional conventions, or customs, concerning France. The mere existence of constitutional conventions, or more largely of non-written constitutional law, has been the subject of heated debates for at least the last century[9]. If admitting that these

4 This line of argument is mostly developed at the Senate, see the official report written on behalf of the senatorial commission in charge of this proposition: Agnès Canayer, "Proposition de loi constitutionnelle visant à protéger et à garantir le droit fondamental à l'interruption volontaire de grossesse" [2023] Senate website, available online at <http://www.senat.fr/rap/l22-283/l22-283_mono.html#toc21>.

5 Constitutional Council, 27th June 2007, decision n° 2001-446 DC, *Voluntary Interruption of Pregnancy (Abortion) and Contraception Act*.

6 Results drawn from an opinion poll directed by IFOP from the 18th to the 22nd of November, 2022.

7 Stéphanie Hennette-Vauchez, Diane Roman and Serge Slama, "Pourquoi et comment constitutionnaliser l'avortement" [2022] RDLF.

8 For an overview, see Olivier Beaud, "Pour une interprétation raisonnable de la disposition votée par le Sénat sur la constitutionnalisation du droit à l'IVG" [2023] JusPoliticum Blog.

9 See René Capitant, "La coutume constitutionnelle" [1929] Gazette du Palais republished [1979] Revue de Droit Public 959 and Raymond Carré de Malberg, *La Loi, expression de la volonté générale. Étude sur le concept de la loi dans la Constitution de 1875* [1931] Librairie du Recueil Sirey 105.

practices were conventions, they could also be seen as constitutional dismemberments. These reforms modify the basic idea behind the French parliamentary regime. It takes away parts of the responsibility of the Prime Minister before the Assembly and reinforces the role of the President. It is a slight modification, but a modification nonetheless, that goes in the direction of the increased importance of the President. This preeminence of the President over the Government is a general trend of the French regime, started in 1962 with the direct election of the President by the people, and that has increased since ever so slightly with each constitutional reform.

None of these three constitutional reforms goes against an unamendable rule in the French constitution.[10] Likewise, the Constitutional Council does not play any role in these reforms, being unable to control them.[11] Indeed, even when it comes to constitutional conventions, the Council has no jurisdiction, and there is no procedural way to have a ruling on the matter of the institutional acts of the President of the Government. The refusal to accept the Prime Minister's resignation or the lack of asking for a vote of confidence are considered "government acts" ("actes de gouvernement") by the Council of State and are thus insusceptible to judicial review by any jurisdiction.[12]

IV. LOOKING AHEAD

Last year, we concluded by saying that "we should expect 2022 to be an *interesting* year on a constitutional level – if not a peaceful year."[13] As we started this year by saying that each year seems like the previous one, the same could be said of 2023.

Indeed, and without giving away too much, the Senate has recently adopted its version of the constitutional amendment bill on abortion rights. While we might have expected to witness heated debates on its precise wording and placement in the Constitution, President E. Macron has taken advantage of International Women's Day to announce that, following demand from parts of the left-wing parliamentary coalition, he would take over the reins of this constitutional amendment and include it in a larger constitutional reform to be announced in early Summer. This decision is likely to have crucial consequences for the future of the bill in at least two main directions. The first is its actual political feasibility, considering how complicated President E. Macron's position is regarding his majority at the National Assembly as well as his relationships with his different political opponents for him to take the lead on this otherwise well-engaged constitutional amendment might lead to its ultimate failure – like the rest of the constitutional reforms he meant to implement throughout his first mandate. Another consequence this decision might have triggered regarding the way constitutional amendments are approved. Since the initial bill was put forward by a group of deputies, it had to be approved through a referendum, as Article 89 of the Constitution provides. If President E. Macron proceeds with his decision to take over this amendment, he will be offered a choice between a referendum *or* a vote of the Congress (the reunion of the two chambers of Parliament) as a mode of approval. Considering the political risks that might come with a president-decided referendum, it is likely that, should the amendment reach this step, the French people will not be given the right to decide whether or not they want abortion rights to be entrenched into their Constitution.

Concerning the bigger announced constitutional reform that would encompass abortion, it will also probably address some institutional elements that have yet to be disclosed. It will also take into consideration what we discussed last year concerning the constitutional status of the island of Corsica, giving it a proper constitutional status.[14] It will very likely also include some element concerning the status of New Caledonia since the independence process was halted following a referendum in December 2021, rejecting plans of independence and thus remaining a French territory.

2023 should, then, definitely be an *interesting* year. Or so we hope for next year's reporters!

V. FURTHER READING

Olivier Beaud, "Pour une interprétation raisonnable de la disposition votée par le Sénat sur la constitutionnalisation du droit à l'IVG" [2023] JusPoliticum Blog <https://blog.juspoliticum.com/2023/02/18/pour-une-interpretation-raisonnable-de-la-disposition-votee-par-le-senat-sur-la-constitutionnalisation-du-droit-a-livg-par-olivier-beaud/>.

Stéphanie Hennette-Vauchez, Diane Roman, Serge Slama, "Pourquoi et comment constitutionnaliser le droit à l'avortement" [2022] La Revue des droits de l'homme <https://doi.org/10.4000/revdh.14979>.

Pierre Mouzet, "Le Premier ministre et la Constitution non écrite" [2022] JusPoliticum Blog <https://blog.juspoliticum.com/2022/09/07/le-premier-ministre-et-la-constitution-non-ecrite-par-pierre-mouzet/>.

10 On the unamendable rules in France, see Eleonora Botinni, "France" [2020] IRCR 115.

11 On the role of the Constitutional Council, see Eleonora Botinni, "France" [2020] IRCR 115.

12 On this, see Mattias Guyomar, "Actes de gouvernement et actes législatifs" [2000] Revue Française de Droit Administratif 120.

13 Camille Bordere, Sacha Sydoryk, "France" [2022] IRCR 92.

14 Camille Bordere, Sacha Sydoryk, "France" [2022] IRCR 89.

The Gambia

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I. INTRODUCTION

The Gambia, a small West African country, has been on a journey towards consolidating its democracy in recent years. In 2022, President Adama Barrow's second term began with the country's attention toward the April parliamentary elections. These elections were held to elect 53 members of the National Assembly. Despite significant efforts to promote gender equality and women's political participation in The Gambia, the number of women elected to the National Assembly remained low. Out of the 53 seats in the Assembly, only three were won by female candidates. This highlights women's ongoing challenges in entering and advancing in the political sphere and underscores the need for sustained efforts to address the underlying barriers to women's political participation.

Against this backdrop, President Barrow's second term began with a challenging political climate marked by economic struggles, security concerns, and a slow pace of reforms. One of the key promises of his second term is the introduction of a new constitution. The failure of a previous attempt at constitutional reform in 2020 has raised concerns about the government's ability to deliver on its commitments. Nevertheless, President Barrow has reiterated his commitment to ensuring that the new constitution is adopted by the people before the end of his term. The Gambia's transition to a democratic government was met with great excitement and enthusiasm after years of authoritarian rule. However, despite the progress made toward establishing a truly open and free multiparty political system, the country's democracy remains fragile.[1] This report[2] will examine The Gambia's constitutional reform efforts in 2022, focusing on the political, legal, and social dynamics that have shaped the process.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. PARLIAMENTARY QUOTAS

Despite The Gambia's commitment to promoting women's rights and increasing their political participation, women remain significantly underrepresented in decision-making processes. Out of the 58 members of the National Assembly, only five are women lawmakers, with a mere three of them elected. This underrepresentation is in stark contrast to the fact that women make up more than half of the country's population, highlighting a severe deficit in gender equality. The reasons behind the lack of women in politics are varied and complex, stemming from a mix of legal, political, social, and religious factors. Patriarchy and poverty are two of the primary reasons for the marginalization of women in politics. Women's voices are often silenced, and their opportunities for education and financial independence are limited. These factors, along with others, combine to create a significant barrier to entry for women seeking to participate in political decision-making.

The insufficient legal framework in The Gambia has led to a lack of substantive rights for women in politics. Section 15 of the Women's Act 2010, which allows for the implementation of temporary special measures, does not provide specific guidelines, such as gender quotas, to address the gender gap in representation effectively. Furthermore, the current legal system does not adequately address the deeply rooted socio-cultural barriers that hinder women's political participation. These patriarchal norms and beliefs regarding power dynamics within society shape voters' perceptions and expectations of female politicians, as noted by Nabaneh.[3]

As indicated in the 2020 Global Review of Constitutional Law on The Gambia, the Draft 2020 Constitution includes several provisions aimed at promoting substantive gender equality in accordance with The Gambia's international human rights obligations.[4] The Draft Constitution in Section 322) explicitly prohibits discriminatory treatment on the basis of gender and mandates equal treatment between men and women in political, economic, and social opportunities under Section 55. Additionally, Section 74 outlines general principles for the electoral system, including fair representation of all genders in elective public bodies. The draft Constitution proposes a quota system that reserves 14 seats in the National Assembly for women to ensure equal representation.

1 S Nabaneh 'The Gambia's Milestone Election?' *Human Rights in Context*, Dec 1, 2021, https://www.humanrightsincontext.be/post/the-gambia-s-milestone-election.

2 The research assistance of Fatou Mbenga, Research Intern, Law Hub Gambia is duly acknowledged.

3 S Nabaneh 'Women's political participation in The Gambia – One step forward or two back?' in S. Nabaneh, A Abebe, & G. Sowe (eds) *The Gambia in Transition: Towards a New Constitutional Order* (Pretoria University Law Press, 2022) 125-152, https://www.pulp.up.ac.za/edocman/edited_collections/gambia_in_transition/2022%20Gambia%20in%20trans%20chapter%206.pdf.

4 S Nabaneh, G Sowe & M Saine, 'Gambia' in R Albert *et al* (eds) *The I·CONnect-Clough Center 2019 Global Review of Constitutional Law* (November 26, 2020), pp. 129-133.

The proposal for a quota system in The Gambia's draft Constitution aligns with the results of a nationwide study on women's political participation and representation, which revealed that 89% of respondents favored its implementation.[5] Similarly, an Afrobarometer survey in 2018 found that 85% of Gambians supported constitutional changes that would require a quota system for women's representation in the National Assembly.[6] While temporary special measures such as quotas can address imbalances in political representation, progress on the new constitution has stalled due to the rejection of the proposed Constitution Promulgation Bill of 2020 in the National Assembly. This Bill failed to pass due to political polarization and partisanship, with insufficient engagement in consensus-building by all political actors.[7]

To address this issue, Hon. Fatoumatta Njie, one of the three elected women parliamentarians in the country, collaborated with the Civil Society Gender Platform and development partners to create a private member bill aimed at increasing women's representation in the National Assembly.[8] A private member's bill is typically introduced by a Parliamentarian who is not a member of the Cabinet or acting on behalf of the Executive branch, as stated in section 101(1) of the 1997 Constitution. The bill aimed at promoting women's rights in The Gambia by increasing the total number of seats in the National Assembly from 58 to 74, with 16 reserved for women Assembly members. The plan was for 14 seats to be elected from each region, with one woman representing persons with disabilities and the remaining woman member appointed by the President. Even though this would require a constitutional amendment, passing the private member bill would have been a significant step toward gender equality. Unfortunately, the bill failed to go to the third reading due to a lack of required support.[9]

2. THE URGENCY OF A NEW CONSTITUTION TO FACILITATE TRANSITION: REVITALIZING THE GAMBIA'S CONSTITUTIONAL REPLACEMENT PROJECT

The 2016 political watershed in The Gambia was seen as a turning point for the country's democratic future. The Coalition, led by President Adama Barrow, had long been advocates for electoral reforms and democracy, and their 2016 Manifesto was filled with promises for a brighter future.[10] They committed to a three-year transitional agenda and pledged to repeal or reform any laws that infringed on human rights, popular participation, and democracy within six months of coming to office.

The Coalition recognized that institutional reforms were necessary to enhance democracy and good governance in the country, and identified several provisions in the Constitution, the Elections Act, and the Public Order Act for review. However, the road to genuine democratic transition has been a challenging one.

Since assuming office in January 2017, the government has embarked on an ambitious transitional justice program. This program has led to the establishment of various processes and institutions, including the Truth, Reconciliation, and Reparations Commission (TRRC),[11] the Constitutional Review Commission (CRC), and reforms in the security sector and civil service. The government has also taken measures to ensure citizens can exercise their fundamental rights, such as freedom of expression, assembly, association, and media.

Even so, despite the initial ambitious transitional justice program launched by the President after taking office, a number of promises and hopes for better governance have yet to be fulfilled. This includes the inability of the Draft Constitution 2020 to pass in the National Assembly. The lack of visible support from the President himself is cited as a key factor in this failure.[12]

Emerging from two decades of dictatorship, The Gambia is currently undertaking an ambitious transition, including re-establishing strong rule of law institutions, building a culture of human rights, and enacting laws and practices to enhance good governance. Well-functioning justice institutions and a government bound by the rule of law are critical to building peace and consolidating the gains within The Gambia's fragile transition. As such, robust and open exchanges of experiences and proffer on what is needed, and the way forward will enrich ongoing reforms to improve justice institutions and the rule of law.

On October 21, 2022, Law Hub Gambia and the Institute for Human Rights and Development in Africa (IHRDA), in collaboration with the American Bar Association Rule of Law Initiative, held a dialogue on "Building Strong Rule of Law Institutions" in The Gambia, with the Chief Justice of the Gambia as the guest of honor.[13] The dialogue was accompanied by the launch of *The Gambia in Transition: Towards a New Constitutional Order*,[14] a first-of-its-kind book project that brings together diverse contributions from scholars and practitioners to provide context-specific understandings of the past, ongoing and future efforts of constitution-making, protection of human rights and enhancing accountable governance in The Gambia.

5 S Nabaneh 'Women's political participation and representation in The Gambia: One step forward or two back?' (2013) commissioned by TANGO.

6 Centre for Policy, Research and Strategic Studies (CEPRASS) 'Summary of Results: Afrobarometer Round 7 Survey in the Gambia, 2018' (2018).

7 Satang Nabaneh, 'Attempts at Constitutional Reform in The Gambia: Whither the Draft Constitution?' IACL-AIDC Blog (29 September 2020) https://blog-iacl-aidc.org/2020-posts/2020/9/29/attempts-at-constitutional-reform-in-the-gambia-whither-the-draft-constitution.

8 Satang Nabaneh, Women's Political Participation in The Gambia: Gender Quotas as Fast Track to Equality', IACL-AIDC Blog (25 January 2022) https://blog-iacl-aidc.org/spotlight-on-africa/2022/1/25/womens-political-participation-in-the-gambia-gender-quotas-as-fast-track-to-equality.

9 A Ceesay 'Touma Njai to re-introduce women's empowerment bill' The Standard, March 20, 3023 https://standard.gm/touma-njai-to-re-introduce-womens-empowerment-bill/.

10 Manifesto of the Candidate Adama Barrow and the Coalition 2016.

11 For more information on the mandate, scope and work of the TRRC, see S Nabaneh 'The future in transition: Realising respect for human rights in the "New" Gambia' in R Adeola & MW Mutua (eds) *The Palgrave Handbook of democracy, governance and justice in Africa* (2022) 310-311; S Nabaneh 'Prospects for democratic consolidation in The Gambia: A cup half full, half empty (or more)?' in A Welikala, D Samararatne & T Daly (eds) *Democratic consolidation and constitutional endurance: Comparing uneven pathways in Asia and Africa* (forthcoming 2023).

12 Nabaneh (n 7 above).

13 Law Hub Gambia 'Dialogue on Building Strong Rule of Law Institutions in the Gambia & and Book Launch 'The Gambia in Transition: Towards a New Constitutional Order' December 29, 2022, https://www.lawhubgambia.com/latest-news/category/Constitutional+Law.

14 S. Nabaneh, A Abebe, & G. Sowe *The Gambia in Transition: Towards a New Constitutional Order* (Pretoria University Law Press, 2022) https://www.pulp.up.ac.za/edited-collections/the-gambia-in-transition-towards-a-new-constitutional-order.

The main aim of the dialogue was to provide a platform for decision-makers, practitioners, academics, and experts to reflect on the role of transitional justice mechanisms in promoting strong rule of law institutions. The conversation aimed to increase the discussion around developing a constitutional structure that promotes fairness, inclusivity, and social equality. Additionally, it highlighted ways to strengthen the rule of law, improve transitional justice mechanisms, protect constitutional principles, and implement legal reforms that address the needs of underrepresented groups such as women, youth, persons with disabilities, and other marginalized communities.

The panelists and speakers expressed their appreciation for the dialogue, which provided an opportunity to revive discussions about the crucial constitutional reform process in The Gambia. Janet Ramatoulie Sallah-Njie, Former Commissioner of the Constitutional Review Commission (CRC) and currently Commissioner of the African Commission on Human and Peoples' Rights, emphasized the urgent need for a new constitution in The Gambia. During her statement, she explained that reintroducing the Draft Constitution would be more beneficial as making multiple amendments to the 1997 Constitution may not effectively address all the issues. She highlighted the importance of examining why the draft Constitution failed to pass as a "whole" instead of in pieces. In her view, this approach will provide a more comprehensive solution to the constitutional challenges currently facing The Gambia.

The keynote address by the Chief Justice echoed this sentiment, emphasizing the need for constitutional reform to establish a new democratic order in the country. He stated:

> We must revive the process, engage all the stakeholders in a national dialogue that can deliver a new constitution acceptable to the nation. It must however be a frank and honest dialogue. A dialogue which will enable us to know the real issues holding back the adoption of a new constitution. We need to know and understand the concerns of the various stakeholders. And then we must be ready to compromise; to accommodate each other. A dialogue involving critical stakeholders such as the National Assembly, the Political Parties, and the government. And supported by independent and impartial preferably local facilitators. I believe such a process can unlock the unfortunate deadlock we currently face and help us secure a new and progressive constitution. I once again urge all the stakeholders to review the constitution making process and with that spirit work together to ensure the adoption of a new constitutional framework for our nation.[15]

In conclusion, the call for constitutional reform in the country by the Chief Justice emphasizes the need for a transparent, inclusive, and collaborative approach to ensure the adoption of a new and progressive constitution that reflects the interests and aspirations of all stakeholders.

15 Law Hub Gambia (n 13 above).

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. DECENTRALIZATION AND CONSTITUTIONAL CONFLICTS: SUPREME COURT RULING ON LOCAL GOVERNMENT ACT PROVISIONS

The decentralization of power through the establishment of local government administration is provided for by Section 193 of the Constitution, which states that "Local government administration in The Gambia shall be based on a system of democratically elected councils with a high degree of autonomy." The Local Government Act[16] is a law that aimed "to establish and regulate a decentralized local government system for The Gambia, and to make provision for the functions, powers, and duties of local authorities, and for connected matters." The Act further reinforces this by creating municipalities and area councils that work alongside central government authorities, including the Ministry of Local Government and Regional Governors. These Local Government Authorities (LGA) consist of city councils, municipalities, and area councils, which are determined by the Independent Electoral Commission (IEC). Members of the LGAs are elected every four years.

The country has eight regional administrative areas, each with a governor at the helm. These regions are the North Bank Region (NBR), the Central River Region (CRR) North and South, the Upper River Region (URR), the Lower River Region (LRR), and the West Coast Region (WCR). Additionally, two municipalities, namely Banjul City Council and Kanifing Municipal Council, have elected mayors to oversee their affairs as per the wishes of their residents.

On December 13, 2022, the Supreme Court of The Gambia issued a landmark ruling in the case of *Talib Ahmed Bensouda and 54 others v the Attorney General*.[17] The fifty-five plaintiffs in this case, members of the Kanifing Municipal Council, Mansakonko Area Council, and Basse Area Council, invoked the original jurisdiction of the Court as provided by section 127(1) of the 1997 Constitution. This section gives the Supreme Court exclusive jurisdiction on any question regarding whether any law was made in excess of the powers conferred by the Constitution or any law upon the National Assembly.

The plaintiffs challenged specific provisions of the Local Government Act 2002 (as amended), specifically sections 9, 9A, 20, and 27A. The plaintiffs argued that these provisions were inconsistent with the Constitution of The Gambia and, therefore, unconstitutional.

The Court's ruling declared section 9 of the Local Government Act, which mandates at least twelve months between any local government elections and elections to the National Assembly, as *ultra vires* and void. The Court found that this provision was inconsistent with section 194(a) of the Constitution. Section 194(a) of the Constitution mandates that local government elections and elections to the National Assembly should be held every four years. The said provision was severed from the

16 As amended by Act No 8 of 2004, Act No. 2 of 2006, Act No. 13 of 2007, Act No. 7 of 2015, and Act No. 2 of in 2018. The Act was also amended in 2020 through a private member bill tabling in 2020, to delete sec. 19(1) (G) of the Act, which made it possible for elected Council Officials to lose their offices in case of expulsion from their parties.

17 SCCS No. 001/2022.

remaining sections of section 9 of the Act. Therefore, the Court also ordered that all local government elections subsequent to the 2023 elections should be held every four years, as mandated by the Constitution.

The Court also ruled that section 9A(2) of the Local Government Act, which provides for the dissolution of a Local Government Council ninety days before a local government election and empowers the President to appoint an Interim Management Team, was inconsistent with Section 193 of the Constitution and therefore, *ultra vires* and void. The Court notes that:

It would surely defeat the whole purpose of setting up local government authorities that are supposed to be democratically elected, as per the said dictates of the Constitution, if those same authorities could be dissolved months before their members are due to be elected.[18]

Furthermore, the Court declared section 27A of the Local Government Act, which prohibits members of councils from traveling outside The Gambia without prior approval from the Minister, as null and void. The Court found that this provision was inconsistent with the high degree of local autonomy of Councils provided for in Section 193(1) of the Constitution.

The Court upheld the validity of section 20 of the Local Government Act, which allows for the removal of members of councils, stating that it did not contradict any provisions of the Constitution. However, one drawback of this system is that while citizens are empowered to elect their local representatives, they are simultaneously disempowered by the control that unelected executive officials exercise over these elected councilors.

In general, the Court's judgment is significant as it upholds the constitutional provisions on local government elections and the degree of autonomy enjoyed by local government councils in The Gambia. It also clarifies the limits of the powers of the President and the Minister in relation to local government councils.

IV. LOOKING AHEAD

The year 2023 is poised to be significant for The Gambia as the country sets its sights on addressing several critical issues. Among these issues are the enactment of crucial legislation, including the Anti-Corruption Bill, the new Labour Bill, and amendments to the Criminal Code and Criminal Procedures Code. These legislative changes would demonstrate The Gambia's commitment to strengthening its legal framework and promoting transparency and accountability.

In 2023, The Gambia faces a crucial challenge of building on the concluded work of the Truth, Reconciliation, and Reparations Commission (TRRC), which submitted its Final Report to the President in November 2021. After the Government published its White Paper on the TRRC report in 2022 and developed an Implementation Plan for 2023-2027, the next step is to move forward with the Draft Victims' Reparations Bill[19] and concretize the prosecution strategy.

In anticipation of the increase in workload resulting from the implementation of TRRC recommendations, a proposed bill for establishing a hybrid specialized court may be in the works to try those allegedly responsible for human rights violations under the 22-year rule of Yahya Jammeh.[20] The Chief Justice has also noted that:

> In anticipation and in preparation for this increase in the workload and the need for its speedy and efficient disposal I have proposed, in the context of the Judiciary estimates for 2023, the establishment of a fully-fledged special criminal division of the High Court which would be assigned all cases arising from the TRRC process.[21]

These moves signal a commitment to promoting a culture of accountability and sends a strong message that impunity will not be tolerated. Such efforts are critical in establishing a society that respects human rights and the rule of law, including gender justice, and promoting national reconciliation and sustainable peace. By doing so, The Gambia can build a strong foundation for the future and move towards consolidating its democracy.

V. FURTHER READING

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S Nabaneh 'The APRM As a Tool for Democracy and Political Governance in The Gambia' Africa Peer Review Mechanism (APRM) *Africa Governance Insights Vol 1: Governance, Human Rights and Migration in Africa* (2022) 27-34. Available at https://www.aprm-au.org/publications/africa-governance-insights-volume-i-governance-human-rights-and-migration-in-africa/.

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Gambian Constitutional law database: www.lawhubgambia.com

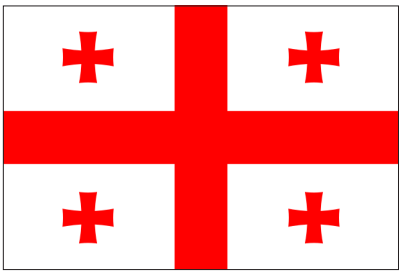
18 As above, para 32.

19 Ministry of Justice 'MOJ With Partners Concludes Three- Day Retreat on Draft Victims' Reparations Bill 'November 11, 2022, https://www.moj.gm/news/227e530e-668a-11ed-8b02-025103a708b7.

20 There has been support for hybrid courts. S Camara 'Judiciary, Executive agree Hybrid Court for Jammeh crimes' The Point (February 7, 2023) https://thepoint.gm/africa/gambia/headlines/judiciary-executive-agree-hybrid-court-for-jammeh-crimes.

21 Law Hub Gambia (n 13 above).

Georgia



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I. INTRODUCTION

In 2022, Parliament initiated a constitutional bill that was previously part of another constitutional bill. It was detached from the previous bill after public deliberations had passed. The aim of this review is to explain the political context of the bill and thereafter discuss whether Parliament is allowed to make changes to the constitutional bill after the public deliberations. I would like to bring 3 different constitutional moments to the reader from Georgian Constitutionalism in regard to when the legislature changed the bill after public discussions. I also touch upon the scope of the power of Parliament through the prism of constituent power.

The review doesn't discuss the possibilities of constitutional amendments which are unconstitutional and the nature of the bill, or whether it's an amendment or a dismemberment. The former is reviewed in previous editions of this book, and since the same bill as last year is essentially on the table again this year, the latter is discussed in the last year's edition. Nor does this paper explain the roles the Constitutional Court plays in Georgia, as I've already done that in previous editions. In the current review, I explain the possibilities of adopting the bill in question, and I demonstrate that those possibilities are relatively low because of the ongoing political affairs which undermine the country's stability and its EU integration process. In the paper, I also point to some legal problems, which need to be further elaborated on in other articles.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

On September 5, 2022, majority members of the Parliament of Georgia initiated a constitutional amendment bill that only contained one particular subject – the rule of appointing an Attorney General. The faithful reader of *The International Review of Constitutional Reform* series would note that in 2021, the proposed amendment bill also included sections regarding the same topic.[1] So, why would it be necessary to propose two separate amendment bills about the same topic in two consecutive years? Is that even considered good practice for changing constitutions? It's worth noting that the wording of the amendment proposed in 2022 about the position of Attorney General is identical to the one proposed in 2021. Thus, what made the ruling party in the Parliament initiate another similar bill?

Recall that in order to amend the Constitution of Georgia, before the parliamentary hearings begin, it's mandatory to hold public debates about the bill for a month.[2] In the minutes of the public debates of the 2021 amendment bill, one can see that all four topics[3] were discussed.[4] The document says that many of the participants questioned the effectiveness of the mechanism of the appointment of the Attorney General.[5] When meticulously reading the minutes of the public debate N1, one can see two trends. On the one hand, most of the opposition members of the Parliament praised the suggested rule about the appointment of the Attorney General. However, the other part of the opposition, as well as the majority members, criticized the clause.[6] Those who denounced it, especially the majority members, argued that "it's appropriate to continue discussions on other alternative mechanisms."[7] Therefore, the ruling party during the committee hearings decided to exclude the section about an Attorney General from the bill.[8] When the Parliament adopted the bill by the first hearing, it did so excluding the named section.[9] However, there was no explicit indication on the Parliament website of such exclusion. According to the Rules of Procedure, after the bill is adopted by the first hearing, it shall be transferred to the Leading Committee to include comments made regarding the bill and

1 Giorgi Alaverdashvili, 'Georgia' in Luís Roberto Barroso and Richard Albert (eds), *The 2021 International Review of Constitutional Reform*, the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2022, 95.

2 Constitution of Georgia, art 77 (2).

3 These are (1) the threshold in the next two parliamentary elections, (2) the minimum number of deputies to create a parliamentary faction, (3) the appointment of the Attorney General, (4) the abolishment of the mixed electoral system designed purposely for the extraordinary elections before 2024.

4 Final minutes of the public hearings of The Bill of Constitutional Law on Amending Constitutional Law on the Amendment to the Constitution of Georgia (N07–3/92, 29.06.2021) <https://info.parliament.ge/file/1/BillReviewContent/282167?> accessed on 29 January, 2023.

5 Ibid.

6 Minutes of the organizing commission of the public debates N1 of the constitution amendment bill (N07–3/92, 29.06.2021). I received these minutes from the Parliament. Letter N948/2-7/23 from the Parliament of Georgia received on February 2nd, 2023.

7 This quote belongs to Parliament majority member Mikheil Sarjvelaze. Minutes of the organizing commission of the public debates N1 of the constitution amendment bill (N07–3/92, 29.06.2021). I received these minutes from the Parliament. Letter N948/2-7/23 from the Parliament of Georgia received on February 2nd, 2023.

8 The audio of the committee hearing, <https://info.parliament.ge/file/1/BillReviewContent/284031?> accessed on 29 January, 2023.

9 In the following section I will discuss whether or not the Parliament is allowed to remove.

to prepare it for consideration by the second hearing.[10] Thus, technically after the first hearing, the Legal Issues Committee in this case is tasked to make adjustments to the bill, i.e., remove the section about Attorney General from it. However, since September 7th of 2021, the committee hasn't held any meetings to address the issue. On the contrary, it has continuously asked the Bureau to prolong the deadline for the second hearing.[11] I've been notified by the Parliament that the terms of the parliamentary discussions for the second hearing on the committee and plenary level have been shifted to the spring session of 2023.[12]

On March 3, 2022, Georgia officially applied for EU membership.[13] On June 17, the EU issued an opinion on the application.[14] In the document, the Commission recommends that Georgia be granted candidate status once 12 requirements will have been met, including ensuring the proper functioning of prosecutorial institutions,[15] *inter alia* addressing any shortcomings in the nomination of an Attorney General.[16] Georgia had to report back to the EU about the progress by the end of 2022.

In order to meet one of the requirements of the EU candidacy, the Parliament of Georgia initiated a constitutional bill in September of 2022.[17] The explanatory note of the bill reiterates the arguments for the exclusion of the Attorney General appointment clause from the 2021 amendment bill.[18] However, it also acknowledges its importance in the Constitution, because it's demanded by the EU. Recall that the so-called "Charles Michel Document" was also from the EU.[19] Then there's a legitimate question: why would the ruling party want to remove the clause from the constitutional amendment bill, which was put there because of the EU requirements in the first place, and then try to reinsert it into the Constitution via the new amendment bill? That kind of approach to designing constitutions is bizarre and certainly requires further inquiry.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Constitution amendment bill of 2022 repeats, word for word, the removed section of the 2021 amendment bill. In last year's edition of this book, I discussed in detail the scope of the amendment in question and the possibilities of constitutional control over it.[20] Therefore, I will not bore you, the reader, with the same text. Instead, I would like to take you on a tour around making and amending the Constitution of Georgia. On the tour, we'll stop 3 times to see how Parliament altered the text of the bill during the parliamentary hearings, which took place after public deliberation. The question I would like to touch on is whether or not Parliament is allowed to modify a constitutional bill, and if it is, to what extent can it do this after the public debates?

The Constitution of Georgia was adopted on August 24, 1995. However, the process of drafting the document took around two years.[21] The final draft, if adopted, would have established a semi-presidential system.[22] Bear in mind that various actors had put forward drafts of the new constitution, none of which established a classical presidential system of governance.[23] In the summer of 1995, the Parliament started adopting chapters of the future constitution. On August 9, 1995, the Parliament adopted the chapter about the President and went on to discuss the chapter about the government.[24] The semi-presidential system was unacceptable to the majority of the members of Parliament.[25] Finally, one political figure, Bakur Gulua, unexpectedly proposed the shift from a semi-presidential to an American presidential system.[26] Thus, the Parliament supported the proposition, and instead of semi-presidential, as perceived by the draft, the newly proposed presidential system was decided to be established in one day. Was the Parliament even allowed to make such a monumental change in a single day, when another system of governance was being debated for 2 years? Some even question the constitutionality of such an act.[27]

The second instance when the Parliament modified a constitutional bill after public deliberations happened in 2004. The constitutional amendments of February 6, 2004, are some of the most famous in Georgian constitutionalism. The President initiated[28] the bill on May 11, 2001.[29] The following day, the Parliament ordered the committee to organize public hearings.[30] The Parliamentary hearings didn't start until 3 years later, in 2004.[31] What is curious about the purposes of this review is how

10 Rules of Procedure of the Parliament of Georgia, art 112 (1).
11 See the process of the adoption of the bill on the Parliament of Georgia, <https://info.parliament.ge/#law-drafting/22438> accessed on 2 February, 2023.
12 Letter N948/2-7/23 from the Parliament of Georgia received on February 2nd, 2023.
13 Georgia applied for membership in the European Union. What happens next? <https://www.radiotavisupleba.ge/a/31734674.html> accessed on 29 January, 2023.
14 Opinion on the EU membership application by Georgia, <https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_3800> accessed on 29 January, 2023.
15 Ibid.
16 Ibid.
17 The Bill of Constitutional Law on Amending Constitutional Law on the Amendment to the Constitution of Georgia, < https://info.parliament.ge/file/1/BillReviewContent/304222?> accessed on 2 February, 2023.
18 Explanatory note of the Bill of Constitutional Law on Amending Constitutional Law on the Amendment to the Constitution of Georgia, < https://info.parliament.ge/file/1/BillReviewContent/304223?> accessed on 2 February, 2023.
19 To learn about "Charles Michel Document" see Giorgi Alaverdashvili, 'Georgia' in Luís Roberto Barroso and Richard Albert (eds), *The 2021 International Review of Constitutional Reform*, the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2022, 93-96.
20 Giorgi Alaverdashvili, 'Georgia' in Luís Roberto Barroso and Richard Albert (eds), *The 2021 International Review of Constitutional Reform*, the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2022, 94-96.
21 Dimitry Gegnava, Tamar Papashvili, Ketevan Vardosanidze, Giorgi Goradze, Rati Bregadze, Tengiz Tevzadze, Lana Tsanava, Paata Javakhishvili, Zurab Macharadze, Giorgi Sioridze, Besik Loladze, Introduction to Constitutional Law, Sulkhan-Saba University Press, 2019, 54.
22 Wolfgang Babeck, Drafting and Adopting the Constitution in Georgia (1993-1995), 2nd edition, translated by K. Kublashvili, 2013, 72.
23 ibid, 27-31.
24 ibid, 92.
25 Avtandil Demetrashvili, Marina Kvachadze, Konstantine Kulblashvili, David Losaberidze, Zaza Rukhadze, Vakhtang Khmaladze, Zurab Jibghashvili, Handbook of Constitutional Law, 2005, 73.
26 Babeck, (n 22) 92.
27 Dimitry Gegnava, Tamar Papashvili, Ketevan Vardosanidze, Giorgi Goradze, Rati Bregadze, Tengiz Tevzadze, Lana Tsanava, Paata Javakhishvili, Zurab Macharadze, Giorgi Sioridze, Besik Loladze, Introduction to Constitutional Law, Sulkhan-Saba University Press, 2019, 55.
28 Until constitutional amendments of October 15, 2010, which came into force on November 17, 2013, the President of Georgia could initiate constitutional amendment bills.
29 The presidential act N229/1 to the Parliament, <https://info.parliament.ge/file/1/BillReviewContent/275768?> accessed on 14 February, 2023.
30 The resolution of the Parliament on some of the issues of organizing public hearing events for Constitutional bill on "Making Changes and Additions to the Constitution of Georgia", <https://info.parliament.ge/file/1/BillReviewContent/275746?> accessed on 14 February, 2023.
31 To see the timeline of adoption of the bill follow the link: < https://info.parliament.ge/#law-drafting/2656> accessed on 14 February, 2023.

modified the bill was in 2004. In the official letter from the Ministry of Justice to the Parliament, one can notice that the State Commission on the Study of Constitutional Matters and Proposals agreed to send to the Parliament the "corrected version" of the bill, without first having it sent for public deliberations.[32] However, some members of the Commission suggested starting the amending process over and following the constitutional rule, which implied holding public deliberations.[33] The Commission argued that, since the bill had been published before for public deliberations, this step in the constitutional amendment process had already been satisfied, and thus they could continue with parliamentary hearings.[34] It's worth noting that the bill published in 2001 and the one submitted to the Parliament in 2004 were massively different. The latter differed a lot.[35] Again, this kind of approach to constitutional changes begs a question: is the Parliament allowed to do this after the public debates?

The third case of altering the constitutional bill is the one we've discussed. It's the case of the 2021 amendment bill. In this case, during the public debates, all four matters[36] were included in the bill and discussed during the public debates. Only this time, the Parliament removed one of the elements from the bill. Was that step in accordance with the Constitution?

In all three cases, the bill of the constitution or amendments thereto have been modified. In the first case, the form of governance changed during the parliamentary debates; in the second, new clauses had been added to the bill which were not previously discussed, including amplifying the scope of authority of the head of state; in the third case, some elements were removed from the bill after the public deliberations during the parliamentary hearings.

The time for public discussion of the constitutional bill before its adoption into the constitutional theory is known as deliberation requirements.[37] These are part of the temporal limitations of the design of amendment rules.[38] Deliberation requirements are twofold – floor and ceiling.[39] The former refers to the minimum amount of time an amendment proposal must remain open to deliberation prior to its ratification, and the latter to the maximum amount of time lawmakers and the public may deliberate on an amendment proposal before a ratification vote must be held.[40] In the case of Georgia, the deliberation floor catches attention. The question is whether the Parliament can alter the constitutional bill after public discussions. In order to answer this, we need to understand the role of deliberation requirements.

By requiring a minimum period of deliberation, deliberation floors reserve time to consider the amendment proposal.[41] This also provides a forum for the people to weigh in with arguments regarding the bill. Participation is said to increase the legitimacy of the constitution-[changing] process: it "fosters political dialogue and empowers the people."[42] Professor Roznai reports that some scholars argue the necessity of having legal arrangements that would ensure a maximum level of democratic participation of the people during constitution-making/[changing].[43] Public deliberations allow such participation, however, maybe to a lesser degree. In constitutional theory, the constituent power is the power to create and re-create the constitutional order.[44] In democratic settings, this power is said to rest with "the people."[45] Thus, [it] is the role of the primary constituent power,[46] conceived as the people's democratic appearance of popular sovereignty through which the people may establish and reshape the political order and its fundamental principles.[47] Therefore, one can view the one-month deliberation period in the context of Georgia as an expression of the will of the Georgian people regarding the bill in question. As a result, the Parliament is bound by the wishes of the people put forward during the discussions. Thus, it follows, that the legislature is only authorized to add or remove from the amendment bill the very clauses to which the people have given its permission during the deliberation period.

With respect to the three cases discussed above, we can conclude the following: (1) when the Parliament introduced a transformational change to the draft text of the Constitution, which wasn't discussed or approved by the people beforehand, could be argued to be unconstitutional; (2) when the Parliament burdened the constitutional bill with new passages without having it first run by the people could also raise suspicions about its constitutionality; (3) the Parliament removing a particular passage from the bill after the public deliberations wouldn't be problematic, as some people during the discussions had expressed a negative attitude towards it.

As I already demonstrated elsewhere,[48] the Constitutional Court of Georgia doesn't accept the doctrine of unconstitutional constitutional amendments. However, it would've been interesting to hear its opinion about these cases. It's not too late for the Court to assume its role as a preserver of the Constitution. In the future, this could benefit Georgian constitutionalism. This review isn't designed to examine this topic any further, so let's put it off for another time.

32 The letter from the Ministry of Justice to the Parliament of Georgia, < https://info.parliament.ge/file/1/BillReviewContent/275832?> accessed on 14 February, 2023.

33 Ibid.

34 Ibid.

35 For instance, the "corrected version" included provisions about local self-government, when the original bill didn't. Also, the "corrected version" introduced changes to the citizenship clause, parliamentary immunity, presidential elections, presidential status and most importantly the authorities of the president, just to name a few.

36 See footnote 3.

37 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* (Oxford University Press, 2019) 204-205.

38 To learn more about temporal limitations see: Richard Albert, Temporal Limitations in Constitutional Amendment, [2016] Review of Constitutional Studies/Revue d'études constitutionnelles, 37.

39 Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions,* (n 37) 204.

40 Ibid.

41 Richard Albert, 'The Structure of Constitutional Amendment Rules' (2014) 49 Wake Forest Law Review 913, 954.

42 David Landau, 'Constitution-Making Gone Wrong' [2013] 65 Alabama Law Review 923, 933.

43 Yaniv Roznai, '"We the people", "oui, the people" and the collective body: perceptions of constituent power' in Gary Jacobsohn and Miguel Schor (eds), *Comparative Constitutional Theory,* Edward Elgar Publishing, 2018, 310-311.

44 Gary Jeffrey Jacobsohn, Yaniv Roznai, *Constitutional Revolution,* (Yale University Press, 2020) 224-225.

45 ibid, 224-225.

46 This is the term how Professor Roznai denotes constituent power or *pouvoir constituent.* Yaniv Roznai, *Unconstitutional Constitutional Amendments: the Limits of Amendment Powers,* (Oxford University Press, 2017) 120-122.

47 Yaniv Roznai, 'Necrocracy or Democracy? Assessing Objections to Constitutional Unamendability' in Richard Albert and Bertil Emrah Oder (eds) *An Unamendable Constitution? Unamendability in Constitutional Democracies,* Springer International Publishing AG, 2018, 30.

48 Giorgi Alaverdashvili, 'Georgia' in Luís Roberto Barroso and Richard Albert (eds), *The 2020 International Review of Constitutional Reform,* the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2021, 119-120.

IV. LOOKING AHEAD

Constitutional bills of 2021 and 2022 are pending in Parliament. The Legal Issues Committee of the Parliament has asked the Bureau to prolong the deadline for both bills for the second hearing.[49] The Bureau extended the hearing deadlines for 2 more months from February 2023.[50] Currently, there are many political topics, which shift the attention of politicians from these bills to ongoing matters. For example, in March 2023, the Parliament was discussing a bill that aimed at undermining the credibility of NGOs and free media by declaring them foreign agents.[51] The bill would target those organizations, which are financed by the United States[52] and the European Union.[53] This bill in Georgia is known as a Russian law, because just like in Russia, it aims at those organizations that fight against violence, corruption, unlawfulness, etc.[54] However, with brave resistance from the public, the Parliament was forced to withdraw the bill.[55] The health of the imprisoned former President is also a political topic.[56] These are ongoing topics today in Georgia.

Against the backdrop of these events, recall that the government still has to meet the 12 requirements of the EU for the country to receive EU candidate status.[57] The very purpose of the bill re-initiated in 2022 is to meet one of these requirements.[58] I can't make any predictions, but hopefully, for next year's review, this won't be an issue anymore.

49 The letter N2-1837/23 of the Legal Issues Committee to the Bureau of the Parliament, <https://info.parliament.ge/file/1/BillReviewContent/320214?> accessed on 3 March, 2023.

50 The decision N223/13 of the Bureau of the Parliament of Georgia, <https://info.parliament.ge/file/1/BillReviewContent/320260?> accessed on 3 March, 2023. The decision N223/14 of the Bureau of the Parliament of Georgia, < https://info.parliament.ge/file/1/BillReviewContent/320265> accessed on 3 March, 2023.

51 Why is the Russian law dangerous – 5 questions, 5 answers, <https://netgazeti.ge/life/657216/> accessed on 3 March, 2023.

52 The US Senator Jeanne Shaheen during her visit in Georgia in February 2023 stated, that the law has nothing to do with its American analogue, but is rather a copy of a similar Russian law. The same law was adopted by Hungary, but it turned out to be incompatible with EU standards and human rights. American Senators visit Georgia to discuss law on "foreign agents", < https://jam-news.net/visit-of-american-senators-to-georgia/> accessed on 3 March, 2023. U.S. State Department spokesman Ned Price said the proposed legislation "would stigmatize and silence independent voices and citizens of Georgia who are dedicated to building a better future for their own communities." U.S. Voices 'Deep Concern' Over Proposed Georgian 'Foreign Agent' Media Law, < https://www.rferl.org/a/georgia-foreign-agent-media-law-draft-washington-concerns/32274198.html> accessed on 3 March, 2023.

53 The Spokesman of the European Union High Representative for Foreign Affairs and Security Policy Josep Borrell issued a very critical statement. It says that the law violates 2 key requirements among 12, which Georgia needs to meet in order to get the candidate status of the membership of the EU. Georgia: Statement by the Spokesperson on the draft law on "transparency of foreign influence", <https://www.eeas.europa.eu/eeas/georgia-statement-spokesperson-draft-law-%E2%80%9Ctransparency-foreign-influence%E2%80%9D_en> accessed on 3 March, 2023.

54 More than 250 organizations – "The Russian law isn't Georgia's choice" <https://formulanews.ge/News/85571> accessed on 3 March, 2023.

55 The Parliament rejected the "agents' bill" <https://www.radiotavisupleba.ge/a/32311562.html> accessed on 28 March, 2023.

56 To see the main articles in Georgian about the topic, follow: Saakashvili health status, < https://tinyurl.com/2p86pfby> accessed on 3 March, 2023.

57 Twelve priorities are listed here: <https://www.eeas.europa.eu/delegations/georgia/twelve-priorities_en> accessed on 28 March 2023.

58 See Part II of the review.

Germany

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I. INTRODUCTION

Whereas in 2021 the Basic Law (*Grundgesetz*) was not subject to reform, it was amended two times in the year under review: First, in Article 87a of the Basic Law, Section 1a was added (special trust for the Armed Forces). Second, Article 82 of the Basic Law was amended to allow the Federal Law Gazette (*Bundesgesetzblatt*) to be kept in electronic form (II.). The latter was quite uncontroversial; on the other hand, the establishment of a special trust raised more questions (III.). In 2022, no major constitutional reform efforts failed, but proposals on federal Election Law, constitutional rights of children, and amendments to Article 3 of the Basic Law are underway (IV.).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Article 87a of the Basic Law deals with the relationship between the Federal Republic of Germany as a free and democratic state and its Armed Forces. In particular, it defines the conditions under which the Armed Forces may be employed (see also Article 35 and Article 24 Section 2 of the Basic Law). However, with its Section 1 Clause 2, Article 87a of the Basic law had already featured a budgetary provision according to which the numerical strength and general organizational structure of the Armed Forces must be shown in the budget. In addition, Section 1a now provides: "For the purpose of strengthening its ability to honor its alliance obligations and its defense capability, the Federation may establish a special trust with its own credit authorization for a single amount of up to 100 billion euros for the Armed Forces. Section 3 of Article 109 and Section 2 of Article 115 shall not apply to the credit authorization. Details shall be regulated by federal law."[1] A majority of two-thirds of the members of the *Bundestag* (491) are required to adopt, Article 79 Section 2 of the Basic Law. 567 members of the *Bundestag* voted in favor of Article 87a Section 1a of the Basic Law, and 96 members of the *Bundestag* voted against it. 20 parliamentarians abstained.

Article 82 of the Basic Law addresses the certification, promulgation, and entry into force of laws and statutory instruments. Until 2022, laws were promulgated in the Federal Law Gazette, i.e. in paper form, on the other hand, statutory instruments were promulgated in the (paper-based) Federal Law Gazette unless a law otherwise provided. This option was extended to laws by the 19 December 2022 constitutional amendment. Article 82 Section 1 of the Basic Law now provides: "Laws enacted in accordance with the provisions of this Basic Law shall, after countersignature, be certified by the Federal President and promulgated in the Federal Law Gazette. The Federal Law Gazette may be kept in electronic form. Statutory instruments shall be certified by the authority that issues them. A federal law shall regulate details regarding promulgation and the form of countersignature and certification of laws and statutory instruments."[2] Article 79 Section 2 of the Basic Law was complied with 592 members of the *Bundestag* voted in favor of the amendment. Three members of the *Bundestag* voted against it while 69 abstained.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. ARTICLE 82 OF THE BASIC LAW

Prior to the amendment to Article 82 Section 1 of the Basic Law, promulgation on a digital platform was only possible for statutory instruments (if this was provided for by law). For laws, on the other hand, the Basic Law provided only for promulgation in the Federal Law Gazette, i.e. on paper.[3] The Federal Law Gazette, which had already been available on the website www.bgbl.de, was merely an electronic copy and not the binding official version. Due to the amendment the paper version can either be extended by an electronic form or replaced by it. Just as with statutory instruments, the promulgation of laws is now made possible on a digital federal promulgation platform. It may also be provided by law that the countersignature by members of the Federal Government and the certification by the Federal President are permissible other than by signature on paper, e.g. by electronic signature, and that legislation can thus be passed without media discontinuity from

1 Act amending the Basic Law of 28 June 2022 (Article 87a) (Federal Law Gazette I p. 968) (in German).

2 Act amending the Basic Law of 19 December 2022 (Article 82) (Federal Law Gazette I p. 2478) (in German).

3 See *Guckelberger*, Übergang zur elektronischen Gesetzesverkündung?, Deutsches Verwaltungsblatt 2007, p. 985 (993) with further references (in German): "Bundesgesetz*blatt*", literal translation: Federal Law *Sheet of Paper* in the singular, which excludes both a replacement of the paper form and a cumulation of paper and digital form.

draft to promulgation.[4] The federal legislator, following the example of numerous European states and several *Länder* of the Federal Republic of Germany, has already made use of these possibilities, as The Act on Promulgation of Laws and Statutory Instruments and Announcements[5] provides, among other things, that the Federal Law Gazette – regardless of whether it concerns laws or statutory instruments – will no longer be published in printed form but will be issued electronically on the Internet (§ 2). The Federal Government rightly emphasized that an official electronic edition of the Federal Law Gazette offers numerous advantages over the paper-based edition: "It speeds up the output process, improves access to the Federal Law Gazette, and saves resources."[6] While the paper version had to be either obtained for a fee or consulted in libraries, the electronic version is freely accessible at any time (§ 4).[7] The fact that the promulgation is only made on the Internet does not mean that there is tension with any unamendable rules in the Basic Law (which makes constitutional control of the amendment very unlikely). To be sure, Article 79 Section 3 of the Basic Law[8] in conjunction with Article 20 Section 3 of the Basic Law[9] requires that formally enacted legal norms are promulgated since promulgation is an integral part of formal lawmaking. Promulgation regularly also means that the legal norms are formally made accessible to the public in such a way that those concerned can reliably obtain knowledge of their content; this possibility must not be unreasonably impeded.[10] However, this will not be the case here: The majority of the German population has access to the Internet, those who do not have access can still consult the public libraries and their employees.

2. ARTICLE 87A OF THE BASIC LAW

Until 2022, the Ministry of Defense had at its disposal only the funds allocated to it by the federal budget with its annual budget cycle. Its budget continued to grow in 2022, carrying on the steady increase in the defense budget seen in recent years. In 2022, 50.4 billion euros was available;[11] this is an increase compared to 2021 where the figure was around 46.9 billion euros (2020: 45.6 billion euros; 2019: 43.1 billion euros; 2018: 38.5 billion euros; 2017: 37 billion euros; 2016: 34.3 billion euros; 2015: 33 billion euros; 2014: 32.4 billion euros).[12] The 2022 budget, however, still did not meet NATO requirements to commit a minimum of two percent of Germany's gross domestic product (GDP) to defense spending. With Russia's attack on Ukraine in February 2022, German security policy was radically reviewed. Federal Chancellor Olaf Scholz called it a turning point in the history of Europe, which required significantly more investment in the Armed Forces. To this end, he announced the establishment of a special trust with its own credit authorization for a single amount of up to 100 billion euros.[13] Its design is intended to help procure the necessary equipment for the Armed Forces more quickly than would normally be possible in the usual annual budget cycle. Essentially, special trusts are not a new idea, as until 2009, Article 115 Section 2 of the Basic Law allowed such exceptions to the credit limit. However, exceeding the credit limit is now only possible on the basis of a majority decision of the members of the *Bundestag,* stating that "in cases of natural catastrophes or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity" (Article 115 Section 2 Clause 6 of the Basic Law).

In light of this, the amendment of Article 87a of the Basic Law creates the constitutional basis for the establishment of the trust: Article 87a Section 1a Clause 1 of the Basic Law gives the Federal Government the power to set up a special trust with its own one-off credit authorization of up to 100 billion euros; it is earmarked for the purpose of strengthening alliance and defense capabilities of the Armed Forces. The one-off authorization is exempted from the credit limit that normally applies under constitutional debt regulations, Article 87a Section 1a Clause 2 of the Basic Law. It, therefore, receives no allocation from the federal budget and is administered separately. The special trust will be available over the course of several years and can be drawn on as needed (in addition to the usual annual budget). The trust itself is to be established by federal law (Article 87a Section 1a Clause 3 of the Basic Law), which came into force on 7 July 2022[14]. The Act on the Financing of the Armed Forces and the Establishment of a "Special Trust" includes a commitment to the NATO requirements described above (§ 1). The funds of the special trust are to be used to the financing of large-scale equipment projects of the Armed Forces, in particular complex measures extending over more than one year (§ 2). The projects are set out in the economic plan that underlies the special trust (see Annex to the Act). The largest expenditure item in the coming years will be air force procurements at 33.4 billion euros (development and purchase of the Eurofighter ECR, purchase of F-35s as the successor to the Tornado, etc.). According to the plan, 16.6 billion euros go to the "land" sector, while the "sea" sector receives 8.8 billion euros. Finally, 20.8 billion euros can be used for procurements in the "command capability and digitalization" category.

Legal experts overwhelmingly agreed that a constitutional amendment was needed to establish a special trust for the Armed Forces, since the requirements of Article 115 Section 2 Clause 6 of the Basic Law[15] are not met. "The inadequate state of the equipment of the Armed Forces had been generally known for a long time, widely publicized and ultimately politically desired. This is roughly the opposite of an unforeseeable natural disaster, which characterizes the exceptional circumstances, and example being Russia's illegal invasion of Ukraine, which was also neither surprising nor unforeseeable, in view of the aggressive behavior of Putin's Russia, which has long been in violation

4 German Bundesrat Printed Paper 197/22, p. 3 (in German).
5 Act of 20 December 2022 (Federal Law Gazette I p. 2752) (in German).
6 German Bundesrat Printed Paper 243/22, p. 1 (in German).
7 See www.recht.bund.de/en (last access: 14 March 2023).
8 This so-called Eternity Clause provides: "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible."
9 It provides: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."
10 Federal Constitutional Court, Order of 22 November 1983, 2 BvL 25/81, BVerfGE 65, 283 (291) (in German) (decided on the basis of the rule of law as laid down in Article 20 Section 3 of the Basic Law without reference to Article 79 of the Basic Law).
11 German Bundestag Printed Paper 20/5700 p. 14 (in German).
12 German Bundestag Printed Paper 20/900, p. 51 (in German).
13 German Bundestag, Plenary Protocol 20/19, Stenographic Report, 19th Session, 27.2.2022, pp. 1352-1353 (in German).
14 Act on the Financing of the Armed Forces and the Establishment of a "Special Trust" (Act of 1 July 2022) (Federal Law Gazette I p. 1030) (in German).
15 See also Federal Constitutional Court, Order of 22 November 2022, 2 BvF 1/22: Application for preliminary injunction against transfer of 60 billion euros borrowing authorization as a response to the COVID-19 pandemic to "Energy and Climate Fund" rejected.

of international law, especially since the occupation of Crimea."[16] Moreover, none of the experts saw a conflict with any unamendable rules in the Basic Law including the principle of democracy (Article 20 Section 1 of the Basic Law[17]) and the rule of law (Article 20 Section 3 of the Basic Law). Of course, by amending Article 87a of the Basic Law the legislator limited judicial review of the Act on the Financing of the Armed Forces and the Establishment of a "Special Trust" to the effect that it is now no longer to be measured against the provisions of Articles 110 to 115 of the Basic Law governing budgetary laws but only against Article 87a Section 1a of the Basic Law. However, this is the necessary consequence of a constitutional amendment, which can only be measured against Article 79 of the Basic Law. The German *Bundestag* now also has only a limited say. The idea of the parliamentary budgetary right to approve the budget by means of the budget law, to declare it legally binding by its "adoption" (Article 110 Section 2 Clause 1 of the Basic Law) and thus to legitimize government spending democratically, lies in the fact that the German *Bundestag*, by means of the budget approval, is given an additional control option vis-à-vis the executive branch in addition to the (substantive) laws on the allocation of funds. That option, to be sure, is not available here, but major projects of the Armed Forces are to be financed from the Special Trust in close consultation with the democratically legitimized German *Bundestag* (§ 5 of the Act on the Financing of the Armed Forces and the Establishment of a "Special Trust"). Constitutionally setting defense spending at two percent of GDP might be in tension with the principle of democracy by considerably restricting the responsibility of future budget legislators to shape the budget.[18] But the main issue here is instead "the borrowing of up to 100 billion euros on a one-off basis does not prove to be a serious threat to the Federal Republic's solvency, in particular there is no risk of serious impairment of fundamental state functions."[19]

IV. LOOKING AHEAD

Several big questions await the Federal Republic of Germany in the context of constitutional reform:[20] Proposals on federal Election Law (1.), amendments to Article 3 Section 3 of the Basic Law (2.), Climate Change Law (3.), and on constitutional rights of children (4.) are all underway.

1. FEDERAL ELECTION LAW

Two reforms to the German Election Law are under discussion, which relate to the Basic Law to varying degrees. First, the governing coalition in Germany has proposed a reform of the federal Election Law to limit the size of the German *Bundestag* to 630 members. Second, there is an ongoing debate about whether to reduce the voting age for federal elections from 18 to 16.

The legislative proposal[21] to limit the size of the German *Bundestag* does not include an alteration of the Basic Law. Article 38 of the Basic Law does not prescribe a specific electoral system. Instead, it is up to the legislature to come up with an electoral system (Section 3) that complies with the principles set forth in Section 1 Clause 1[22]. The current Federal Election Act provides for a mixture of proportional representation and personal representation, which may lead to an increase in the total number of seats: The direct mandates (won in the personal election) must be allocated – regardless of the result in the proportional election. These so-called "overhanging" mandates must then be compensated for by giving the other parties as many additional seats as are necessary to restore the balance between the parties in accordance with the result of the proportional election.[23] As a result, the German *Bundestag* currently has 736 seats instead of the intended 598.[24] The governing coalition has therefore proposed that the direct mandates not covered by proportional representation simply not be allocated beyond 630 seats.[25] This could contradict the principle of personalized representation.[26] However, it remains to be seen whether the draft will withstand judicial review by the Federal Constitutional Court once it becomes law.[27]

Article 38 Section 2 of the Basic Law provides: "Any person who has attained the age of eighteen shall be entitled to vote; … ." The governing coalition has committed in its coalition agreement to reduce the voting age for federal elections to 16 years[28] – following the example of several *Länder* such as Berlin[29] as well as the European Elections Act[30]. So far, however, every legislative initiative has failed;[31] and a legislative proposal by the current Federal Government is not yet available.

16 *Waldhoff*, Written Opinion, German Bundestag Budget Committee, Printed Paper 0596, 20th Legislative Period, p. 59 (in German); similar *Thiele*, Written Opinion, German Bundestag Budget Committee, Printed Paper 0596, 20th Legislative Period, p. 52 (in German). Differing view *Wieland*, Written Opinion, German Bundestag Budget Committee, Printed Paper 0596, 20th Legislative Period, pp. 61-62 (in German).

17 It provides: "The Federal Republic of Germany is a democratic and social federal state."

18 *Wieland*, Written Opinion, German Bundestag Budget Committee, Printed Paper 0596, 20th Legislative Period, pp. 63 (in German).

19 *Thiele*, Written Opinion, German Bundestag Budget Committee, Printed Paper 0596, 20th Legislative Period, p. 51 (in German).

20 While there was no constitutional control of constitutional reforms in 2022, the Federal Constitutional Court is excepted to decide on the 2017 amendment of Article 21 of the Basic Law (see German Bundestag Printed Paper 18/12357 and 18/12846) in 2023 (Federal Constitutional Court, Preview for 2023 [last access: 14 March 2023]). Article 21 Section 3 of the Basic Law provides: "Parties that, by reason of their aims or the behaviour of their adherents, are oriented towards an undermining or abolition of the free democratic basic order or an endangerment of the existence of the Federal Republic of Germany shall be excluded from state financing. If such exclusion is determined, any favorable fiscal treatment of these parties and of payments made to those parties shall cease." In an *Organstreit* proceeding (Article 93 Section 1 Number 1 of the Basic Law), the National Democratic Party of Germany (NPD) assert that the German *Bundestag* violated the principle of democracy (Article 20 Section 1 in conjunction with Article 79 Section 3 of the Basic Law) by amending Article 21 of the Basic Law.

21 German Bundestag Printed Paper 20/5370 and 20/6015 (both in German).

22 It provides: "Members of the German *Bundestag* shall be elected in general, direct, free, equal and secret elections."

23 See Federal Constitutional Court, Judgment of 25 July 2012, 2 BvF 3/11 et. al., BVerfGE 131, 316 (in German).

24 German Bundestag Printed Paper 20/5370, p. 1 (in German).

25 German Bundestag Printed Paper 20/6015, p. 5 (in German).

26 See e.g. Federal Constitutional Court, Judgment of 10 April 1997, 2 BvF 1/95, BVerfGE 95, 335 (357) (in German).

27 The German *Bundestag* adopted the draft by the current Federal Government on 17 March 2023, but it has not yet been certified by the Federal President and promulgated in the Federal Law Gazette.

28 Coalition Agreement 2021-2025, p. 10 (in German).

29 *dpa*, Voting age in Berlin to be lowered to 16 years, berlin.de, 22 April 2022 (last access: 14 March 2023).

30 See Federal Law Gazette 2023 I Nr. 11 (in German).

31 See e.g. German Bundestag Printed Paper 19/13512 (draft by parliamentary group in the German *Bundestag* Bündnis 90/Die Grünen) (in German).

2. AMENDMENT OF ARTICLE 3 SECTION 3 OF THE BASIC LAW

Currently, Article 3 Section 3 of the Basic Law provides: "No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavored because of disability." The governing coalition has committed in its coalition agreement to, first, include a ban on discrimination on the grounds of sexual identity and, second, to replace the term "race".[32] Such proposals also exist in the *Länder* like Berlin,[33] while others have already taken this step. Article 7 Section 3 of the Constitution of Saxony-Anhalt, for instance, prohibits discrimination on the basis of "sexual identity" and on "racial grounds" (instead of "race"). As far as the Basic Law is concerned, prior legislative attempts both to replace the term "race"[34] and to include "sexual identity"[35] in its Article 3 failed. A draft by the current Federal Government has not yet been presented, but is expected in 2023.

3. CLIMATE CHANGE

The Basic Law does not address climate change explicitly; it does, however, protect the right to life and physical integrity (Article 2 Section 2 Clause 1 of the Basic Law), property (Article 14 of the Basic Law) and, more generally, the natural foundations of life and animals (Article 20a of the Basic Law[36]). Since the Federal Constitutional Court – in its landmark decision on climate change[37] – derived from these provisions the constitutional obligation to take climate action, legislative attempts to enshrine climate protection in the Basic Law[38] have become rarer. Proposals, therefore, concentrate on other questions such as financing, the Basic Law, e.g., more specifically its Article 84 Section 1 Clause 7[39], would have to be amended to make it possible to co-finance municipal climate protection from federal funds.[40] However, there are occasional voices calling for more profound changes to the Basic Law such as the addition of "ecological persons" to Article 19 Section 3 of the Basic Law[41] or a new basic right of ecological integrity.[42]

32 Coalition Agreement 2021-2025, p. 96 (in German).
33 *dpa*, Rassismus in Deutschland: Justizsenator gegen „Rasse"-Begriff in Berlins Verfassung, 16 June 2020 (last access: 14 March 2023) (in German).
34 See e.g. German Bundestag Printed Paper 19/20628 (draft by parliamentary group in the German *Bundestag* DIE LINKE) (in German); German Bundestag Printed Paper 19/24434 (draft by parliamentary group in the German *Bundestag* Bündnis 90/Die Grünen) (in German); Federal Ministry of Justice, Discussion Draft (in German); for the discussion: *Witting*, dw.com, Germany's heated debate over 'race' in the constitution 13 June 2020 (last access: 14 March 2023): "there are no different human races in a biological sense"; recently *Schuster*, Der Begriff „Rasse" erinnert an die Schoa, faz.net, 7 March 2023 (last access: 14 March 2023) (in German).
35 See German Bundestag Printed Paper 19/13123 (in German).
36 It provides: "Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."
37 Federal Constitutional Court, Order of 24 March 2021, 1 BvR 2656/18 et. al. Recently, the Court also emphasized that the expansion of wind energy makes an indispensable contribution in practical terms towards fulfilling the constitutional obligation to take climate action (Federal Constitutional Court, Order of 27 September 2022, 1 BvR 2661/21).
38 See e.g. German Bundestag Printed Paper 19/4522 (2018 draft by parliamentary group in the German *Bundestag* Bündnis 90/Die Grünen) (in German).
39 It provides: „Federal laws may not entrust municipalities and associations of municipalities with any tasks."
40 *Janisch*, Klima-Allianz fordert Grundgesetzänderung, süddeutsche.de, 17 January 2023 (last access:14 March 2023) (in German).
41 It provides: "The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits."
42 See *Kersten*, Das ökologische Grundgesetz, 2022 (in German).

4. CHILDREN'S CONSTITUTIONAL RIGHTS

The governing coalition has committed in its coalition agreement to include children's rights in the Basic Law.[43] The United Nations Committee on the Rights of the Child in its combined fifth and sixth state report on 22 September 2022 also called on Germany to strengthen its efforts to incorporate children's rights explicitly into the Basic Law.[44] At the end of the past legislative period, in 2021, a first legislative attempt to anchor children's rights in the Basic Law[45] failed. A draft by the current Federal Government has not yet been presented, but is also expected in 2023.

V. FURTHER READING

Arling, The German Federal Constitutional Court's Climate Decision and its Implications for International Law, German Yearbook of International Law, 2021, pp. 407-422.

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Eichel/Matt et. al., Rechtsinformationsportale und die digitale Bekanntgabe von Gesetzen, JZ 2022, pp. 639-648 (in German).

Voßkuhle, Judikative Verfassungsvergleichung, Der Staat 2022, pp. 621-636 (in German).

43 Coalition Agreement 2021-2025, pp. 74, 77 (in German).
44 CRC/C/DEU/CO/5-6, para. 6 (in German).
45 Government Draft, Amendment of the Basic Law to explicitly enshrine children's rights, p. 4 (in German).

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I. INTRODUCTION

The year 2022 proved to be very interesting in terms of constitutional discussion on several matters of the highest importance for the proper functioning of the State and the rights of the citizens. One could distinguish the main issue of critique for the year 2022;[1] the National Intelligence Service has been accused of intercepting communications of politicians and other public figures in Greece,[2] with the most significant being the member of the European Parliament and active President of the Panhellenic Socialist Movement (PASOK), Nikos Androulakis,[3] via the spyware detector. In addition to the above, the university police were introduced in the Institutions of Higher Education in Greece through Law no. 4777/2021,[4] which led to two joint cases before the Council of State.

This report intends to examine the different aspects of constitutional dialogue in Greece through the aforementioned pillars. Relevant constitutional provisions will be examined, and the position of formal institutions will be addressed. Moreover, we will also focus on the main parts of the applicable pieces of legislation and the position of the Council of State on those matters. In addition, several other important case laws will be reviewed. In the end, the report aims to provide a brief yet interesting narrative of the constitutional reality in Greece in 2022.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

As depicted in the introduction, the main discussion is on the constitutionality of the interception of communications. The interception of communications by the National Intelligence Service raises issues of compliance with Article 19 of the Constitution. Article 19, para. 1, explicitly states that the secrecy of letters and all other forms of free correspondence or communication is inviolable.[5] The absolute nature of the right guaranteed in Article 19 reflects the value of communication secrecy in a modern democratic society. The secrecy of communications is strongly interrelated with the right to privacy as a special aspect of private life. In the EU legal order, this right is included in article 7 of the EU Charter of Fundamental Rights, which states that "everyone has the right to respect for his or her private and family life, home and communications,"[6] whilst the European Convention of Human Rights guarantees correspondence as an aspect of the right to respect for private and family life, in Article 8.

Article 19, para. 1 of the Greek Constitution inserts only two restrictions in the absolute nature of the right to communication secrecy which is applied only by judicial authorities. Hence, judicial authorities shall not be bound by the secrecy of communications only 1) for reasons of national security or 2) for the purpose of investigating significantly serious crimes. The introduction of those restrictions and the explicit framework for their application does not derive directly from the constitutional provision but needs a specific typical law that specifies the guarantees under which the judicial authorities are not bound by the respective fundamental right.

The typical Law containing the aforementioned is Law no. 5002/2022. Article 3 provides the definitions of the terms. Hence, for the Law, reasons for national security are reasons related to the protection of the basic functions of the state and the fundamental interests of the Greek citizens, such as reasons related to national defense, foreign policy, energy security, and cyber security. In addition, the Law recognizes as political personnel the President of the Republic, the members of the government and the deputy ministers, the members of the European Parliament, the leaders of the political parties represented in the Parliament and the European Parliament, and the highest single bodies of the first and second degree local authorities.

1 Vasileios G. Tzemos, "Conclusion of the 10th Annual Scientific Conference of the Greek Public Law Association", *Dioikitikoi Dikastes*, 6 April 2023 <https://ddikastes.gr/%ce%b4%ce%b5%ce%bb%cf%84%ce%b9%ce%bf-%cf%84%cf%85%cf%80%ce%bf%cf%85-10%ce%bf-%ce%b5%cf%84%ce%b7%cf%83%ce%b9%ce%bf-%ce%b5%cf%80%ce%b9%cf%83%cf%-84%ce%b7%ce%bc%ce%bf%ce%bd%ce%b9%ce%ba%ce%bf-%cf%83%cf%85/> accessed 23 June 2023.

2 Nektaria Stamouli, "Greece's Spyware Scandal Expands Further", *Politico*, 5 November 2022 <https://www.politico.eu/article/greece-spyware-scandal-cybersecurity/> accessed 17 March 2023.

3 Paul Tugwell and Alberto Nardelli, "Greek Spy Chief Quits Over 'Mishandled' Phone Tapping Operation", *Bloomberg*, 5 August 2022 <https://www.bloomberg.com/news/articles/2022-08-05/greek-spy-chief-quits-over-mishandled-phone-tapping-operation> accessed 17 March 2023.

4 Niki Kitsantonis, "Greece Tries Stationing Police on Campus, and Students Fight Back", *The New York Times*, 9 October 2022 <https://www.nytimes.com/2022/10/09/world/europe/greece-universities-campus-police.html> accessed 17 March 2023.

5 Fereniki Panagopoulou, "Article 19" in S. Vlachopoulos, X. Contiades and Y. Tassopoulos (Eds.), *The Constitution: A Commentary* (Center for European Constitutional Law 2023).

6 Theodora Papadimitriou and Konstantinos Margaritis "Article 7: Respect for Private and Family Life" in Vasileios G. Tzemos (Ed.), *The Charter of Fundamental Rights of the European Union: A Commentary* (Nomiki Bibliothiki 2019).

Moving to the essential part, according to Article 4, only the National Intelligence Service or the Directorate for the Prevention of Special Crimes of Violence of the Hellenic Police may request the lifting of communication secrecy for reasons of national security. The request is addressed to the Public Prosecutor's Office. In cases that refer to political personnel, this competence belongs only to the National Security Service and needs permission from the President of the Parliament to proceed further. The order requiring the lifting of the secrecy of communications for reasons of national security must contain the following: a) the body requesting the lifting, b) the purpose of the lifting, c) the means of response or communication to which the lifting is to be applied, d) the object of the lifting, namely the external elements of the communication and its content, e) the territorial scope of application and the strictly necessary duration of the lifting and f) the date of adoption of the order.

A matter of concern arises from Article 4, para. 7 of Law no. 5002/2022. The provision provides the right to the person affected by the lifting of communication secrecy to be notified about the imposition of the restrictive measure, but only 3 years after the expiry of the measure and under the prerequisite that the purpose for which the lifting was ordered is not compromised. This 3-year time restriction in the notification of the affected person and its formulation in absolute terms in the law could be hardly justified and tend to be disproportional.[7] Regarding the procedure, an inquiry shall be submitted to the Hellenic Authority for Communication Security and Privacy, which is forwarded to the National Intelligence Service or the Directorate for the Prevention of Special Crimes of Violence of the Hellenic Police, respectively. The decision on the inquiry is taken by a body consisting of two members of the Public Prosecutor's Office and the President of the Hellenic Authority for Communication Security and Privacy. The conferring of such competence to a body other than the Hellenic Authority for Communication Security and Privacy, a constitutionally recognized independent authority, raises issues of power conflicts between the judiciary and independent authorities.

Article 6 of Law no. 5022/2022 covers the second case that justifies judicial authorities not being bound by the secrecy of communications, the purpose of investigating significantly serious crimes. Paragraph 1 includes felonies from several chapters of the Greek Criminal Code, for example, offenses against the democratic regime, offenses against the state and political institutions, crimes against bodily integrity, bribery, arson in forests, etc. Paragraph 2 includes other crimes such as espionage, criminal organization, human trafficking, abduction, revenge pornography, and protection of competition. What could be observed is the extensive list of crimes that have been characterized as "significantly serious" and may lead to the lifting of the secrecy of communications. This fact reverses the constitutional perception that the lifting of secrecy of communications shall be the exception and extends it to the point that is normalized.

The lifting of the secrecy of communications in the cases referred to in the abovementioned paragraph 1 and paragraph 2 shall be decided, within 48 hours, by a justified decision of the competent judicial council on the proposal of the Public Prosecutor. After the expiry of the measure of lifting confidentiality and upon submission of a relevant request, the Hellenic Authority for Communication Security and Privacy shall notify the affected person of the imposition of this measure within 60 days. This demands consent on behalf of the Prosecutor of the Supreme Court and under the prerequisite that the purpose for which it was ordered is not compromised.

In paragraph 2 of Article 19, the Constitution explicitly guarantees an independent authority for the protection of secrecy. In particular, the provision states that "matters relating to the formation, the operation and the functions of the independent authority ensuring the secrecy of paragraph 1 shall be specified by law". Within the constitutional framework, Law no. 3115/2003 establishes the Hellenic Authority for Communication Security and Privacy, an independent authority that enjoys administrative autonomy. The competencies of the Authority are regulated in Article 6 of Law no. 3115/2003. One of the fundamental competencies that triggered the debate is the inspection of service providers, both public and private. In particular, the Authority carries out, on its initiative or after a complaint, inspections on the facilities, technical equipment, archives, data banks, and documents of the National Intelligence Service, other public services, organizations, enterprises of the wider public sector, as well as private enterprises engaged in postal, telecommunications or other services related to response and communication.

Regarding another issue that triggered constitutional discussion in Greece in 2022, the university police were established under Article 18 of Law no. 4777/2021. According to that provision, the university police operate under the umbrella of the Hellenic Police. The focal point is whether this form of operation complies with the constitutionally recognized principle of self-government that applies to Institutions of Higher Education in Greece. In particular, article 16, para. 5 of the Constitution states that education at the University level shall be provided exclusively by Institutions that are fully self-governed public legal entities. Therefore, the fact that the university police will be exclusively involved in university affairs and at the same time falls out of the control of the University's bodies introduced two joined cases before the Council of State, which will be reviewed in part III of this report.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The reforms described in part II are not classified as constitutional revisions but as the necessary legislation for the implementation of the constitutional provisions. In particular, Law no. 5002/2022 implements the constitutional obligation of Article 19, para. 1 of the Constitution. Implementing laws are pieces of legislation whose adoption is laid down in the respective constitutional provisions to specify, supplement, or implement their regulatory content. Implementing laws may be omitted or even repealed without being replaced unless the exercise of a constitutional right depends on them.

In terms of constitutional design, the Constitution of Greece is rigid. According to A. V. Dicey, a "rigid" constitution is one under which certain laws, generally known as constitutional or fundamental laws, cannot be changed in the same manner as ordinary laws.[8] The specific manner that the Constitution of Greece is amended is described in

7 Vasileios G. Tzemos "The "Mature" Proportionality" in Vasileios G. Tzemos (Ed.), *Public Law in "Puzzlement": Classical Matters and New Dilemmas* (Greek Public Law Association 2020) <http://www.dimosiodikaio.gr/docs/praktika_6syn.pdf> accessed 13 March 2023.

8 Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Palgrave Macmillan 1985).

Article 110. The same article includes an eternity clause, provisions that cannot be amended under any circumstances. Article 110, para. 1 exempts the provisions that determine the form of government as a Parliamentary Republic and certain particular provisions from the revision procedure. More specifically, the article, para. 1 (respect and protection of the value of the human being), article 4, paras. 1 (equality before the law), 4 (eligibility for public service), and 7 (non-recognition of titles of nobility), article 5 paras. 1 (freedom of personality development) and 3 (personal liberty), article 13, para. 1 (freedom of religious conscience) and Article 26 (separation of powers).

The constitutional control over the constitutional amendment is principally bestowed on the Revisionary Parliament, with the courts having no power to intervene. The rationale is based on the democratic legitimacy of the Revisionary Parliament. The Revisionary Parliament occurs after elections on the ground of the proposals for amendment of the Proposing Parliament, a necessary intermediate step for the completion of the amendment procedure, with a special role in completing it. The only exemption derives from Article 87, para. 2 of the Constitution, which empowers the judges not to apply provisions enacted in violation of the Constitution. Although never applied in practice, a judge should abstain from applying any revised constitutional provision that amends unamendable constitutional rules. At the supranational level, any constitutional provision can be reviewed for compliance with EU law under the principle of supremacy from the CJEU.[9] In such cases, the constitutional provision is not repealed but should be set aside when conflicts with EU law arise.

However, the changes presented in part II fall under the traditional constitutional review mechanism, which can be found in Article 93, para. 4 of the Constitution. According to that provision, the courts shall be bound not to apply any statute whose content is contrary to the Constitution. Constitutional review in Greece can be classified as decentralized since all courts can potentially be engaged in the constitutional review procedure, ex-post since courts can exercise this power only after the law has taken effect and concrete as the courts incidentally resolve matters of constitutionality when examining a particular case. At this point, the most important cases of the year 2022 will be briefly reviewed.

1. COUNCIL OF STATE (PLENUM) JOINT CASES 2046-2047/2022

As mentioned in the introductory part, Law, the establishment of university police via Law no. 4777/2021 led to two joint cases before the Council of State. The constitutional matter at stake was whether the provisions of the Law comply with the principle of self-government of Institutions of Higher Education as guaranteed in Article 16, para. 5 of the Constitution. The Court decided that Law no. 4777/2021 is within the framework of the principle of self-government of Higher Education Institutions and does not affect the right of these institutions to decide on their affairs and their bodies. In particular, the Court based its decision on three main reasons. First, Law no. 477/2021 grants competence to the university bodies through a series of measures with regard to matters of internal operation and order, such as issues of common academic order, common security and safety of university premises, and control of access to them.

Secondly, the Court acknowledged that the law assessed the circumstances that the previously proposed solution of entrusting to the Universities to address the issues of security and protection of their premises and those operating therein against criminal acts has failed. Therefore, it entrusts the competence for preventing and combating criminal acts to the university police, emphasizing the deterrent role of its operation and the rapid and immediate nature of its action before the intervention of the actual police. At the same time, the action of the university police, which is subject to disciplinary and criminal control and may give rise to civil liability of the State, is governed by the Constitution and the principles of legality and proportionality. The latter, especially regarding policing the premises of the University, does not allow the police to intervene in cases of non-serious disorder within its premises of, cases for which the security measures taken by the Universities themselves have been provided for.

In addition, the Court underlined that under articles 18 to 20 of Law No. 4777/2021, special care is taken to establish a climate of trust between the members of the academic community and the university police through the cooperation of the latter with the Rector, the Vice-Rector and the competent university bodies. To this end, the university police are also composed of special guards who are recruited for this purpose, receive special training oriented towards the cultivation of a philosophy adapted to the particularities of the Universities, and do not carry a firearm. Besides, the operation of the university police to a particular University takes place only if and to the extent that a need for such operation is ascertained in accordance with the principle of proportionality in the light of which each separate decision for the operation of the university police to a specific University is subject to judicial review.[10]

Finally, Law no. 4777/2021 does not include any provision for the participation of the university police in any administrative body of the University; neither provides the former with competence to intervene in matters of science, research, teaching and the operation of universities in general, which fall within the competence of the Universities themselves. Consequently, the Court concluded that the contested provisions not only do not undermine but also strengthen the constitutional order.

2. COUNCIL OF STATE (THIRD CHAMBER) CASE 2332/2022

Under decision 2332/2022 of the seven-member composition of the Third Chamber, the Council of State re-examined the issue of compulsory vaccination of personnel in the health sector. The Court concluded that the provision of Article 2, para. 2 of Law No. 4917/2022, which extended the validity of Article 206, para. 2 of Law No. 4820/2021 on the reassessment of the compulsory vaccination of personnel working in the public and private health sector until 31-12-2022[11] is contrary to the constitutional principle of proportionality.

9 C-213/07 *Michaniki AE v Ethniko Symvoulio Radiotileorasis and Ypourgos Epikrateias* [2008] ECLI:EU:C:2008:731. See among others Vasileios G. Tzemos, "The Basic Shareholder and the Principle of Proportionality" [2008] Media and Communication Law 531.

10 On the principle of proportionality see Vasileios G. Tzemos, "The "Mature" Proportionality" in Vasileios G. Tzemos (ed.), *Public Law in "Puzzlement": Classical Matters and New Dilemmas* (Greek Public Law Association 2020) <http://www.dimosiodikaio.gr/docs/praktika_6syn.pdf> accessed 19 March 2023.

11 For analysis of the previous case law of the Council of State, see Vasileios G. Tzemos, Konstantinos Margaritis, and Eleni Palioura, "Greece" in Richard Albert and Luis Roberto Barroso (Eds.), The 2020 International Review of Constitutional Reform (2022).

In particular, the Council of State underlined that the compulsory vaccination of several categories of workers may still constitute a serious interference with fundamental rights, such as the free development of personality, freedom of movement, and privacy, but such interference is constitutionally tolerable as long as, inter alia, such measures are taken for the necessary period of time and in any event until a solution to combat the pandemic is found. Moreover, the competent State bodies, in the light of existing epidemiological data and the development of valid scientific assumptions, must periodically review the intensity and duration of those measures, given their temporary nature.

In the present case, at the time of the publication of Law no. 4917/2022, 31-3-2022, a period of more than eight months had passed since the adoption of compulsory vaccination of personnel working in the public and private health sector. The Court underlined that this period manifestly exceeds what is reasonable, given the nature of the measure and its consequences, even more, without any further evaluation based on updated scientific and epidemiological data on the course and development of the pandemic. Furthermore, according to the Court, it is unclear based on which specific scientific data the time for reassessment was extended until 31-12-2022, that is to say, it was set at a time that is also longer than is reasonable, given the fact that nine months had passed after the adoption of Law no. 4917/2022.

3. COUNCIL OF STATE (PLENUM) JOINED CASES 1911-1912/2022

The Plenary Session of the Council of State deemed unconstitutional the new salary rates of the faculty members of Greek Public Universities with decision no. 1911-1912/2022 and based the unconstitutionality on Article 16 of the Constitution. In particular, the Council of State developed in its reasoning that the legislator, with the regulations of Law no. 4472/2017, aimed to limit the number of special salary rates, not by abolishing any of them, but by merging the existing special salary rates, which, according to the law, had a similar object. However, the Council of State decided that the combination of the salary arrangements of the faculty members of the Universities with those concerning other categories of civil servants implies a violation of the principle of the special salary treatment of the faculty members, as derived from article 16 of the Constitution. Moreover, it was further decided that the above regulations violated the principles of equality and proportionality.[12] In particular, the Court ruled that the legislator enjoyed a wide margin of appreciation for the formation of the salaries of the faculty members, however, the courts control the implementation of the principle of the special salary treatment of the members of the Public Universities, which is, included on the article 16 of the Constitution, as well as the constitutional principle of equality, from the point of view of the obligation to treat different situations that are not similar and the principle of proportionality, from the point of view of accepting a fair balance between the public interest and the protection of rights under the Constitution.

Although Greece applies a decentralized system of constitutional review, the Council of State has emerged as a key court in delivering constitutional justice. From this perspective, it has been accurately argued that the Council of State functions as a quasi-constitutional court. Under the three Weberian types,[13] the Council of State mostly plays a countermajoritarian role. According to its well-established case law, the Court abstains from judging on political affairs unless fundamental rights violations or other abuse of power matters are at stake, in line with its constitutional competencies. The cases discussed above are perfect examples of its role; the Court identified the situation and ruled on human rights issues without interfering in principle with the decisions of the Government. This long-standing position of the Council of State perfectly completes the separation of powers principle, which is of fundamental value to every democratic society, and is guaranteed, in the Constitution of Greece, in Article 26.

In general, when courts embrace the representative role could, in some cases, underlie some form of "judicial populism," whilst the enlightened role may sometimes lead to a substantial replacement of the political institutions by the courts. This could potentially shift the balance deriving from the separation of powers principle towards the judiciary.

IV. LOOKING AHEAD

Unlike 2020, and to a lesser extent 2021, the year 2022 did not include any measures taken under the emergency constitutional framework, nothing interrupted the normal course of the legislative procedure. The basic constitutional concern focused on matters of fundamental rights. More specifically, the secrecy of communications in article 19 and secondly, the self-government of Institutions of Higher Education in article 16, para. 5 of the Constitution.

Although no formal constitutional amendment has taken place, the laws introduced to implement the aforementioned constitutional rights draw attention for a variety of reasons. Several legal scholars have argued that the establishment and form of operation of the university police violates the principle of self-government of universities, however, the case was ultimately solved by the Council of State.

Law no. 5022/2022 has been the institutional response to the so-called wiretapping scandal that led to the interception of communications via the spyware detector, albeit not without problems. Regarding the lifting of communication secrecy for reasons of national security, the person affected by such measures may be informed accordingly, three years after the expiry of the measure, a period of time that is too broad and hence disproportional. In addition, the law undermines the role of the Hellenic Authority for Communication Security and Privacy, which is the independent authority for ensuring the secrecy of communications according to Article 19, para. 2 of the Constitution. Finally, the fact that the law characterizes a high number of crimes as significantly serious for lifting the communications secrecy could raise questions on the ground of proportionality.

The major stakes of public Law and public life in Greece in 2022-2023 is the need to truthfully protect the secrecy of communications and personal data of all people. We shall not accept the unfortunately pervasive feeling in the Greek public sphere that the protection of privacy in the current state of technological development is a lost battle, a utopia. The secrecy of communications and personal data shall not be

12 See, also the decision of the Plenary Session of the Council of State no. 4741/2014 on the salary cuts of the faculty members, Spyros Vlachopoulos "The Principle of the Rule of Law in the Recent Case Law of the Council of State" [2022] e-Politeia 475.

13 Luis Roberto Barroso, "Countermajoritarian, Representative and Enlightened: the Roles of Constitutional Courts in Democracies" [2019] Am. J. Comp. Law 109.

considered less important, a "second class" right. Their intensive and uncompromising protection is a necessary precondition for the democratic rule of Law of our future.[14]

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Guatemala

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I. INTRODUCTION

The Constitution of Guatemala prescribes two distinct procedures for amending its provisions. The process for modifying the "Individual Rights" section situated in Chapter I of Title II, mandates the unicameral Congress of Guatemala to convene a Constitutional Assembly, backed by a special majority of two-thirds of its members. It is vital to recognize that the Constitutional Assembly's jurisdiction is limited; the Congress must pinpoint the articles to reform during the initiation of the Constitutional Assembly.[1]

To amend any other article within the Constitution, aside from those in the "Individual Rights" section, Congress must endorse a bill through a special majority vote of two-thirds of its members.[2] Following this, a referendum must be held to gauge the public's agreement or disapproval of the proposed amendments.

Title VII of the Constitution delineates the guidelines applicable to its reform:

ARTICLE 277. INITIATIVE

The following entities are entitled to propose amendments to the Constitution:

a. The President of the Republic in the Council of Ministers.
b. Ten or more deputies to the Congress of the Republic.
c. The Court of Constitutionality.
d. The citizenry [el pueblo] via a petition submitted to the Congress of the Republic, supported by no fewer than five thousand duly registered citizens.

ARTICLE 278. NATIONAL CONSTITUENT ASSEMBLY

To reform this or any Article contained in Chapter I of Title II of this Constitution, it is indispensable that the Congress of the Republic, with the affirmative vote of the two-thirds part of the members that integrate it, to convene a National Constituent Assembly. In the decree of convocation[,] the Article or Articles to be reformed shall be specified[,] and it shall be communicated to the Supreme Electoral Tribunal so that it may determine the date when the elections will be held within the maximum deadline of one hundred twenty days, proceeding in the other respects by the Constitutional Electoral Law.

ARTICLE 279. DEPUTIES TO THE NATIONAL CONSTITUENT ASSEMBLY

The National Constituent Assembly and the Congress of the Republic may function simultaneously. The qualifications required to be [a] deputy to the National Constituent Assembly is the same as those needed to be a deputy of the Congress. Additionally, the constituent deputies shall enjoy equal immunities and privileges as deputies of the Congress.

An individual may not simultaneously be a deputy in the National Constituent Assembly and the Congress of the Republic.

The elections of [the] deputies to the National Constituent Assembly, the number of deputies to be elected, and any other related questions, [together] with the electoral process, will be governed equally as for the elections to the Congress of the Republic.

ARTICLE 280. REFORMS BY THE CONGRESS AND [THE] POPULAR CONSULTATION

For any other constitutional reform, it will be necessary for the Congress of the Republic to approve it with an affirmative vote of two-thirds part of the total number of deputies. The reforms will not take effect unless ratified through the popular consultation referred to in Article 173 of the Constitution.

If the outcome of the popular consultation were to approve the reform, it would come into effect sixty days after the Supreme Electoral Court announces the result.

ARTICLE 281. NON-REFORMABLE ARTICLES

Articles 140, 141, 165 paragraph g), 186, and 187 are non-reformable. This includes any provisions that refer to the republican form of government, the principle of non-reelection for the presidency of the Republic, or the effectivity or validity of the articles that establish the alternation in the presidency of the Republic. These articles cannot be suspended or altered in a way that would change or modify their content.

1 Guatemala's Constitution 1985, art. 278,
2 Currently, Guatemalan Congress is composed by 160 deputies. The special majority of two-thirds is equivalent to 107 votes.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

There were no formal constitutional amendments introduced or debated in Guatemala in 2022. Given the high threshold for amending the Constitution in Congress and the necessity for approval by a referendum, constitutional amendments are infrequent in Guatemala.

Since 1986, 17 bills aimed at reforming the Constitution have been introduced in the Guatemalan Congress, [3] along with four bills intended to convene a Constitutional Assembly. [4]

All attempts to call for a Constitutional Assembly have failed in Congress. Most of these attempts were either dismissed on the floor or received an unfavorable assessment at the respective legislative commission. [5]

The 17 bills intending to introduce amendments using the process stipulated in Article 180 tell a similar story. Only a package of constitutional amendments proposed in 1993 was approved by Congress and subsequently ratified by the public in a referendum.[6]

These reforms emerged following a political crisis when President Jorge Serrano attempted a self-coup on May 25, 1993,[7] by issuing a decree intending to dissolve Congress and the Supreme Court of Justice, while simultaneously suspending a series of fundamental rights.[8]

Congress sanctioned the amendments on November 7, 1993,[9] and the referendum took place on January 30, 1994. The referendum's turnout was notably low, with only 16% of registered voters participating; the "yes" option received 68% of the total votes.[10]

While these amendments altered 37 articles of the 281 articles of the 1985 Guatemalan Constitution and changed some critical elements of the Constitution, they did not disturb the Constitution's fundamental values. One significant change was the reduction of the Presidential term from five to four years. Additionally, the reforms included a nominating commission to appoint the Attorney General, as well as the justices of the Supreme Court and Courts of Appeal, among other reforms.[11]

In 1998, a constitutional reform proposal received approval from two-thirds of the Guatemalan Congress, but it was subsequently rejected in the 1999 referendum. This proposal was directly tied to the Peace Accords, signed in December 1996, which brought an end to a devastating 36-year civil war.[12]

These proposed reforms aimed to amend 42 articles of the Guatemalan Constitution. They included the recognition of the country's multiethnic, pluricultural, and multilingual nature. The reforms also sought to constitutionalize the establishment of a Civil National Police, redefine the role of the military, and modify key aspects of the justice system, among other objectives.[13] However, the rejection in the referendum prevented these proposed amendments from altering the Constitution.

The most recent attempt to introduce constitutional amendments occurred in 2017, when a group of congresspeople proposed initiative 5179, intending to modify 34 articles of the Guatemalan Constitution. The amendments were primarily directed at the justice system, aiming to enhance judicial independence. Despite advancing through the third debate, the bill faltered on the floor once the proposal was examined and debated article by article.[14]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

As previously detailed, there were no successful constitutional amendments in 2022.

IV. LOOKING AHEAD

The Constitutional Court delivered three advisory opinions at the request of the President of the Republic of Guatemala, resulting in informal constitutional mutations worthy of note.

In the advisory opinion issued in file 6247-2021 on January 7, 2022,[15] the Court interpreted article 168 of the Guatemalan Constitution, pertaining to the authority of legislative committees to interrogate executive branch officials. In the Court's opinion, a summoned official can only be questioned on matters relevant to "its matter". This interpretation is challenging to define and may not necessarily favor the pursuit of accountability.

In another advisory opinion issued on the same day in file 6248-2021,[16] the Court interpreted Article 161, paragraph b), relating to deputies' immunity for their opinions, initiatives, and handling of public business.

The Court adopted a narrow interpretation of the Constitution, limiting Congressional immunity to "the opinions that the deputies express within the scope of their attributions," excluding opinions they may voice in the media or other public spaces. This constrictive interpretation of Congressional immunity has shifted the balance of powers, as there is now at least one congressman criminally accused of voicing "defamatory" opinions.[17]

These criteria signify informal constitutional mutations that have influenced the separation of powers and the accountability role of Congress.

3 Guatemalan Congress. Public Information request of February 2 of 2023.
4 Those are Initiative 1334 introduced in June of 1995; Initiative 1815 introduced in August of 1997; Initiative 4500 introduced in July of 2012 and Initiative 5022 introduced in January of 2016.
5 The last attempt, Initiative 5022 of 2016, received an unfavorable opinion of the Legislation and Constitutional Affairs Commission and didn't make it to the floor.
6 'Gana el SÌ, en la consulta' *Prensa Libre* (Guatemala, 31 January 1994)
7 Edmond Mulet. 'The Palace Coup That Failed' New York Times (New York, 22 June 1993)
8 Florencio Gramajo and Luis Pedro del Valle, 'El 25 de mayo de 1993 en la historia jurídico-política del país' Iuristec < https://iuristec.com.gt/index.php?title=Articulo:0152> accessed 12 April 2023.
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Honduras

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I. INTRODUCTION

During 2022, the Honduran constitutional system experienced two important episodes concerning amendments, which happened amid the start of the new governmental period with a new Congress and the first female president in the country's history. However, the authorities of the Judiciary Power, the Supreme Court Judges, continued in office since their seven-year term would end in January 2023. The first episode concerns the only amendment approved by the National Congress in 2022: the derogation of the Special Zones for Employment and Economic Development (ZEDE) from the Constitution. The other relevant constitutional amendment that remains a proposal in Congress is the creation of the Anti-Corruption International Commission (CICIH) in the Constitution. Both reforms could substantially affect the legal, political, and economic landscape of Honduras. However, none of the amendments are applicable today, considering the requirements for the enforceability of constitutional amendments, which will be discussed in the following sections.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. THE DEROGATION OF THE ZEDE, AN UNFINISHED PATH

The first reform relevant to this analysis is eliminating ZEDE from the constitutional system. Considering this is the first report on Honduras in the International Review of Constitutional Reform, it is essential to give some context on how constitutional amendments are enacted. The current Honduran Constitution, adopted in 1982, establishes the constitutional amendment process in Articles 373 and 374. Article 373 expresses that constitutional reform can be approved in ordinary sessions of Congress with a two-thirds majority vote of Congress. Since there are 128 members in the National Congress, at least 86 members must vote to support the proposal and approval of amendment reforms. After being approved, the reform must be ratified in the next ordinary legislature to be enforceable. Congress is elected for a four-year term. Each year, within those four years, corresponds to one legislature. Article 374 enlists the unamendable provisions of the Constitution. Among these, we find provisions referring to the form of government, the national territory, the presidential term, the prohibition of presidential reelection, and the prohibitions referring to those who cannot be president of the Republic in the next period.

On April 21, 2022, the National Congress approved the derogation of the ZEDE. These zones were created through an amendment that modified articles 294, 303, and 329 of the constitution in January 2013. These Zones are subject to special regimes which have legal personality and autonomous functionality. Additionally, the articles concerning the division of the national territory into departments and autonomous municipalities were also amended to recognize the legality of zones subject to special regimes. In September 2013, Congress enacted the Organic Law of the ZEDE through Legislative Decree No. 120-2013, which expanded the regulations of these Zones. Furthermore, the Constitutional Chamber of the Supreme Court recognized the constitutionality of the ZEDEs in a decision issued in 2014. The Legislative Decree which eliminated the ZEDE comprehended the Decree that created the figure in the Constitution. It also explained that the Organic Law, other regulations, resolutions, acts, contracts, or concessions issued in favor of the ZEDE do not have legal validity. However, the amendment still lacks enforceability, considering it has yet to be ratified by the 2023 legislature.

2. IS THE CICIH A CONSTITUTIONAL AMENDMENT OR AN INTERNATIONAL AGREEMENT?

On November 1, 2022, Congress Member Xiomara Zelaya presented a constitutional amendment project concerning the reform of Article 232, which established the Public Ministry as the professional and specialized institution responsible for the defense and protection of society's interests. This provision recognizes the Ministry's competency to exercise public prosecution in criminal affairs. The amendment proposal pretends to add a paragraph to Article 232, creating the International Mission Against Corruption and Impunity (CICIH), which could, exceptionally, act through independent investigation, focusing on intelligence and financial analysis, in cases involving organized crime networks that execute corruption acts affecting public goods. The CICIH would be able to act in irregular procurement processes, concessions, public-private alliances, fraud, tax evasion, bribery of judges, illicit enrichment, and the administrative behavior of the heads of the three State Powers. The Honduran State would install the CICIH with the support of the Organization of the

United Nations. An international agreement and secondary legislation would amplify the regulations concerning the functioning of the CICIH. However, this project has not yet been discussed on the floor of Congress. Installing the CICIH has its precedent on substantive citizen protests that emerged in 2015 due to corruption acts regarding the Honduran Institute of Social Security (IHSS) and the demands for the installation of the CICIH, following the Guatemalan experience with the International Anti-Impunity Commission in Guatemala (CICIG).[1] These protests which were driven by the citizens' demands for justice led Honduran President Juan Orlando Hernandez to agree to the installation of the Mission of Support Against Corruption and Impunity in Honduras (MACCIH), an international initiative sponsored by the Organization of American States (OAS) through an agreement subscribed with the Honduran government on January 19, 2016.[2]

After the subscription of the agreement, Congress approved the MACCIH initiative on March 29, 2016.[3] The MACCIH´s objective was to support the Honduran State in complying with its commitments concerning the Inter-American Convention Against Corruption, the American Declaration of the Rights and Duties of Man, and the United Nations Convention Against Corruption. Additionally, the MACCIH would support, strengthen, and collaborate actively with the State institutions in charge of preventing, investigating, and combating government corruption. The Public Ministry, in collaboration with the MACCIH, presented 14 high-impact corruption cases to the Judiciary Power.[4] After its four-year term of applicability of the agreement that enabled the functioning of the MACCIH, the National Congress recommended not to renew the agreement, and according to the OAS, the Honduran government did not agree with the continuation of the collaboration of the Public Ministry with the MACCIH in any investigation affairs. Therefore, the government decided not to renew this agreement which dealt with corruption to a certain extent.[5] When the OAS-backed MACCIH left the country, claims to install the CICIH continued afterward. Additionally, the newly elected president, Xiomara Castro, included the CICIH as a part of her government plan.[6] On December 15, 2022, representatives of the Honduran Government and the United Nations subscribed to a Memorandum of Understanding that initiated the process of installing the CICIH in the country.[7] The Memorandum outlines a series of legal reforms that Congress must approve while also mentioning the ratification of an international agreement to install the CICIH formally.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. THE ZEDE, A CONTRAST WITH THE SPECIAL REGIONS FOR DEVELOPMENT, AND THE REVERSAL OF A CASE OF CONSTITUTIONAL DISMEMBERMENT

To put things in an integral perspective, before the ZEDE, in February 2011, the Special Regions for Development (RED) were created through a constitutional amendment of Articles 304 and 329. Article 304 is included in the Judiciary Power's chapter, and Article 329 is in the chapter of the Economic Regime. The RED were special regions of the territory that aimed to accelerate the adoption of technologies that enable the production of high-value services capable of attracting national and foreign investment. The RED was supposed to have its public administration system, and it had to be regulated through a Constitutional Statute, approved with the same majority as a constitutional amendment. These regions also had their judicial jurisdictions, and matters such as budget and taxes had to be regulated on the Constitutional Statute. The amendment mentioned that the RED was subject to the national government in sovereignty, national defense, foreign affairs, electoral issues, and civil registration. With a majority vote, the Supreme Court declared the unconstitutionality of the RED in October 2012.[8] The Court explained that the RED violated unamendable provisions which addressed the national territory as a critical element of the structure of the State, among other arguments. In response to the Supreme Court's ruling regarding the unconstitutionality of the RED, Congress created the ZEDE, zones which aimed to promote economic growth in Honduras It is noteworthy to mention that between the decision of the RED in 2012 and the ruling concerning the ZEDE in 2014, Congress removed four of the five judges that belonged to the Constitutional Chamber. Then, the National Congress named four new judges. Currently, the Inter-American Court of Human Rights is analyzing the removal of the judges as a presumptive human rights violation by the Honduran State.[9]

With a newly elected Constitutional Chamber, the decision concerning the constitutionality of the ZEDE was issued on May 25, 2014. The claim reviewed by the Chamber questioned the unconstitutionality of the figure under arguments addressing the inviolability of the territory, the violation of the faculty to determine the taxing regime as a non-delegable competence of Congress, and the violation of the State's power to exercise sovereignty in the aerial space and the undergrounds of its continental territory and sea. The fourth argument of unconstitutionality was the violation of the unamendable provision concerning the form of government. The last argument of the claimant about the unconstitutionality of the ZEDE referred to the violation of

1 Juan Paullier, 'Honduras: la OEA crea misión para combatir la corrupción y la impunidad' (*BBC News Mundo,* 28 September 2015) < https://www.bbc.com/mundo/noticias/2015/09/150928_honduras_oea_mision_corrupcion_impunidad_jp> accessed 2 February 2023.

2 Convenio entre el Gobierno de la República de Honduras y la Secretaría General de la Organización de los Estados Americanos para el establecimiento de la Misión de Apoyo contra la Corrupción y la Impunidad en Honduras [2016].

3 German Reyes, 'Con la dispensa de dos debates Congreso aprueba el Convenio de la MACCIH' (*Revistazo,* 1 April 2016) <https://revistazo.com/con-la-dispensa-de-dos-debates-congreso-aprueba-el-convenio-de-la-maccih/> accessed 6 February 2023.

4 Charles Call, 'The Legacy of Honduras´ International Anti-Corruption Mission' (2020) 2 CLALS Working Paper Series No. 27 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3633943>

5 Jorge Burgos, 'Congreso Nacional se pronuncia por no extender acuerdo de la MACCIH' (*Criterio HN*, 11 December 2019) <https://criterio.hn/congreso-nacional-se-pronuncia-por-no-extender-acuerdo-de-la-maccih/> accessed 24 February 2023.

6 'Plan de Gobierno para la Refundación de la Patria y Construcción del Estado Socialista y Democrático' (*Partido Libre*, 2021) <https://www.libre.hn/plan-de-gobierno-de-xiomara-2022-2026#> accessed 1 March 2023.

7 Dalma Acosta, '¿Qué dice el memorándum firmado entre el gobierno de Honduras y la ONU para la instalación de la CICIH?' (*El Heraldo*, 15 December 2022) <https://www.elheraldo.hn/honduras/que-dice-memorandum-firmado-gobierno-honduras-onu-instalacion-cicih-corrupcion-xiomara-castro-HE11408096> accessed 2 March 2023

8 *Certificación de la sentencia de la Corte Suprema de Justicia del Recurso de Inconstitucionalidad 769 =11* [2012].

9 'Caso Gutérrez Navas y Otros Vs. Honduras' (*Corte Interamericana de Derechos Humanos,* 2022) <https://www.corteidh.or.cr/docs/tramite/gutierrez_navas_y_otros.pdf>

the prohibition to enact reforms that restrict fundamental rights. This is due to the differences in guaranteeing and regulating rights within the ZEDE compared to the rest of the country. The Constitutional Chamber, in a unanimous vote, declared that the unconstitutional claim against the ZEDE constitutional amendment and its organic law would not proceed. The Chamber concluded that there was no violation of the national territory due to provisions included in the amendment and in secondary legislation that recognized compliance with other constitutional provisions concerning the territorial structure of the State. According to the Constitutional Chamber, the taxing regime was not violated, considering that the National Congress, as a power derived from citizens, approved the special fiscal regime of the ZEDE through the Organic Law. The Chamber used a similar argument to justify the absence of a violation of national sovereignty, explaining that Congress is one of the State Powers created amid a constituent process; therefore, it has the faculty to amend the Constitution. Another of the Constitutional Chambers' conclusions was that the existence of a hierarchy of norms in the Organic Law of the ZEDE, and the constitution being the first of these, also contributes to the prevalence of the form of government foreseen in the constitution in the ZEDE. The Chamber argued that there was no violation of the rights and guarantees recognized in the Constitution. For example, the right to freedom of movement is not violated because the people who accede to living in a ZEDE do it voluntarily.

The precedent of the RED is helpful as a contrast with the change of criteria of the Constitutional Chamber in the ZEDE judgment, as evidence that despite the 2014 decision of the Chamber recognizing the constitutionality of the ZEDE, there are prevalent tensions with unamendable provisions of the constitution. One of the most evident tensions is the amendment of Article 294, which divides the national territory into departments and autonomous municipalities. In the reform of Article 294, a paragraph was added explaining the faculty of Congress to create ZEDE in compliance with the other constitutional provisions that created the figure. In the decision concerning the unconstitutionality of the RED, the Supreme Court argued on the non-delegable character of sovereignty as a primary source of the form of government. Ultimately, the Court concluded that the RED violated the principle of division of powers, considering that these networks oversaw the public administration in their territories and enacted their legal norms. These faculties belong to the Executive Power and the Legislative Power, respectively.[10]

In the RED decision, the Court explained that the primary sources of a State are related to its interior government, foreign affairs, justice administration, and national defense. The Court also contended that in a system that follows the rule of law, the monopoly of force is used to guarantee citizens' welfare and tranquility. This reasoning employed in the decision that declared the unconstitutionality of the RED conflicts with the provisions foreseen in the Organic Law of the ZEDE, which states that these Zones can have their own education, healthcare, and social security system. They have operational and administrative functionality equivalent to the municipalities, recollect and administer their taxes, and are considered offshore fiscal and custom zones. The ZEDE can establish its security system, including police, crime investigation units, and a prison system. However, there are contradictions between these provisions and others of the Organic Law which expressly mention that the ZEDE are subject to the Constitution and the national government in matters regarding sovereignty, justice administration, electoral regulations, and national identification system. All of these leads to arguing that the amendment that created the ZEDE can be considered a dismemberment of the constitutional structure and identity.[11] Both types of dismemberments occur because, on one hand, the ZEDE implies a change in unamendable provisions, and, on the other side, its scope collides with the form of government. Consequently, the reform approved in 2022 to derogate the ZEDE and its Organic Law can be classified as a restorative amendment. In the preamble of the legislative decree that approved the 2022 amendment, Congress expressed that the cohort of Congress members who created the ZEDE trespassed the limits imposed on the constituted powers by the constituent power. The amendment would return constitutional provisions to the scope they had before the existence of the ZEDE; however, Congress must ratify the amendment for it to be enforceable. To the date of the elaboration of this analysis (June 2023), the ratification is still on the agenda of Congress but has yet to be approved.

2. THE CICIH AND THE SUITABILITY OF A CONSTITUTIONAL REFORM

On the other hand, in the CICIH case, the agreement subscribed by the Government of Honduras and the United Nations foresees two steps. The first step involves adopting measures to facilitate the legal and political conditions for the CICIH to work. The second phase would start with ratifying a bilateral convention between the parties. However, a constitutional amendment project like the one presented by Zelaya would oblige any convention to be subject to the limitations the constitution would expressly impose on the CICIH. The constitution describes how international conventions and treaties must be ratified to be enforceable. Chapter III of Title 1 of Honduras' Constitution explains that Congress must first approve international conventions before being ratified by the Executive Power. There are different conditions for approving conventions. For instance, if a treaty or an international convention affects a constitutional provision, the convention must be approved following the procedure foreseen for constitutional amendments. The constitutional provision must be amended to guarantee harmony with the convention before the Executive ratifies the latter. The Executive Power can subscribe to and ratify conventions on matters comprehended among its constitutional competencies without the approval of Congress. When the subscription of a convention results in the need for further legislative measures, then it must be approved by Congress. The case of the CICIH requires other legislative decisions for it to work collaboratively with the Public Ministry. Therefore, the approval of Congress is mandatory. Let us focus on the scenario where the constitutional amendment project is the next step in installing the CICIH. In this case, the effects will not only extend to the content of the convention, but another debate also emerges on the suitability of approving an amendment for a figure that is not destined to remain permanently in the constitutional and justice system. In 2018, the Constitutional Chamber of the Supreme Court reviewed

10 Idem.

11 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitution* (Oxford University Press 2019) 85-86.

an unconstitutional claim against the legislative decree through which the National Congress approved the convention that established the MACCIH. The Chamber argued that the content of the international convention that created the MACCIH could not imply a delegation of the faculties or constitutional duties of national institutions.[12] In the cases of the Public Ministry and the Accountability Superior Tribunal, related to the tasks of investigating corruption, the Court argued that "it is contrary to the constitution, that government agencies do not comply with their faculties, delegating decisions to the MACCIH."[13] A constitutional reform within the scope proposed by Congresswoman Zelaya can also be classified as a dismemberment of the constitutional structure, in so far as it would suppose an addition to the provision that creates and sets the basis of the Public Ministry in the Constitution. A constitutional amendment supposes a substantial difference with creating the CICIH through a convention between the Honduran Government and the United Nations with a limited timeframe, like the MACCIH's precedent. Establishing the CICIH through a constitutional amendment would provide it with a timeless presence and a role that, at the constitutional level, was exclusively assigned to the Public Ministry.

3. THE ROLE OF THE HONDURAN SUPREME COURT

According to the provisions in Title V, Chapter XII of the Honduran Constitution, the Supreme Court consists of 15 judges, elected by Congress with a two-thirds vote of its members, for seven years, with the possibility to be reelected. The latest appointment process of the Supreme Court is illustrative of what can be expected of its role. In February 2023, the 15 judges for the 2023-2030 term were elected by Congress, where six political parties have representation, three of which have the largest membership in this State Power. Amid the appointment of the judges, these three political parties subscribed to an agreement in which they pledged that negotiations for the subsequent appointment processes in Congress would represent the proportionality of political parties.[14] The latter means that each political party would have a share of the power in appointing high officials in Congress, depending on how many members it has in Congress. In the case of the Court, the Center of Democratic Studies (CESPAD) assured that the appointment of the 15 judges followed the tradition in which the interests of political parties prevailed over merits and that "the judges arrive to the office with compromises with the parties that supported them, putting in risk their independence in justice administration."[15] This phrase is suitable for classifying the Court as exercising a counter-majoritarian, representative, or enlightened role.[16] If any of these categories would apply, and to start a reflection on this matter, without making an extensive analysis due to the purpose of this report, the counter-majoritarian role could characterize the Supreme Court's behavior in so far as it does not touch on the interests of the political parties.

Three examples may be helpful to contribute to this argument, two of which are appropriate for the themes addressed in previous sections. In December 2012, when the four judges were removed from the Constitutional Chamber, the United Nations Special Rapporteur on the Independence of Judges and Lawyers expressed that the National Congress exercised critical control on the Judiciary Power. The removal of these judges came about after the Supreme Court declared the unconstitutionality of a legislative decree oriented to conduct administrative changes in the National Police.[17] After this removal, the renewed Constitutional Chamber declared the constitutionality of the ZEDE in 2014 and unapplied unamendable constitutional prohibitions for presidential reelection in 2015.[18] During the 2016-2023 term, the Constitutional Chamber issued the decision recognizing the constitutionality of the MACCIH. One of the former MACCIH officials analyzed the decision and argued that on the days before its publication, there were rumors that the Court would declare the unconstitutionality of the agreement that created the Mission.[19] Once the decision was published, contradictions in its text were evident, considering the recognition of the agreement's constitutionality but restricting the operation of the MACCIH according to the interpretations of the Chamber. However, other decisions issued by the Chamber and the Supreme Court have declared the unconstitutionality of legislative decrees and do not necessarily produce repercussions for political elites.[20] While there is more information required to continue this argumentative path this section provides the grounds for a broader analysis of the role of the Honduran Supreme Court.

IV. LOOKING AHEAD

Both cases of constitutional amendments reviewed in this analysis are not closed in terms of efficacy. During the legislature of 2023, the ZEDE amendment must be ratified to be enforceable. Additionally, due to the actions the State has taken to derogate the ZEDE and its effects on the legal and political system, one of the existing ZEDE, Honduras Próspera, announced the filing of a lawsuit against the State of Honduras in the International Centre for Settlement of Investment Disputes "to protect from the violations to international law and the

12 *Sentencia de la Sala de lo Constitucional de la Corte Suprema de Justicia del Recurso de Inconstitucionalidad en el expediente SCO-0189-2018 RI* [2012] 17.

13 Ibid, 23.

14 Laura Cáceres, 'Antes de elegir CSJ, fuerzas políticas firmaron acuerdo histórico' (*Tiempo,* 20 February 2023) <https://tiempo.hn/antes-de-elegir-csj-partidos-firmaron-acuerdo/> accessed 15 March 2023.

15 Gustavo Irías, 'Análisis semanal | Entre lo viejo y lo nuevo: Honduras elige una Corte Suprema de Transición' (*CESPAD*, 17 February 2023) <https://cespad.org.hn/analisis-semanal-entre-lo-viejo-y-lo-nuevo-honduras-elige-una-corte-suprema-de-transicion/> accessed 18 March 2023.

16 Luis Barroso, 'Countermajoritarian, representative and enlightened: The role of Constitutional Courts in Democracies'[2019] Oxford University Press.

17 Gabriela Knaul, 'Grave atentado a la democracia en Honduras la destitución de magistrados de la Sala Constitucional' (*Oficina del Alto Comisionado de Naciones Unidas para los Derechos Humanos,* 29 January 2013) <https://newsarchive.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=12958&LangID=S> accessed 20 March 2023.

18 Joaquín Mejía y Rafael Jerez, 'La reelección presidencial en Honduras, la sentencia espuria y la falacia de un derecho humano' en Joaquín Mejía (Coord.), *La reelección presidencial en Centroamérica: ¿Un derecho absoluto?* (Equipo de Reflexión, Investigación y Comunicación 2018).

19 Julio Arbizu, 'El fallo de Sala Constitucional de la Corte Suprema de Justicia hondureña sobre la MACCIH: sí, pero no' (*Blog de la Fundación para el Debido Proceso*, 12 June 2018) <https://dplfblog.com/2018/06/12/el-fallo-de-sala-constitucional-de-la-corte-suprema-hondurena-sobre-la-maccih-si-pero-no/>

20 Emy Padilla, 'Justicia de Honduras declara inconstitucional la Ley Marco de Protección Social' (*Criterio HN*, 5 April 2022) <https://criterio.hn/justicia-de-honduras-declara-inconstitucional-la-ley-marco-de-proteccion-social/> accessed 30 March 2023.

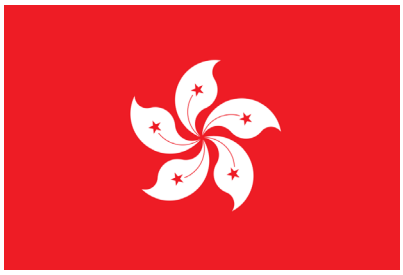
Honduran legislation."[21] Próspera claims respect for the legal stability guarantee under the ZEDE regime, but the results of this process are yet to be seen. The same occurs with the CICIH´s constitutional amendment project. However, the memorandum subscribed by the Honduran Government and United Nations was extended for six more months in June 2023. One of the critical compromises in this document is the ratification of the convention to install the CICIH, which has not been written yet. It will be essential to follow the advancement of the compromises agreed upon in the memorandum and the negotiations in Congress to approve a constitutional amendment with the scope proposed by Congresswoman Zelaya. These constitutional reform processes will continue during the 2023 edition, along with a new constitutional amendment project presented by the Executive concerning a package of legislative measures on the fiscal regime.

V. FURTHER READING

Rafael Jerez, 'Aspectos claves del memorándum de entendimiento suscrito entre el Gobierno de Honduras y la ONU para instalar la CICIH' [2022] Envío 17-23.

21 'Demanda de $10,775 millones de dólares contra el Gobierno de Honduras' (*Próspera Newsroom*, 20 December 2022) <https://prospera.hn/news/press-releases/demanda-de-10-775-millones-de-dolares-contra-el-gobierno-de-honduras> 31 March 2023.

Hong Kong SAR, China



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I. INTRODUCTION

There are two Special Administrative Regions (SAR) in the People's Republic of China (PRC), the Hong Kong SAR and Macao SAR. Pursuant to Article 31 of the PRC's Constitution, both are governed by Basic Law adopted by the National People's Congress (NPC)[1]. As a usual feature of any constitution in the world, the Basic Law of Hong Kong contains a chapter on the political system, protecting fundamental rights, and the interpretation[2] and amendment[3] of the Basic Law. However, the mini-constitution also contains 'unusual features' such as chapters on Central-local relations, the economy, external relations competencies, and the obligation to enact local laws on national security offenses.

On May 28th, 2020, the National People's Congress Session, delayed by the COVID-19 pandemic, adopted a decision to "take necessary measures to establish and improve the legal system and enforcement mechanisms for the HKSAR to safeguard national security, as well as to prevent, stop and punish in accordance with the law acts and activities endangering national security". Therefore, the Standing Committee of the National People's Congress (NPCSC) has been entrusted to adopt the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (HKNSL). To apply the HKNSL locally in Hong Kong, the NPCSC decided to include it in Annexe III pursuant to Article 18 of the Hong Kong Basic Law. This was then followed by the promulgation of the HKNSL in Hong Kong by the Chief Executive (CE) of the HKSAR.

As discussed in the 2020 report on Hong Kong by Dr. Pui-Yin Lo, this law transforms the constitutional, political, legal, and judicial landscape of the HKSAR[4]. This Report serves as a continuum of the 2020 report. In 2022, the Hong Kong courts had to decide whether Timothy Owen KC, an English lawyer not in Hong Kong, should be admitted to Hong Kong to represent Jimmy Lai in his national security offenses trial. By a request from the CE, the NPCSC issued an interpretation of Articles 14 and 47 of the HKNSL[5]. Nonetheless, this interpretation has apparently no direct relation with the problem discussed in the courts, which does not concern Article 14 of the HKNSL.

This Report reviews whether this first interpretation could be qualified as a "constitutional reform." The HKNSL is a national law in Annexe III of the Hong Kong Basic Law and is arguably subject to it. However, there are provisions of the HKNSL that could be taken as prioritizing it and its enforcement, such as Article 42 on the presumption against bail in HKNSL and Article 62 which states that "this Law shall prevail where provisions of the local laws of the Hong Kong Special Administrative Region are inconsistent with this Law." This priority appears contradictory to Articles 4 and 5 of the HKNSL. Article 4 of the HKNSL expresses that "human rights shall be respected and protected in safeguarding national security in the Hong Kong Special Administrative Region." Moreover, "the rights and freedoms, including the freedoms of speech, press, publication, of association, assembly, procession, and demonstration, which the residents of the Region enjoy under the Basic Law of the Hong Kong Special Administrative Region, the provisions of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law." Article 5 of the HKNSL, states that the rule of law shall 'be adhered to in preventing, suppressing, and imposing punishment for offenses endangering national security'. Thus, both seem to promote the protection of fundamental rights in accordance with the Hong Kong Basic Law and the tradition of the HKSAR courts in applying the Basic Law with the common law's concern of promoting the observance of fundamental rights.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The HKNSL has been enacted on June 30th, 2020, by the NPCSC. In 2022 and for the first time since its adoption, the NPCSC issued an interpretation of the HKNSL. This section describes the background leading to this interpretation.

1 Constitution of the People's Republic of China, article. 31:< http://www.npc.gov.cn/englishnpc/constitution2019/201911/1f65146fb6104dd3a2793875d19b5b29.shtml>, accessed April 16, 2023.

2 Hong Kong Basic Law, article 158: < https://www.basiclaw.gov.hk/en/basiclaw/chapter8.html >, accessed April 16, 2023.

3 Hong Kong Basic Law, article 158: < https://www.basiclaw.gov.hk/en/basiclaw/chapter8.html >, accessed April 16, 2023.

4 Barroso, Luis Roberto and Albert, Richard, The 2020 International Review of Constitutional Reform (September 4, 2021). Published by the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism (ISBN 978-1-7374527-0-6), Available at SSRN: <https://ssrn.com/abstract=3917596>, accessed on April 18, 2023.

5 Interpretation by the Standing Committee of the National People's Congress of Article 14 and Article 47 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region, https://www.elegislation.gov.hk/hk/A406B, accessed on April 18, 2023.

Article 40 of the HKNSL states that "the Hong Kong Special Administrative Region shall have jurisdiction over cases concerning offenses under this Law, except under the circumstances specified in Article 55 of this Law." However, according to Article 65 of the HKNSL, "the power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress". Pursuant to Article 67 (4) of the PRC Constitution and Article 42 of the Legislation Law of the People's Republic of China[6], the power of legal interpretation belongs to the Standing Committee of the National People's Congress. Hence, the NPCSC is the only authority that has the power of interpretation in regard to the HKNSL.

The case that leads to the NPCSC interpretation in 2022 involves the *ad hoc* admission of overseas lawyer, Timothy Owen KC, in Hong Kong. In this case[7], the Secretary for Justice failed to advance the argument that national security considerations overwhelmingly preclude the admission of an overseas barrister to act for a defendant in a national security offense trial until very late. This case went to the Court of First Instance (High Court), the Court of Appeal, and to the Court of Final Appeal. The admission of the overseas lawyer had been granted by the High Court. This then started a long debate inside the different layers of courts on his *ad hoc* admission. After this unsuccessful decision, the Secretary for Justice appealed against the High Court's decision raising a claim against the exercise of discretion of the Chief Justice. However, the Court of Appeal rejected its application and refused leave to appeal. Therefore, the case went up to the Court of Final Appeal. This final decision does not deal with the HKNSL itself but with the procedural ground of whether the applicant can raise new points justifying departure from the principle in *Flywin Co Ltd v Strong & Associates*[8]. According to the Secretary of Justice who raised new arguments, the HKNSL is a PRC law from the continental legal system, and therefore, overseas lawyers "have little to offer because their experience is only confined to the common law[9]." Also, he argued that the case involved the protection of State secrets and sensitive information, thereby overseas lawyers should not be involved. The Secretary for Justice then applied a blanket ban on overseas lawyers in Hong Kong. However, the Court of Appeal and the Court of Final Appeal declined to consider that argument as exceptional consideration. Hence, the Appeal Committee of the Court of Final Appeal underscored the significance of national security as a consideration if and when it is properly presented before the court.

In accordance with Article 43 of the Hong Kong Basic Law and Article 11 of the HKNSL, the CE is the head of the HKSAR and shall make recommendations to the Central People's Government on matters concerning the maintenance of national security in the HKSAR. Moreover, the CE shall, if requested by the Central People's Government, submit reports on specific matters relating to the maintenance of national security in a timely manner. In accordance with the above-mentioned legal provisions, the State Council issued an official letter to the CE on November 26th, 2022, requesting him to submit a report on the progress made in the maintenance of national security in Hong Kong since the implementation of the HKNSL, including the work of the Committee on the Maintenance of National Security of the HKSAR (NSC). Two days later, the CE submitted a report to the State Council and asked it to request the NPCSC to interpret the HKNSL. Therefore, the CE's question to the NPCSC was as such: "Based on the legislative intent and objectives of the National Security Law, can an overseas solicitor or barrister who is not qualified to practice generally in Hong Kong participate by any means in the handling of work in cases concerning offense endangering national security?[10]" However, this question did not explicitly state which article of the HKNSL shall be interpreted.

To clarify the original intent of the HKNSL, the NPCSC was requested, by Central People's Government, to interpret Articles 14 and 47 of the HKNSL to make it clear that the National Security Committee of the HKSAR shall assume the statutory responsibility of safeguarding national security of the HKSAR and shall have the power to take decisions on whether national security issues are involved. As explained by the Director of the Hong Kong and Macao Affairs Office on behalf of the State Council, Xia Baolong, in a statement published in the Gazette of the NPCSC[11], the issues requested for interpretation by the NPCSC are important and concern the functions of the institutions implemented under the HKNSL. The NPCSC's interpretation of the above-mentioned legal provisions will clarify the power of the National Security Committee to take decisions on issues relating to national security. Pursuant to Xia Baolong, the interpretation of the two provisions is conducive to maintaining executive-led governance and supporting the CE in discharging their duties in accordance with the law as well as establishing a mechanism for handling similar issues in the future.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

This part describes and analyses the 2022 NPCSC Interpretation. The NPCSC was requested, by Central People's Government, to interpret Articles 14 and 47 of the HKNSL.

In this first interpretation concerning the HKNSL, the NPCSC stated that Article 14 is about the duties and functions of Hong Kong's Committee for Safeguarding National Security. According to Article 13 of the HKNSL[12], this body is composed of members of the HKSAR's government:

6 Legislation Law of the People's Republic of China, article 42, accessed <http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/11/content_1383554.htm > accessed April, 18, 2023.

7 *Secretary for Justice v Timothy Wynn Owen KC* [2023] 1 HKC 429.

8 Flywin Co Ltd v Strong & Associates Ltd (2002) 5 HKCFAR 356, [2022] HKCA 1751, [2002] HKCU 629. The principle related in this decision is composed of two elements: 1) 'the state of the evidence' which means 'that a party cannot raise a new point involving factual issues there was no reasonable that the state of the evidence relevant to the point would have been materially more favorable to the other side if the point had been taken out the trial'. The second element is 'the not considered on intermediate appeal' which is related to the most exceptional circumstances.

9 *Secretary for Justice v Timothy Wynn Owen KC*, [9].

10 Statement of the Chief Executive on the interpretation of the Law on Safeguarding National Security in Hong Kong by the Standing Committee of the National People's Congress: <https://www.info.gov.hk/gia/general/202212/30/P2022123000725.htm> accessed April 18, 2023.

11 Xia, Baolong, Explanations on the Proposal of the State Council on the Request for Interpretation of Provisions of the Law on Safeguarding National Security of the Hong Kong Special Administrative Region of the People's Republic of China (Before the Thirty-Eighth Session of the Standing Committee of the Thirteenth National People's Congress on 27 December 2022) (2023.1) Gazette of the Standing Committee of the National People's Congress, p. 46 (in Chinese).<http://www.npc.gov.cn/wxzlhgb/gb2023/202302/699f5ec62e6b406a98b7214074ec5392/files/9a2b13f2f3bc43838ee0d57c8796b83a.pdf >, accessed April 18, 2023.

12 Hong Kong National Security law, article 13: <https://www.elegislation.gov.hk/fwddoc/hk/a406/eng_translation_(a406)_en.pdf> accessed April 18, 2023.

- the Chief Executive
- the senior principal government officials: Chief Secretary for Administration, the Financial Secretary
- the head(s) of law enforcement agencies: the Secretary for Justice, the Secretary for Security, the Commissioner of Police, the head of the Department for Safeguarding National Security of the Hong Kong Police, the Director of Immigration, the Commissioner of Customs and Excise, and the Director of the Chief Executive's Office.
- a secretary and an advisor appointed by the Central People's Government.

The Committee act under the supervision of the Central People's Government and is accountable in front of it. Among its duties, it must provide a mechanism for the Region in regard to safeguarding national security. Therefore, it has the power to make judgments on whether national security is involved. According to Article 14 of the HKNSL, the functions of the Committee on Safeguarding National Security in the HKSAR are as follows:

- analyzing and assessing developments in relation to safeguarding national security in the Hong Kong Special Administrative Region, making work plans, and formulating policies for safeguarding national security in the Region,
- advancing the development of the legal system and enforcement mechanisms of the Region for safeguarding national security,
- coordinating major work and significant operations for safeguarding national security in the Region[13] .

In its express terms, this provision suggests functions of the macro and systemic level for the Committee. The 2022 NPCSC Interpretation of Article 14 of the HKNSL indicates that the Committee can make decisions on specific micro or applied questions. However, the NPCSC recalls that the rulings of the Committee are not subject to any judicial review. In addition, its works cannot be interfered with by any powers of the HKSAR, and all organs of the HKSAR have to apply and implement its decisions.

In a second paragraph, the NPCSC explains Article 47 of the National Security Law. According to this article, local judges must ask for and obtain a certificate from the CE "to certify whether an act involves national security or whether the relevant evidence involves State secrets when such questions arise in the adjudication of a case." Moreover, the certificate binds the courts. The NPCSC Interpretation of this article of the HKNSL indicates that the question about the suitability of an overseas lawyer's participation in a national security offense trial is a question that involves national security that the courts ought to have sought a certificate from the Chief Executive, and in the event that the courts did not do so, the Committee under Article 14 would make a decision.

In a 3-page interpretation, the NPCSC did not exactly reply to the question of the Chief Executive on whether we should allow an overseas counsel in a case related to a national security offense. It simply said that the issue pertaining to the admission of an overseas judge is a matter of Article 47 and a certificate from the CE is needed. Rather, it is a clarification of the duties of the Chief executive regarding the HKNSL. The intent of the 2022 NPCSC Interpretation seems to have adopted the principle of subsidiarity in favor of the HKSAR based national security institutions. Moreover, the Committee seems to have become the institution of last resort and ultimate determiner of whether an act involves national security in the HKSAR, and the "act" that may be subject to this authority and mechanism includes a matter that arises in the adjudication of a case before the courts or in connection with the adjudication of a case before the courts.

This first interpretation of the HKNSL was adopted by the NPCSC. While the NPC can overturn a decision of the NPCSC, this is unlikely to happen. Also, the NPC or the NPCSC can enact amendments to the HKNSL to overwrite the interpreted provision, which is also unlikely to happen. The HKSAR courts have disavowed jurisdiction to review provisions of the HKNSL against the Hong Kong Basic Law on the superficial basis that the HKNSL was introduced in accordance with Article 18 of the Hong Kong Basic Law. This refusal of interpreting the HKNSL with the Hong Kong Basic Law has been confirmed by the Court of Final Appeal in the Lai Chee Ying case of 2021[14]. In its paragraph 37, the Court stated that "in our view, in the light of Ng Ka Ling v Director of Immigration (No. 2), the legislative acts of the NPC and NPCSC leading to the promulgation of the NSL as a law of the HKSAR, done in accordance with the provisions of the Basic Law and the procedure therein, are not subject to review on the basis of any alleged incompatibility as between the NSL and the Basic Law or the ICCPR as applied to Hong Kong[15]." This case fails to address any substantive issue, such as whether the HKSAR courts, owing their jurisdiction or judicial power from the Hong Kong Basic Law, are not qualified to review the propriety and extent of the jurisdiction they obtain from the HKNSL. All that they can do is apply Articles 4 and 5 of the HKNSL to harmonize the application of the provisions of the HKNSL with the protection of fundamental rights.

IV. LOOKING AHEAD

On March 21st, 2023, the Executive Council "advised" and the Chief Executive of the Hong Kong SAR "ordered" the amendment of the Legal Practitioners Bill. It is expected that the Legislative Council will deliberate the bill in May 2023 with a view for it to pass in that month[16]. The new section 27B exposes that an overseas lawyer must not be admitted for a national security case, unless the CE considers that there is an exceptional circumstance, i.e., "has sufficient grounds for believing that the lawyer's practicing or acting as a barrister for the NS case does not involve national security or would not be contrary to the interests of national security." This amended section implies that the power to admit an overseas lawyer is no longer in the hands of the High Court of the HKSAR, pursuant to section 27(4) of the actual Legal Practitioner Bill[17]. Plus, according to the new section 27C of the bill, "an overseas lawyer seeking to be admitted for a national security case [must] obtain a notice of permission to proceed issued by the CE, before an admission application may be made. The applicant must

13 Hong Kong National Security law, article 14: <https://www.elegislation.gov.hk/fwddoc/hk/a406/eng_translation_(a406)_en.pdf> accessed April 18, 2023.

14 *HKSAR v Lai Chee Ying* [2021] 24 HKCFAR 33.

15 *Ibid.*

16 Legal Practitioners (Amendment) Bill 2023 < https://www.legco.gov.hk/en/legcobusiness/council/bills.html?bill_key=10016&session=2023>, accessed April, 18, 2023.

17 Legal Practitioner Bill, section 27(4): <https://www.elegislation.gov.hk/hk/cap159>, accessed April 18, 2023.

provide a written statement and supporting evidence showing grounds that the application falls within the exceptional circumstance. The CE will issue a notice of permission to proceed only if the CE considers that there is a real prospect that the exceptional circumstance exists." Furthermore, the new section 27D of the same amended Bill requires that "before making any order as to the admission of an overseas lawyer for an NS case, the Court must request and obtain a certificate from the CE under Article 47 of the HK National Security Law and must not admit the lawyer unless the Court receives a certificate from the CE certifying that the exceptional circumstance exists."

On April 11th, 2023, an application for leave to apply for judicial review was filed by Jimmy Lai's legal team in order to quash two decisions, the decision from the Committee which ruled that overseas lawyers taking part in Jimmy Lai's case are contrary to national security interests and the decision from the Director of Immigration that any new visa application from Timothy Owen KC shall be refused. According to the application, those decisions are considered *ultra vires* in regard to the powers given by the HKNSL because the NCS also had "misconstrued the interpretation as creating a new function" which is to decide whether or not to admit an overseas counsel in national security cases[18]. Again, the 2022 NPCSC interpretation of Articles 14 and 17 seems to be at the heart of the dispute. The case may lead to further action by the Committee, the Chief Executive, and/or the local courts.

Another major question for Hong Kong is whether or not the local government will enact its own national security law through Article 23 of the Basic Law, which presumably means that none of its provisions must contravene the Hong Kong Basic Law. If yes, two questions will emerge:

- First, would this local law be the same as the one enacted by the NPCSC in 2020? While the HKNSL has covered some parts of Article 23 such as secession and subversion, and incitement of secession and subversion, there are plenty of subject matters left for the HKSAR authorities to enact legislation to safeguard national security, not only pursuant to Article 23 but also to address other national security risks or threats.
- Second, who will be able to review it? Would the NPCSC be the sole reviewer of the local legislation? If this is the case, would it be contrary to Article 158 of the Basic Law and case laws as both the NPCSC and Hong Kong courts have the power of interpretation?

Lastly, in March 2023, the Central Committee of the Communist Party of China and the State Council of the PRC issued the Party and State Institution Reform Plan. It includes that both SARs, Hong Kong and Macao, works will be administratively handled by a Work Office of the Central Committee of the Communist Party of China to be established within 2023 on the basis of the Hong Kong and Macao Affairs Office of the State Council, with the name of the Hong Kong and Macao Affairs Office of the State Council retained. This shift from state to party institution work institution can be significant. This is because the Hong Kong Basic Law is a product of the PRC's Constitution, and its restrictive provisions on Central-local relations describe and relate to relationships between state, provincial, and municipal institutions and the HKSAR. While Party leadership is evident in the conception and implementation of the "one country, two systems" policy, the institutional reform might be simply extra-legal in the sense of it being extra-Basic Law. It could fit in the pattern or approach of the Central Authorities of resolving SAR matters by applying methods not exclusively pursuant to the framework and provisions of the Hong Kong Basic Law.

V. FURTHER READING

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Xia, Baolong, Explanations on the Proposal of the State Council on the Request for Interpretation of Provisions of the Law on Safeguarding National Security of the Hong Kong Special Administrative Region of the People's Republic of China (Before the Thirty-Eighth Session of the Standing Committee of the Thirteenth National People's Congress on 27 December 2022) (2023.1) Gazette of the Standing Committee of the National People's Congress, p. 46 (in Chinese).

18 See Candice Chau, 'Hong Kong media tycoon Jimmy Lai files legal bid against gov't decision to deny his foreign lawyer a visa' (*Hong Kong Free Press*, 13 April 2023) < https://hongkongfp.com/2023/04/13/hong-kong-media-tycoon-jimmy-lai-files-legal-bid-against-govt-decision-to-deny-his-foreign-lawyer-a-visa/>, accessed April 18, 2023.

Hungary

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I. INTRODUCTION

Hungary's Constitution, the Fundamental Law (FL), was adopted in 2011 by the Fidesz government led by Viktor Orbán, which enjoyed a two-thirds parliamentary majority. Since then, there have been three general parliamentary elections in 2014, 2018, and 2022, each with the same political power's two-thirds victory. According to the Constitution, the two-thirds parliamentary majority can adopt and amend the Constitution without any further procedure as a constituent power. As part of the political agenda, the constitutional project was accomplished by eleven amendments to the FL, incrementally transforming the entire constitutional order in the past twelve years. As part of this constitutional project, the Constitutional Court's (CC) role changed, and its competencies transformed, making it a counterbalance to the ordinary judiciary rather than the political branches of power.

Even though the special legal order (state of danger) related to the Covid-19 pandemic ended in 2022, based on the Tenth Amendment to the FL, the Government introduced it again due to the war in Ukraine.

Our report will focus on explaining the ongoing problems concerning the constitutional regulation of and practice related to special legal orders in Hungary, as well as the controversies related to the Eleventh Amendment to the FL, which changed the election calendar on the one hand, and introduced some historicizing terms related to the counties, on the other hand, the latter of which proved to be a communication tool, rather than a genuine amendment.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

To present the context of the topics discussed in Chapter III, in this section, we summarize the Hungarian Constitution's particularities and some aspects of the constitution-making and amending practice.[1]

The FL was enacted based on the previous Constitution's provisions by the two-thirds majority of the National Assembly (the Parliament). The FL's drafting process lacked transparency, inclusiveness, and the parliamentary debate on the proposed text lasted only a month. As a result, the FL was approved by the governing majority's unilateral votes (having two-thirds of the seats in Parliament) in the Spring of 2011. Regarding its amendability, the FL contains explicit rules on the formal amendment procedure and contains no eternity clauses or otherwise entrenched procedures. The FL can be amended by the two-thirds majority of the National Assembly, while the popular vote is explicitly excluded from the possible procedures. The FL was altered eleven times between 2012 and 2022: three times in 2012, twice in 2013, and once in 2016, 2018, 2019, and 2020 respectively. The Tenth and the Eleventh Amendments to the FL were enacted in 2022. Some of those changes were reactions to the CC's decisions against the government; others implemented different political purposes or deregulated provisions that had become superfluous. The amendments were supported exclusively by the governing (super)majority. The only exceptions are the Eighth and the Eleventh Amendments (2019 and 2022). The former repealed the provisions related to the heavily criticized and therefore discarded administrative court system; this was also supported by opposition MPs. The latter was supported by five MPs of a far-right opposition party outside the opposition alliance. In practice, the provisions of the FL were also supplemented by the Transitory Provisions, right before entering into force of the FL. However, the CC expressed that the concerned legal act has an uncertain legal status and cannot be considered part of the Constitution. As a result, formal amendments included these provisions in the text of the FL. The CC is not authorized for substantive review of constitutional amendments. However, the Fourth Amendment to the FL introduced significant changes in this regard: the CC can review constitutional amendments before or thirty days after their enactment – but only on a procedural basis. Even before this Amendment, it was generally accepted that if procedural rules are violated, the constitutional amendment could be considered unconstitutional on formal grounds.

The Tenth Amendment, the first of those adopted in 2022, modified both the text of the FL in force and the Ninth Amendment that had been adopted but was not yet in force. It related to the special legal order permanently maintained in Hungary by extending the legal grounds for a state of danger allowed for its prolongation while the pandemic was subsiding. The Eleventh Amendment brought changes in two separate topics. First, it moved the date of municipal elections. As a result, in 2024, the municipal and the European Parliamentary elections will be held on the same date. Secondly, it changed the names of the counties to their historic titles.

In 2022, opposition MPs initiated amendments to the Fundamental Law four times (T/1210, T/1298, T/1404, T/1493) – and were stopped at the earliest stage of the parliamentary work (entry into Order Book) by

1 Certain findings are based on the report on Hungary in the 2020 and 2021 International Review of Constitutional Reform.

the governing supermajority. Some proposals aimed at strengthening independent institutions (the proposal for establishing the office of the Anti-corruption Chief Prosecutor and the proposal for participating in the activity of the European Public Prosecutor's Office), extending the protection of fundamental rights (the proposal for recognizing the right to housing), while others were of a clear political nature (the proposal for ending the mandate of all leaders of state organs, appointed or elected by the Orbán-government).

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. PERMANENT STATE OF DANGER

As we mentioned in the previous reports, based on the constitutional provisions on special legal orders, the Government declared a state of danger in March 2020 when the WHO decided that Covid-19 was a pandemic. During 2021 and 2022, there was a continuous state of danger in Hungary; however, following the Tenth Amendment to the Fundamental Law, its legal ground changed.

Between March 2020 and May 2022, apart from a period of four months, the state of danger was based on the Covid-19 pandemic. Although among the six special legal orders included in the Fundamental Law at that time, the state of danger was designed for handling an industrial catastrophe or a natural disaster (i.e., categories the Covid-19 situation was hard to squeeze into), the Government included the pandemic in this framework, which the Parliament approved by adopting an Enabling Act.

During this period, in 2020, the two-thirds majority in Parliament adopted the Ninth Amendment to the FL that we analyzed in the 2021 report. The amendment simplified the system of special legal orders in Hungary. The new regulation, which includes three types of special legal orders, was planned to enter into force in 2023. In the new system, the third type of special legal order remains the state of danger that continues to be designed to handle serious incidents threatening lives and property, such as a natural disaster or an industrial catastrophe. However, the vague formulation of the grounds for the state of danger allows the Government to declare it in unforeseen cases. The constitutional amendment brought a significant change in the parliamentary control over the Government's state of danger decrees: whereas beforehand, the extension of the temporal scope of a government decree required authorization by the Parliament, under the new regulation, based on a parliamentary authorization, the Government is entitled to extend the state of danger itself.[2]

While there has been an almost constant state of danger for three years, its grounds changed in the middle of 2022 when the Tenth Amendment to the FL was adopted. In May 2022, a few days before the end of the third period of the state of danger based on the Covid pandemic, the Parliament adopted the Tenth Amendment to the FL, which altered the text of both the FL then in force and the Ninth Amendment (which latter entered into force later in 2022). In both texts, the grounds for declaring the state of danger were supplemented by "the event of an armed conflict, state of war or humanitarian crisis in a neighbouring country." The new text referred to the war in Ukraine. While the effects of the Covid pandemic were subsiding and the third period of the pandemic-based state of danger was nearing its end, the Government declared a new, fourth, and later fifth period of the state of danger, this time based on the armed conflict in Ukraine. The Tenth Amendment to the Fundamental Law has created the possibility for the Government to maintain a state of danger despite the changing circumstances.

2. CHANGING THE ELECTION CALENDAR – THE ELEVENTH AMENDMENT ON THE DATE OF MUNICIPAL ELECTIONS

In the middle of Summer 2022, the Eleventh Amendment to the FL was adopted changing, on the one hand, the names of the counties, and, on the other hand, moving municipal elections from autumn to spring. As a result of this latter change, European Parliamentary (EP) elections and municipal elections will be held on the same date, starting from the 2024 elections. While the former modification, affecting only the names of counties, can be regarded as of symbolic importance (as argued in the section below), changing the dates of elections is of great relevance in terms of Hungarian politics and democracy and might be regarded as an example of constitutional amendment fuelled by sheer power-calculations (abusive constitutionalism)[3] as well as of a 'structural risk';[4] namely, that election law is exposed to partisan changes, especially when one political actor has the power to change it unilaterally.

To understand the importance of the amendment, one needs to consider its political context. At the parliamentary elections held in April 2022, government parties Fidesz-KDNP won again by a two-thirds majority in the unicameral parliament, even though the opposition, which involves parties with very different agendas and ideologies, made an electoral alliance and ran with a single party list and coordinated in the single districts. Understandably, after the elections, the idea of electoral alliance and cooperation was questioned, and many politicians and political commentators expressed the need for a single political actor emerging from the opposition, or at least for the decrease of the number of opposition parties. The election calendar supported this idea to some degree, as EP elections were to be held in Spring 2024 in an electoral system where only party lists compete, and seats are distributed proportionally; therefore, no electoral cooperation is needed. This would have provided room for parties to build a distinct identity and pursue separate agendas. It would also have given clear feedback on actual popularity in terms of vote share. Municipal elections were scheduled for Autumn 2024, so around half a year later, where the opposition is strategically compelled to cooperate since mayors are elected in a one-round plurality system, and members of city councils in towns with more than 10.000 residents in a Mixed-Member-Plurality system,

2 For detailed analysis on the Ninth Amendment, see the 2021 report and Gábor Mészáros, 'Exceptional Governmental Measures without Constitutional Restraints' (*Hungarian Helsinki Committee*) https://helsinki.hu/en/wp-content/uploads/sites/2/2023/01/Meszaros_special_legal_order_02112022.pdf accessed 31 March 2023

3 For a most recent study on applying Landau's concept of abusive constitutionalism on Hungary see: Nóra Chronowski, Ágnes Kovács, Zsolt Körtvélyesi and Gábor Mészáros, 'The Hungarian Constitutional Court and the Abusive Constitutionalism' (2022) 7 MTA LWP https://jog.tk.hu/mtalwp/the-hungarian-constitutional-court-and-the-abusive-constitutionalism accessed 31 March 2023

4 Richard Pildes, 'Inherent authoritarianism in Democratic Regimes' in András Sajó (ed), *Out of and into authoritarian law* (Kluwer Law International, 2003) 125–149.

where in the absence of cooperation candidates of Fidesz-KDNP even with only the relative majority of vote share can win a disproportionately high number of seats. Therefore, by holding these two elections on the same date, the opposition – if it is to act in a strategically sound way – needs to cooperate much earlier and without the chance of the parties building their agenda and receiving electoral feedback.

Since the date of the municipal elections is constitutionally entrenched [FL, Article 35 (2)], a constitutional amendment was required. Moreover, as mayors and other municipal representatives were elected for a five-year term in Autumn 2019, a special provision was added, under which the mandate of those already in office expires only on 1 October 2024. Accordingly, a rather strange situation is to occur in Spring 2024, namely, that the newly elected representatives will enter office only about half a year after the elections, and, in turn, those elected in 2019 will remain in office for the same period despite losing the elections.

The Amendment, which was submitted as a single MP proposal, was adopted with 140 voting in favor and 36 against. Notably, no political party from the opposition supported the change.[5] In fact, in the parliamentary debate, it was argued by opposition leaders that the Amendment serves only partisan purposes. In contrast, the reasoning for the Amendment as well as arguments expressed in the parliamentary debate by government politicians, referred to the financial benefits of the change, arguing that the 2022 parliamentary elections that were held together with four referendum questions[6] proved that around HUF 10 billion, (around EUR 25 million) was spared by organizing the elections and referendum on the same date.

As both under the relevant case law of the CC and the text of the FL constitutional amendments might be examined, only regarding the procedural requirement of adoption, nobody lodged a motion before the Court. Moreover, there is no solid doctrinal basis on which such a motion might be based, as in this case, the substance of the amendment itself (even if one accepts the possibility of an unconstitutional constitutional amendment) is not unconstitutional per se – it is arguably a democratic option to have two elections on the same date, although it might be detrimental regarding the different stakes at EP and municipal elections. In addition, there are financial arguments for such conduct, although some commentators expressed doubts about the amount of money that can be saved this way.[7]

However, on the one hand, it is questionable that budgetary considerations of this magnitude might justify such changes. On the other hand, and more importantly, when all the circumstances are considered, it seems to be clear that the real reason for amending was not saving money for the public budget but changing the law of democracy because of sheer political calculations. The amendment was adopted without the votes of the opposition; moreover, it was enacted in the middle of Summer, after a long campaign period, after which the political community was understandably exhausted, and the opposition was deeply disillusioned. It is no wonder that no robust public discourse took place on the amendment.

3. THE ELEVENTH AMENDMENT AS A COMMUNICATION TOOL

As mentioned above, the Eleventh Amendment to the FL also renamed the middle-size administrative units of Hungary the counties. Hungary is a unitary state, therefore, state organs function only on the central level (there is no federal and state level in the exercise of state power). The country has nineteen counties (plus the capital city, Budapest) which are important from two aspects. First, most central administrative state organs exercise their powers through their county units. With some exceptions, at the county-level, the so called 'county government offices' exercise administrative power, headed by the county government commissioner, appointed by the prime minister. The second important aspect is that the local (county-level) governments also function: the members of 'county general assemblies' are elected at local elections.

The Eleventh Amendment restored the historic name of the counties. In verbatim translation, counties are named 'castle-counties' (vármegye) – this name was used in the past centuries when Hungary was a kingdom. In 1946 Hungary became a republic, which later, between 1949-1989, functioned under Soviet influence and communist rule. According to the official explanation, the restoration of the historic name of the counties, is a tribute to the past in which the castle-counties functioned as 'bastions of constitutionality.' One can add that this restoration has no legal or social significance, taking into consideration that the territory and the number of historic castle-counties were completely different compared to the present ones. This part of the Eleventh Amendment demonstrates that the Government, having a two-thirds majority in Parliament, uses the constitutional amendment as a simple communication tool. The restoration of the old name of counties can be linked on the communication level to the 'honour of the achievements of the historic constitution' which – according to the Fundamental Law – has to be taken also into consideration when interpreting the constitution. This is a more than contradictory provision, demonstrated by the related, confusing practice of the CC.[8] Moreover, in light of the other part of the amendment (changing the election calendar), the historicizing changes arguably served the purpose of diluting the public discourse.

IV. LOOKING AHEAD

The year 2022 proved again what we already knew: Hungarian constitutional politics is turbulent, unpredictable, and dominated by ad-hoc

5 The only exception was the far-right 'Mi Hazánk' ('Our Homeland') party, which has five MPs. The party had a single list at the 2022 elections, and an alliance with Mi Hazánk and other opposition parties is not an option both because of its ideological incompatibility with the other parties and because the party clearly pursues an outlier political strategy.

6 On the referendum questions, see: Viktor Z. Kazai, 'The Role of Referenda in Orban's Regime' *(Verfassungsblog*, 18 June 2022) https://verfassungsblog.de/the-role-of-referenda-in-orbans-regime/ accessed 31 March 2023

7 Tóth Zoltán, former president of the predecessor of National Election Office (Nemzeti Választási Iroda, NVI) argued that the budget for the 2022 elections was increased from the original HUF 12 billion to HUF 19 billion, and that shows the real extra costs of adding a referendum. The current NVI admitted that the referendum costs extra money, however, the increase was necessary also because of the increase of prices (e.g. papers). Nevertheless, the NVI argued that HUF 7,2 billion is to be saved by organizing the two ballots simultaneously. Portfoliu.hu, '7 milliárd forinttal drágul a 2022-es parlamenti választás szervezése' (1 February 2022) https://www.portfolio.hu/gazdasag/20220201/7-milliard-forinttal-dragul-a-2022-es-parlamenti-valasztas-szervezese-524451 accessed 31 March 2023

8 Gábor Halmai, 'The Hungarian Constitutional Court and Constitutional Identity' (*Verfassungsblog*, 10 January 2017) https://verfassungsblog.de/the-hungarian-constitutional-court-and-constitutional-identity/ accessed 31 March 2023

and arbitrary amendments. Although elections were held in the Spring, the two successful amendments pushed through by the Fidesz majority were not at all mentioned in the electoral agenda of the government parties. This also shows that in many cases, the changes just appear out of nowhere, in an up-bottom fashion in the public discourse, and they are adopted shortly afterward without any meaningful public debate.

In these circumstances, it is rather hard to foretell what comes next. The mere fact that there is no constitutional amendment on the table does not mean anything. It might have seemed that with the Ninth Amendment, constitutional questions related to the state of emergency had been settled; however, the Tenth Amendment showed that the framework is always tailored to current events. Furthermore, the Eleventh Amendment proves that constitutional politics in the contemporary Hungarian political system is in constant motion – it would be hard to tell what the ever-changing political strategic needs will require next.

V. FURTHER READING

Bernadette Somody, 'Power Politics versus the Rule of Law in Hungary: A Case Study' in Redo Slawomir (ed), *The Rule of Law in Retreat: Challenges to Justice in the United Nations World* (Rowman and Littlefield 2022)

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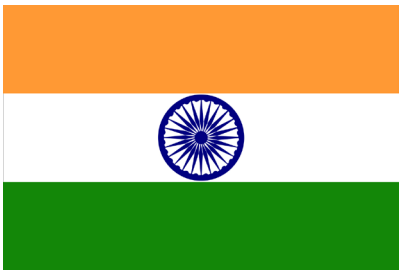
India



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I. INTRODUCTION

The year 2022 was an ambivalent year for the democratic and liberal values enshrined in the Constitution of India ('Constitution'). While no bill to amend the Constitution was neither proposed nor passed, a study of political practices and judicial decisions reveals two contrasting trends. On the one hand, the Supreme Court handed several progressive, rights-enforcing decisions; on the other, there was further deterioration in the democratic culture practiced by the political elites, posing constant threats to the values of federalism, free speech, and the independence of fourth-branch institutions and judiciary. Despite such repeated affronts to India's constitutional ideals, the courts adopted a non-interference approach. Barring a decision on sedition, the Supreme Court kept pending several matters involving critical constitutional questions like the constitutionality of the electoral bond scheme, amendment to the citizenship law, and the change in status of the state of Jammu and Kashmir.

Given the absence of any constitutional amendment in India in 2022, this chapter is structured slightly differently than others. In Part II, we discuss two Supreme Court decisions that substantively changed constitutional jurisprudence in India. The first decision upheld a 2019 constitutional amendment, and the second expanded the scope of judicial review of legislative processes. In Part III, we discuss a few trends to highlight the manner in which the political elites are attempting to change the meaning of federalism and judicial independence while claiming to remain within the bounds of the Constitution. In Part IV, we discuss key decisions of the Supreme Court that expanded on the rights enshrined in the Constitution.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2019, the Government of India ('Union Government') enacted the 103rd amendment to the Constitution, inserting a new clause each to Articles 15 and 16 for the advancement of economically weaker sections belonging to the hitherto non-protected classes of citizens. This necessarily meant that the amendment protected economically vulnerable but socially forward classes of citizens. Apart from any special measure that the government may deem fit, the amendment specifically recognized the right of the union and state governments to make reservations for such class of citizens in public employment and educational institutions, subject to the maximum limit of ten percent.[1] In November 2022, a five-judge bench of the Supreme Court upheld the constitutionality of the amendment in a 3:2 split decision in *Janhit Abhiyan v. Union of India*.[2]

In upholding the amendment, the majority emphasized that reservations are an instrument of affirmative action. It noted that reservations are critical to support economically weaker sections, correct pervasive inequality, and meet the constitutional goal of an inclusive and egalitarian society. It observed that the amendment would be a catalyst in alleviating the conditions of economically disadvantaged people and that the sole reliance on the economic criterion in making policies for positive discrimination does not violate the basic structure of the Constitution. It must be noted that all five judges agreed to this conclusion.

In another decision, in the year 1992, the Supreme Court held that there would be a 50% ceiling on the extent of reservation in public employment and educational institutions.[3] The 103rd amendment breached this upper limit by extending an additional 10% reservation in favor of the economically weak sections of the citizens. The Supreme Court negated the challenge to the amendment on this ground by noting that the upper limit of 50% is not an inflexible rule and that this limit applies only to existing reservations under Articles 15 and 16, made in favor of socially and educationally backward classes, scheduled castes, scheduled tribes, and other backward classes of citizens ("protected classes").

On the exclusion of the hitherto protected classes from enjoying the benefits of the new 10% reservation, there was a difference in opinion amongst the judges. The majority of judges held that such exclusion does not violate the equality clause of the Constitution for multiple reasons. *First*, the protected classes already enjoy reservation under Articles 15(4), 15(5), and 16(4), and thus, their exclusion from the amendment constitutes a reasonable classification. *Second*, as poverty is one of the criteria used while determining a class as 'socially and educationally backward', the parliament has the right to exclude such classes from the domain of the amendment. *Third*, if such a distinction is not made, an excessive advantage would be conferred upon the protected classes, disturbing the 'entire balance of the general principles of equality and compensatory discrimination.' Challenging these reasonings, the dissenting opinion observed that denying the benefits of the

1 The Constitution (One Hundred and Third Amendment) Act 2019.
2 *Janhit Abhiyan v Union of India, Writ Petition* (Civil) No. 55 of 2019.
3 *Indira Sawhney v Union of India* 1992 Supp 2 SCR 454.

extra 10% reservation to the classes for whose benefit the reservation regime was first introduced in the Constitution, violates the principle of non-discrimination and, thus, is unconstitutional.

The other significant ruling of the Supreme Court in 2022 concerned the power of the judiciary to review legislative processes. Articles 122 and 212 of the Constitution restrict the power of the judiciary to review legislative processes. Article 122(1) states that '*the validity of any proceedings in Parliament shall not be called in question on the ground of any alleged irregularity of procedure.*' Article 212 makes a similar provision for the proceedings in state legislative assemblies. In *Ashish Shelar v. The Maharashtra Legislative Assembly*,[4] the Supreme Court not only recognized the power of the courts to review legislative processes in cases of substantive illegality and procedural irregularity but also extended it to any legislative action that could challenge the democratic framework of governance as enshrined in the Constitution of India. In other words, it was one of the first attempts by the Court to adopt Stephen Gardbaum's political process theory[5] (without referring to it) and claim the power to review purely legislative processes if the Court considers it violative of the basic principles of the Constitution. This decision effectively mutated Articles 122 and 212 of the Constitution. Now, any '*irregularity of procedure*' can be challenged if the Court considers it to violate, for example, the idea of democracy.

In brief, the case involved a challenge to the resolution passed by the Maharashtra State Legislative Assembly that suspended twelve members from the House for one year, citing their unruly behavior. The Court decided in favor of the suspended members for three reasons. Due to the paucity of space, we focus only on the third reason. The Court observed that suspending the members for one year is undemocratic and violates the idea of a parliamentary model of democracy. It noted that if the Speaker/House is allowed to suspend its members for such long durations, it would allow the ruling party to suspend the opposition members and manipulate the representative form of democracy as enshrined in the Constitution. It would curtail their right to question the government, participate in debate and deliberation on matters of national importance, disrespect the people's mandate, and deny the opposition a platform to present an alternative vision of the government and be a government-in-waiting.

If the Supreme Court chooses to take this new jurisprudence to its conclusion, it could enable it to challenge any legislative process – not only laws – for its potential impact on the democratic form of governance and even challenge laws and the presumption of constitutionality for not adhering to the parliamentary procedures.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. POLITICAL ATTEMPTS TO CHANGE INSTITUTIONAL ARRANGEMENTS ENSHRINED IN THE CONSTITUTION

The Constitution establishes India as a quasi-federal nation with a union government at the Centre and state governments at the provincial level. Every state government has an elected Chief Minister along with a nominated Governor. Along similar lines as the President, the Governor has limited powers and is supposed to act as the nominal head of the state executive. As per Article 163, the Governor is bound by the advice of the state Council of Ministers in most matters except a few and has no independent discretion. The Governor is required to work independently of any party affiliation and perform her/his duties as the guardian of the Constitution in their state. Interestingly, the Governor is nominated by the President on the advice of the Union Council of Ministers, and hence, the union government tends to use this office for political gains, particularly when they face a different political party in power in the state government. The late-twentieth century witnessed how the union government at the time collapsed several state governments ruled by opposition parties by colluding with the governors. This stopped only once the Supreme Court intervened and held such actions by the governors unconstitutional.

India is currently witnessing another phase of Governors' partisan performance for politically benefiting the union government. Though the Governors are not going to the extent of collapsing state governments directly, they are playing a crucial role in supporting the political ambitions of the union government and blocking legislative actions of the politically opposed state governments. Many such episodes took place in 2022. In several states, the Governors withheld their own consent to summon the state legislative assembly, indefinitely delayed their assent to the bills passed by the assembly, and exercised discretion on matters they possess none, actions which prima facie go against the Constitution. For instance, there are numerous Bills pending with the Governor of Telangana, who has not signed them since September 2022.[6] Similarly, the Governor of Punjab failed to respond to the government's request to summon the state legislative assembly.[7] These are a few of the many incidents wherein the Governor is bound by the request of the state Executive and has no independent discretion to disagree. These and many other affected state governments have challenged such conduct in the respective High Courts and the Supreme Court, and several judgments are expected to be released in 2023.

The office of the Governor is not the only constitutional position that has been in the middle of debate and discussion in India, the Executive has been at loggerheads with the Judiciary over the appointment of Judges. Article 124 of the Constitution empowers the President to appoint the Judges of the Supreme Court in consultation with the Chief Justice of India.[8] Because the President is a mere figurehead with little actual power, the decision is ultimately taken by the Union Council of Ministers. Textually, the President is obligated to 'consult' the Chief Justice but is not bound by her/his advice. This practice continued for four decades until it was changed by the Supreme Court in the year 1993. In *Supreme Court Advocates on Record Association v. Union of India*, the Court held that the President's 'consultation' with the Chief Justice was mandatory and that his/her opinion was binding on the President.[9] The Court created an institution called the '**Collegium**' which was to consist of the Chief Justice and two-senior most Judges,

4 *Ashish Shelar v The Maharashtra Legislative Assembly* Writ Petition (Civil) No 797 of 2021.

5 Stephen Gardbaum, 'Comparative Political Process Theory' (2020) 18 IJCL 1429.

6 *State of Telangana v Secretary to the Governor* Writ Petition (Civil) No 333 of 2023.

7 *State of Punjab v Principal Secretary* Writ Petition (Civil) No 302 of 2023.

8 The Constitution of India 1950, art 124.

9 *Supreme Court Advocates on Record Association v Union of India* (1993) 4 SCC 441.

who would take the decision on the appointment of Judges and submit the names to the President who was to approve them. The composition of the Collegium was later extended to four of the senior most judges.[10] In effect, through a judicial decision, the primacy in matters of judicial appointment was transferred from the Executive to the Judiciary, contrary to the provision of the Constitution.

The present union government tried to undo this approach in the year 2014 by introducing the Constitution (Ninety-Ninth Amendment) Act, 2014 which proposed a National Judicial Appointment Commission which would appoint Judges to the Supreme Court and high courts.[11] The membership of the Commission included representation from both the Executive and the Judiciary. The Amendment was challenged before the Supreme Court, and the Court deemed it unconstitutional.[12]

In the year 2022, the Executive launched a scathing attack on the judiciary over judicial appointments by attacking the constitutional basis of the Collegium. The Law Minister termed it alien to the Constitution since it finds no place in the text.[13] He argued that there are complaints of lack of transparency, objectivity, and social diversity within the Collegium. The Vice President termed the NJAC decision as *'a compromise of parliament sovereignty and disregard of the people's mandate'*.[14] However, the criticism was not merely verbal, and the Executive refused to approve the names recommended by the Collegium for a judgeship or issue their appointment orders. It must be noted that the official notification for appointing Judges must be issued in the name of the President. In some cases, the appointments were made swiftly while in others there has been no activity. The oldest pending appointment dates back to September 2021. The Court has responded to the Executive's allegations by publicly advising it to control the criticism. Further, the Court continues to hear a contempt petition against the Executive for its failure to approve the names of candidates cleared by the Collegium. During one of the hearings, the Court reprimanded the Executive and termed its practice as a *'device to compel the candidates to withdraw their potential candidature.'*[15] While on the one hand, the Executive's selective approach to judicial appointments raises concerns about appointing favorable judges; on the other, the collegium system continues to be questionable for its lack of foundation in the text of the constitution.

2. JUDICIAL INTERPRETATION AND CONSTITUTIONAL RIGHTS

In the year 2022, the Supreme Court delivered some significant verdicts that promote personal liberty. It broadly dealt with three areas of liberty i.e., (a) incarceration, (b) dignity and autonomy, and (c) freedom of religion.

First, in *S.G. Vombatkere v. Union of India,* the Court urged the Executive to keep in abeyance the provision of sedition i.e., Section 124-A of the Indian Penal Code.[16] Interestingly, unlike its erstwhile colonial master, India continues to retain the draconian provision of sedition which punishes any attempt to bring contempt, hatred, or disaffection towards the government. Acknowledging the rising misuse of the provision to stifle dissent, the Court urged the government to refrain from registering complaints under the section, until the time the government reconsiders the provision itself. Similarly, in *Satender Kumar Antil v. Central Bureau of Investigation,* the Court took note of the rising number of prisoners who were awaiting trial and attributed it to unnecessary arrests by the authorities, who were also, often in violation of the law.[17] The Court relied on Article 21 i.e., the Right to Life and Liberty, and reiterated that 'bail is the rule and jail is an exception'. It directed the governments to comply with this principle and consider the introduction of a separate Bail Act, which would streamline the grant of bail.

Second, in *X v. Principal Secretary,* the Court held that all women are entitled to safe and legal abortion.[18] The Court was hearing a challenge to Rule 3B of the Medical Termination of Pregnancy Rules, which contained the categories of women who can obtain an abortion, but it did not include unmarried women. The Court held that excluding unmarried women will be violative of the Right to Equality and would perpetuate the stereotype that only married women indulge in sexual activities. The Court based its decision on the woman's right to bodily autonomy and dignity. Similarly, in *Budhadev Karmaskar v. State of West Bengal,* the Court held that sex workers also possess the right to life, which includes rights of human decency and dignity.[19] Taking note of the rising abuse of sex workers at the hands of the police, the Court passed detailed directions to the governments, including the obligation to sensitize the police and other law enforcement agencies to the rights of sex workers.

Third, in *Aishat Shifa v. State of Karnataka,* the Court delivered a split judgment (1:1) on the right of female Muslim students to wear a headscarf/hijab in educational institutions.[20] Article 25 of the Constitution guarantees every citizen the right to freedom of conscience and religion. Justice Gupta observed that permitting one religious group to wear their religious symbols would be violative of secularism which demands equal treatment to all religions and preference for none. He further observed that religion has no place in a secular school and any reasonable accommodation if granted, would be violative of the right to equality. In contrast, Justice Dhulia observed that the denial of wearing hijab in the classroom violates the right to dignity of the students and denies them secular education. He observed that wearing a headscarf is a matter of choice that must be protected. In his opinion, accommodating the religious belief of the students would promote diversity and empathy among students. Due to the divergence of opinion amongst the Judges, the case has now been referred to a larger bench for a conclusive opinion.

IV. LOOKING AHEAD

Four constitutional reforms seem to be in sight in 2023. *First,* the judiciary has responded to the Executive's criticism of the lack of

10 *In Re: Under Article 143(1)* AIR 1999 SC 1.
11 Constitution (Ninety-Ninth Amendment) Act 2014.
12 *Supreme Court Advocates on Record Association v Union of India* (2016) 5 SCC 1.
13 'Law Minister questions Collegium system again' (*Live Law*, 23 January 2023), <https://www.livelaw.in/top-stories/law-minister-questions-collegium-system-again-backs-ex-judge-who-said-sc-hijacked-constitution-219657> accessed 25 March 2023.
14 Awastika Das, 'Power of the people was undone' (*Live Law*, 2 December 2022) <https://www.livelaw.in/top-stories/power-of-the-people-was-undone-world-doesnt-know-of-any-such-instance-vice-president-jagdeep-dhankhar-on-njac-verdict-215668> accessed 25 March 2023.
15 *The Advocates Association, Bengaluru v Barun Mitra* Contempt Petition (C) 867/2021 in T.P.(C) No. 2419/2019.
16 *SG Vombatkere v Union of India* Writ Petition (Civil) No. 552 of 2021.
17 *Satender Kumar Antil v Central Bureau of Investigation* M.A. 1849 of 2021.
18 *X v Principal Secretary, Health and Family Welfare Department, Government of NCT of Delhi* Civil Appeal No. 5802 of 2022.
19 *Budhadev Karmaskar v State of West Bengal* Criminal Appeal No. 135 of 2010.
20 *Aishat Shifa v State of Karnataka* Civil Appeal No. 7095 of 2022.

transparency in Collegium proceedings, by issuing detailed reasons for recommending a candidate/s. The earlier practice was for the Collegium to merely recommend names of candidates without disclosing any reasons in favor or against. The proceedings were opaque, and no one knew the backroom discussion between the Executive and the Collegium. In January 2023, the government reiterated the name of lawyer Saurabh Kirpal for elevation to the High Court of Delhi, which has been pending with the government since the year 2021. For the first time, the Collegium disclosed the government's reasons for withholdings Kirpal's nomination which was his openness about his sexual orientation (he is openly gay) and his partner being a Swiss national. The Collegium disagreed with the government and observed that it would be contrary to the Constitution to reject a candidate on the grounds of sexuality. Further, having a partner of a foreign national is no ground to pre-suppose that the partner would be inimically disposed to our country. In addition to Kirpal, the Collegium has reiterated the names of other lawyers whose nominations have been withheld by the government on the grounds of bias and prejudice against the government. The government has not taken the Collegium's disclosure positively, and the Law Minister has termed it a 'serious issue'. In fact, the Executive has gone ahead and selectively appointed some Judges from the names recommended by the Collegium, while withholding the others. The Court has termed this practice as a matter of grave concern.[21] The tussle does not seem to be dying down; however, we can expect more transparency in the working of the Collegium, which is a breath of fresh air.

Second, a constitution bench of the Supreme Court has finished hearings in a dispute between the government of Delhi and the Union government, which will have repercussions on the jurisprudence on federalism in India. Delhi holds a unique constitutional position being the capital of India. It is dually administered by both the union and the state government, with the latter having all the powers of a state government except on matters of public order, police, and land. Akin to a state government, Delhi has an elected government presided over by the Chief Minister and a Lieutenant Governor. The Supreme Court has consistently held that the Lieutenant Governor in Delhi is bound by the advice of the elected Council of Ministers in matters of their competence. However, in the year 2021, the Union Government enacted a constitutional amendment that barred the legislative assembly from considering matters concerning the day-to-day administration of the national capital territory of Delhi. Furthermore, it obligates the government to obtain the Lieutenant Governor's opinion before undertaking any sort of executive action. The Delhi government has challenged this amendment before the Supreme Court on the grounds of violating the separation of powers, federalism, and representative democracy, which are protected features of the Constitution. We can expect the Court's judgment this year. It may significantly affect the jurisprudence on federalism and the role of unelected Governors.

Third, in a judgment delivered in March 2023, a five-judge bench of the Supreme Court effectively amended the Constitution while holding that henceforth, the appointment of the Election Commissioners would be made by the President on the basis of the advice tendered by a three-member committee comprised of the Prime Minister of India, the Leader of Opposition in the Lower House of Parliament (in whose absence, the leader of the largest opposition party by numerical strength), and the Chief Justice of India.[22] Hitherto, the Election Commissioners were appointed by the President on the advice of the Prime Minister. Rightly recognizing that it was virtually entering the domain of the legislature in delivering this decision, the Court restricted the applicability of its directions until the time the Parliament enacts a law in this regard. We can expect parliamentary legislation regulating the appointment, removal, and terms of service of election commissioners soon.

Fourth, a three-judge bench of the Supreme Court has transferred the case about the recognition of same-sex marriage as a right under the Constitution to a constitution bench of five judges. We may expect a decision on this plea by the end of this year. It is important to note that the union government has positioned itself against the recognition of same-sex marriage, citing its incompatibility with traditional notions about family and societal structure. In the last decade, the Supreme Court has delivered a line of progressive decisions recognizing the LGBTQ+ community as enjoying the full benefits of citizenship under the Constitution of India, quashing all practices of discrimination.[23] It is expected that the Court continues building on its past jurisprudence and upholds marriage equality in India.

V. FURTHER READING

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Anoop Baranwal v Union of India Writ Petition (Civil) No. 104 of 2015.

Deepika Singh v Central Administrative Tribunal SLP (C) 7772 of 2021.

21 'Collegium Resolution dated 21 March 2023' (Supreme Court of India) <https://main.sci.gov.in/pdf/Collegium/22032023_092852.pdf> accessed 27 March 2023.

22 *Anoop Baranwal v Union of India* Writ Petition (Civil) No. 104 of 2015.

23 *National Legal Services Authority v Union of India* (2014) 5 SCC 438; *Justice (Retd.) KS Puttaswamy v Union of India* (2017) 10 SCC 1; *Navtej Singh Johar and Ors v Union of India* (2018) 10 SCC 1. See also *Naz Foundation v Government of NCT Delhi (Delhi High Court)* (2009) 160 DLT 277; *Arun Kumar v Inspector General of Registration, Tamil Nadu (Madras High Court)* Writ Petition (MD) No. 4125 of 2019.

India—Part 2

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I. INTRODUCTION

Formal amendments made in exercise of constituent power by the Parliament of India under Article 368 of the Constitution were not part of the constitutional discourse in India during 2022. However, there were a handful of rulings of the Supreme Court of India that contributed to the increasing milieu of constitutional jurisprudence that focused on diverse legal contexts that were subject to constitutional scrutiny. Three important rulings that stood out were about challenges to abortion rights of unmarried women, question of wearing of headscarves, and the extension of affirmative action to economically weaker sections of the society by the Constitution (One Hundred and Third Amendment) Act, 2019.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Expanding derivative rights under Article 21 of the Constitution of India, in *X v. Principal Secretary, Govt of NCT & Another*,[1] the Supreme Court held that a woman's right to terminate her pregnancy was tantamount to her right to her bodily integrity. It was the case of a petitioner whose relationship failed and who sought to legally terminate her pregnancy at twenty-two weeks. Medical Termination of Pregnancy in India is regulated by the MTP Act, 1971, Section 3 (2) (b) of the Act[2] and Section 3B[3] of the rules framed thereunder as MTP Rules, 2003 stipulate when pregnancies may be terminated by registered medical practitioners and the category of women eligible for termination of pregnancy up to twenty-four weeks respectively. This was a special leave petition[4] as the court below denied her the right to legally abort her pregnancy as she was unmarried and therefore did not come under the category of women covered under Section 3 (2) (b) of the MTP Act read with Rule 3B (c) framed thereunder. The High Court below ruled in favor of the petitioner's submission that her exclusion from the category violated the Equality Clause under Article 14 of the Constitution of India, and that its powers could not traverse beyond the express statute (Rule 3B). The Supreme Court reasoned that the interpretation of Rule 3B (c) ought to be purposive and inclusive. The Court recognized that Explanation 1 to Section 3 (2) (a) of the Act did provide for a case where a "woman or her partner" faced a situation of unwanted pregnancy. The Court noted that Explanation 2 of Section 3 of MTP Act, 1971 was amended (as Explanation 1) in 2021 to include a case of "any woman or her partner." The Court acknowledged the lacuna in the law that Rule 3B of the MTP Rules, 2003 though a subordinate legislation, fell short of the liberal provision entrenched in Section 3 of the parent Act. Restating earlier precedents in *Suchita Srivastava v. Chandigarh Administration*,[5] *Justice K. S Puttuswamy (Retd.) v. Union of India*,[6] *High Court on its own Motion v. State of Maharashtra*,[7] and *S. Khusboo v. Kanniammal*,[8] the Court observed that notions of taboo associated with premarital sex and social morality are inherently subjective and that morality and criminality are not coextensive. The Court held that Article 21 confers a woman with the right to reproductive autonomy and that if she wished to discontinue her pregnancy, she could not be forced to do otherwise. The ruling in the present case is a far cry from *Dobbs v. Jackson Women's Health Organization*, [9] wherein it was held that the Constitution of the United States does not confer a right to abortion.

Another noteworthy ruling that had constitutional import was that in *Aishat Shifa v. State of Karnataka*, a case involving the deliberation on a prohibition on wearing headscarves in educational institutions.[10] The case involved a challenge to an order by the State of Karnataka that required female students in state schools to follow prescribed uniform forbidding headscarves (hijab). The High Court of Karnataka upheld the ban and hence the matter was taken up in appeal to the Supreme Court of India that resulted in a split decision. One ruling was that the order of the State was not against the ethics of secularism or the objective of its educational statute as permitting a religious community to wear its symbols would be antithetical to secularism. Further, prescription of uniform did not restrict the access to education of the appellants. It was also added that the State in prescribing the uniform did not rob the appellants of their right under Article 21 of the Constitution and that the appellants could not claim a right to wear headscarves. The contrary ruling held that prohibition of headscarves was an invasion of privacy, dignity and finally a denial of secular education that violated constitutional provisions: Article 19 (1) (a) – freedom of speech and expression, Article 21 – protection of life and personal liberty and finally Article 25 (1) right to freedom of conscience and the right to profess, practise and propagate religion.[11] However, in view of the divergent rulings, the matter would be referred to a larger Bench of the Court yet to be constituted.

1 *X v. Principal Secretary, Health, and Family Welfare Dept, Govt of NCT & Another* [2022] SCC OnLine SC 905 <https://main.sci.gov.in/supremecourt/2022/21815/21815_2022_4_33_36536_Judgement_21-Jul-2022.pdf> accessed on 26 March 2023

2 Medical Termination of Pregnancy Act, 1971 s 3: <https://www.indiacode.nic.in/bitstream/123456789/6832/1/mtp-act-1971.pdf> accessed on 26 March 2023

As amended in 2021: <https://egazette.nic.in/WriteReadData/2021/226130.pdf > accessed on 26 March 2023

3 MTP Rules 2003, Rule 3B has been made in pursuance of the provisions of clause (b) of sub-section (2) of the MTP Act, 1971 s 3 <http://www.bareactslive.com/ACA/ACT140.HTM#0> accessed on 26 March 2023

4 Constitution of India, Article 136

5 [2009] 9 SCC 1

6 [2017] 10 SCC 1

7 [2016] SCC OnLine Bom 8426

8 [2010] 5 SCC 600

9 [2022] US LEXIS 3057

10 [2022] SCC OnLine SC 1394

11 <https://legislative.gov.in/constitution-of-india> accessed on 27 March 2023

Janhit Abhiyan v. Union of India[12] was an appeal that challenged the Constitution (One Hundred and Third Amendment) Act, 2019.[13] The amendment introduced many changes, including the addition of clause (6) to Article 15 with Explanation and clause (6) to Article 16. This empowered the State to provide for a maximum of ten percent reservation through affirmative action by way of quotas to economically weaker sections of citizens, excluding scheduled castes, scheduled tribes, and non-creamy layer of the other backward classes. The majority held that reservation is a tool to ensure affirmative action towards an egalitarian society in the face of inequality. Excluding certain classes of citizens serves to achieve balance between non-discrimination and compensatory discrimination that would not violate the Equality Clause or damage the basic structure of the Constitution. The Court added that the limit of ten percent is flexible and applied to the reservations under Articles 15(4), (5) and 16 (4) which are facets of equality. However, there were dissenting opinions too, and the ratios were the following. It was ruled that special provisions that were founded on objective economic criteria *ipso facto* did not violate the basic structure, but exclusion of certain communities violated the same. The dissents primarily stressed that though economic criteria were permissible in relation to public goods (under Article 15), the same did not hold good for the goal of empowerment through representation of communities such that clause 6 of Articles 15 and 16 contradicted the basic structure and was therefore void.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Cases discussed above were part of constitutional reform as these rulings changed the way Constitution is to be interpreted. *X v. Principal Secretary, Govt of NCT & Another* espoused that the right to reproductive autonomy included "the constellation of freedoms and entitlements that enable a woman to decide freely on all matters relating to her sexual and reproductive health."[14] It was recapped that apart from the physical, the choice to reproduce was political, with ramifications in not just politics but in society and economy.[15] It is particularly so for reason that a woman is often entangled in a web of society, community and religion that dictate her reproductive choices. These factors are strengthened with legal barriers that moderate her autonomy and right to abortion. It was for this reason that the Court interpreted the right to reproductive autonomy as a derivative of the right to life protected in the Constitution. Purposive interpretation of statute[16] and preference to construction that gave it salutary effect was preferred over one that rendered it inoperative. A restrictive and narrow interpretation of statute that would have excluded the appellant woman and deprived her of the right to abortion was eschewed for one that was inclusive.

Aishat Shifa v. State of Karnataka [17] represented various aspects of constitutional significance. The right to profess, practice and propagate religion could be regarded as a facet of free speech and expression, but faith is a matter of conscience squarely confined in the process of thought and liberty. The choice of apparel was not protected as a right to privacy but as part of religious belief but not essentially within the ambit of Article 25.[18] It was relied upon that the complete neutrality towards religion and religious teachings in institutions of the state have not helped in removing intolerance *inter se* sections of the people of different faith. Secularism can connote a positive feeling of mutual respect to all religions.[19]

In *Janhit Abhiyan v. Union of India* [20] the impugned Amendment was challenged as violative of the basic structure doctrine. The Court asserted that the standard of judicial review would be to check if the Amendment destroys, abrogates, or damages the identity, nature, or character of the Constitution.[21] Reservation (affirmative action) is considered as a transformative tool to achieve an egalitarian society not just for recognized scheduled population and other backward classes but for any section befitting criteria for recognition as weaker section and would not breach the basic structure. There was reflection that exclusion of mobility from reserved quota to a reservation based on economic deprivation was Orwellian.

IV. LOOKING AHEAD

Judicial review is considered an essential feature of the basic structure of the Constitution of India since 1973 when the concept was first illustrated in *Kesavananda.*[22] Independence of the judiciary too was ruled as part of the basic structure in *Supreme Court Advocates on Record Association.*[23]Though the Constitution provides for eligibility of judges to the higher judiciary,[24] textual provisions are absent as to the suitability of judges for their appointments. The Collegium (evolved through case law) and Memorandum of Procedure currently employed in the selection of judges are not constitutionally entrenched. The suitability of a judge for appointment to the higher judiciary is currently excluded from judicial review.[25] As courts have played a vital role in constitutional reform since the Constitution was first enacted it is high time that an independent, democratic, representative, transparent and institutionalized framework is in place to assess both the eligibility and suitability of candidates selected for the higher courts in India.

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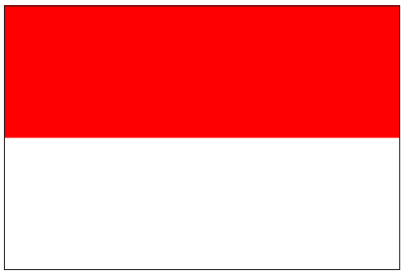
12 [2022] SCC OnLine SC 1771
13 <https://www.india.gov.in/my-government/constitution-india/amendments/constitution-one-hundred-and-third-amendment-act-2019> accessed on 28 March 2023
14 X (n 1) 56
15 Zakiya Luna, *Reproductive Rights as Human Rights: Women of Color and the Fight for Reproductive Justice* (New York University Press 2020)
16 MTP Rules (n 3)
17 Aishat (n 10)
18 *K S Puttaswamy v Union of India* [2017] 10 SCC 1 [127], [128] (n 10)
19 *Aruna Roy v. Union of India* [2002] 7 SCC 368 [66] (n 10)
20 Janhit (n 12)
21 ibid [22] (Janhit)
22 *Kesavananda Bharati v State of Kerala* [1973] AIR 1973 SC 1461
23 [1994] 4 SCC 441
24 Constitution of India, Articles 124 and 217
25 *Anna Mathews and others v Supreme Court of India and others* [2023 SCC OnLine SC 131]

Indonesia



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I. INTRODUCTION

The year of 2022 was a continuation of efforts to amend the 1945 Constitution, which started in the following years. At least two main agendas signify the echoed suggestions, even though some moves resulted unsuccessfully. First, the reinstatement of the General Guidelines for State Policy (*Garis-Garis Besar Haluan Negara*, GBHN) under the authority of the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR). Second, the addition of the presidential term of office, which by the 1945 Constitution, is limited to a maximum of two periods - five years for a term – raised the pros and cons and fueled the debate of political circumstances in Indonesia. However, the latest development to the presidential term issue was temporarily ended as President Joko Widodo and his party rejected the efforts to change the Constitution to avoid polemics, considering the political instability effect on the preparations for the 2024 general election.

Arguably, in 2022, the polemic over the desire to change the Constitution ended. However, it was discovered that there had been an attempt to conduct a judicial review of the norms for extending the term of office for the president in the Election Law to the Constitutional Court and the discourse to allow the President to become Vice President when his term of office had ended. Therefore, this paper will describe the existing polemic chronologically and systematically that represent the influence of most of them, derived from political interest from the political party in Indonesia, which intertwine to political agenda for the 2024 General Election in Indonesia.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The 1945 Constitution is the written constitution of the Republic of Indonesia, which is the primary basis for regulating the life of the nation and state. Amendments to the 1945 Constitution were carried out in four stages, namely in 1999, 2000, 2001, and 2002. Originally, the text of the 1945 Constitution contained 71 provisions; after being amended four times, the contents of the 1945 Constitution include provisions of 199 points.[1] Likewise, the changes to the 1945 Constitution cover almost all of the same material as the 1945 Constitution.

The changes to the 1945 Constitution were numerous and covered a vast scope. However, at least those changes can be categorized into the:

1. Changes to the content (substance) of existing provisions. For example, changes in the President's authority to make laws become a trivial authority to propose bills. Forming laws is the authority of the House of Representatives (*Dewan Perwakilan Rakyat*, DPR) (First Amendment).
2. Addition of existing provisions. For example, from one verse to several articles or paragraphs, such as Article 18 relating to Regional Government (Second Amendment) and Article 28 regarding Human Rights Human (Second Amendment).
3. Development of existing content materials into new chapters. For example, Chapter on the Supreme Audit Board.
4. Completely new addition. For example, the Chapter on State Territories, the Chapter on Human Rights (Second Amendment), Regional Representative Council (*Dewan Perwakilan Daerah*, DPD) (Third Amendment), and General Elections (Third Amendment).
5. Elimination of existing provisions. For example, we are removing the substance of the article Transitional Rules and Supplementary Rules and abolishing the Supreme Advisory Council (Dewan Pertimbangun Agung, DPA) institution (Fourth Amendment).
6. Insert and move some Explanation contents into the stem body, such as the principle of the state based on the law (Third Amendment) and an independent judicial power (Third Amendment).
7. Amend the structure of the 1945 Constitution and remove the Elucidation as part of the 1945 Constitution (Fourth Amendment).[2]

20 years after the last amendment of the 1945 Constitution, the idea of reinstating the General Guidelines for State Policy (*Garis-Garis Besar Haluan Negara*, GBHN) still exists. The 1945 Constitution was amended four times, negating the existence of GBHN as state development policy guidance long established in New Order Era. Indeed, the spotlight is directed at the People's Consultative Assembly (MPR)

1 Jimly Asshiddiqie, "The Role of Constitutional Courts in The Promotion of Universal Peace and Civilization Dialogues Among Nations" paper was presented in the International Symposium on "The Role of Constitutional Courts on Universal Peace and Meeting of Civilizations," Ankara, April 25, 2007, p. 6-7.

2 Fulthoni, Luthfi Widagdo Eddyono, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan, 1999-2002, Buku X, Perubahan UUD, Aturan Peralihan, dan Aturan Tambahan*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, Jakarta (2008), p. 379-380.

as the leading actor. Its interest is echoed in the Principles of State Policy (*Pokok-Pokok Haluan Negara*, PPHN). The debate still revolves around ways to legitimize the existence of PPHN, whether through constitutional conventions or limited constitutional amendments as a form of formal change predicted to improve constitutional performance.[3] So far, three alternative legal products are echoing to accommodate PPHN, which are regulated through the 1945 Constitution, the MPR Decree, or the Law.[4]

PPHN began to appear in various constitutional discourses over concerns about the state's development plans, which were considered too executive-centric and always followed the rotational pattern of the President's leadership. PPHN does not have formal legitimation compared to GBHN. Therefore, the MPR intended to state PPHN in the 1945 Constitution, which means to formally return the authority of the MPR to decide the state policy principles. Consequently, the amendment was supposed to be proposed. Currently, PPHN reflects the Law on the National Development Planning System, the Law on National Long-Term Development Plans, and the Presidential Decree on the National Medium-Term Development Plan, which is concreted as the Government Work Plan Presidential Decree as a blueprint of the country's development.

The discourse on changing or amending the 1945 Constitution arose for various reasons that were then connected. In this sense, the intention to return the GBHN through constitutional amendment may likely open an opportunity to turn on the suggestion for extending the President's term of office.[5] Notably, referring to Article 7 of the 1945 Constitution as the heart of the reform, it limits the presidential term in order to guard the President and the government system from plunging and being trapped in authoritarianism. Thus, the term cannot be extended despite the current president being considered good, in this case, President Joko Widodo.[6]

Tim Lindsey (2002) argued that the critical notion of the First Amendment of the 1945 Constitution, in October 1999, was intended to prevent the rise of another dictator like Soeharto and his predecessor Soekarno, who had been declared president for life. Hence, the change was of enormous symbolic importance. Furthermore, he addressed it as the heart of the Reformasi (Reformation) agenda, free elections, and removing the armed forces from politics. Therefore, reversing this would be a massive drawback to Indonesia's fragile democratic system.[7]

Along with this, another proponent of Indonesian constitutional scholars, Jimly Ashiddiqie (2022), said that the amendment to the 1945 Constitution makes no sense if it is done to change the length of the president's term of office. It is because constitutional changes are ideally intended for significant and long-term interests. He cited as an example the amendment to the Constitution to revive GBHN.[8]

Notwithstanding, the crowd discourse on extending the presidential term was also raised by the three general chairmen of President Joko Widodo's government coalition political parties in 2022.[9] The proposed political agenda was broadened to discuss a possible general election delay to provide a longer time for constitutional amendment . Another reason for postponing the election is framed under the impact that the Covid-19 pandemic had on economic recovery and global conditions. Several political party leaders have proposed postponing the 2024 elections for one or two more years to tackle the Covid-19 pandemic and the impact of war in Ukraine, which will provide stability in Indonesia[10]. Pros and cons surrounded this idea, intermingled political interest and concerns on post Covid-19 recovery.

Inevitably, the government is involved in this debate. For example, Minister of Home Affairs Tito Karnavian commented, "Voicing for an extension of the President's term of office is not prohibited. Moreover, the constitution can be changed; the only taboo to change is the scriptures."[11] Additionally, former Deputy Law and Human Rights Minister, Denny Indrayana said that a representative of a particular group had told Coordinating Political, Legal, and Security Affairs Minister-Mahfud MD - of its readiness to push for a special session of the MPR to amend the Constitution and pave the way for an extension of Jokowi's term.[12] In other words, the political parties and government shared a portion in keeping the contention of possible election delay and the presidential term extension, which aim to secure President Joko Widodo's opportunity in power beyond 2024.

Eventually, President Joko Widodo stated that he had no intention for a third term as it violated the 1945 Constitution and he would comply with it. Aside from that, President Joko Widodo affirmed that the discourse on postponing the election could not be banned since it is a part of democracy.[13]

To some extent, President Joko Widodo's statement above was perceived as ambiguous in his stance on the third term of the presidency. However, the obedience to the Constitution could not be strictly interpreted as rejecting a third term and election postponement since it can be changed to the amendment of a specific article in 1945. At last, the Indonesian Democratic Party of Struggle (PDI-P), of which President Jokowi is a member, issued clear standing on rejecting election postponement. It has suspended its push for a constitutional amendment to strengthen the MPR in response to a controversial proposal from other ruling coalition members to delay the 2024 elections.[14]

3 Annisa Salsabila, «Sesat Pikir» Wajah Baru GBHN», https://news.detik.com/kolom/d-6279932/sesat-pikir-wajah-baru-gbhn.
4 Ibid.
5 https://news.republika.co.id/berita//qrkykl396/amandemen-uud-celah-perpanjangan-masa-jabatan-presiden?
6 Ibid.
7 Tim Lindsay, "Indonesia battles a push to postpone elections and undermine its fragile democracy," https://www.thejakartapost.com/opinion/2022/04/03/indonesia-battles-a-push-to-postpone-elections---and-undermine-its-fragile-democracy.html.
8 Kompas.com, "Jimly: Jika Amendemen Konstitusi demi Atur Masa Jabatan Presiden, Ada Potensi Presiden Dimakzulkan", https://nasional.kompas.com/read/2022/03/08/13331461/jimly-jika-amendemen-konstitusi-demi-atur-masa-jabatan-presiden-ada-potensi.
9 Kompas.com, "Jimly: Jika Amendemen Konstitusi demi Atur Masa Jabatan Presiden, Ada Potensi Presiden Dimakzulkan", https://nasional.kompas.com/read/2022/03/08/13331461/jimly-jika-amendemen-konstitusi-demi-atur-masa-jabatan-presiden-ada-potensi.
10 Agus Riewanto, "Is delaying the elections legitimate and constitutional?", https://www.thejakartapost.com/paper/2022/03/07/is-delaying-the-elections-legitimate-and-constitutional.html.
11 Yusuf Lakaseng, "Amandemen Konstitusi untuk Perpanjangan Masa Jabatan atau untuk Tiga Periode Membahayakan Jokowi dan Bangsa," https://news.okezone.com/read/2022/04/06/58/2574046/amandemen-konstitusi-untuk-perpanjangan-masa-jabatan-atau-untuk-tiga-periode-membahayakan-jokowi-dan-bangsa
12 thejakartapost.com, "Government keeps term extension debate alive amid amendment scheme revelations", https://www.thejakartapost.com/paper/2023/02/03/government-keeps-term-extension-debate-alive-amid-amendment-scheme-revelations.html.
13 Ibid.
14 thejakartapost.com, "PDI-P puts brakes on plan to amend Constitution", https://

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Article 37 of the 1945 Constitution, before the amendment, requires that amendments to the Constitution need at least 2/3 of the members of the People's Consultative Assembly (MPR) to be present and the approval of at least 2/3 of the members present. These requirements were then added to the requirements for a referendum based on the MPR Decree Number IV/MPR/1983, in which Article 2 reads, "If the MPR wishes to amend the 1945 Constitution, it must first ask the people's opinion through a referendum."

The Constitution of the United States of Indonesia (1949 Constitution), which adheres to the principle of federalism, requires a 2/3 in the presence of members of the DPR/senate and the approval of 2/3 of the members present (Article 190). However, "political activities" emerged that were anti-federal states and wanted to return to a unitary state, so the 1950 Constitution was presented. The 1949 Constitution was only valid in Indonesia from 27 December 1949 to 17 August 1950.

According to the provisions of Article 140 of the 1950 Constitution, the authority to change the Constitution is given to a body called the Constitutional Amendment Council (Konstituante), which consists of members of the Provisional People's Representative Council and members of the Central Indonesian National Committee who are not members of the Provisional People's Representative Council. It requires more than half of the members present and approved by the highest number of votes. However, in every decision-making, the Konstituante never reached a quorum, so President Soekarno issued a Presidential Decree on 5 July 1959, which dissolved the Konstituante and re-enforced the 1945 Constitution.

Historically speaking, in the Indonesian context, an amendment to the Constitution needs to receive convincing support from the people with sufficient and conscious consideration. Suppose the amendments to the Constitution are made difficult. It will also be difficult for the country's development to adapt to global dynamics and handle constitutional problems that may arise in the future. Therefore, opportunities must also be opened to make changes to the Constitution. However, if it is too easy to amend the Constitution, the government will face instability.

The drafters of the Amendment to the 1945 Constitution in 1999-2002 took a middle ground by increasing the flexibility of the procedure for amending the previous constitution, but it still remains rigid. To amend the articles of the 1945 Constitution, the MPR session is attended by at least 2/3 of the total MPR members. Eventually, decisions to amend the articles of the Constitution are made with the approval of at least 50% + 1 member from the total members attended.

Thus, through the provisions in the constitution, upheaval, and conflict in the intention to amend the Constitution becomes natural for the need to build a solid constitutional state and guarantee sustainable democracy. Of course, parties who try to pass the Fifth Amendment to the 1945 Constitution must provide comprehensive academic data and conceptual support. Apart from that, by remembering the widespread dissemination of ideas and inviting open public participation, the community, and people must be the primary driver for improving the 1945 Constitution.

According to Lindsay (2022), proposals for removing the two-term limit are not the only evidence that elite enthusiasm for Indonesian democracy may be thin. Another constitutional amendment proposal closely linked to it could also be very damaging: the reinstatement of the New Order's GBHN, now to be called the PPHN. Under Soeharto, these five-year plans were used by the super-legislature, the People's Consultative Assembly (MPR), to set the government's policy program.[15]

Under the New Order, the president, who the MPR selected, was obliged to implement the GBHN and must go to the examination by the MPR by delivering an "accountability speech" to retain the MPR's support. If the MPR rejected that speech, the presidential term could be ended. This means that the MPR has power and control over the continuation of the presidency. Alas, this mechanism was merely a formality under Soeharto because he had an iron grip on the numbers in the MPR. On the contrary, the potential of the GBHN system to control the president became clear when Soeharto's successor, President Habibie, abandoned his plans to retain the presidency after the MPR rejected his accountability speech in 1999. Consequently, if the Constitution is amended to authorize the MPR to issue PPHN, it will return to the old mechanism that controls the president to follow PPHN to secure its presidential cabinet.[16]

Lindsay argued that the MPR has little opportunity to amend the Constitution. Still, it could use that crucial power to re-introduce the PPHN and win power over the president and, in doing so, the government.[17] There is still anxiety, even fear, among oligarchs and party bosses about the dangers of restarting the amendment process that delivered such vast change between 1999 and 2002. But who knows where it might lead once that door is opened and the Indonesian system is up for grabs? Lindsay states a clear, settled, and costly-elite deal locking in almost all the parties and most prominent political players would be needed to amend the constitution, which has yet to be achieved. But Indonesia's political landscape can change quickly when the elites agree it should.[18]

IV. LOOKING AHEAD

President Joko Widodo will end his second five-year term in October 2024 and is barred under the Constitution from seeking a third term. Meanwhile, the country's political landscape shivered amid a controversial discourse on extending Jokowi's presidency beyond the constitutional two-term limit. Such talks also included the possibility of postponing the 2024 legislative and presidential elections entirely in

www.thejakartapost.com/indonesia/2022/03/20/pdi-p-puts-brakes-on-plan-to-amend-constitution.html.

15 Tim Lindsay, "Indonesia battles a push to postpone elections and undermine its fragile democracy," https://www.thejakartapost.com/opinion/2022/04/03/indonesia-battles-a-push-to-postpone-elections---and-undermine-its-fragile-democracy.html.

16 Ibid.

17 Ibid.

18 Ibid.

the name of political stability the country needs to accelerate economic recovery post-pandemic. As the debate died down, so rose another. As a result, President Joko Widodo's supporters have figured out another way to extend his political career beyond 2024: having him run as vice president.[19]

Article 7 of the 1945 Constitution says the president and vice president can hold office for five years and then be re-elected in the same office for only one term. It is also supported by Article 169 of Election Law No. 7/2017, which stipulates that any individual can be elected president and vice president as long as they have never held office for two terms. Technically speaking, though the two articles may not explicitly keep Jokowi from running as vice president, the issue lies in Article 8 of the Constitution. The article stipulates that the vice president will take over if the president dies, resigns, is impeached, or cannot fulfill their mandate. Hence, should Jokowi be elected the vice president, he would not be allowed to step in for the president if any of such things happened.[20]

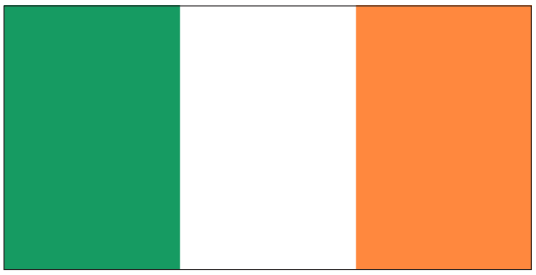
President Joko Widodo has less than two years before he finishes his position, but his political supporters have been tinkering with ways to keep him in power beyond 2024. At the end of 2022, a group calling itself the Prabowo-Jokowi joint secretariat petitioned the Constitutional Court to review the General Elections Law to pave the way for Jokowi to run for the country's second-highest post. The 1945 Constitution does not stipulate whether an incumbent president can run for a term as vice president.[21]

19 thejakartapost.com, "Analysis: Constitutional and ethical issues with Jokowi running for VP", https://www.thejakartapost.com/opinion/2022/09/26/analysis-constitutional-and-ethical-issues-with-jokowi-running-for-vp.html.

20 Ibid.

21 thejakartapost.com, «Jokowi's die-hards seek ways to keep him in power», https://www.thejakartapost.com/paper/2022/09/28/jokowis-die-hards-seek-ways-to-keep-him-in-power.html.

Ireland



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I. INTRODUCTION

On October 25, 2022, at the Shelbourne Hotel, the Irish celebrated the 100th anniversary of a constitution that contributed to the country's independence. While the current constitution was established in 1937, the Constitution of the Irish Free State Act (1922) provided the legal framework for the establishment of the Irish Free State. This piece of legislation recognized the sovereignty of Ireland, which has become independent from England. Despite the nation's independence, the United Kingdom still influences Ireland's foreign and economic policies.

The Irish Constitution can be modified in two ways: the amendment or referendum process. The process of amending the Irish Constitution is outlined in Article 46 of the document, which allows for variation, addition, and repeal of any provision of the Constitution. Every proposal for amending the Irish Constitution must be initiated by the lower house of the *Oireachtas*: the *Dáil Éireann*. Once the proposal is passed by the *Dáil Éireann* and the *Seanad Éireann,* the two bodies that make up the Irish Legislature, it is to be submitted by Referendum to be decided by the people. For an amendment to be finalized, the President also needs to sign the bill which contains the proposal for amending the Irish Constitution. According to Article 47 of the Irish Constitution, the Referendum may be in relation to Article 46 amendments and its topics. The *Taoiseach*, the leader of the Government and relevant cabinet members, may initiate the process of Referendum, a direct vote by the people on a certain proposal or law. While the *Taoiseach,* the *Oireachtas,* and the nation's people are all involved in modifying the Irish constitution, *An Chúirt Uachtarach* (the Irish Supreme Court) hears constitutional matters, statutory and regulatory challenges, and issues pertaining to the implementation of European Law. While the last amendment process in Ireland was in 2019, there was a referendum in 2022.

All levels of the government engage with the European Union system through the implementation and interpretation of the various regulatory, judicial, and statutory edicts emanating from the governing bodies of that supranational structure. Notably in 2022, Irish leaders assumed the presidencies of the Council of Europe and the European Court of Human Rights.

Regarding constitutional reform in 2022, Ireland had a failed neutrality amendment, continued work on proposed amendments, a couple of referenda related to housing, and the implementation of a new electoral commission and referendum procedures. The country also faced lingering COVID-19 matters, environmental developments, and several European Union and foreign affairs issues.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. NEUTRALITY AMENDMENT & PROPOSED AMENDMENTS

There were ten active proposed amendments in the *Oireachtas*, and they were all before the *Dáil Eireann*. Out of the ten active amendments, only three saw activity in 2022 as two remained active and one was defeated. One of the amendments would have lowered the voting age prescribed by Article 16(1) (2°)(ii) of the Irish Constitution from 18 to 16. This proposal reflects a trend in many nations seeking to expand voting rights to adolescents at the state and federal levels. The other active amendment relates to remote parliamentary voting in Ireland. This reform would permit leaders who struggle to return to Dublin the opportunity to virtually participate in voting measures. These measures were implemented temporarily during COVID, and now the *Oireachtas* is debating on establishing these reforms permanently.

In 2022, there was also a failed amendment related to Ireland's commitment to neutrality and peace during the war. In the fifth attempt by members of the *Dáil Eireann* to implement a neutrality amendment since 2015, four deputies introduced a new version of the amendment on March 23, 2022, which was narrowly defeated in a 53-67 vote during the second reading of the bill. Of all the neutrality amendments in Ireland's history, 2022's yielded the highest number of "yea" votes.

SEE CHART >

NEUTRALITY AMENDMENTS (DEFEATED)			
BILL	YEA	NAY	ABSTAIN
2013 Bill (Neutrality), March 10, 2015, vote	25	85	0
2014 Bill (Peace & Neutrality), March 31, 2015, vote	24	72	0
2016 Bill (Neutrality), December 1, 2016, vote (bill be read a second time)	52	42	37
2016 Bill (Neutrality), December 1, 2016, vote (that the motion, as amended, be agreed to)	52	39	38
2018 Bill (Neutrality), April 11, 2019, vote	41	80	0
2022 Bill (Neutrality), March 31, 2022, vote	53	67	0

While four of the neutrality bills since 2013 have relatively the same language, the 2014 Peace & Neutrality Bill sought to use the *Oireachtas* powers to implement an international agreement (Article 29(6) of the Irish Constitution) by citing the 1907 Hague Convention Respecting the Rights and Duties of Neutral Powers, which outlined the rights of neutral states during times of war. Article 28 of the Hague Convention V says, "War shall not be declared, and the State shall not participate in any war or other armed conflict, nor aid foreign powers in any way in preparation for war or another armed conflict, or conduct of war or other armed conflicts, save with the assent of Dáil Éireann." In 2018, the Deputies added "…save where it is immediately necessary in defense of the State…". Then in 2022, the Deputies added "in the case of actual invasion or attack." While the amendment of Article 29 states that "Ireland is a neutral state that will maintain a policy of non-membership of military alliances." The 2022 amendment proposed adding the following to Article 29: "And shall not allow its territory to be used by other states to transport war material or personnel to third countries for the purpose of war or another armed conflict." Ultimately, the 2022 amendment sought to distance itself from the national policies of the European Council in case the organization ever decides to enter any war or armed conflict. The narrow defeat in the vote on March 31, 2022, indicates a relatively divided *Dáil Éireann*.

This is not the first neutrality amendment to have failed in Ireland, and it most likely will not be the last. There was a measure that did succeed in reaction to the Russian war in Ukraine which contributed to an energy shortage around the world. Interestingly, the Development (Emergency Electricity General) Act implemented a disapplication of the Planning and Development Act of 2000 when establishing "emergency measures for electricity generation development to ameliorate and protect the security of electricity." The Planning and Development Act underwent substantial corrective amendments throughout 2022 in the *Oireachtas* and the *An Chúirt Uachtarach*. In the *Oireachtas*, although a substantial overhaul was proposed, the enacted measures that modified the act included (1) Water Environment (Abstractions and Associated Impoundments), (2) Institutional Burials, and (3) Circular Economy and Miscellaneous Provisions. In *An Chúirt Uachtarach*, the Planning and Development Act (2000) was a part of the analysis concerning a case regarding greenhouse gas emissions being released by cows. These greenhouse gas emissions may have proliferated due to the increased milk output prompted by the development of a cheese factory and a jurisdictional analysis to grant to *An Bord Pleanála* (the Planning and Development Board).

2. HOUSING REFERENDUM & PLANNING AND DEVELOPMENT

The *Taoiseach*, also known as the Irish Prime Minister, was the principal body behind the development of a referendum on housing, including a strategy session, a referendum subcommittee, a conference, and public consultation. The housing referendum efforts in 2022 began with a strategy session with the Minister for Housing, Local Government and Heritage, the Housing Commission, and the conference of academics. The Housing Commission newly established a Referendum Subcommittee that exemplified complex constitutional questions surrounding a referendum on housing rights. The *Taoiseach's* aspirations for a referendum also led to a conference about housing that included topics such as theoretical foundations, housing, property rights, Irish judicial approaches to socio-economic rights and positive obligations, international perspectives, constitutionalizing social rights, statutory housing rights, and discrimination. The panel on constitutionalizing social rights addressed constitutional provisions and their related jurisprudence. Notable for the subject matter of the referendum on housing was Article 40.5 of the Irish Constitution, which provides that the "dwelling of every citizen is inviolable and shall not be forcibly entered safe in accordance with the law." In regard to this referendum on housing, the government commissioned an external organization to conduct a public consultation survey which serves to gather public opinion on the housing question. The results of this survey are forthcoming and will be used to help inform the government how the public feels about the issue.

Reforms to the Planning and Development Board, particularly the Act of 2000, were a central theme throughout the year in the *Oireachtas* and *An Chúirt Uachtarach*. In July, the Planning and Development, Maritime and Valuation Act (2022) was enacted and allowed for

judicial review of *An Bord Pleanála activities*. Throughout the year, many cases sought to reform planning and development regulations regarding the environmental effects of development, strategic housing, and business development, and the availability of Irish language acts, European, and international edicts.

Notably, the Planning and Development Act (2000) was addressed in a case concerning the Aarhus Convention's implementation of environmental provisions at the national level in Ireland. In Heather Hill Management Company v. *An Bord Plenála* (2022), the Supreme Court ruled that individuals challenging environmental provisions are entitled to special protective costs (PCO) for all grounds in proceedings.

3. THE IMPLEMENTATION OF A NEW ELECTORAL COMMISSION AND REFERENDA PROCEDURES

The Electoral Reform Bill implemented a major reform in the Irish electoral process and its related activity. The Electoral Commission/ *Coimisiún Toghcháin* was established and took on the functions of the Referendum Commission, the Registrar of Political Parties, the Constituency Commission, and the Local Electoral Area Boundary Committees. The Commission's referendum responsibilities would include decision-making, oversight, administration, and supporting services to ensure voter participation. Previously, a new Referendum Commission was implemented every time a new referendum came about, and these functions were centralized by the Referendum Commission. *Coimisiún Toghcháin* is charged with conducting reviews of *Dáil* and European Parliament constituencies, and there will be a report to the Joint *Oireachtas* Committee within three months after the census of the population. Another responsibility related to electoral operations is the compilation of political parties and the oversight of the electoral register. *Coimisiún Toghcháin* comprises an appointed chairperson and four ordinary members. While the appointed chairperson is selected through an open competition run by the Public Appointments Service, the four ordinary members are selected by the Chief Justice of *An Chúirt Uachtarach*.

4. LINGERING COVID-19 MATTERS

There were two *An Chúirt Uachtarach* cases that were directly dedicated to COVID-19 reforms impacting the constitutional rights of those living in Ireland. The first case pertained to the validity of modifying testing that seemed to disproportionately impact homeschooled children in violation of Article 42 which states that "parents are entitled to provide education outside the school system if they please." The second case addresses concerns about liberty, free movement, travel (Article 40.4.1) the inviolability of the dwelling, (Article 40.5) freedom of association (Article 40.6), and unlawful detention requiring High Court inquiry (Article 40.4.2). Ultimately, the only COVID bill that was implemented related to pandemic special recognition payments, amending six acts relating to the emergency measures in reaction to deadly diseases, social welfare, value-added tax, duty consolidation, and intoxicating liquor.

5. ENVIRONMENTAL DEVELOPMENTS

There are also environmental developments related to regulatory reform that concern waste management and water abstractions. The *Oireachtas* also enacted emergency measures of electricity supply security, one dedicated to the shortages resulting from the Ukraine-Russian War.

6. EUROPEAN UNION & FOREIGN RELATIONS ISSUES

Several proposed and enacted reforms were dedicated to the implementation of European laws and regulations at the national level. Additionally, the dynamics with the United Kingdom continues to result in foreign relation issues due to the country's engagement with Northern Ireland, with at least one *Oireachtas* enactment dedicated to the European Electronic Communications Code and the Brexit implications for Ireland. Despite England's involvement, Ireland held its own during its presidency of the Council of Europe in 2022—which was responsible for the conference on children and youth in Cork (likely driving the debate in the *Dáil Éireann* about lowering the voting age).

The interaction with referenda by the *Taoiseach* was not limited to the metes and bounds of Ireland. In fact, the Minister of Foreign Affairs, Simon Coveney, made a statement about what the nation termed "sham referendums" held by the Russians and their proxies in occupied Ukraine. The commentary refers to the referenda as illegitimate since they violate the UN Charter and Russia's obligations under international law. The "sham referendums" also ignore the Ukrainian Constitution, which provides a legal basis for any referendum in that nation. The Russian constitution provides the following procedures for referenda: the supreme direct expression of the people's power is through referendum and free elections (Art. 3), and citizens of Russia have the right to participate in referenda (Art. 32(2)), the President shall announce a referendum (Art. 84(c)), and local self-government is exercised by citizens by means of a referendum (Art. 130(2)). The Ukrainian Constitution also states that citizens can participate in national and local referenda in Article 38 of the document. Furthermore, there is an entire Chapter dedicated to referenda (Art. 69-74), whereby age restrictions are established, and the *Verkhovna Rada*—the unicameral parliament of Ukraine—is given authority to call a national referendum at the request of at least 3 million Ukrainians. The Ukrainian Constitution also stated that a territorial alteration requires a national referendum while excluding referenda on taxes, budgets, and amnesty. The referendum authority of the *Verkhovna Rada* is further bolstered by Article 85(2), and the ability to establish a referendum is given exclusive determination by Ukrainian laws listed in Art. 92(20). Additionally, the President of Ukraine is given the authority to designate a national referendum regarding constitutional amendments. Art. 106(6). The Constitution also notes that advocates regarding referenda disputes do not need to be members of the Ukrainian Bar (Art. 131). Ukrainian constitutional provisions are violated by Russia's referendum, while also complying with Russian constitutional law. Still, the Irish—and most of Europe—did not recognize the legitimacy or legality of these referenda prompted by Russia's leadership. Russia's bids to

legitimize the annexation of Ukraine through its referendum attempt to include the Ukrainian people undermines Ukraine's independence. The most recent referendum promulgated by the Ukrainian people arose more than twenty years before Russia began bombing the country in 2022. As a democratic issue, it was important for Ireland to promote Ukraine's sovereignty from Russia. However, in Ireland, a place with many referenda and amendments, it is surprising that the country's leadership was not more critical of Ukraine's paucity of popular involvement.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. NEUTRALITY AMENDMENT & PROPOSED AMENDMENTS

The Neutrality Amendment would have been a dismemberment constitutional measure that could have been a big-bang moment that codified pacifist tenets of liberal democracy. A contingent of the legislature has attempted to implement neutrality as the constitutional norm for Ireland. However, Ireland has been implicit when it comes to cases, votes, and commentary regarding the country's beliefs on neutrality in conflicts. For example, while *An Chúirt Uachtarach* did not address neutrality explicitly during 2022, in about half of the cases (23 out of 45), the Court engaged frequently with European law and regulations—showing that there is supranational influence on Ireland's national systems. Furthermore, some of the major reforms that Ireland has influenced at the Council of Europe are related to the protection of human rights in conflict zones.

2. HOUSING REFERENDUM & PLANNING AND DEVELOPMENT

While the housing referendum intensified public debate on the topic in 2022, the various Irish and European government bodies wrestled deliberately to exercise control over any constitutional reforms relating to housing. Indeed, housing reforms or the "housing revolution" was implemented during the big bang moment of COVID-19 measures that reinterpreted the tests for inviolability. The *Oireachtas*, the Irish Government, and *An Chúirt Uachtarach* were all reformative in a representative manner of one another.

The planning and development throughout the year were very prevalent with involvement from a variety of government bodies such as the Commissioner for Environmental Information, the Minister for Communications, Climate Action and the Environment, *An Bord Pleanála*, the Minister for Housing, Planning and Local Government, the Minister for Housing, Local Government and Heritage, the Environmental Protection Agency, and Director of Authorized Intervention. The *Oireachtas* enacted over half of the bills presented in 2022 concerning planning and development—out of the 11 bills, 6 of them were passed. Furthermore, the *An Chúirt Uachtarach* generally affirmed the government and statutory reforms concerning planning and development as this was exemplified in the 11 such cases presented before the court.

3. THE IMPLEMENTATION OF A NEW ELECTORAL COMMISSION AND REFERENDA PROCEDURES

The reformative Electoral Reform Act that established the *Coimisiún Toghcháin* amended Ireland's electoral and referendum processes. Although neither Article 46 (Amendments) nor Article 47 (Referendums) are mentioned in the new legislation, both are implicated when the *Oireachtas* granted constitutional control of pending and future constitutional referenda to the *Coimisiún Toghcháin*. Despite the implementation of a new electoral commission and referendum procedures, there have been delays with the first referendum that the *Coimisiún Toghcháin* inherited.

4. LINGERING COVID-19 MATTERS

The COVID-19 pandemic has had a profound impact on liberal democracies due to governments having to exercise their emergency powers to address this public health crisis. The circumstances of the pandemic have led to the codification of emergency powers that have resulted in the deterioration of democratic principles such as limited government. Across the government branches, especially in the *Oireachtas* and *An Chúirt Uachtarach*, government overreach and the violation of individual liberties are typically justified by the supposed need to protect the greater good. Those exercising constitutional control were generally more inclined to strip people of their constitutional rights through reforms that disregarded liberty, free movement, travel (Article 40.4.1), freedom of association (Article 40.6), and unlawful detention without inquiry by the High Court (Article 40.4.2).

One measure that was brought to light was the inviolability of the home (Article 40.5). However, even this impinged upon landowners and landlords, who incurred the housing costs of their tenants. This reform concerning the home was posed to the people in the referendum regarding housing in July 2022. Results still have not been yielded from either the Housing Committee or *Coimisiún Toghcháin*.

Moreover, the erosion of the school rights of a particular portion of the population has deeply impacted the psychological development of children who are homeschooled. Despite these setbacks in their education, homeschooled children have not received any support to compensate for the delays in their education.

For all of these measures, *An Chúirt Uachtarach* affirmed the activities of the *Oireachtas* and the Government, proving yet again that on the whole, the Court is a representative organ of both the national and supranational in the following cases: Burke v. The Minister of Education (2022) and O'Doherty & Waters v. The Minister for Health (2022). The latter case was an instance when *An Chúirt Uachtarach* agreed with European and global bodies such as the World Health Organization regarding the constitutionality of emergency lockdown measures during the pandemic. However, there is a COVID measure related to travel that presents an interesting exception which is perhaps in conjunction with the movement for housing reform. In Clare County Council v. McDonagh & Anor (2022), the Court ruled that a nomadic group could remain on what was traditionally deemed public property. In their case, the McDonaghs argued for traveler-specific

accommodation and stated that they would have nowhere else to reside if they were evicted from the Council site. In response to the lingering COVID-19 matters, the proposed amendment which would allow for remote voting in the *Oireachtas* would provide the members the right to a private life away from Dublin.

5. ENVIRONMENTAL DEVELOPMENTS

Numerous efforts to support environmental reform and reinforce liberal democratic principles were integral to the revision of the Irish Constitution which would allow for the advancement of legislation related to climate change. These efforts included regulatory overhauls regarding waste management and water abstractions. Several cases in *An Chúirt Uachtarach* exercised constitutional control over attempted reforms, while simultaneously incorporating measures that emanated from the Court of Justice of the European Union and other EU laws. In one specific case, the Court protected the President's constitutional immunity from encroachment by interpretation of supranational regulations—European Communities (Access to Information on the Environment) Regulations. In the case Right to Know CLG v. Commissioner for Environmental Information & ors (2022), it was made clear that the constitutional control of the Court yielded to the constitutional immunity afforded to the President—perhaps affirming the provision as an unamendable rule, at least for the time being.

Other *An Chúirt Uachtarach* cases regarding environmental reform furthered the position of the government's constitutional control of such reforms: affirming the construction of a cheese factory even with the purported increase of greenhouse gas emissions that would emanate from the amplified milk production in An Taisce v. An Bord Pleanála (2022), considering the word "statement" in favor of the government's interpretation in Waltham Abbey Residents Association v. An Bord Pleanála & ors (2022), a novel point illustrating the complexity of planning law and judicial review when issues of European law seek to be relied upon for environmental cases in Hellfire Massy Residents v. *An Bord Pleanála & Ors* (2021), and the authorization of wind-turbine planning in Krikke & Ors v. Barranafaddock Sustainability Electricity Limited (2022).

6. EUROPEAN UNION & FOREIGN RELATION ISSUES

The multiple enactments that have facilitated the incorporation of European laws and regulations into the Irish government may be codifications of the sovereign authority of the nation.

The Irish Language is constitutionally mandated as the first language in the nation. Although there were not any amendments enacted concerning the language, *An Chúirt Uachtarach* played a representative role when it reinforced the importance of making laws available as soon as possible on November 1, 2022, in Glann Mór Céibh Teoranta, Glann Mór Cuan Teoranta & Siobhán Denvi Bairéad v. An t'Aire Tithiochta, Pleanála, Éire & an tArd-Aigne [2022]. This corrective and elaborative judgment enhanced the way government ministries timely provide publications for the dual-lingulate nation. In fact, one of the prongs of the judgment exercised constitutional control of the reforms associated with translation of statutory instruments made pursuant to the European Communities Act. Further affirmation of representative constitutional control that was wrested from the European Union arose in *An Chúirt Uachtarach*'s Costello v. Ireland, in which the Court declared that the Comprehensive Economic and Trade Agreement between the European Union and Canada breached the judicial sovereignty of the State, contrary to Article 34 of the Irish Constitution. MK (Albania) v. Minister for Justice & Equality is another case that showcases the Court's representative constitutional control as the court upheld the applicant's deportation through the application of the European Convention on Human Rights document.

Ireland's constitutional impact within European Courts was further validated by a ruling in the European Court of Human Rights, Case of P.C v. Ireland (2022), which recognized the country's views on the provisions of pensions during incarceration. Ultimately, this decision was favorably received by Ireland, a country that has a commitment to upholding human rights.

IV. LOOKING AHEAD

Ireland's constitutional reform in 2022 will be foundationally determinative of the subject-matter considerations for the nation's future regarding neutrality and war, continued work on proposed amendments, forthcoming referenda, the impact of the electoral commission on elections and referenda procedures, the constitutionality of COVID-19 measures, environmental developments (particularly international influence on the nation's approaches), foreign affairs, and forthcoming implementation of measures from the European Union (EU).

Since the amendment for neutrality failed, there is a strong likelihood that Ireland will participate in military action if an issue arises due to the Europe Union's clashes with Russia regarding Ukraine. There will likely be another attempt to codify stricter tenets of neutrality as the war in Ukraine continues. Ireland is deeply divided on the issue of how involved the country should be in the Russia-Ukraine war as the Ukraine Solidarity Bill is still before the *Dáil Éireann*, and it has not seen any movement since December 2022.

Housing as well as planning and development remain a pressing issue in all factions of the Government. A few referenda are on the immediate horizon for Ireland. The *Taoiseach* has already proposed a referendum about gender equality to be held in November 2023, and it will likely continue to support the Housing Commission in the interpretation of a housing referendum. Motherhood and the home clauses of the Irish Constitution may prompt another referendum regarding Article 41.2. Citizens' assemblies are calling for the protection of biodiversity and climate change topics to be included in the Irish Constitution as well. Other questions to consider in the coming days are:

1. Will any progress be made for the Good Friday Agreement; will the agreement be held concurrently in the North and the South of the Island?
2. Will there ever be enough momentum to support the abolition of the *Seanad Éireann*, as was proposed in 2013?
3. Will there be room for more rights given to citizens outside the State in regard to voting in presidential elections?

4. Could the withdrawn abortion regulation bill ever really lead to decriminalization in Ireland?

The housing referendum results will be published. Furthermore, the future of the *Coimisiún Toghcháin* has a nexus to the census report as well as the constituency review comment period with a deadline of 10 May 2023. The effectiveness of the *Coimisiún Toghcháin* remains to be determined. Now that all referendum processes will be centralized, it will be interesting to observe the worth of the reform process that arises regarding the topic of referenda. While there have been delays with the first referendum, perhaps the commission will have better luck with the forthcoming referenda on gender equality due to its involvement from the start of the questioning process.

Coimisiún Toghcháin's electoral responsibilities show that there are further electoral amendments forthcoming as Heneghan v. Minister for Housing, Planning, and Local Government (2023) was an *An Chúirt Uachtarach* (Irish Supreme Court) case about the electoral processes in the *Seanad Éireann*. The *Dáil Éireann* also has plans to amend and extend the Planning and Development Acts from 2000 to 2020.

In addition to the *Coimisiún Toghcháin*, several new government entities were established during 2022 including the following: 1. Construction Industry Register Ireland, 2. *Coimisiún na Meán* (broadcasting, media, and online services commission), and 3. the Office of the Protected Disclosures Commissioner. There will likely be changes in the industries engaged in construction, telecommunications, and European Union law at the Irish level. When considering government immunity, it is possible for other nations to influence this issue in Ireland.

While it is very likely that COVID measures will diminish, long-term lessons regarding constitutional reform will probably arise throughout various levels of the Irish governmental structures.

While green hydrogen remains an issue before the *Oireachtas*, the likelihood of success seems slim without a European Union regulation or law to bolster support for such dramatic changes. The interpretation of climate change will be interesting to observe upon completion of the International Court of Justice's advisory opinion on the topic.

While Ukraine will continue to be prevalent in the minds of the reformers throughout Ireland, there are other questions that may arise in the future. For example, how will the process of judicial appointments, with the backing of the recommendations from the Council of Europe's Group of States Against Corruption, be modified by the *Oireachtas*? Will the display of advertisements for national and supranational elections undergo new regulation?

One thing is certain, constitutional control will shift to a certain extent as the newly implemented *Taoiseach* ushers housing and gender equality referenda into their next stages—paving the way for Irish men and women to engage in the implementation or failure of the next generation of reforms.

V. FURTHER READING

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Israel

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I. INTRODUCTION

We have concluded our 2021 report with a "looking ahead" full of anticipation, as the then "new government" presented various important constitutional reforms: "Basic Law: Legislation," that would regulate the political rules of the game and once and for all establish and regulate the manner by which basic laws are enacted and amended; amendments to Basic Law: The Government establishing term limits for the Prime Minister and prohibiting holding the office of Prime Minister while criminally charged; Basic Law: Rights in the Criminal Process; and constitutionally anchoring the right to equality.[1] However, that government, which was formed in 2021 as a unity of diverse parties, suffered from political difficulties and constant struggles, and in June 2022, decided to end its term by dissolving the Knesset. The proposed reforms remained mere proposals and were not enacted.

After the dissolution of the Knesset, general elections took place in November 2022. In these elections, the right-wing and religious parties' bloc, headed by Netanyahu's Likud party, achieved a majority of 64 members out of the 120-member Knesset. As part of forming the new government, the coalition has enacted two constitutional amendments that concern the appointment of Ministers who were convicted of criminal offenses and allowing to fill a greater number of parliamentary seats ceded by ministers. These two amendments are reviewed below.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Toward the end of 2022, the new government enacted two constitutional amendments:

BASIC LAW: KNESSET (AMENDMENT NO. 52):

The first amendment was a relatively minor reform concerning the ability of Knesset Members (Known as: "MK") who are appointed as ministers to resign from the Knesset and according allow the entry of new MK who were listed as the candidate list to become MK, instead of those who have resigned. This is termed in the Israel jargon as "the Norwegian law." The law aims to release the Ministers or vice ministers to do their governmental work and allow the MK to do the parliamentary work. Prima facie, this law aims to strengthen the separation of powers between the executive and the legislature. Of course, in Israeli reality, this law is required due to the relatively small number of parliament members (there are 120 MK), the relatively high number of parliamentary committees, and the large size of the cabinet - often reaching the number of 35 Ministers and vice ministers. Without the "Norwegian law," there are only about 75 MK (deducting the speaker of the Knesset and their deputies and the chairs of the committees) that are "available" to do the parliamentary affairs.

Until the current amendment, there was a limit of five "Norwegians" for a list. However, the Likud Party wanted to abolish this upper limit and allow big parties - lists of at least 18 MK- to insert up to third a "Norwegians," which was the aim of this amendment.[2]

BASIC LAW: THE GOVERNMENT (AMENDMENT NO. 11):

This amendment, also known as "The Aryeh Deri Law," is named after MK Aryeh Deri, a former Minister of Internal Affairs of the State of Israel. This amendment changed the conditions for being appointed to a ministerial position so that only an MK who served an actual prison sentence could not serve as a minister. This change was meant to allow MK Aryeh Deri to be appointed as a minister in the government that was established in 2022.

In 1999, Deri was convicted of bribery, fraud, and breach of trust and spent 2 years in prison.[3] In 2013, he returned to politics as the chairman of the "Shas" party, which primarily represents the interests of "Sephardic" and "Mizrahi" Ultra-orthodox Jews. In 2016, he was under criminal investigation again,[4] and in 2018, he was indicted for tax offenses. A plea bargain was reached in 2022 between Deri and the Attorney General, which stated that Deri would resign from the

1 See Yaniv Roznai, Amir Fuchs, Nadiv Mordechay, and Yuval Ram, 'Israel' The 2021 International Review of Constitutional Reform (Luís Roberto Barroso & Richard Albert eds., the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2022), 123-126.

2 See Carrie Keller-Lynn, 'Israel amends basic law allowing parties to fill greater number of parliamentary seats ceded by ministers' ConstitutionNet (January 25, 2023), https://constitutionnet.org/news/israel-amends-basic-law-allowing-parties-fill-greater-number-parliamentary-seats-ceded

3 Gil Hoffman, "Shas leader Arye Deri quits Knesset in criminal plea deal". The Jerusalem Post (January 23, 2022). https://www.jpost.com/israel-news/politics-and-diplomacy/article-694272

4 Raoul Wootliff, 'Aryeh Deri admits to tax offenses as part of plea deal, will resign from Knesset' The time of Israel (December 23, 2021), https://www.timesofisrael.com/aryeh-deri-admits-to-tax-offenses-as-part-of-plea-deal-will-resign-from-knesset/

Knesset and, arguably, not return to public life in exchange for a suspended prison sentence of 12 months for three years.[5] However, less than a day after the verdict, Deri held a press conference in which he stated that he had no intention of stepping away from public life.[6] He ran in the 2022 elections as the head of the Shas party and won 11 seats.[7] While Petitions were filed against his appointment as minister due to the violation of the plea bargain, the Attorney General determined that Section 6(C) of the Basic Law: The Government set a higher standard of normative competence for office than required of MK, and stated that no one convicted of an offense and sentenced to imprisonment can be appointed minister unless approved by the chairman of the elections committee.[8] This meant that the chairman of the elections committee must approve Deri's appointment as a minister.

During the coalition negotiations to form the 37th government led by Benjamin Netanyahu, it was decided that Aryeh Deri would serve as the Minister of Health for two years and later as the Minister of Finance.[9] To overcome the legal obstacle to his eligibility, an amendment to section 6(C)(1) of the Basic Law: The Government was proposed. This particular section currently prohibits the appointment of individuals as ministers if they have been convicted of a crime, sentenced to an imprisonment, and have not yet completed seven years since their release or the date of the verdict. The amendment changed the word "imprisonment" to "actual imprisonment", since Deri was only sentenced to probation, not actual imprisonment.[10] Because the coalition feared that the then Minister of Justice would delay the promulgation of the law, it expressly stated in the amendment that it shall be in force as of the day of its acceptance in the Knesset - i.e., immediate applicability, rather than prospective.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

A petition was filed with the High Court of Justice against the amendment to Basic Law: The Government ("Deri Law"), with three arguments: The amendment was a personal law to allow Deri to serve as a minister and is thus a misuse of constituent power; The prime minister's decision to appoint Deri as minister was extremely unreasonable; and that Deri was prevented from being appointed as a minister since he misrepresented to the court that he intended to retire from political life in order to get the plea bargain.

In 2023, in an extended bench of eleven judges, the High Court of Justice ruled that Deri, indeed, was prevented from being appointed as a minister because his appointment was extremely unreasonable, especially considering his statement that he intended to retire from political life.[11] Ten of the eleven justices ruled against Deri's appointment. In her majority decision, Supreme Court President Esther Hayut stated that "this is a person who has been convicted three times of offenses throughout his life, and he violated his duty to serve the public loyally and lawfully while serving in senior public positions… Prime Minister Benjamin Netanyahu was not entitled to ignore the "accumulation of serious corruption offenses"[12] .Hayut further stated that "having Deri in charge of two of the most important ministries in the government damages the image and reputation of the country's legal system and contradicts principles of ethical conduct and legality."[13] Accordingly, Deri was disqualified from serving in a ministerial position. Justice Yosef Elron delivered an individual opinion, according to which the proper solution to the legal issue is to hold, as an interpretive approach, that the amendment does not apply to Deri, and thus he should go to the chairperson for the examining of his appointment.

Considering this decision, High Court of Justice ruled that it was unnecessary to decide upon the constitutionality of the amendment.[14] By this judgment, the court did not actually invalidate the "Deri Law", which presents clear moral concerns. Consequently, the ruling permits the possibility of a future politicians being appointed as a minister, even if they have been found guilty, solely based on the fact that they entered into a plea bargain. Therefore, it is important to note: had the court been forced to deal with, the constitutionality of the amendment, there were good reasons for its invalidation. In a prevision judgment,[15] the court set out a detailed test for disqualifying amendments to the Basic Laws that are, in fact, a misuse of the title 'Basic Law.' One of the tests was whether the constitutional amendment was a norm with general structural applicability or a norm that has personal characteristics.[16] It seems evident that this amendment, especially in light of its immediate application, was of a personal nature; however, the government could have still justified the appointment in light of Deri's important ministerial experience. An alternative solution could have been the adoption of Justice Elron's opinion and applying a prospective application rule for the amendment, thereby holding that the amendment does not apply to Deri, who would have to get the approval of the chairperson of the elections committee, as according to the older rules. But again, this is a mere theoretical discussion, as this issue was not decided by the court.

IV. LOOKING AHEAD

While 2022 was "slim" concerning constitutional amendments, 2023 is all about constitutional reforms. After the establishment of the new government, on January 11, 2023, Israel's Minister of Justice, Yariv Levin, declared a major constitutional reform in the judicial system.

5 Shirit Avitan Cohe, 'Deri agrees plea deal, to quit Knesset next week' Globes (January 19, 2022) https://en.globes.co.il/en/article-deri-to-quit-knesset-agree-plea-deal-next-week-1001399182

6 i24NEWS, 'Israel: Aryeh Deri claims "racism" over corruption trial'. I24 (February 02, 2022), https://www.i24news.tv/en/news/israel/politics/1643814212-israel-aryeh-deri-claims-racism-over-corruption-trial

7 For the results of the 2022 elections in Israel, see: https://en.idi.org.il/israeli-elections-and-parties/elections/2022/

8 Gali Baharav-Miara, 'Letter from the Attorney General to Benjamin Netanyahu, Head of the Likud Party, Application of Section 6(c) of the Basic Law: The Government' (November 17, 2022).

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11 HCJ 8948/22 Ilan Sheinfeld v. Knesset (Nevo, 18.01.2023), pp. 20-21. On the jurisprudence of the Israeli Supreme Court on this matter, see, generally, Yoav Dotan, 'Impeachment by Judicial Review: Israel's Odd System of Checks and Balances' (2018) 19(2) Theoretical Inquiries in Law 705.

12 *See id*. at 43-44.

13 *See id*. at 35-36.

14 *See id*. at 30.

15 HCJ 5969/20 Stav Shafir v. The Knesset (May 23, 2021) (ISr.).

16 See also Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2019) 21(3) European Journal of Law Reform 403-423; Yaniv Roznai & Nadiv Mordechay, 'Israel', in The 2020 International Review of Constitutional Reform (Luís Roberto Barroso & Richard Albert eds., the Program on Constitutional Studies at the University of Texas at Austin in collaboration with the International Forum on the Future of Constitutionalism, 2021), 158-161

Briefly put, the Minister of Justice has declared four broad reforms:

First, changing the manner by which judges are appointed, that one that is controlled by the coalition;

Second, limiting judicial review by providing that only 80% or more of all Supreme Court Justices can strike down unconstitutional legislation, by enacting an "override clause" that would allow a majority of MK to reenact an unconstitutional law, and by prohibiting judicial review of basic laws themselves;

Third, abolishing the "reasonableness doctrine" in administrative review;

Fourth, changing the way by which legal advisors are appointed, from an independent committee to a personal ministerial appointment.

In response to these dramatic proposals that would significantly increase the executive power, an unprecedented protest movement has emerged, involving hundreds of thousands of demonstrators participating in mass rallies every week. In order to solve the crisis, and in an unprecedented move, the President of the state published his own proposal of reform, which was rejected by the coalition.[17] At the time of the writing, the proposals have gone through some stages in the legislative process yet have not been legislated, and the coalition has been negotiating the reform, with the opposition, under the auspices of the President to attempt to bring a more balanced reform in a broad consensus. It is unclear how these negotiations will end.[18]

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17 See 'Peoples' Directive - From a crisis to a constitutional opportunity: The president's proposed constitutional framework for settling the relations between the branches of government in Israel by broad consensus', https://www.mitve-haam.org/_files/ugd/f35a26_8eb0f820ae1b4d32bd178cc2b7cf4352.pdf

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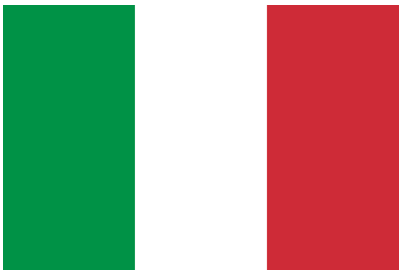
Italy



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I. INTRODUCTION

The 1948 Italian Constitution (ItC) is a comprehensive, written document characterized by a complex pathway to constitutional change. The Constitution consists of 139 articles, some of which have been abrogated, as well as 18 transitional and final provisions. The first twelve articles represent the fundamental principles of the Constitution. These provisions (and few others, such as Article 32 ItC, which recognizes health as a "fundamental individual right" and a "collective interest") are considered a part of the 'supreme principles of the constitutional order' theorized by judgment no. 1146/1988 of the Italian Constitutional Court. In this decision, the Court argued that such principles cannot be altered in their essential content, even though this limitation to constitutional amendment is not explicitly stated in a constitutional provision (interpretive unamendability).

Subsequently, the Constitution is divided into two main sections: Part I provides for the rights and obligations of citizens by distinguishing among civil relations (Articles 13-28), ethical and social relations (Articles 29-34), economic relations (Articles 35-47), and political relations (Articles 48-54). Part II (Articles 55-139) is devoted to the "Organization of the Republic" and shapes the political regime of the country.

The only explicit limit to amendment concerns the republican principle under Article 139. The mentioned theory of interpretive unamendability of fundamental principles enhances the rigidity of the Constitution. Despite its rigidity, the Constitution has been altered over time. Since its entry into force until now, a total of 47 constitutional laws have been enacted, but only 19 directly affected the Constitution, resulting in amendments that have impacted 38 different articles. Throughout the years, with the exception of the 2001 reform of Italian regionalism,[1] all attempts to pursue extensive constitutional reforms have failed. Such was the outcome of the so-called Bozzi Bicameral Committee in 1983-1985, the De Mita-Jotti Bicameral Committee in 1992-1994, the D'Alema Bicameral Committee in 1997-1998, the reform project launched by the second Berlusconi government in 2005-2006, and the Renzi-Boschi 2016 reform.

Regarding the year 2022, two constitutional reforms were successfully adopted. The first one (Constitutional Law no. 1) was approved by both Houses with a two-thirds majority and then promulgated by the President of the Republic on February 11th. Constitutional Law No. 1 amends Article 9 by adding a new principle of protection for the environment, biodiversity, and ecosystems for the sake of future generations. It also grants the state the responsibility to regulate the methods and forms of animal protection.

The second reform (Constitutional Law no. 2) was approved by a qualified majority and promulgated on November 7th. Following the publication in the Official Journal, no referendum was initiated. Constitutional Law No. 2 includes a modification in Article 119, paragraph 6, which acknowledges the unique characteristics of the islands and the need to redress their disadvantaged economic condition.

After a quick evaluation of the repercussions of the Parliament's early dissolution in 2022 and the consequences of the implementation of the 2020 reform aimed at reducing the number of Members of Parliament (MPs), this report will assess all the constitutional reform propositions presented in the two legislative terms in 2022. It will offer a more comprehensive understanding of the two successful reforms in connection to the role played by the Constitutional Court. Ultimately, a concluding remark will highlight the primary avenues for future constitutional amendments in Italy.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The defining feature of 2022 is the shift from the 18th to the 19th parliamentary term due to the early dissolution of Parliament. The end of the term was proclaimed by the President of the Republic, Sergio Mattarella, after the crisis of the Draghi Government, eight months prior to its natural expiration—which was originally due in March 2023. Consequently, new elections were called. The 19th Parliament is the first to operate under the revised Articles 56, 57, and 59 ItC which have reduced the number of MPs in the Chamber of Deputies from 630 to 400. Additionally, the 2020 amendment has also reduced the number of elected members in the Senate from 315 to 200, following the first application of Constitutional Law No. 1 of October 19th, 2020. With the inclusion of six life senators, the Senate currently has a total of 206 members. The recent reform has impacted the number of votes required to initiate and pass a constitutional amendment under Article 138. Although thresholds are unchanged and remain onerous, it is politically easier to meet them with an inferior number of MPs.

1 For a review of all constitutional reforms, see Carlo Fusaro, 'Per una storia delle riforme istituzionali (1948-2015)' (2015) 2 *Rivista Trimestrale di Diritto Pubblico*, 431-555.

To amend the Italian Constitution, a special procedure involving both Houses of Parliament and a possible referendum is required. The 2020 reform has reduced the number of votes needed for each type of majority. While any MP can propose a constitutional amendment, it must first be approved by a simple majority of half plus one of all House members present for the first reading. The second reading requires an absolute majority, which now stands at 201—instead of 316—votes in the Chamber of Deputies and 104—instead of 161—votes in the Senate. The two readings must be spaced at least three months apart.

If the proposal gains two-thirds majority support during the second reading, no referendum is necessary. This means that at least 267 deputies and 138 senators must vote in favor instead of the previous numbers of 420 and 214, respectively.

In addition to these changes in the majority numbers, which have an impact on parliamentary works and decision-making processes, and imply political readjustments, it shall also be considered that when a parliamentary term expires, legislative proposals introduced in Parliament but did not successfully progress into law also expire. These proposals must be reintroduced in the new legislative term if sponsors wish to continue pursuing their passage. Alternatively, bills may be abandoned or substantially modified before reintroduction. Generally, bills do start the legislative process anew due to the principle of sovereignty and autonomy of each Parliament. However, some exceptions exist based on parliamentary rules of procedure, such as bills initiated by citizens or those reproducing a previously approved text, which can be declared urgent and follow a fast-track procedure. (See Rule 107 of the Chamber of Deputies, as well as Rules 74.2 and 81 of the Senate of the Republic.)

In 2022, during the 18th legislature, 34 constitutional bills were lodged, with 14 filed in the Chamber of Deputies and 20 in the Senate of the Republic. From the beginning of the 19th legislature in October 2022 until the end of the year, 51 proposals for constitutional revision were introduced, of which there were 35 in the Chamber of Deputies and 16 in the Senate.[2]

One of the promising proposals worth mentioning is the amendment of Article 33 of the Constitution, which aims to introduce an explicit reference to the sport as a basic right rather than just as a shared legislative power (as per Article 117.3 ItC). The suggested revision was already tabled during the 18th legislative term.[3] A unified text was adopted at the first and second readings by the Senate, and only at the first reading by the Chamber, where it did not conclude its proceedings by reason of the dissolution of the Parliament. An identical text has been presented at the Senate, following Rule 81 of the Senate's Procedures, and approved after its first reading on December 13th, 2022.[4] Afterwards, this amendment proposal was adopted in first reading by the Chamber on April 14th, 2023;[5] at the Senate, it was adopted in the second reading on May 17th, 2023. Its examination is currently underway at the Chamber of Deputies.

Before 2022, two successful proposals were introduced, but the stages for the approval of the constitutional laws were finalized in 2022 and are therefore worth mentioning in this report. Firstly, the so-called 'Environmental Reform' became Constitutional Law No. 1 on February 11th, 2022, concerning "Amendments to Articles 9 and 41 of the Constitution on Environmental Protection."[6] Secondly, a bill initiated by citizens in 2018 sought to amend Article 119 by introducing a sixth paragraph concerning the recognition of the peculiarities of the islands. It received the approval of the Senate on April 27th, 2022, and was definitively approved by the Chamber of Deputies on July 28th, 2022, despite the early dissolution of Parliament. Unlike the "sports reform," which had to undergo a new legislative path, the course of the "insularity reform" was not interrupted by the dissolution of the Parliament. This has high political significance since it seems to set a new precedent in which proposals initiated by popular initiatives can also be voted on during the temporary *prorogatio* of a dissolved Parliament.[7] Constitutional Law No. 2, enacted on November 7th, 2022, refers to the "Amendment of Article 119 of the Constitution". The purpose of this amendment recognizes the characteristics of the Islands and the overcoming of the disadvantages deriving from insularity[8] entered into force on November 30th, 2022.[9]

In the previous legislative term, multiple proposals were introduced and are now being sponsored again in the current term. Others have been newly presented in the 19th legislative term. Among these bills are proposals aiming to modify the territorial organization of the State and obtain increased autonomy for regions with special status, namely Sardinia and Trentino-Alto Adige/South Tyrol, or the city of Rome as the capital.[10] By amending Article 111 ItC, other proposals aim to insert a principle of independence for lawyers[11] or to recognize the need to protect crime victims.[12] Other bills seek to modify the composition of the Constitutional Court in general,[13] allocate a share of members to the category of lawyers[14] or to linguistic minorities[15] as well as inserting a specific provision to recognize Italian as the official language of the Republic[16]. Other proposals are also included which seek to amend Article 27 ItC concerning criminal liability,[17] the establishment of new provisions for protecting human rights,[18] and changes to the national fiscal regime.[19] Additionally, some proposals hope to modify the rules concerning the decrees-laws, under Articles 74 and 77,[20] alter Part II

2 All parliamentary draft bills by legislative term can be found in the Senate's online database, equipped with an advanced search engine. See: <https://www.senato.it/ric/sddl/nuovaricerca.do?params.legislatura=19>.

3 For the draft bills at the Chamber of Deputies, see C.3531, C.3531-B, C.3536. For the draft bills at the Senate of the Republic, see S.747, S.2262, S.2474, S.2478, S.2480, S.2538, S.2538-B.

4 See S.13, S.135, S.152.

5 See C.212, C.337, C.423, C.715.

6 The law is published in the Official Journal no. 44 of 22 February 2022.

7 It should be noted that in the Italian system, the legal concept of *prorogatio* does not equal that of prorogation. While the latter means the status of a Parliament following the termination of a session of a House, *prorogation* refers to the status of a Parliament which, despite its dissolution, can be summoned for urgent or temporary issues. The rationale of *prorogatio* is to avoid discontinuity in the functioning of the assemblies before newly elected Members can be summoned.

8 The law is published in the Official Journal no. 267 of 15 November 2022.

9 See Gianmario Demuro, 'Le isole ritornano in Costituzione' (2022) 4 *Quaderni costituzionali*, 901-904.

10 For the 18th legislative term, limited to 2022, see S.2608, S.2654 and C.3635; for the 19th legislative term, see S.172, S.324, S.304, S.305, S.307, S.308, C.7, C.277, C.278, C.392, C.393, C.350, C.514.

11 19th legislative term, S.418, C.6694.

12 19th legislative term, S.427 and C.286.

13 18th legislative term, C.3497.

14 19th legislative term, C.227.

15 19th legislative term, C.6.

16 19th legislative term, S.337, C.736.

17 19th legislative term, S.426, C.285.

18 19th legislative term, C.9, C.580.

19 19th legislative term, C.91, C.414. For the 18th legislative term, see C.3520.

20 19th legislative term, C.607. For the 18th legislative term, see S.2523.

of the Constitution, and especially change the articles that cover the Parliament, legislative procedures, and the confidential relationship with the Government.[21] There are also proposals that serve to introduce norms concerning the participation of Italy in the European Union.[22] Other reforms have been tabled in the 19th term to separate the careers of the judiciary,[23] amend norms pertaining to the social dimension of individuals related to family and school,[24] establish a right to access the internet,[25] change the rules concerning amnesty and pardon,[26] alter the distribution of competences between the State and the Regions on health matters,[27] abolish the National Economic and Labor Council (CNEL),[28] and change the procedure for constitutional amendment under Article 138.[29]

During the 18th legislative term, more proposals were introduced but have now expired due to the dissolution. They encompassed a variety of different amendments, such as creating a dedicated section for military offences within the regular courts by modifying Article 111 of the ItC,[30] defining the prerequisites for announcing a state of national emergency,[31] altering aspects of the President of the Republic's election and powers,[32] and eliminating foreign constituencies for electing MPs.[33] Other constitutional reforms which never progressed include those that aimed to convene a constituent assembly to revise the constitution's organizational section (Part II),[34] to withdraw the constitutional recognition of the Treaty regulating the relationship between the Catholic Church and the State,[35] to incorporate the principle of human dignity in Article 2 ItC,[36] to establish citizen assemblies for public consultation,[37] and to amend Article 41 ItC to address criminal interference in the national economy.

To gain a comprehensive understanding of the attempts to alter the Constitution, it is important to note that during the 18th Parliament, 310 constitutional reforms were put forward. Among these reforms, 34 were awaiting committee assignment, 189 were assigned to committees but never debated, 12 were being examined by committees, 4 were being discussed in the plenary, and 2 were waiting for rapporteurs to finalize their opinions. Out of these 310 reforms, only 4 minor modifications were implemented between 2018 and 2022, which confirms the level of rigidity of the Italian Constitution.

21 19th legislative term, S.149, S.94. It can be included also C.325 aiming at ensuring the functionality of the Parliament in times of emergency. During the 18th legislative term, proposals S.2584 and S.2608 were filed to amend the composition of the Senate to ensure a territorial representativity.
22 19th legislative term, C.221, C.349.
23 19th legislative term, C.434.
24 19th legislative term, C.175, C.253, C.331. For the 18th legislative term, see C.3553 and S.2497.
25 19th legislative term, C.327.
26 19th legislative term, C.156.
27 19th legislative term, S.116.
28 19th legislative term, C.8.
29 19th legislative term, C.391.
30 This proposal was filed during the 18th legislative term, S.2554, but by the time being is not lodged again since its main sponsor is not elected in the new Parliament.
31 18th legislative term, C.3444.
32 18th legislative term: C.3453, C.3456, S.2534 and S.2521 concern the procedure for the election of the Head of State. S.2511 seeks to abolish the power to nominate life senators, while S.2522 aims at modifying the regime of parliamentary dissolution. S.2525 aims at amending Article 92 ItC which provides for the power to design ministers.
33 18th legislative term, S.2524.
34 18th legislative term, S.2581, C.3541.
35 18th legislative term, C.3470.
36 18th legislative term, S.2593.
37 18th legislative term, S.2665.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The two amendments adopted in 2022 can be described as amendments rather than dismemberments of the Italian Constitution. Borrowing from Richard Albert's taxonomy,[38] both amendments do not exceed the boundaries of the existing constitutional order. However, some questions were raised during the drafting process.

Specifically, Constitutional Law no. 1/2022 was the first amendment in the history of the Italian Republic to affect the content of a provision located in the initial section of the Constitution, namely Article 9 ItC. This sparked debates about whether it is permissible to amend the 'Fundamental Principles' (Articles 1 to 12) of the Italian Constitution since it has long been established that such basic principles, having a 'super-constitutional value,' are considered more difficult to change and may serve as silent limitations regarding constitutional amendments. Moreover, in 1988, the Italian Constitutional Court (judgment no. 1146) identified an unamendable core of the Constitution that extends beyond the guarantee of republicanism entrenched in Article 139 ItC. Constitutional amendments altering this untouchable core of the constitutional would most likely be deemed unconstitutional by the Constitutional Court, who has the power to scrutinize their constitutionality and to strike them down (as further stated in judgment no. 2/2004).

In light of this, critics have argued that amending a provision explicitly included among the 'Fundamental Principles' of the Constitution may significantly alter the spirit and the content of the Constitution. A recurring objection is that the unamendable core of the Constitution is not forcefully limited to the 'Fundamental Principles' of Articles 1 to 12 and does not necessarily correspond with them.

Prior to 2022, Article 9 ItC stated that the Republic promotes the development of culture and research, and protects the natural landscape, as well as the historical and artistic heritage of the Italian nation. As a result of the 2022 amendment, the new Article 9 ItC includes an additional task of the Italian Republic: protecting the environment and the ecosystem for the sake of future generations.

Some critics have argued that explicitly mentioning the environment may ultimately undermine the constitutional protection of Italy's natural landscape and cultural heritage, which are deeply ingrained in the Constitution and, more broadly, in the Italian model of heritage protection.[39] Therefore, amending Article 9 may induce a dramatic alteration of the meaning and scope of well-established constitutional principles.

Nevertheless, the dominant view is vastly different. Since the 1980s, environmental protection has been recognized as a specific "constitutional good" through the case law of the Constitutional Court. In 2001, Constitutional Law no. 3/2001, which set the ground for a significant transformation of the Italian regional model, also made reference to the "protection of the environment, the ecosystem, and the cultural heritage" as a subject matter in which the state holds exclusive legislative competence. Constitutional Law no. 1/2022 has not significantly modified the existing fundamental principles related to the promotion of research

38 See Richard Albert, *Constitutional Amendments. Making, Breaking and Changing Constitutions* (OUP, 2019).
39 See Tomaso Montanari, 'Art. 9' in the series edited by Pietro Costa and Mariuccia Salvati, *Costituzione italiana: i Principi fondamentali*" (2nd ed., Carocci editore 2002).

and the protection of national heritage. Instead, it has contributed to further highlighting the constitutional relevance of environmental principles that had already been established through constitutional case law and constitutional and ordinary legislation.

In line with the above, Constitutional Law no. 2/2022 is worth mentioning as its contents may at first glance seem to have limited legal and political impact. However, the heated debate surrounding the implementation of asymmetric regional autonomy and the internal balance of the Italian model of regional state suggests that this amendment may have more profound consequences.

A procedural point should be noticed. The Chamber of Deputies approved this amendment in the second reading on July 28th, 2022, despite President Mattarella's dissolution of the legislature and calling for a snap election on July 21st. For the first time since the Constitution came into effect, an amendment was passed by a dissolved legislature. Some scholars have objected that both the Chamber and the Senate had already approved this bill in the first reading. Furthermore, the second reading had been completed in the Senate before the dissolution of the Parliament. Consequently, it was reasonable to get to the end of the legislative procedure. A further incentive for the legislature to approve the reform was the fact that this amendment was the result of a popular initiative (see above at II). Considering the public's support for this reform, it would have been unwise for elected officials to hinder the legislative process. On the other hand, critics pointed to this as setting a potentially dangerous precedent that an unscrupulous legislature may rely upon in the future.

Before drawing conclusions, it should be noted that in the Italian system, there is no ex-ante constitutional control of constitutional reforms. The only form of scrutiny in the amendment process concerns the admissibility of the referendum.[40] According to Article 138.2 ItC, a constitutional referendum can only be initiated if three conditions are met: 1) if the two-thirds threshold for the approval of the reform during the second reading is not met, 2) if a request is made within three months of the publication of the Law, 3) if such request is filed by at least one-fifth of the members of a House, 500,000 voters, or five regional councils. With regard to the 2022 reforms, a referendum was technically allowed only for Constitutional Law no. 2. However, no request was filed.

Concerning the ex-post scrutiny of constitutional laws, it can be asserted that the Italian Constitutional Court plays a counter-majoritarian role since the established case law has acknowledged the power to invalidate constitutional norms approved by the Parliament for defects or errors in the substance or content of the law (*vizi sostanziali*). At the same time, defects in the form of the law and parliamentary procedural irregularities (*vizi formali*) cannot render a law invalid or unconstitutional since the final parliamentary approval is assumed to correct every fault unless this results in a violation of the Constitution itself.

The Court's control for substantial defects in constitutional laws is premised on the idea of the hierarchical superiority of specific principles or norms that subsequent constitutional reform could never override, mostly including Articles 1-12 fundamental principles. This line of reasoning formed the basis of the theory of silent (or 'natural') limitations to constitutional revision, which, as previously mentioned, was carved in the 1988 judgment and is supported by dominant constitutional literature.[41] Concerning the 2022 amendments, no referral was made to the Court up to now. In this regard, the constitutional and legislative regulation of access to the Court has an obvious impact on the possibility that amendments are subject to constitutional review.

IV. LOOKING AHEAD

The victory of the right-of-center coalition led by Fratelli d'Italia in the 2022 general election may foreshadow yet another round of constitutional reform. The four political parties that make up the right-of-center coalition share a platform that places a significant amount of emphasis on constitutional reforms. Several ambitious goals are mentioned, such as the direct election of the President of the Republic and the reform of both the judiciary and the Higher Council for the Judiciary. Other envisaged innovations do not forcedly require constitutional innovations.

Introducing direct presidential elections was foreseen since the 1980s in the agenda of Fratelli d'Italia's predecessors, Alleanza Nazionale (AN) and the Movimento Sociale Italiano (MSI).[42] However, declarations issued by senior representatives of Fratelli d'Italia, including party leader and Prime Minister Giorgia Meloni, suggest that this reform project would go beyond modifying the election process for the head of state. Rather, it seeks to change Italy's parliamentary form of government into a presidential or, more likely, a semi-presidential model. The specific way this change may occur is unclear. As mentioned above, during the 18th parliamentary term, Fratelli d'Italia MPs tabled a constitutional bill that can be viewed as a blueprint for their constitutional objectives.[43] In its early form, critics noticed that the bill was affected by inherent contradictions, as it was based on the difficult coexistence of a strong President of the Republic entrusted with primary responsibility for governmental action and mechanisms seeking to ensure the stability of the cabinet, including the German-inspired constructive vote of no confidence.

Even some critics of the current government's constitutional reform agenda acknowledge that changes to improve the institutional structure are desirable. However, they disapprove of the limited flexibility and the internal inconsistency of (semi-)presidential projects. These detractors also suggest that well-targeted adjustments to the existing parliamentary form of government should be favored. In this aspect, an element that should be considered with the greatest attention in the discussion about reform is the increasing and unprecedented deinstitutionalization of the party system since 2013, which has impacted existing institutions.[44]

A distinct question is how these reforms should be adopted. Evidence from the past, most notably the two constitutional referendums in 2006 and 2016, suggests that a unilateral, confrontational

40 Whether or not the President of the Republic may abstain from promulgating a constitutional law and ask for yet another parliamentary deliberation is disputed.

41 See, for instance, Stefano M. Cicconetti, *Le fonti del diritto italiano* (3rd ed., Giappichelli, 2017), 108 ff.

42 More generally, the French semi-presidential model has been quite popular in conservative and moderate circles since the 1960s: see Raffaele Romanelli, *L'Italia e la sua Costituzione. Una storia* (Laterza, 2023), 210 ff.

43 18th legislative term, C.716. The bill was rejected by the Chamber of Deputies in the final weeks of the term, on 10 May 2022.

44 A trend that has its root causes in the peculiarity of the history of Italian political parties, well described by Pietro Scoppola, *La repubblica dei partiti* (Il Mulino, 1991), *passim* and Giuseppe Maranini, *Storia del potere in Italia. 1848-1967* (Corbaccio, 1995), *passim*.

approach may ultimately backfire against the very proponents of a given reform project. To date, Prime Minister Meloni has generally acknowledged the need for cross-partisan consensus; meanwhile, she has also suggested that the right-of-center majority has the ability and duty to pursue its agenda also in this field. Uncertainty about the contents of this reform has not waned. In a hearing before the Senate Committee for Constitutional Affairs on April 5th, 2023, the Minister of Constitutional and Law Reform, Maria Elisabetta Alberti Casellati, confirmed that the constitutional bill will be tabled in the next few months. The bill will address two main topics: governmental stability and the direct election of the President of the Republic or the Prime Minister.

Finally, other reform projects should be mentioned because, although they do not impact the text of the Constitution, they have very clear constitutional implications. As amended in 2001, Article 116(3) ItC empowers ordinary regions to achieve 'additional forms and particular conditions of autonomy,' thereby paving the way for greater asymmetry in the Italian regional model. Back in 2017, the regional governments of Lombardy, Veneto, and Emilia-Romagna initiated this procedure. Towards the end of the 17th parliamentary term, the Gentiloni government concluded three preliminary agreements with Lombardy, Veneto, and Emilia-Romagna. During the 2018-2022 term, the implementation of these preliminary agreements was severely affected by political instability in the center, with three governments supported by three very different coalitions.

Meanwhile, the COVID-19 crisis cast a shadow over the Italian regional model. Supporters of the Italian model highlight the virtues of territorial pluralism, while critics make the case for some kind of recentralization of powers and competencies. These skeptics also argued that granting greater autonomy to some of the regions—mostly those in the North of the country—would be tantamount to authorizing a 'secession of the rich.' [45]

The ambiguous wording of Article 116(3) ItC and the lack of a general implementing law fostered a wide array of conflicting opinions in scholarship comments. In the current parliamentary term, asymmetric regionalism is a priority in the agenda of the Meloni government and, above all, of the Lega Salvini Premier, one of the political parties of the right-of-center coalition. However, to grant greater autonomy to some regions, several preliminary issues should be resolved, mostly related to the largely unimplemented constitutional reform of 2001 (see above at III). On March 23rd, 2023, the Meloni government established a nonpartisan committee in charge of setting the basic standards for civil and social rights throughout the national territory. On the same day, the Minister for Regional Affairs and Autonomy, Roberto Calderoli, tabled a general bill on asymmetric regionalism.[46]

Amid growing partisan polarization, the presidential reform and asymmetric regionalism will most likely dominate the agenda of constitutional reform in a broader sense. The success of these reform efforts will ultimately depend on the clarification of several substantive and procedural issues.

45 See Gianfranco Viesti, *Verso la secessione dei ricchi? Autonomie regionali e unità nazionale* (Laterza, 2019).
46 19th legislative term, S.615.

V. FURTHER READING

Giuliana Giuseppina Carboni, 'La stagione dell'insularità' (2022) 22 *Federalismi.it*, 20-30.

Marta Cartabia and Nicola Lupo, *The Constitution of Italy. A Contextual Analysis* (Hart, 2022).

Marcello Cecchetti, 'La revisione degli articoli 9 e 41 della Costituzione e il valore costituzionale dell'ambiente: tra rischi scongiurati, qualche virtuosità (anche) innovativa e molte lacune' (2022) 3 *Forum di Quaderni Costituzionali Rassegna* 286-314.

Enzo Cheli, 'Perché dico no al presidenzialismo' (2022) 3 *Forum di Quaderni costituzionali Rassegna* 54-62.

Marilisa D'Amico, 'Lo sport come diritto della persona: analisi dei progetti di revisione costituzionale' (2022) 1 *Rivista del Gruppo di Pisa*, 152-167.

Jamaica

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I. INTRODUCTION

In January 2022, a newly minted Ministry of Legal and Constitutional Affairs was established and given responsibility for, among other things, constitutional reform. Despite its early establishment, the Ministry's work in constitutional reform did not generate legislative proposals for reform in 2022. In light of the absence of concrete attempts to amend the Constitution in 2022 and this entry being the first contribution from Jamaica, this report, in Part II, provides a historical background to proposed, failed, and successful reforms of the past, and offers, in Part III, comments on judicial control over aspects of the most impactful of the successful reforms – the introduction of a new bill of rights.[1] Part IV describes the work of the Ministry of Legal and Constitutional Affairs and offers thoughts on the prospects of successful reforms in the future.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Jamaica's Constitution has been amended through fourteen separate pieces of legislation since its independence in 1962. These amendments include changes to the chapters on all three branches of government, the Bill of Rights, and the electoral system.

Seven of the fourteen amendments were made after a flurry of constitutional reform activity in the 1990s. These activities took place through Joint Select Committees (JSC) of both Houses of Parliament, as well as Constitutional Commissions consisting of a cross-section of persons in society. In 1991, a JSC on Constitutional and Electoral Reform was established, which in turn, recommended the establishment of a Constitutional Commission to, among other things, receive submissions from the public and make recommendations for constitutional reform.[2]

The Constitutional Commission produced a report dated August 1993, in which it made recommendations in respect of each chapter of the Constitution. This Constitutional Commission was reconstituted in 1993 with a specific mandate to 'consider further and finalize an appropriate draft on the Fundamental Rights and Freedoms Chapter of the Constitution ....'[3] A report on a proposed new bill of rights was published in February 1994. The 1993 and 1994 Constitutional Commission Reports were then considered by a reconstituted JSC, which subsequently published a report in May 1995 ("the 1995 Report") recommending various constitutional reforms to Parliament.

Most of the proposed reforms in the 1995 Report were not implemented. Examples of these include:

1. Replacing the British monarch with a President selected through a process involving a Parliamentary vote.
2. Increasing the number of persons appointed to the Senate, and including in that number, two members who were not selected by the Prime Minister or Leader of the Opposition.
3. Limiting the number of parliamentarians who can be part of the Cabinet.
4. Introducing impeachment proceedings for parliamentarians and heads of statutory bodies.
5. Replacing appeals to the Judicial Committee of the Privy Council (JCPC) with a Caribbean court of final appeal.
6. Enshrining in the Constitution, the offices of the Contractor General, Ombudsman, and electoral commission.

A handful of the proposed reforms were successfully implemented through amendments to the Constitution. These reforms are: changes to the Constitution's citizenship provisions; the replacement of the Bill of Rights with a Charter of Fundamental Rights and Freedoms ('the Charter'); and the recognition of a system of local government.

Another set of the 1995 proposals may be classified as partial achievements since they were implemented through ordinary legislation. In 2000, Parliament established the office of the Public Defender to protect and enforce the rights of citizens. Over time, Parliament also implemented the recommendations related to the process of the appointment of persons to specific public offices. In this regard, the Public Defender, the appointed members of the Integrity Commission (the successor institution to the office of the Contractor General), and the independent members of the Electoral Commission are appointed by the Governor-General after consultation with the Prime Minister and Leader of the Opposition. The 1995 Report's proposal to subject these appointments to Parliamentary approval does not feature in their

1 This report is a joint endeavor of all the authors. However, Jeffrey Foreman did not participate on Part III.

2 Joint Select Committee of the Houses of Parliament on Constitutional and Electoral Reform, *Report of the Constitutional Commission of Jamaica* (August, 1993) 1.

3 The Reconstituted Constitutional Commission, *Final Report of the Constitutional Commission Jamaica* (February 1994) 1.

respective legislation, though it may be observed that all three institutions are designated as Commissions of Parliament. While not enjoying constitutional protection, these offices and the method of appointments have status in the framework of laws possessing constitutional significance. Furthermore, the pieces of legislation establishing the Public Defender and the Electoral Commission are stated to be 'interim' laws that continue in effect until they are included in the Constitution in a way that prevents amendment by ordinary legislative procedures.[4]

We believe that the most significant reform resulting from the 1995 Report was the introduction of the Charter. In the following section, we discuss judicial control over two aspects of Charter law.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Albert described the promulgation of the Charter as a dismemberment.[5] We agree. It departs from its predecessor in deeply fundamental ways – structurally, substantively, and symbolically.[6] As Bulkan explains, the Charter marks both progress and regression in Jamaican society.[7] For instance, the Constitution affirms the inherent dignity of persons, it now recognizes a general right to privacy, the drafters removed the general savings law clause (which immunized pre-independence laws from unconstitutionality vis-à-vis fundamental rights), and they altered the structure of rights provisions to afford greater protection to individuals against abuse by the State, organizations, or other persons. However, the legislature introduced a suite of malevolent provisions, including sections 13(12) and 18. Section 13(12) purports to immunize laws pertaining to sexual offenses (such as buggery), obscene publications, and offenses regarding the life of the unborn, while section 18 aims at the exclusion of same-sex marriage.

It is the JCPC that sets the tenor for the interpretation and application of those provisions. It will determine how, if at all, the seemingly disparate identities embodied in its provisions might be reconciled. Because the JCPC is Jamaica's apex court, it remains a co-author of the constitutional text,[8] though Jamaica has been independent for over sixty years. Its decisions in cases like *Chandler No 2*,[9] and *Ferguson*[10] portend conservatism.[11]

Against this background, the discussion will focus on specific aspects of the role that Jamaican courts are playing in constitutional governance: (1) The JCPC's approach to interpreting the general limitations clause, and (2) the role of Jamaican lower courts in safeguarding rights in the context of a State of Public Emergency (SOPE).

1. THE MARGIN OF APPRECIATION AND THE ROLE OF COURTS IN CONSTITUTIONAL GOVERNANCE

In *AG v. The Jamaican Bar* Association (*JBA*), the JCPC interpreted and applied section 13(2), which provides that rights may be limited if the limitations are demonstrably justifiable in a free and democratic society.[12] It applied *Oakes*[13] and thus confirmed proportionality as the appropriate standard of review for rights restrictions. In *JBA*, the Board considered the constitutionality of a measure that sought to disrupt money laundering facilitation by attorneys. The anti-money laundering regime subjects attorneys to oversight as well as inspection by the General Legal Council, and also obliges them to disclose any knowledge or belief that another person has engaged in a transaction that could constitute or be related to money laundering under penalty of criminal sanction. The Board accepted that the measure infringes the right to privacy, but did not accept that the measure failed the test of demonstrable justifiability.

The Board applied the European concept of a margin of appreciation when determining whether the means used to restrict the right were no more than necessary. The Strasbourg jurisprudence says that the margin is not a thing to which States are entitled as of right,[14] but is instead an exercise of 'restrained review at the international level which reflects the primary role borne by national authorities, including the courts, in protecting human rights.'[15] The margin is then a pragmatic response to the European Court of Human Rights' need to 'reconcile European standard setting and national diversity.'[16] It is an appropriate concession by a transnational court, exercising a subsidiary jurisdiction over multiple jurisdictions, as part of a transnational project. Simply put, it affords a mechanism for 'ordering pluralism' in a transnational context.[17]

The adoption of the European doctrine underscores what Mitchell refers to as the JCPC's 'difficulty of distance.'[18] It is a tacit acknowledgment that the JCPC's distance, which is regarded by its proponents as a virtue, is in fact an impediment that limits its capacity to reckon with the competing considerations before it. In that regard, the JCPC's use of the margin is concerning because, rather than the dialogical approach implicit in the overlapping constitutional governance roles of the various arms of government, it signals deference.[19] As Stone Sweet and Matthews explain, bills of rights set out the general blueprint for the making of public policy.' [20] With the courts as guardians of the

4 Public Defender (Interim) Act, s3; Electoral Commission (Interim) Act, s3.
5 Richard Albert, 'The Boundaries of Constitutional Amendment' in Richard Albert (ed), *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 86–88.
6 Ibid 87.
7 Arif Bulkan, 'The Limits of Constitution (Re)-Making in the Commonwealth Caribbean: Towards the "Perfect Nation"' (2013) 2 Canadian Journal of Human Rights 81, 82–3.
8 Simeon CR McIntosh, *Reading Text and Polity: Hermeneutics and Constitutional Theory* (Ian Randle Publishers 2012) 3–25.
9 [2022] UKPC 19
10 [2022] UKPC 5.
11 Cf the Caribbean Court of Justice. See Ronnie Yearwood and Rashad Brathwaite, 'Barbados' in Luis Roberto Barroso and Richard Albert (eds), The International Review of Constitutional Reform (Program on Constitutional Studies at the University of Texas at Austin and the International Forum on the Future of Constitutionalism 2020) 26.
12 [2023] UKPC 6.
13 [1986] 1 SCR 103. (1) A limitation must meet a sufficiently important objective, (2) there must be a rational connection between the means used and the objective sought to be achieved (3) the measure must limit the right no more than is necessary to achieve the objective (4) there must be proportionality between the benefit and the harm cause by the measure.
14 Cossey v United Kingdom (App no 10843/84 (1991) 13 EHRR 622 (ECHR).
15 See submission by counsel in Huang v Secretary of State for the Home Department [2007] 2 AC 167 (UKHL).
16 Janneke Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (2018) 18 Human Rights Law Review 495, 497.
17 Ibid 497, 500.
18 Paul Mitchell, 'The Privy Council and the Difficulty of Distance' (2016) 36 Oxford Journal of Legal Studies 26.
19 Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 Oxford Journal of Legal Studies 409, 428.
20 Alec Stone Sweet and Jud Mathews, 'Proportionality and Constitutional Gover-

constitution, adjudication becomes a primary mechanism for constitutional governance. In the area of rights adjudication, courts' proportionality assessments are therefore established governance practice. For, 'it is through limitations clauses that a democratic polity draws lines between individual liberties and the public interest, and seeks to strike a stable balance among contending values of constitutional importance.'[21]

Proportionality is a governance practice that engages the Executive branch and the Legislature due to its requirement for evidence and justification. The Court of Appeal in *JBA* rejected the state's claim because the state failed to demonstrate that a non-criminal anti-money laundering scheme could not be equally disruptive.[22] On the other hand, the JCPC accepted that the existing scheme was a reasonable response. Though we accept that the test of necessity can yield multiple reasonable answers, the point here is that application of the margin of appreciation can stymie scrutiny. Thus, it can undermine the Pareto-optimality which proportionality aims at, and can diminish its call for justificatory evidence.[23] Additionally, deference is inimical to the generation of what Mureinik refers to as a 'culture of justification.'[24] As he explains it, it is: "…a culture in which every exercise of power is expected to be justified; in which the leadership given by government rests on the cogency of the case offered in defense of its decisions, not the fear inspired by the force at its command."

2. JAMAICAN LOWER COURTS AS GUARDIANS OF RIGHTS DURING STATES OF PUBLIC EMERGENCY

Under the pre-Charter emergency regime, a proclamation by the Governor-General would remain in force for one month or up to twelve months if extended by the votes of a majority of all the members of the House of Representatives. Under the new dispensation, a proclamation by the Governor-General lasts fourteen days or up to three months if extended by the votes of a two-thirds majority of both Houses of Parliament.[25] Thus, extensions now require bipartisan support,[26] which the Opposition has withheld in recent times.[27] The issues around contemporary use in crime fighting as well as historical factors make the use of SOPEs a politically sensitive issue.[28]

In 2006, Jamaica suffered the ignominy of being dubbed the 'murder capital of the world,' and has since been consistently ranked among the most murderous spaces across the globe. Jamaica's political culture has long had links with criminality as well as communal clientelism as characteristic features.[29] The result is a system featuring both de jure and de facto governance sanctioned by that culture. Jaffe theorizes that the product is really a hybrid state.[30]

The government now routinely invokes SOPEs, though the Constitution's language and amendment history suggest exceptionality.[31] Young describes the result as a quasi-permanent state of exception.[32] This routinized use is perhaps because the nature and level of criminality at various points challenge even the uneasy hybrid model.[33] Interestingly, while the SOPE was available to the government as the overarching framework for its legislative response to the COVID-19 pandemic, it opted not to utilize it.[34] This strongly suggests that SOPEs are invoked for the possibility of preventative detentions.[35]

Relevantly, the Governor-General may invoke the emergency regime when action is taken or immediately threatened by persons, but it has to be of such a nature and on such an extensive scale that it is likely to endanger public safety.[36] The Opposition has asked the courts to rule on the constitutionality of the government's routinized use of the measure in crime fighting.[37] The question is, does routinized use necessarily negate the existence of a SOPE if in each instance the State can demonstrate the existence of the requisite threat?

The Jamaican lower courts have examined the constitutionality of emergency regulations and of deprivations of liberty for persons preventatively detained under states of emergency. The sample size is small, but thus far, they have applied rigorous scrutiny though the measures are likely very popular.[38] In *Douglas v Minister of National Security*,[39] the first instance court determined that preventative detentions ranging from 177 to 431 days were unconstitutional. And in *Clarke v AG*,[40] the court applied tests of rationality and proportionality in determining that certain regulations themselves were unconstitutional. Those

nance' in Alec Stone Sweet and Jud Mathews (eds), *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (Oxford University Press 2019) 51.

21 Ibid 34.

22 [2020] JMCA Civ 37 [560]-[568].

23 Robert Alexy, 'Proportionality and Rationality' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality* (1st edn, Cambridge University Press 2017); Steven Greer, 'The Interpretation of the European Convention on Human Rights: Universal Principle or Margin or Appreciation' (2010) 3 UCL Human Rights Review 1, 13.

24 Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) South African Journal on Human Rights 31, 32.

25 Jamaica Constitution 1962, s 20(3).

26 See Jamaica Constitution 1962, s 35 which fixes the composition of the Senate. Note that the Constitution does not expressly prevent the government from invoking a fresh SOPE once a proclamation has expired if the circumstances warrant.

27 'Citing Fatigue and Appeals, Golding Rejects SOE Extension' (23 November 2022) <https://jamaica-gleaner.com/article/lead-stories/20221123/citing-fatigue-and-appeals-golding-rejects-soe-extension> accessed 5 April 2023.

28 '40 Years After the Infamous State of Emergency…' *Jamaica Observer* (18 June 2016) <https://www.jamaicaobserver.com/news/40-years-after-the-infamous-state-of-emergency/> accessed 5 April 2023.

29 M Figueroa and A Sives, 'Homogenous Voting, Electoral Manipulation and the "Garrison" Process in Post-Independence Jamaica' (2002) 40 Commonwealth & Comparative Politics 81.

30 Rivke Jaffe, 'The Hybrid State: Crime and Citizenship in Urban Jamaica: The Hybrid State' (2013) 40 American Ethnologist 734, 735.

31 Jermaine Young, 'States of Exception as Paradigms of Government: Emergency and Criminal Justice in Jamaica?' (2022) 47 Canadian Journal of Latin American and Caribbean Studies 235.

32 Ibid.

33 'Jamaica Is Fighting "Super Gangs" Says PM' *Jamaica Gleaner* (14 June 2020) <https://jamaica-gleaner.com/article/news/20200614/jamaica-fighting-super-gangs-says-pm> accessed 28 March 2023.

34 G Elliott-Williams, T Robinson, K Adair Morgan, J Foreman, D Jackson-Miller, T Myrie, 'Jamaica: Legal Response to Covid-19', in Jeff King and Octávio LM Ferraz et al (eds), The Oxford Compendium of National Legal Responses to Covid-19 (OUP 2021).

35 'Zero Tolerance! PM Announces "Preventative Detention" Among Crime Fighting Measures' *Jamaica Gleaner* (8 February 2017) <https://jamaica-gleaner.com/article/news/20170208/zero-tolerance-pm-announces-preventative-detention-among-crime-fighting> accessed 29 March 2023.

36 Jamaica Constitution 1962, s 20(2)(b).

37 'Opposition Asks Supreme Court to Rule on Constitutionality of Soes - Golding' *Jamaica Observer* (14 March 2023) <https://www.jamaicaobserver.com/latest-news/opposition-asks-supreme-court-to-rule-on-constitutionality-of-soes-golding/> accessed 31 March 2023.

38 'Just Over 50% Of Jamaicans Say SOEs Effective In Fighting Crime - Poll' <http://radiojamaicanewsonline.com/local/just-over-50-of-jamaicans-say-soes-effective-in-fighting-crime-poll> accessed 5 April 2023.

39 [2020] JMSC Civ 267.

40 [2022] JMFC Full 3.

included Regulations 22 and 30. Regulation 22, which authorized the exclusion from entry or residence of persons who acted or were suspected of acting in a manner prejudicial to public safety, was found to be overbroad in terms of the categories of persons caught by the measure, and its failure to specify a time period lends itself to abuse.[41] The Court found Regulation 30 to be disproportionate, given that it authorized the arrest and detention for up to thirty days, without judicial intervention, of persons whom it is thought have acted, are acting, or will act in a manner prejudicial to public safety [42]

IV. LOOKING AHEAD

Constitutional reform proceedings in Jamaica are expected to get underway in a significant manner in 2023. A Constitutional Reform Committee has been formed and has started to meet to give oversight and guidance to the process of reformation, and also to help build national consensus. The work is being overseen by the Ministry of Legal and Constitutional Affairs. The reform process will be approached in three stages.[43]

Phase 1 will include the patriation of the Constitution, the abolition of the constitutional monarchy, and the establishment of Jamaica as a republic. The provision establishing the Head of State is a deeply entrenched provision, requiring an enhanced majority of two-thirds of each House of Parliament, along with a referendum, for amendment. The bill to establish Jamaica as a republic is expected to be brought to the Parliament in the 2023-2024 legislative year.[44] This is not expected to be a controversial process in and of itself, as the measure appears to enjoy bipartisan support. A 2022 opinion poll indicated that 56% of Jamaicans wished to see the removal of the Queen as Head of State, with 27% expressing support for retention.[45] No public polling on this issue has been done since King Charles III's accession, but it is likely that he, and thus the monarchy, will enjoy less support.

The government has also announced that other deeply entrenched constitutional provisions requiring a referendum for amendment will be dealt with in phase 1. Outside of the abolition of the monarchy, it is not clear which other issues will be included. The government has signaled its intention to proceed with a bill that would see the creation of an indigenous president as the new head of state, possessing powers similar to that of the current Governor-General, who represents the monarch. The Governor-General's position is not entirely ceremonial, as he or she does exercise several important discretionary powers. These include revocation of the appointment of the Leader of the Opposition and the appointment of Commissions of Enquiry. Furthermore, there is some appetite in Jamaica for expanding the powers of the office and establishing an executive presidency, and the extent of that desire will become clear in due course.

Phase two of the reform is likely to be contentious as the government intends to review the fairly new 2011 Charter. There are concerns that the government could seek to weaken its protections.[46] The concerns are not unfounded, given Prime Minister Holness' suggestion that the constitutional provisions governing the use of states of public emergency in Jamaica need 'clarification and redefinition.'[47]

Phase three is to include a comprehensive assessment of the state's legal and constitutional infrastructure to facilitate the drafting of a new Constitution.[48] This process is likely to cover areas that proved controversial in the past and led to litigation. These include the issue of dual citizenship of parliamentarians, and the inability of the Prime Minister and Leader of the Opposition to remove senators they appointed.

One major area of controversy will be the decision on Jamaica's apex court. The Jamaica Labour Party, which is now in government, has largely opposed replacing the JCPC with the Caribbean Court of Justice (CCJ). It appears open to the possibility of an indigenous third-tier court. The opposition People's National Party, on the other hand, supports transferring the apex jurisdiction to the CCJ.

Based on the JCPC's ruling in *Independent Jamaica Council for Human Rights*,[49] a two-thirds majority in both houses is needed for either transferring the apex jurisdiction to the CCJ or to a new Jamaican apex court. Under Jamaica's constitutional arrangements, at least one opposition senator must vote with the government for either change to be made. The matter of the apex jurisdiction remains a divisive political issue, and there is no indication that consensus is likely.[50]

Provided there is bipartisanship, the process ahead appears to be one that could, for the first time, see comprehensive constitutional reform realized. National dialogue and consideration on constitutional matters, as detailed in Section II, have yielded relatively few attempts at actual legislative work. This is due largely to a lack of consensus required for the amendment of entrenched provisions.

Deeply entrenched provisions also require a referendum. Several recent referenda in the Anglo-Caribbean have failed, including in St. Vincent and the Grenadines (2009), and Grenada (2018). Grenade identifies the divisive partisanship associated with Westminster politics as a cause.[51] As Barrow-Giles notes, 'the manner in which parliament is divided between adversaries … does not provide a climate for collaboration.'[52]

41 Ibid [77]-[82].
42 Ibid [89].
43 '14-member Constitutional Reform Committee named' The Gleaner (Kingston, 22 March 2023) <https://jamaica-gleaner.com/article/news/20230322/14-member-constitutional-reform-committee-named > accessed 9 April 2023).
44 'Election-year Deadline for Ditching the Queen' The Gleaner (Kingston, 8 June 2022) < https://jamaica-gleaner.com/article/lead-stories/20220608/election-year-deadline-ditching-queen> accessed 4 April 2023.
45 'Just over 50% of Jamaicans support removal of Queen' The Gleaner (Kingston, 8 August 2022)< https://jamaica-gleaner.com/article/news/20220808/just-over-50-jamaicans-support-removal-queen > accessed 9 April 2023
46 Lorraine Mendez, ' Opposition Declines to Name Members to Constitutional Reform Committee' < http://radiojamaicanewsonline.com/local/opposition-declines-to-name-members-to-constitutional-reform-committee> accessed 9 April 2023
47 'Provisions under the Constitution governing SOE need 'clarification and redefinition' – PM' Jamaica Gleaner (Kingston, 12 June 2022) https://jamaica-gleaner.com/article/news/20220617/provisions-under-constitution-governing-soe-need-clarification-and accessed 9 April 2023
48 N42
49 Independent Jamaica Council for Human Rights (1998) Ltd and others v Marshall-Burnett and Another
[2005] UKPC 3.
50 Balford Henry, ' 'Jamaica must decolonise once and for all" Jamaica Observer (Kingston, 13 January 2023) < https://www.jamaicaobserver.com/news/jamaica-must-decolonise-once-and-for-all/> accessed 10 April 2023.
51 Wendy C. Grenade, 'Direct Democracy and Party Politics in the Commonwealth Caribbean: An Analysis of the 2016 Referendum on Constitutional Reform in Grenada' (2020) 58 Commonwealth and Comparative Politics 495.
52 Cynthia Barrow-Giles, 'Beyond the Status Quo, Centring Women in the Westminster System in the Commonwealth Caribbean: a Preliminary Analysis' (2015) 53(1) Commonwealth & Comparative Politics 49, 61.

Previous referenda in the region caution that politically divisive reform processes will end in failure. Thus, if Jamaica's reform process is to succeed, political compromise and consensus will be necessary.

V. FURTHER READING

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Simeon McIntosh, Caribbean Constitutional Reform (The Caribbean Law Publishing Co Ltd, 2002)

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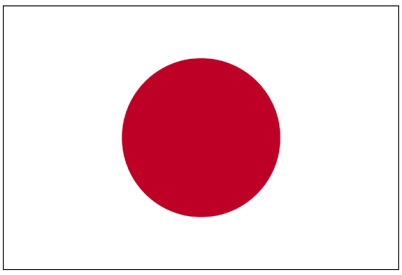
Japan



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I. INTRODUCTION

Of all the events that occurred in 2022, it is indisputably obvious that the assassination of former Prime Minister Shinzo Abe (July 9, 2022) had the greatest impact on Japanese constitutional politics.

The late Abe was negative about postwar politics itself and believed that his political mission was to revise the 1947 Japanese Constitution, the symbol of postwar politics, by the hands of the Japanese people. He was also a conservative politician who, among other things, considered old family values absolute. The first Abe administration, which began in 2006, ended after about a year due to his illness, but Abe's subsequent return as prime minister began in 2012, followed by the first, second, third, and fourth administrations, and then he reigned over Japanese politics for eight years before resigning in 2020, due to illness again. The Abe administration became the longest reign, during which Abe strongly pushed for constitutional reform, at one point reaching a concrete political schedule with a plan to have the amendment in place by the time of the 2020 Tokyo Olympics. Abe's eight-year reign has taken Japanese politics to an extreme conservative level, bringing constitutional reform one step closer to becoming a reality.

With Abe's death, however, that momentum came to a halt. The conservatives have lost their strongest revisionist and most influential facilitator in the postwar period. Under these circumstances, in 2022, like before, textual revision of the constitution has not been achieved, and not even a draft amendment has been presented to the Diet. In this Review, as in the previous one, we must report that constitutional reform is still unachieved. However, there were events that led to important constitutional changes. These include the Fumio Kishida administration's proposal of a new axis for national security (II.**1**); the constitutional issues that erupted with the assassination of Abe (II.**2**); recent challenges to the issues around family values and the constitution (the citizens' fight against the conservative family values that the late Abe insisted on) (II.**3**). They are worth recording here.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. NATIONAL SECURITY

1.1. POSSESSION AND EXERCISE OF COUNTERSTRIKE CAPABILITIES

Against the backdrop of the recent deterioration of the international situation surrounding Japan, such as the expansion of Chinese military power and the danger of a contingency in Taiwan, the Russian invasion of Ukraine, and repeated missile launches by North Korea, the Kishida administration adopted the so-called "Three Security Documents" on December 16, 2022.[1]

As the name suggests, it consists of three national security documents: (A) the National Security Strategy of Japan (NSS), a top-level strategic guideline on Japan's national security, (B) the National Defense Strategy (NDS), which sets a new set of goals for the Japanese government and outlines the approach and means necessary to achieve them, and (C) the Defense Buildup Program (DBP), which specifies how the defense force will prepare itself under the NDS by compiling expected defense spending and major equipment.

Particularly problematic in relation to Article 9 of the Japanese Constitution, known as the pacifism clause, is the fact that Japan's possession of "Counterstrike Capabilities" was clearly stated in the first two documents. Counterstrike capabilities are defined in the documents as follows: "Counterstrike capabilities are SDF's capabilities that leverage stand-off defense capability and other capabilities. In cases where armed attack against Japan has occurred, and as part of that attack ballistic missiles and other means have been used, counterstrike capabilities enable Japan to mount effective counterstrikes against the opponent's territory. Counterstrikes are done as a minimum necessary measure for self-defense and in accordance with the Three New Conditions for Use of Force."

The Three New Conditions for Use of Force, presented by PM Abe's Cabinet decision in 2014, are conditions for Japan to exercise the right of self-defense under Article 9 of the Constitution: (1) When an armed attack against Japan occurs or when an armed attack against a foreign

1 English translations of three documents are available on the website of the Cabinet Secretariat. *See* https://www.cas.go.jp/jp/siryou/221216anzenhoshou.html.

country that is in a close relationship with Japan occurs and as a result threatens Japan's survival and poses a clear danger to fundamentally overturn people's right to life, liberty and pursuit of happiness (the so-called "Survival-Threatening Situations"); (2) When there are no other appropriate means available to repel the attack and ensure Japan's survival and protects its people; and (3) Use of force limited to the minimum extent necessary.

Originally, the counterstrike capabilities were called "enemy base attack capabilities." However, since this term seemingly condoned preemptive strikes, the government changed the terminology to counterstrike capabilities. In fact, the documents explicitly state, "Needless to say, preemptive strikes, namely striking first at a stage when no armed attack has occurred, remain impermissible." However, under the counterstrike capabilities, it would now be possible for Japan to attack missile launching sites and other facilities once the other party *undertakes* an attack, enabling substantive action even if the country is not actually under attack. In this sense, the name "counterstrike" capabilities can be criticized as misleading. In addition, unlike the "enemy base attack capabilities," the target of the counterstrike capabilities is not limited to an enemy base.

1.2. WEAPONS AS COUNTERSTRIKE CAPABILITIES

Counterstrike capabilities materialize through the purchase, deployment, and use of long-range missiles and fighter aircraft. The Japanese government explained the constitutionality of the possession and exercise of counterstrike capabilities by referring back to an official statement issued by the government on February 29, 1956, which clarified that under the Constitution, "as long as it is deemed that there are no other means to defend against attack by guided missiles and others, hitting the bases of those guided missiles and others is legally within the purview of self-defense and thus permissible."[2] In other words, according to the government's explanation, Japan's decision not to acquire the capabilities until now has not been due to a constitutional imperative but has rather been a policy decision.

The government has repeatedly stated that there are weapons whose possession and exercise have been banned by the Constitution. For instance, in 1967, the government stated that Japan could not possess a self-defense force that posed a "threat of aggression" against another country,[3] while in 1970, it also stated that "offensive weapons such as the B-52, ICBMs, or intermediate-range ballistic missiles, which pose a direct threat to the territory of another country, are prohibited [by the Constitution]."[4]

In 1988, it further clarified that "the possession of so-called offensive weapons whose performance is exclusively used for the catastrophic destruction of the territory of the other country is not permitted in any case, since this would immediately exceed the minimum necessary for self-defense."[5] Hence, some criticize that it is difficult to distinguish the counterstrike capabilities from the capabilities that cannot be possessed under the Constitution as a war potential.

1.3. INCREASE IN DEFENSE SPENDING

Considering the need to acquire equipment, improve facilities, and increase cyber warfare capabilities, the Defense Buildup Program declares that the defense spending in the next five years will be approximately ¥ 43.5 trillion ($314 billion), about 1.6 times the spending plan for the past five years.

In 1976, PM Takeo Miki's cabinet decision set a defense spending ceiling of 1% of GNP. Although the Yasuhiro Nakasone Cabinet decided to eliminate this cap in 1978, Nakasone stated he would respect the spirit of the 1% quota. Since then, successive administrations have generally kept defense spending within 1% of GDP. In contrast, PM Kishida has instructed his cabinet members to boost defense spending to at least 2% of GDP by 2027.

This increase was listed in the election manifesto made by the Liberal Democratic Party in the House of Councilors election held in July 2022. The Constitutional Democratic Party of Japan (CDP) and Japan Innovation Party (JIP), the two biggest opposition parties, also indicated that they were in favor of a large increase in defense spending. In this sense, there is a consensus to increase defense spending among the main parties. The remaining issue is the amount of spending as well as the means for securing the necessary financial resources.

1.4. DEVIATION FROM EXCLUSIVELY DEFENSE-ORIENTED POLICY?

Under Article 9, a basic policy for the defense of Japan has been the exclusively defense-oriented policy, which means that "defensive force is used only in the event of an attack, that the extent of the use of defensive force is kept to the minimum necessary for self-defense, and that the defense capabilities to be possessed and maintained by Japan are limited to the minimum necessary for self-defense. The policy including these matters refers to the posture of a passive defense strategy in accordance with the spirit of the Constitution."[6]

Survival-Threatening Situations, one of the Three New Conditions for Use of Force, include not only attacks against Japan but also "against a foreign country that is in a close relationship with Japan." This means Japan can exercise the right to collective self-defense and use its counterstrike capabilities even if it is not being attacked or when attacks "threaten(s) Japan's survival and pose(s) a clear danger to fundamentally overturn people's right to life, liberty, and pursuit of happiness." Is the right to collective self-defense and use of counterstrike capabilities within the scope of exclusive defense-oriented policy? The Three Security Documents clarify the possession of counterstrike capabilities under the security legislation, enabling the exercise of the right of collective self-defense, and coupled with increased defense spending, undoubtedly represent a major shift from the conventional exclusive defense-oriented policy that crucially excludes the amendment of Article 9.

2 Dai 24-Kai Kokkai Shugiin Naikaku Iinkai Kaigiroku [The 24th Diet Session, House of Representatives Cabinet Committee Minutes], No. 15, at 1 (February 29, 1956) (statement by Naka Funada, reading on behalf of Prime Minister IchirÐ Hatoyama).

3 Dai 55-Kai Kokkai Sangiin Yosan Iinkai Giroku [The 55th Diet Session, House of Councilors Budget Committee Minutes], No. 4, at 3 (March 31, 1967) (statement by Prime Minister Eisaku Sato).

4 Dai 63-Kai Kokkai Shugiin Yosan Iinkai Kaigiroku [The 63th Diet Session, House of Representatives Budget Committee Minutes], No. 18(1), at 24 (March 30, 1970) (statement by Secretary of Defense Yasuhiro Nakasone).

5 Dai 112-Kai Kokkai Sangiin Yosan Iinkai Giroku [The 112th Diet Session, House of Councilors Budget Committee Minutes], No. 18, at 2 (April 6, 1988) (statement by Secretary of Defense Tsutomu Kawara).

6 Defense of Japan 2022, at 193, *available at*: https://www.mod.go.jp/en/publ/w_paper/wp2022/DOJ2022_EN_Full_02.pdf.

2. TWO MAJOR ISSUES IN THE AFTERMATH OF THE ASSASSINATION OF FORMER PRIME MINISTER ABE

2.1. THE NATIONAL FUNERAL

On July 5, 2022, Shinzo Abe, 67, the former prime minister, was shot to death during his campaign speech outside the railway station in Nara prefecture for the support of a candidate for the House of Councilors election.

Nine days later, Prime Minister Kishida immediately announced that Abe's funeral would be held as a government-sponsored event in the form of "the state funeral service." At this press conference, Kishida indicated that the cost of the state funeral would be fully covered by government funds. The legal basis for the Cabinet to conduct the state funeral is found in the Cabinet Office Establishment Act, which stipulates that the Cabinet Office is in charge of "state ceremonies," and the Cabinet can conduct such a ceremony just by the Cabinet decision. Such a proposal for a state funeral caused a great deal of legal controversy. The Cabinet Legislative Bureau had previously defined a state funeral as a funeral conducted at the will of the state, at the expense of the state, and as an action of the state. In contrast, the Legislative Bureau of the House of Representatives developed the interpretation that "the will of the State" means that the decision to conduct a national funeral cannot be made by the Cabinet alone, but requires at least the involvement of the Diet, given that Article 41 of the Japanese Constitution defines the Diet as "the highest organ of state power." The interpretations of the experts in legislative review were clearly divided between those of the Cabinet and those of the House of Representatives.

Despite such controversy, PM Kishida pushed for Abe's state funeral because (1) Abe's political achievements, especially his reputation in the international community, were highly regarded, (2) assassination during an election is a hostile act against democracy, and it is necessary to show national determination to defend democracy, and (3) Abe's tenure as prime minister is the longest in history of modern constitution of Japan (2,822 consecutive days in office). The Kishida administration conducted the state funeral without any religious mode on September 27, 2022.

2.2. THE UNIFICATION CHURCH AND LEGAL MEASURES

Abe was fatally shot during a street speech for the House of Councilors election. Since the incident occurred during the election period, it was initially believed that the crime was politically motivated, and many politicians across parties condemned the incident as "an attack on democracy and freedom of speech."[7] However, as the investigation of the case progressed, it became clear that behind this incident lay a problem deeply rooted in postwar Japanese society: the relationship between the Liberal Democratic Party (LDP) and the Unification Church (UC), an organization known as the predecessor of Family Federation for World Peace and Unification.

How could this be? Tetsuya Yamagami, 41, the accused in this case, is allegedly a victim of UC[8], while his mother was a member of the church. Because of excessive donations to the UC, his mother went bankrupt, and subsequently, his family collapsed. According to his letter to a freelance writer, he murdered Abe because of his close ties to the UC. The church's doctrine emphasizes traditional family values, chastity, and anti-communism. Abe's grandfather, Nobusuke Kishi, who despite being a class-A war criminal, became the LDP prime minister after World War II, was greatly involved in forging and fortifying UC's ties with Japanese politics based on a shared ideology: anti-communism. After Kishi died, the UC's connections were passed on to Shintaro Abe, Shinzo's father and an LDP politician himself, and then to Shinzo Abe.

In the 1980s, the UC became a social problem as it forced victims into donating or buying goods through "spiritual sales," which exploited potential consumers through the induction of psychological fear or a promise of spiritual salvation.

The Assassination of Abe again drew attention to UC followers and their families (especially their children) who suffer due to such donations. As a result, it became clear that the UC was providing electoral support to the LDP politicians, and then, the cabinet's approval rating dropped dramatically. Prime Minister Kishida could have sought to increase approval ratings by (1) completely severing the relationship between the UC and the LDP, (2) issuing a dissolution order against the UC under the Religious Corporation Act, and (3) enacting a law to help victims. However, instead of taking actions (1) and (2), he only followed through with (3).[9]

The resulting product, the Improper Solicitation Prevention Act, went into effect in 2023. It clarifies prohibited acts, including forcing donors to take on debt or sell real estate to fundraise for donations, and it imposes a duty of care on religious organizations and other corporations regarding the solicitation of donations[10]. A corporation that commits any prohibited act will receive a correction order, and those with multiple violations of such orders may be imposed the maximum of one year and a fine of up to ¥1 million ($7,300). The abovementioned duty of care bars corporations from preventing the solicited person's exercise of free will and from solicitating in ways that oppress said person's relatives. Any breach the duty of care will cause a corporation's name will be made public.

Furthermore, the Act permits donations to be revoked within 10 years following the conclusion of a contract and within 3 years after a donor gain understanding of the damages they have incurred. It also allows donor's spouses and dependent children to rescind donations that are deemed improper solicitations, and it enables donors or their spouses and/or children to claim any future damages, living expenses, or other support they are entitled to.

The question is whether the Act violates the "freedom of religion" guaranteed under the Constitution of Japan. Article 12 of the Act demands that one "give consideration for academic freedom, freedom of religion, and freedom of political activities," signifying that the Act must be operated to take careful note of constitutional rights.

7 Foster Klug & Mari Yamaguchi, 'Terrorism': Abe Killing Seen as Attack on Japan's Democracy' *AP News* (U.S., Jul 11, 2022), *available at*: https://apnews.com/article/shinzo-abe-crime-tokyo-freedom-of-speech-b6a34a5269f6c90097eb677071aeb11c.

8 'Church 'Victim' Defense to Complicate Abe Murder Trial' *The Japan Times* (Tokyo, Jan 26, 2023), *available at:* https://www.japantimes.co.jp/news/2023/01/26/national/crime-legal/yamagami-abe-assassination-trial-defense.

9 'Japan Enforces New Law to Assist Donation Victims' *The Japan Times* (Tokyo, Jan 26, 2023), *available at*: https://www.japantimes.co.jp/news/2023/01/06/national/religious-donations-law.

10 'Kishida Vows Relief to Wide Range of Unification Church Victims' *The Japan Times* (Tokyo, Nov 25, 2022), *available at*: https://www.japantimes.co.jp/news/2022/11/25/national/mind-control-donations.

3. FAMILY AND CONSTITUTION

3.1. COULD A NEW DECISION ON THE CONSTITUTIONALITY OF THE SURGICAL REQUIREMENTS FOR GENDER REASSIGNMENT COME SOON?

The Law on Special Cases in Handling the Gender Status of Persons with Gender Identity Disorder (the gender identity disorder special law), enacted in 2004, states in Article 3(1)(iv) that one of the requirements for a person with gender identity disorders to change the sex on the family register is "the absence of gonads or a permanent lack of gonadal function". As a result, it is a de facto requirement that a person who wishes to change their gender undergo a surgical procedure that results in the loss of reproductive capacity. The two main purposes of this provision have been pointed out as follows: (A) to prevent confusion and problems that could result from a child being born with the reproductive functions of the original sex and (B) to prevent the negative physical and mental effects that could result from the secretion of sex hormones from the gonads. In Japan, there has been criticism of the inevitability of surgical procedures that are highly physically invasive. From this perspective, in the area of constitutional law, there have been arguments regarding the right to self-determination.

On January 23, 2019, the Supreme Court ruled that this surgical requirement was constitutional. However, in its supplementary opinion, while pointing to changes in the domestic situation and trends in other countries, the Court stated that Article 3(1)(iv) of the gender identity disorder special law, which establishes the surgical requirements, "cannot be said to violate Article 13 of the Constitution at this time, but it is undeniable that the suspicion of such a violation has arisen."[11]

Under these circumstances, on December 7, 2022, the First Petty Bench of the Supreme Court (consisting of five Supreme Court justices), which was hearing a domestic relations case in which the constitutionality of the surgical requirement was in dispute, decided that the constitutionality of the article would be decided by the Grand Bench (consisting of all 15 justices).[12] The Supreme Court usually hears cases before the Petty Bench, but if a new constitutional decision is needed or an earlier decision is to be reversed, the case is referred to the Grand Bench for further proceedings. These circumstances indicate that some changes could be expected regarding the 2019 decision.

3.2. THE BATTLE FOR SAME-SEX MARRIAGE STILL CONTINUES

As we mentioned in our previous report, Japan has recently been involved in a legal battle over the legalization of same-sex marriage.

Japan's Civil Code does not recognize same-sex marriage. Some local governments have introduced partnerships without legal effect by ordinance, but there is no such system in Japan as the civil unions that were once introduced in several states of the U.S. and other countries. Same-sex couples have filed public law litigations in many jurisdictions, claiming that the current Civil Code is unconstitutional. As mentioned in the last Review, on March 17, 2021, the Sapporo District Court ruled the current Civil Code unconstitutional on the grounds that it discriminates against same-sex couples by not giving them any of the public recognition and legal protection afforded to heterosexual couples. On June 20, 2022, the Osaka District Court ruled that the Civil Code's refusal to recognize same-sex marriages was constitutional. Then, on November 30 of the same year, the Tokyo District Court noted that the current Civil Code was reaching "an unconstitutional state", but did not find it clearly unconstitutional and invalid. The court left the resolution of the unconstitutional state to the democratic process.

Under these circumstances, PM Kishida stated during the deliberations in the Diet that the legalization of same-sex marriage is "a topic we should consider very carefully" and that "because it's a topic that will change people's perception of family, values, and society, it's important to decide only after deeply contemplating the mood of the whole of society."[13] The critics charged that the statement could be perceived as a negative statement against same-sex marriage, especially for gay couples. In the end, he was forced to give an explanation.

Furthermore, two days after the Prime Minister made the statement in question, Masayoshi Arai, the Prime Minister's secretary, said in an interview intended to be off the record, "The impact on society is significant. It is negative." In addition, he allegedly stated that "If [Japan] recognizes [same-sex marriage], some people will abandon the country."[14] Arai later retracted his remarks and apologized but was ultimately removed from his duty by PM Kishida.

These statements reveal the ruling party's negative attitude toward the legalization of same-sex marriage. Among several district court rulings on lawsuits filed over the legalization of same-sex marriage, some have ruled that the issue should be left to the legislative process. However, considering these statements, the current situation is such that the legalization of same-sex marriage cannot be left in the hands of the legislative branch. In this sense, more and more attention will be paid to the upcoming court battles.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Again, no formal and institutional constitutional amendments were made. Of course, some events that were not formal amendments, but which amounted to constitutional reform in a broad sense did occur as we saw in Part II. The scope of individual reforms and degree of constitutional control over them were mentioned in Part II.

IV. LOOKING AHEAD

Although it cannot be said that this is a robust debate involving the entire nation at all, the Constitutional Review Committees established in both the House of Representatives and the House of Councilors have been sluggishly discussing the formal revision of the Constitution.

11 Saiko Saibansho [Sup. Ct.], 2nd petty bench, 23 Jan 2019, 261 Saiko Saibansho Saibanshu Minji [Shumin] 1

12 'Are surgical requirements to change sex unconstitutional? Japan top court reviewing case' *the Mainichi* (Tokyo, 6 March 2023), *available at*: https://mainichi.jp/english/articles/20230303/p2a/00m/0na/028000c.

13 'Kishida cautious on gay marriage because it would' "change society"', *the Asahi Shinbun* (Tokyo, 3 Feb 2023), *available at*: https://www.asahi.com/ajw/articles/14830834.

14 'Arai Lacked Awareness of Heavy Responsibility for Key National Policies', *the Japan Times* (Tokyo, 7 Feb 2023), *available at*: https://japannews.yomiuri.co.jp/editorial/yomiuri-editorial/20230207-89403.

Nevertheless, there have been some notable developments recently.

The LDP plans to give top priority to the creation of an amendment stipulating an emergency clause. Recently, four parties — the LDP, Komeito (LDP's ruling coalition partner), JIP (Japan Innovation Party) (*Nippon Ishin no Kai*), and the DPFP(Democratic Party for the People)— agreed on the need to extend the terms of Diet members during natural disasters and other emergencies at the Commission on the Constitution of the House of Representatives.[15] However, the CDP (Constitutional Democratic Party of Japan), the largest opposition party, and the Japanese Communist Party show a negative attitude towards the agreement.

Another notable event was the beginning of a divergence in the direction of constitutional revision between Komeito and the LDP. On April 20, 2023, for the first time, Komeito expressed clear opposition to the LDP's proposal to amend Article 9 (the war renouncement clause) at the Constitutional Review Committee of the House of Representatives. Komeito is the LDP's partner in the coalition government. Although it was somewhat expected, this explicit opposition from a party that is, so to speak, a friend of the LDP has once again put the LDP's goal of constitutional revision on the back burner. The debate on constitutional revision in Japan has never been a focal point because it lost the most powerful proponent, Mr. Shinzo Abe.[16] Once again, the debate began to wander.[17]

V. FURTHER READING

As for an overview of the Japanese politics, see: Robert J. Pekkanen and Saadia M. Pekkanen eds., The Oxford Handbook of Japanese Politics (2020, Oxford University Press).

On the movement of constitutional revision and civic activism, see: Helen Hardacre, Timothy S. George, Keigo Komamura, and Franziska Seraphim, eds., Japanese Constitutional Revisionism and Civic Activism (2021, Lexington Books).

On an overview of the amendment clause and its process, see: Masahiko Kinoshita, *The Form of Constitutional Amendments in Japan*, in Richard Albert ed., The Architecture of Constitutional Amendments (2023, Hart).

15 'LDP aims to accelerate constitutional amendment discussions', *the Japan Times* (Tokyo, 11 Jan 2023), *available at*: https://japannews.yomiuri.co.jp/politics/politics-government/20230111-83130.

16 'CDP's Konishi Resigns from Key Party Post after Gaffe' *Jiji Press* (Tokyo, Apr 11, 2023), <https://sp.m.jiji.com/english/show/25705> accessed 17 April 2023.

17 'Japan lawmaker apologizes for calling weekly constitutional meetings 'monkey' business,' Minichi Newspapers (Tokyo, March 31, 2023) <https://mainichi.jp/english/articles/20230331/p2a/00m/0na/016000c> accessed 17 April 2023.

Jordan

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I. INTRODUCTION

In April 2021, the Jordanian Parliament endorsed a set of constitutional amendments that served to strengthen the nation's governance and substantially broaden the powers of King Abdullah II. These amendments empowered the King to appoint judges and leaders of independent institutions, dissolve the Parliament, and assume direct control of the armed forces. Additionally, a new council was formed to provide expert advice to the King on matters related to national security, economic affairs, and political development.

Supporters of the constitutional amendments were seen as a necessary step for maintaining political stability and addressing the challenges occurring in Jordan. These advocates argued that consolidating power under the King's authority would enable swifter and more effective decision-making in times of crisis.

Throughout 2022, the proponents of the constitutional amendments believed that these amendments were essential for preserving political stability and enhancing the nation's governance. These individuals contended that the King's strong leadership was critical for navigating the complex political landscape of the region and promoting national unity.

The adoption of these constitutional amendments coincided with Jordan grappling with significant economic and political hurdles, such as increasing public debt, high unemployment rates, and social unrest. In the years leading up to the amendments, the country witnessed multiple waves of protests and public demonstrations. The amendments aimed to address these challenges and create a stable environment for economic growth and social cohesion.

Despite these obstacles, Jordan has been regarded as a relatively stable nation within a turbulent region. The country has maintained peace agreements with neighboring Israel and has actively participated in regional security initiatives. King Abdullah II's leadership has played a significant role in fostering national stability and promoting cooperation with international partners.

While the constitutional amendments have generated concerns among certain international partners, others have recognized Jordan's unique regional position and its need for strong, stable leadership. The amendments were seen as part of the broader effort to strengthen the nation's political system and ensure its continued resilience in the face of regional challenges.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2021, the constitutional amendments enacted in Jordan introduced notable enhancements to the nation's political system, aimed at promoting stability and continuity. Key positive aspects of these changes include the following:

1. Streamlining Decision-making: The augmentation of the King's authority to appoint judges, leaders of autonomous entities, and high-ranking military personnel allows for more efficient decision-making in key institutions and government branches, fostering quick responses to national challenges.

2. Maintaining Political Stability: By granting the King the discretion to dissolve the Parliament and schedule early elections, these amendments ensure the stability of the political system, allowing for timely interventions in case of political deadlocks or crises.

3. Strengthening National Security and Development: The establishment of the National Defense Council (NDC), under the King's leadership and consisting of top military, security, and governmental processes, centralizes expertise and streamlines decision-making processes. The NDC demonstrates the government's commitment to protecting Jordan and fostering national growth.

While the amendments sparked debate between the two sides, proponents argued that these reforms would benefit the people of Jordan as they were crucial for preserving stability and continuity within the country's political framework. By centralizing authority, the amendments aimed to create a more effective and efficient government that can navigate the complexities of regional politics and addressing domestic challenges.

Additionally, advocates of the amendments emphasized the need for strong, unified leadership to guide Jordan through uncertain times and maintain its position as a beacon of stability in a turbulent region. Overall, the constitutional amendments enacted in Jordan in 2021 represent a significant shift in the country's political system, with the potential to foster a more stable and prosperous future for Jordanian politics and society.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The National Defense Council (NDC) is a strategic addition to Jordan's political system, introduced by the constitutional amendments ratified in 2021. Chaired by the King and composed of top military, security, and government officials, the NDC is designed to provide expert counsel on matters related to national security, political turmoil, and economic development.

The establishment of the NDC, as part of the 2021 constitutional amendments, demonstrates the King's commitment to ensuring Jordan's protection and stability, particularly given the nation's challenging geopolitics. The council's comprehensive mandate enables it to address multifaceted policy issues that require input from a variety of different specialists and stakeholders, thereby enhancing the efficiency of decision-making processes. Although the NDC has faced criticism for potentially consolidating power in the King's hands, it is essential to consider the council's role in maintaining national security and stability.

Supporters of the NDC argue that the council's presence is vital for safeguarding Jordan's security and stability, especially amidst significant regional security challenges. They maintain that the council's broad mandate equips it to address complex policy matters that necessitate contributions from various experts and stakeholders.

This section about the scope of reforms and constitutional control discusses how the creation of the NDC represents a crucial component of Jordan's legal system. Additionally, the ratification of these amendments emphasizes the King's dedication to ensuring the national security, stability, and economic prosperity of Jordan. The council's involvement in these areas serves to centralize expertise and streamline decision-making, thus enabling the King to navigate intricate policy issues effectively.

It is crucial to recognize the positive contributions of the NDC in enhancing Jordan's political system. The King's leadership, combined with the expertise of top military, security, and government advisors l, ensures that the nation remains on a positive path going forward.

Despite concerns surrounding the potential concentration of power, the NDC offers valuable support to the King in addressing pressing issues related to national security, the economy, and development. By leveraging the council's collective knowledge, the King can make well-informed decisions that benefit Jordan and its people.

Furthermore, the NDC's involvement in economic policymaking and development initiatives can contribute to the nation's growth and progress. The council's broad mandate enables it to examine intricate policy issues, such as economic diversification, infrastructure development, and regional cooperation, providing the King with comprehensive insights to advance the country's best interests.

The creation of the NDC also sends a strong message to the international community about Jordan's commitment to maintaining stability and fostering growth in a volatile region. As a result, the nation continues to be a reliable partner for the West in areas such as counterterrorism and regional security.

Ultimately, the establishment of the NDC due to the constitutional amendments in Jordan highlights the positive strides made in the nation's political system under King Abdullah II's leadership. The council's expertise in various fields, coupled with its mandate to advise the King on critical policy matters, ensures that Jordan continues to be secure, stable, and prosperous. This development further solidifies the nation's commitment to effective governance and collaboration with its international partners for the betterment of its citizens and the region.

IV. LOOKING AHEAD

The responsibility of the National Defense Council (NDC) before the Parliament and the House of Representatives is a topic that warrants deep elaboration, as it encompasses varying perspectives on the council's accountability and transparency. Two differing views can be highlighted, each with its unique defense:

View 1: The NDC should be accountable to the Parliament and the House of Representatives to ensure transparency and democratic oversight.

Supporters of this view assert that, given the NDC's extensive mandate and considerable influence over policy areas like national security, economy, and development, there is a need for increased scrutiny and accountability. They contend that the NDC's advisory role to the King does not exempt it from its responsibility towards the Jordanian people and their elected representatives.

Additionally, they argue that the consolidation of power in the hands of the King and the NDC could undermine the democratic representation of the Jordanian people. These advocates maintain that enhanced transparency and responsibility are crucial to ensure policy decisions align with public interest.

Advocates of this perspective might propose that the Parliament and the House of Representatives have the authority to review and approve the NDC's policies and decisions, guaranteeing they reflect the interests and priorities of the Jordanian people. They might also recommend that the NDC report to the Parliament and the House of Representatives regularly, promoting greater transparency and accountability.

View 2: The NDC should be accountable only to the King since it is an advisory body designed to provide expertise and guidance to the monarch.

Proponents of this view argue that the NDC's advisory role to the King indicates that it is not accountable to the Parliament and the House of Representatives. They believe that the King should possess the authority to appoint advisors and experts to assist him in making decisions without interference from other government branches.

Moreover, they argue that the concentration of power in the hands of the King and the NDC is necessary for ensuring national security and stability, particularly in a region facing significant security challenges. These advocates suggest that allowing the Parliament and the House of Representatives to interfere with the NDC's policies and decisions could compromise the country's security and stability.

Supporters of this view might propose that the NDC's responsibilities be clearly defined and that its decisions and policies be made in consultation with the King. They might also argue that the King should retain the final authority over the NDC's decisions and policies to ensure alignment with the country's strategic interests.

In conclusion, the National Defense Council's (NDC) responsibility before the Parliament and the House of Representatives remains a

highly debated issue. Proponents and critics offer differing perspectives regarding the council's required level of transparency and accountability. Ultimately, Jordan's political leaders will need to carefully weigh and determine the balance between national security and democratic representation to ensure the country's interests are best served.

V. FURTHER READING

European Forum's article "Jordan approves controversial constitutional amendments" (2021) is likely to discuss the constitutional amendments approved in Jordan and their potential implications. The European Forum is a platform for discussions on European politics, economics, and society.

Al Jazeera's article "Jordan critics denounce reforms enlarging king's authority" (2022) would likely cover the criticism of the constitutional amendments in Jordan that expanded the king's authority. Al Jazeera is an international news organization based in Qatar.

Rodenbeck, M. wrote an article titled "Jordan's Constitutional Crisis: Is King Abdullah II Becoming a New Arab Strongman?" (2021) for The New York Review of Books. This article may discuss whether King Abdullah II's increased authority after the constitutional amendments is leading him towards becoming an authoritarian ruler.

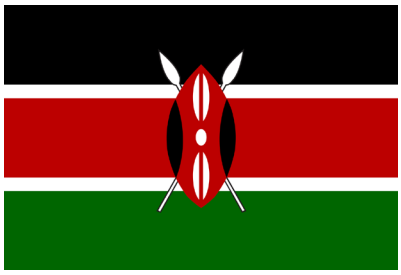
Saleh, M. authored an article titled "Jordan's Controversial Constitutional Amendments: A Threat to Democracy?" (2021) for the Carnegie Endowment for International Peace. This article likely discusses the impact of the constitutional amendments on democracy in Jordan.

Fraihat, I. wrote "The National Defense Council in Jordan: Reform or Reinforcement of Authoritarianism?" (2021) for the Middle East Institute. This article may discuss the role of the National Defense Council in Jordan and its potential impact on the country's political landscape.

Al-Harazi, S. penned an article titled "Jordan's constitutional amendments will only deepen its crisis" (2021) for The Guardian. This article likely argues that the constitutional amendments in Jordan will exacerbate the country's political and social challenges.

Alsamhan, E. wrote a PhD thesis titled "Secession and Self-Determination: A Comparison between Kurdistan and Catalonia" (2022) for the University of Pécs. This thesis is likely focused on the comparison between the secession movements in Kurdistan and Catalonia. However, it is related to the constitutional amendments in Jordan.

Kenya



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I. INTRODUCTION

In the past year, there have been proposals to amend the Kenyan Constitution, and the Supreme Court has made pronouncements on interpreting provisions of the Bill of Rights. We may recall that on March 31st, 2022, the Supreme Court of Kenya ruled that the President could not initiate constitutional amendments through the popular initiative framework under Article 257 of the Constitution. This led to the Constitution (Amendment) Bill, 2020, being declared as unconstitutional.[1] While the constitutional amendment process failed to progress, it did not prevent future amendment initiatives from being introduced.

On August 9th, 2022, Kenyans went to the polls and elected a new President, H.E. William Ruto. Within months in office, H.E. Ruto proposed constitutional reforms. On December 9, 2022, the President delivered a memorandum with constitutional amendment proposals to the Speakers of the Senate and the National Assembly for the two Houses of Parliament for consideration. In the memorandum, the President emphasized the fact that in line with the March 2022 Supreme Court's decision, he could not initiate constitutional reforms. It is for this reason that he sought Parliament's intervention in initiating his proposed reforms which include:

1. Implementation of the two-thirds gender rule,
2. Constituency Development, Senate Oversight, and National Government Affirmative Action Funds, and
3. The position of Leader of Official Opposition.

Article 256 of the Constitution provides that a bill to amend the Constitution may be introduced and debated by either house of Parliament. In addition to the President's proposals through Parliament, there have been other constitutional amendment proposals which will be highlighted in the next section.

Aside from the proposed constitutional reforms, in *NGOs Coordination-Board v EG*, the Supreme Court made a ruling regarding how to interpret Article 27(4) of the Constitution on February 24, 2023. Article 27(4) states that "the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth." In a majority decision, the Supreme Court argued that "sex" under Article 27(4) referred to sexual orientation. As explained below, this decision has been touted as a move by the Supreme Court to amend the Constitution.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

This section summarizes the proposed constitutional reforms by the President and a Constitutional Amendment Bill proposed by a Member of the National Assembly.

1. IMPLEMENTATION OF THE TWO-THIRDS GENDER RULE

The proposal as per the President is to enact a "formula to guide the computation of the gender ratio in the National Assembly based only on the numbers of those members elected from the constituencies (National Assembly) and counties (Senate) per Art.97(1)(a) and 98(1)(a) respectively. The proposed amendment can be set out under Art. 97(3)."

This proposal is based on Article 27(8) which says, "The State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender." Since the promulgation of the Constitution on August 27, 2010, Parliament has not yet implemented this principle despite numerous Constitutional Amendment Bills being tabled and debated to address the gender quotas issue.

In 2020, the then Chief Justice wrote to the President calling for the dissolution of Parliament for failing to meet the gender quotas outlined by Article 27(8) of the Constitution. However, the dissolution was not recognized.

2. CONSTITUENCY DEVELOPMENT, SENATE OVERSIGHT, AND NATIONAL GOVERNMENT AFFIRMATIVE ACTION FUNDS

Under this proposal, the President seeks to have elected Members of Parliament involved in the provision of public funds to their constituencies. However, over the years, the courts have declared any management of public funds by elected Members of Parliament to be unconstitutional. The main reason for this is that the courts have

1 Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amici curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (Constitutional and Human Rights).

emphasized that the role of elected Members of Parliament is to provide oversight over the management of public funds. These elected members should not be involved in the actual process of management. Historically, Members of Parliament have managed public funds to provide bursaries to students, build classrooms and health facilities, upgrade infrastructure, improve access to water, and develop market facilities among other initiatives.

3. THE POSITION OF LEADER OF THE OFFICIAL OPPOSITION

This proposal serves to amend Chapter Nine of the Constitution and establish the position of Leader of Opposition. Currently, unsuccessful candidates of presidential elections have no constitutional provision after elections as they do not contest presidential elections together with parliamentary elections. The only provision for the opposition leadership in the Constitution recognizes the leaders of the Minority in the Senate and National Assembly. However, these are positions for individuals who have already been elected to the Senate or the National Assembly.

The proposal does not delve into what the powers and functions of the Leader of the Opposition would be. The proposal just states that "operational dimensions" of the role would be provided for in the legislation.

4. INCREASE IN NUMBER OF COUNTIES

There was a bill published by a Member of the Nation Assembly proposing an increase of counties from 47 to 52. The proposed new counties would be:

a. Kuria County from the existing Migori County,
b. Teso County from the existing Busia County,
c. Mount Elgon County from the existing Bungoma and Trans Nzoia Counties,
d. East Pokot County from the existing Baringo and West Pokot Counties, and
e. Mwingi County from the existing Kitui County.

The MP contends that the increase in the number of counties would "solve the perennial ethnic antagonism and divisive elections." The MP further states that the proposal will "ensure that the objects of devolution are realized and that the rights of minorities and the marginalized are promoted and protected. These amendments allow some specific minorities the right to manage their own affairs and further their own development."

5. THE SUPREME COURT AND INTERPRETATION OF THE CONSTITUTION

On February 24, 2023, the Supreme Court made a decision that sparked debate among individuals. While some believe that the decision constitutes an amendment to the Constitution, others argue that the decision breathes life into the Bill of Rights. In the *NGOs Coordination Board v EG* case, the issue in contention was the refusal by the Non-Governmental Organizations Coordination Board to register a Non-Governmental Organization (NGO) seeking to champion the rights of Lesbian, Gay, Bisexual, Transgender, Queer, or Questioning (LGBTIQ) individuals in Kenya.

The High Court and Court of Appeal had found that the NGOs Coordination Board had contravened the provisions of Article 36 of the Constitution in failing to accord just and fair treatment to Lesbian, Gay, Bisexual, Transgender, Queer, or Questioning (LGBTIQ) individuals in Kenya seeking registration of an association of their choice. The Supreme Court in a 3:2 decision affirmed the finding of the Court of Appeal. All of these courts were in consensus that there was no constitutional or statutory reason to bar Lesbian, Gay, Bisexual, Transgender, Queer, or Questioning (LGBTIQ) persons in Kenya from registering an association.

In arriving at its decision, the Supreme Court analyzed what "sex" under Article 27(4) of the Constitution meant.[2] The Court stated that:

Under Article 27(4), the use of the word "sex" does not connote the act of sex per se but refers to the sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex, or other. Furthermore, we find that the word 'including' under the same article is not exhaustive, but only illustrative and would also comprise "freedom from discrimination based on a person's sexual orientation." We, therefore, agree with the finding of the High Court to wit, an interpretation of non-discrimination that excludes people based on their sexual orientation would conflict with the principles of human dignity, inclusiveness, equality, human rights, and non-discrimination. In other words, to allow discrimination based on sexual orientation would contradict these constitutional principles." Therefore, the appellant's action of refusing to reserve the name of the first respondent's intended NGO on the ground that "Sections 162, 163 and 165 of the Penal Code criminalizes Gay and Lesbian liaisons" was discriminatory in view of Section 27(4) of the Constitution. Consequently, we find that the first respondent's right not to be discriminated against directly or indirectly based on their sexual orientation was violated by the appellant.[3]

The dissenting opinions were of the view that the right to freedom of association under the Constitution was not absolute, hence, subject to limitation. Furthermore, so long as sex by persons of the same gender remained prescribed by the Penal Code, an association could not be formed by persons engaged in such conduct. Additionally, if the framers of the Constitution wished to have sexual orientation listed under Article 27(4), they would have done so as is the case in constitutions in other jurisdictions.

There have been calls by religious organizations and political leaders for the Supreme Court to revisit its decision. These organizations and leaders wish to ensure that no registration of LGBTIQ associations is undertaken. Additionally, religious organizations have vowed to initiate a constitutional review process to have the Constitution specifically limit the right of association of LGBTIQ persons living in Kenya.

2 Article 27(4): the State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.

3 Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amici curiae) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR) (Constitutional and Human Rights) paragraph 79.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In comparison to the Constitution (Amendment) Bill, 2020, which would have amounted to the dismemberment of the Constitution, the proposed amendments up for debate by Parliament are somewhat minor. What is to be seen is how the Parliamentary Initiative to amend the Constitution under Article 256 will unfold. Article 256 requires Parliament to ensure public participation on a proposed Bill to amend the Constitution. Secondly, the Bill shall have been passed by Parliament "when each House of Parliament has passed the Bill, in both its second and third readings, by no less than two-thirds of all the members of that House. These thresholds are high and have not been met in any previous attempts by Parliament to amend the Constitution on its own initiative.

IV. LOOKING AHEAD

In 2010, religious groups had a well-coordinated approach to oppose the draft Constitution. It is highly possible that they will use a similar approach to initiate a review of the Constitution to entrench the proscription of activities by LGBTIQ+ persons living in Kenya. The process will be a popular initiative under Article 257 of the Constitution. For the process to succeed, these religious groups will need a popular initiative proposal signed by at least one million registered voters. Secondly, the promoters of this popular initiative will be required to deliver the draft Bill and the supporting signatures to the Independent Electoral and Boundaries Commission, which shall verify that the initiative is supported by at least one million registered voters. Once verification is complete, the draft Bill will be submitted to County Assemblies, then to Parliament, and the initiative might even go to a referendum.

However, there are concerns that an initiative by the religious groups will not only seek to shrink the constitutional space for LGBTIQ persons living in Kenya. Additionally, this initiative might also negatively impact other minorities and persons who do not subscribe to the religious groups' ideologies. Ultimately, Kenya might be turned into a "constitutional theocracy."

Regarding the parliamentary initiative pegged on to the President's proposals, it is highly likely that the proposals will soon be crystallized and tabled in Parliament for debate. Just like the previous government had Parliament pass the Constitution (Amendment) Bill, 2020, the current government may persuade Parliament to ratify the President's proposals. Kenya might just witness its first constitutional amendments. However, similar to its predecessors, this process to amend the Constitution will be subjected to judicial scrutiny.

Lesotho

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I. INTRODUCTION

The current 1993 Constitution of Lesotho is largely cast on its suspended 1966 Constitution and it is based on the Westminster model.[1] This Constitution, for the past years, has been described by scholars as one of the most flawed constitutions in the world.[2] It is outdated and thus unsuited for modern-day constitutionalism.[3] The flaws in this Constitution include, *inter alia*, that in terms of this constitution, the Prime Minister exercises all the prerogatives of the King.[4] This is faulty and has led to abuses of power in the past years. Secondly, the Constitution fails to protect the judiciary, which is burdened with the protection of the same Constitution, as it is not difficult for the executive to remove judges of superior courts in Lesotho.[5]

Over the past years, Lesotho has witnessed several constitutional challenges. Some have argued that these challenges emanate from back in 2012 when the first coalition government was elected.[6] Others attribute these challenges to the current electoral system. Nonetheless, there has been a growing need for constitutional reform in Lesotho.

The reform process began sometime on the 27th of November 2018. Following this, the Ninth Amendment to the Constitution was assented to in 2020.[7] This Amendment was aimed at preventing early dissolutions of Parliament and further introduced other significant changes to the Constitution including; changes regarding the dissolution of Parliament, the Prime Minister's resignation due to personal reasons, and provisions concerning caretaker governments.[8]

Furthermore, in August 2022, a period before the National elections process, His Majesty the King, declared a state of emergency and recalled the then-dissolved Parliament of Lesotho to pass the *11th Amendment to the Constitution Bill 2022* and the *National Assembly Electoral (Amendment) Bill 2022*. These amendments were, however, later challenged successfully and declared null and void.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

On the 14th of July 2022, His Majesty the King Letsie III dissolved the 10th Parliament of Lesotho in terms of *Legal Notice No. 61 of 2022* and pursuant to section 83(2) of the Constitution of Lesotho.[9] It is significant to note that the 10th Parliament had served its 5 year tenure and had to be dissolved and demoted to the status of a caretaker government. However, on the 16th of August 2022, the then Prime Minister of Lesotho, Dr. Moeketsi Majoro, according to section 23(1) of the Constitution[10] declared the state of emergency in terms of the *Declaration of a State of Emergency Proclamation 2022*. This was intended to recall the Parliament of Lesotho to pass the *Eleventh Amendment to the Constitution Bill 2022* and the *National Assembly Electoral Amendment Bill 2022*[11] which are held to be some of the National Reforms Authority's major accomplishments in seeking to guard against the unchecked politicization of the public service, unregulated floor crossing in Parliament, and inadequate regulation of political parties in Lesotho, all of which are constitutional challenges that led to the reform process.

Following the declaration of a state of emergency, His Majesty the King Letsie III, through *Legal Notice No. 82 of 2022*[12] and according to section 84(2) of the Constitution of Lesotho recalled the then-dissolved Parliament of Lesotho to pass the two abovementioned bills which Parliament could not pass as it was dissolved. This dissolution had therefore rendered the Parliament's law-making powers inoperative, and this affected the two bills which awaited Royal assent per the Constitution.

This was however challenged by the applicants in *Boloetse & Tuke v His Majesty The King & Others*.[13] The applicants, in this case, contended that; first, the failure of Parliament to pass bills cannot be characterized as a problem of such magnitude as to constitute a threat to

1 Prof. Hoolo 'Nyane & Masebelu Makhobole, 'Expert Report on Constitutional Reforms' October 2019, 1.
2 https://theconversation.com/lesotho-cant-afford-incremental-changes-to-its-constitution-it-needs-a-complete-overhaul-140747 accessed on the 15th of October of 2021.
3 https://www.gov.ls/wp-content/uploads/2019/11/EXPERT-REPORT-OF-CONSTITUTUIONAL-REFORMSFINAL-23-OCT-19.pdf accessed on the 15th of October of 2021.
4 https://theconversation.com/lesotho-cant-afford-incremental-changes-to-its-constitution-it-needs-a-complete-overhaul-140747 accessed on the 15th of October of 2021.
5 Mtendeweka Mhango, 'Reflections on Constitutionalism and Reforms in Lesotho' (National Constitutional Dialogue Address, First Plenary National Constitutional Reforms, 27th November 2018).
6 Shale, 'Independence and Accountability of the Judiciary in Lesotho: The Need For Reform of the Constitutional Processes for Appointment, Discipline, and Removal of Judges', 26(1) *Lesotho Law Journal* (2018) at 170
7 Hoolo 'Nyane, 'A Note to the Ninth Amendment to the Constitution of Lesotho' PER/PELJ 2021(24) 1.
8 Ibid.
9 *Legal Notice No. 61 of 2022; 1993 Constitution s83(2).*
10 1993 Constitution s 23(1); Declaration of State of Emergency Proclamation 2022.
11 Eleventh Amendment to the Constitution Bill 2022 (Omnibus Bill); National Assembly Bill 2022.
12 Legal Notice No. 82, 2022; 1993 Constitution s84(2).
13 *Boloetse & Tuke v His Majesty The King & Others* LSHC 216 Const. (12 September 2022).

the life of the Kingdom. Secondly, it is not novel nor dangerous for bills to be beaten to time in Parliaments here or elsewhere, and lastly that His Majesty did not have the power to issue directives for the legislative business of Parliament thus a directive to Parliament to pass the bills constitutes a violation of the doctrine of separation of powers.[14] In ruling in favor of the applicants, the Court held that failure to pass the bills of Parliament did not constitute an emergency, irrespective of the expectations of powerful interests in the bill.[15] Further, the King had acted *ultra vires* in recalling the Parliament specifically for the passing of the two bills.[16]

The effect of this judgment was that both the 11th Amendment to the Constitution Bill, 2022, and the National Assembly Electoral Amendment Act which were held to be critical ahead of the general elections were null and void.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Omnibus Bill and the National Assembly Electoral Amendment Act, which are still hanging after being declared null and void by the Constitutional Court, were intended to usher in a new era of stability in Lesotho. The passing of these two bills was highly supported by the international community including the European Union (EU), United Nations (UN), and the South African Development Community (SADC).[17] These bills were aimed at amending the key provisions regarding; political parties' floor-crossing in Parliament, the appointment of senior officials, and the role of the Prime Minister. This was considered a step in the right direction and a significant achievement towards achieving political stability in Lesotho. However, disagreements over certain aspects of the Bills delayed their passing until Parliament was dissolved.[18]

Although the *Tuke/Boloetse case* can be considered a blow to those who worked hard in ensuring that the two bills are passed, this case is significant and has introduced two principles that are worth to be noted in Lesotho's jurisprudence. First, the notion of '*public interest litigation*' in Lesotho. Our courts have for a long time adopted a narrow/restrictive approach to the issue of legal standing, and emphasis has been placed only on the requirement of 'direct and substantial interest' in the subject matter of litigation.[19] However, in this case, the Court in upholding the principle of public interest litigation, held that rule of law review gives the ordinary citizens the power to challenge Parliament's authority if their acts contradict constitutional provisions. Further, the court emphasized that the participation of citizens is a guardrail that protects the Constitution as the covenant of the people and the mirror of its soul. This ensures that the Constitution does not become a paper tiger but remains a true tiger that is strong, forceful, and powerful.[20] This is a critical development in Lesotho's jurisprudence, as it has opened a door for the public to challenge any Parliament's decision that goes against their will in terms of the Constitution.

Secondly, this case has introduced the notion of a *'review of constitutional amendments in Lesotho*' which is one of the fundamental principles in constitutional democracies. This concept entails the power of the court to review legislation that seeks to amend or alter the Constitution. This concept seeks to protect the constitution by ensuring that Parliament, as the amending authority, does not alter the constitution in a way that violates the basic structure of the constitution, and in a manner contrary to the constitutional amendment procedure.[21] Although Lesotho's Constitution is silent on the issue of review of constitutional amendments in Lesotho, the Court in the *Tuke/Boloetse Case* invoked this principle by examining the procedure through which the Omnibus Bill was passed. This too is an important development in Lesotho's jurisprudence.

IV. LOOKING AHEAD

Lesotho's long-awaited National reforms are still hanging despite the fact the new government was elected and has been in office for about four months now. However, the government has resumed the journey towards the completion of the reform process and the adoption of the 11th Amendment to the Constitution Bill. This is a huge responsibility for this new government.[22]

14 Ibid, para. 30.
15 Ibid Para. 83.
16 Ibid Para. 86.
17 https://issafrica.org/iss-today/lesotho-reforms-hang-in-the-balance-ahead-of-elections accessed on 23rd of March of 2023.
18 Ibid.
19 *Lesotho Human Rights Alert Group v. Minister of Justice and Others* (CIV/APN/173/94) (CIVAPN/173/94) [1994] LSCA 106 (14 June 1994).
20 At para. 25.
21 Thato Katiba 'Judicial Review of Constitutional Amendments in Lesotho' (A dissertation Submitted in Partial Fulfilment of the Requirements for the Bachelor of Laws Degree, National University of Lesotho, 2022) 23.
22 https://www.gov.ls/new-governement-starts-reforms/ accessed on the 23rd of March of 2023.

Lithuania

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I. INTRODUCTION

2022 was an exceptional year for Lithuania regarding constitutional reforms as three major changes were directly incorporated into the country's constitution. Since the stability of Lithuania's Constitution is 'is a great constitutional value'[1] as it ensures 'the continuity of the state, the respect to the constitutional order and law'[2], amending the Constitution is uncommon. During the thirty years of the validity of the Lithuanian Constitution of 1992, its text (until the recent amendments) has only been amended ten times, and most of the amendments were linked to Lithuanian membership in the European Union (EU). Because it is rare for the Lithuanian Constitution to be revised, it is important to discuss the three amendments that altered the provisions of the eight constitutional articles.

There were several different reasons that contributed to the introduction of three amendments to the Lithuanian Constitution. First, it was urgent to amend the constitution in order to preserve the direct election of mayors, introduced by a law that had been recognized by the Constitutional Court to contradict the previous wording of the country's constitution.[3] Next, the second amendment was linked to the implementation of a decision of the European Court of Human Rights (ECHR) adopted against Lithuania.[4] The ECHR took a different perspective on the right to stand for elections to the national representative institution and preferred a different balance of fundamental values than the Lithuanian Constitutional Court. The Lithuanian Constitutional Court emphasized the necessity to eliminate the contradiction between the constitutional provisions and the European Convention on Human Rights.[5] Therefore, the constitutional prohibition for individuals who have been impeached from running for office and taking the oath was lifted. Finally, the political will to increase the representation of young people in the national parliament was recognized by the Constitution which lowered the age of a parliamentary candidate from 25 to 21.

1 The ruling of 28 March 2006 of the Constitutional Court, par. 13. See: https://lrkt.lt/en/court-acts/search/170/ta925/content.
2 Ibid.
3 The ruling of 19 April 2021 of the Constitutional Court on the elections and powers of municipal mayors. See: https://lrkt.lt/en/court-acts/search/170/ta2484/content.
4 The judgment of 6 January 2011 of the ECHR [GC] in the case of *Paksas v. Lithuania* (application No. 34932/04).
5 The ruling of 5 September 2011 of the Constitutional Court. See: https://lrkt.lt/en/court-acts/search/170/ta1055/content.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

This section will provide an overview of the reasons and content of the constitutional reforms, and the evaluation of their impact will be discussed further.

1. THE RIGHT TO STAND FOR RE-ELECTION AFTER SUCCESSFUL IMPEACHMENT PROCEEDINGS

Lithuania is one of few states in the world which has impeached and removed the President of the Republic for violating the Constitution and the oath of office[6]. Following the presidential impeachment, a legal regulation permitting an impeached individual to run for re-election after five years from when the removal from office was introduced. The Constitutional Court ruled that the term of the time period defined (but not the prohibition itself) was in conflict with the Constitution.[7] Additionally, the Constitutional Court explained that the constitutional institution of the oath is not only beautiful solemn words; it is also a legal commitment to fulfill the oath. The Constitutional Court held that, under the Constitution, a person who has committed unconstitutional acts, breached the oath of office, and has been removed from office may not run for re-election again. For instance, the President, a member of the Parliament, or a judge must take an oath which is specified in the Constitution. In the opinion of the Constitutional Court, a different interpretation of the Constitution would be incompatible with the essence and purpose of constitutional liability. The essence and purpose of the oath established in the Constitution is a constitutional value and requirement, stemming from the overall constitutional legal regulation which argues that all institutions executing state power be formed only by citizens who obey the Constitution without reservations and, while in office, unconditionally follow the Constitution as well as the interests of Lithuania. Although the text of the Constitution contains no direct prohibition for an impeached person to run for re-election, the interpretation given by the Constitutional Court to the constitutional provisions establishes such a prohibition.

The impeached President of the Republic applied to the ECHR and U. N. Human Rights Committee by stating that his right to stand as a

6 The conclusion of 31 March 2004 of the Constitutional Court. See: https://lrkt.lt/en/court-acts/search/170/ta1263/content.
7 The ruling of 25 May 2004 of the Constitutional Court. See: https://lrkt.lt/en/court-acts/search/170/ta1269/content.

candidate for the legislature had been violated.As an international court that hears cases regarding human rights violations, the ECHR decided that such a constitutional regulation violated the provisions of Article 3 of Protocol No. 1 of the European Convention on Human Rights.

In its ruling on September 5, 2012, the Constitutional Court remained faithful to its previous position regarding the life-long prohibition of taking the oath of office. The court also emphasized that the judgment of the ECHR may not serve as a constitutional basis for the correction of the official constitutional doctrine. Such reinterpretation, in the absence of the relevant amendments to the Constitution, would undermine the values that the Constitution embodies, particularly regarding the integrity of constitutional institutions such as impeachment, the oath of office, and electoral rights. In addition, the Constitutional Court pointed out that the observance of international obligations undertaken by the state of its own free will, as well as the principle of *pacta sunt servanda*, must be respected. The Constitutional Court explained that the Republic of Lithuania has the responsibility to address any incompatibility of the provisions of the Convention with the Constitution. The only way to have removed this incompatibility was through the adoption of these relevant amendments to the Constitution.

On March 25, 2014, the UN Human Rights Committee in its Views held that the political rights of the former President of the Republic had been violated.[8] Unlike the ECHR, the UN Human Rights Committee ruling was regarding the right to stand for all types of elections rather than just legislative elections.

After over ten years, in order to remove the incompatibility between the European Convention on Human Rights and the Constitution, the provisions of Article 74 of the Constitution regulating the consequences of impeachment proceedings were altered by adding the following paragraph to the Constitution: *"A person who has been removed from office or whose mandate of a Member of the Seimas [Parliament] has been revoked ... according to the procedure for impeachment proceedings for a gross violation of the Constitution or a breach of the oath may take an office that is specified in the Constitution and the commencement of which is, under the Constitution, linked with taking the oath provided for in the Constitution if not less than ten years have passed from the decision of the Seimas by which the person was removed from office or his mandate of a Member of the Seimas was revoked."*[9]

Under the new wording of the Constitution, the constitutional prohibition on standing for election in order to gain a position that requires an oath is limited to 10 years from the day of one's removal from office. The previous constitutional regulation, which was constructed by the Constitutional Court while interpreting Article 74, was replaced by a textual amendment, changing the whole meaning of the Constitution. The possibility of being reelected and taking an oath after being removed from office disregards the constitutional institutions and provisions that are under discussion.

2. THE DIRECT ELECTION OF MUNICIPAL MAYORS

The second constitutional amendment is also related to one of the rulings of the Constitutional Court, namely its ruling of April 19, 2021. The constitutional regulation concerning local self-government is rather limited as before the amendments of 2022, the Constitution only provided for municipal councils and their direct elections. Until 2014, municipal council members, directly elected by the residents of the administrative-territorial unit, were tasked with electing the municipal mayor from among themselves. Not only was the mayor the chair of the municipal council, but the mayor was also the head of the municipality. Due to the fact that the municipal mayor is quite an impressive figure in local self-government, the legislature decided that this would lead to a stronger trust among residents who could directly elect the mayor. Direct mayoral elections were introduced by ordinary law, prescribing that only citizens of the Republic of Lithuania may become municipal mayors (whereas, for the office of a municipal council member, all residents of the administrative-territorial unit may stand for election).

When the case challenging the direct elections of municipal mayors was brought before the Constitutional Court, it was ruled that direct elections of municipal mayors violate Lithuania's Constitution. The Constitutional Court held that, first, the Constitution did not provide for such a separate local self-government authority as the mayor. Secondly, according to the challenged law, the mayor had an exclusive status compared to other municipal council members. While the mayor was elected differently from other municipal council members and was the head of the municipality, the mayor also held some public administration functions at the same time—functions that other members of municipal council did not have. Therefore, the Constitutional Court held that the equal mandate principle of all members of the municipal council was violated. Due to this election process and the specific independent powers granted by the law, the mayor, although a member of the municipal council, was also a municipal institution not provided for in the Constitution. The Constitutional Court explained that in the absence of a constitutional amendment that allows for the establishment of a single-person municipal public administration institution—namely, the mayor—directly elected by the representative territorial community with the responsibility of implementing laws, it is not allowed to establish this institution through ordinary laws.

To keep and strengthen the role of the municipal mayor in local self-government for the next municipal election in 2023, the legislature decided to amend the Constitution accordingly.

Paragraph 1 of Article 119 of the Constitution was amended by stipulating that *"The right to self-government shall be guaranteed to the administrative-territorial units of the State, which are provided for by law. This right shall be implemented through municipal councils and municipal mayors"*, thus, replacing the previous wording stating that "The right to self-government ... shall be implemented through municipal councils". Paragraph 2 of Article 119 was also amended to provide that: *"The members of municipal councils shall be elected from among the citizens of the Republic of Lithuania and other permanent residents of the respective administrative units, and municipal mayors shall be elected from among the citizens of the Republic of Lithuania, for a four-year term, as provided for by law, by the citizens of the Republic of Lithuania and other permanent residents of the respective administrative units on the basis of universal, equal, and direct suffrage by secret ballot."* Alongside that, several other constitutional provisions regulating self-government were amended by introducing the constitutional institution of the municipal mayor (specifically, Articles 67, 122, 124, 141, and 143).

The municipal elections that took place in March 2023 were organized according to the new constitutional regulation which allowed for the direct election of municipal mayors.

8 Communication No. 2155/2012 Rolandas Paksas v. Lithuania. U.N. Doc. CCPR/C/110/D/2155/2012 (2014).

9 The rest of Article 74 remained unchanged as set out in its previous wording, only the indicated part was supplemented.

3. INCREASING THE AGE OF CANDIDATES STANDING FOR PARLIAMENTARY ELECTIONS

The last constitutional amendment under discussion shows political determination to revise the existing constitutional regulation. One of the issues under consideration is the minimum age required to stand for parliamentary elections, an important condition for the implementation of the passive electoral right enshrined in Article 56 of the Constitution.

Previously, Article 56 of the Constitution read as follows: *"Any citizen of the Republic of Lithuania who is not bound by an oath or a pledge to a foreign state, and who, on the election day, is not younger than 25 years of age and permanently resides in Lithuania, may stand for election as a Member of the Seimas."* The legislature decided to lower the age requirement for participation in parliamentary elections from 25 to 21 years. This was the second time that this amendment was proposed as the previous attempt had not been successful.

The drafters of this amendment argued that Lithuania was one of the few European countries maintaining the 25-year-old age of the said candidate. Such a high age limit to enter the parliament is applicable only to Italy,[10] Greece,[11] and Cyprus.[12] Moreover, the authors of this idea pointed out that, according to the national legal regulation, individuals who were 21 years or older were permitted to stand for elections to the European Parliament.

The new age limit applicable to candidates wishing to participate in parliamentary elections will be relevant during the next elections foreseen in 2024 as it could increase the representation of young Lithuanian citizens in the Parliament. Before the adoption of this amendment, only one parliamentarian out of 141 was younger than 30 years old.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Although the reforms discussed above introduced changes to some aspects of constitutional regulations, they were necessary and/or anticipated. Rather than being dismemberments, all these reforms can be qualified as amendments falling under the type of lawful formal constitutional change.[13]

However, in the context of analyzing such a significant number of the constitutional amendments of 2022, it is important to note that, during almost the entire year of 2022, a constitutional state of emergency was declared in Lithuania along the state's border with Belarus, Russia's Kaliningrad region, and at the border checkpoints within Lithuania's territory. The state of emergency was imposed on February 24, 2022 due to an unprecedented use of Russian and Belarusian military forces carrying out military aggression against Ukraine, creating a humanitarian and refugee crisis that poses a significant threat to Lithuania's national security. Under Article 147 of the Constitution, the Constitution may not be amended during a state of emergency. However, the Parliament, which is entitled to decide on the introduction or the prolongation of a state of emergency, made a one-day break in the state of emergency and adopted necessary constitutional amendments.[14] Although the new constitutional amendments were not directly related to the situation that led to the declaration of a state emergency, and even if some of these amendments were really necessary, there is doubt regarding the parliamentary practice of taking a break during the state of emergency when the situation itself remains unchanged. This practice may not be appropriate and cannot be regarded as irreproachable.

Although none of these amendments led to any issues regarding unconstitutionality, there is a concern about the new constitutional status of the municipal mayor, as it is determined by ordinary legal regulation. The status of the municipal mayor might raise some questions in the future. However, it will be the question of the constitutionality of the law implementing constitutional provisions rather than the constitutionality of a constitutional amendment itself.

All the constitutional amendments introduced in 2022 are linked to electoral rights, which are fundamental for the promotion and strengthening of democracy. The new constitutional regulation extends the scope of the application of the passive electoral right and removes obstacles to protect the internationally guaranteed right to stand for election.

The amendment of the Constitution determined by the judgment of the international jurisdiction, which supplements Article 74 and alters the consequences of the impeachment procedure, might potentially be considered as disturbing the existing national constitutional order. This is because previous constitutional rulings confirmed the constitutional ban on standing for election to an office that requires an oath. However, this amendment should not be regarded as the victory of international law over national constitutional regulation or as a denial of the principle of the supremacy of the Constitution.

First, it should be considered that the different evaluations of the right to stand for parliamentary election after the impeachment procedure emerged as a result of a different balance between legal values chosen by the international and national constitutional courts and the different perceptions of the scope of passive electoral rights. The Constitutional Court, in its ruling on May 25, 2004, placed more weight on the security of the state and the related loyalty of the state official and its constitutional order. On the other hand, the ECHR, in its judgment on January 6, 2011, took a broader approach to the passive electoral right and prioritized the free expression of the opinion of the people in the choice of the legislator.[15] Thus, the ECHR did not deny the national constitutional doctrine regarding severe (life-long) consequences of impeachment, but it emphasized the importance of the enforcement of electoral rights.

Secondly, even though the Constitutional Court remained faithful in its ruling of September 5, 2012, to the conclusion that the Constitution, as it was, did not allowing an impeached person to take an office which

10 Articles 56 and 58 of the Constitution of the Italian Republic.
11 Article 55 of the Constitution of Greece.
12 Article 64 of the Constitution of the Republic of Cyprus.
13 There are four types of constitutional change: two of them are lawful (formal constitutional amendment and amendment through the interpretation of constitutional provisions) and two are unlawful (constitutional amendment violating the procedural or substantial requirements or changes via political adaptation). See: Eivind Smith (ed.), *The Constitution as an Instrument of Change*, SNS Förlag, 2003.
14 By resolution No. XIV-932 of 10 March 2022, the Parliament introduced a state of emergency from 11 March 2022 to 20 April 2022 and, by resolution No. XIV-1044 of 21 April 2022, a state of emergency was declared from 21 April 2022 to 29 June 2022 (and prolonged later on); therefore, on 21 April 2022, there was no state of emergency in Lithuania.
15 Dainius Žalimas, "Regional challenges in the implementation of the European Convention on Human Rights: Lithuanian perspective", *JuridiskĐ zinĐtne* 10, 2017: 29–49.

requires taking an oath, it emphasized that the violation of the commitments arising from the international treaty is unconstitutional, as the Republic of Lithuania is bound by its international obligations. There are two ways to rectify such a situation and remove a collision between international and national constitutional norms: either to renounce international obligations or to amend the Constitution. Renouncing the European Convention on Human Rights, which is regarded as the minimum standard for the protection of human rights and freedoms, would be hardly justifiable under the Constitution. The innate nature of human rights is one of the eternal constitutional values; therefore, lowering the level of the protection of human rights and freedoms would contradict it. When considering the significance of protecting the freedom of expression of the people, amending the relevant constitutional provision was the only possibility in the situation.

The amendment related to the direct election of municipal mayors, which altered eight constitutional provisions, is also regarded as the implementation of the respective ruling of the Constitutional Court. After the Constitutional Court decided that the direct election of municipal mayors, enshrined in the ordinary legal regulation, was contrary to the existing Constitution, the legislature could choose between two solutions: to renounce the direct election of mayors and return to the system where mayors were elected by the municipal council members from among themselves, or to amend the Constitution itself. This amendment not only preserved the residents' ability to directly elect the head of the municipality, but it also introduced a new constitutional figure in local self-government. The constitutional status of the municipal mayor should be further clarified to ensure the proper implementation of local government.

These amendments will also mean that a certain part of the previous official doctrine formulated on the basis of the previously valid constitutional provisions is no longer applicable. However, this does not mean that the whole previous official constitutional doctrine is immediately rejected due to the fact that the particular provisions of the Constitution were amended. After a constitutional amendment alters or abrogates a certain provision of the Constitution, which was previously used to create the constitutional doctrine, the Constitutional Court, under the Constitution, has exceptional powers. For instance, the Court has the power to decide whether it is possible (and to what extent) to invoke the official constitutional doctrine formulated by the Constitutional Court on the basis of the previous provisions of the Constitution, or whether it is no longer possible to invoke it (and to what extent). Each time there is the need to correct certain official constitutional doctrinal provisions, the Constitutional Court will explicitly point it out and will properly argue this in the final act of the Constitutional Court.[16]

The constitutionality of these reforms might, if needed, be verified by the Constitutional Court itself, as it has the competence to assess the compliance of constitutional amendments with the Constitution.[17] However, the Constitutional Court has no power to initiate a case *proprio motu*; there must be a petition by the authorized entity requesting an investigation into the constitutionality of the appropriate constitutional amendments. The same rule applies where it is sought to make clear which of the previously formulated provisions of the official constitutional doctrine are still applicable and which ones are not.

IV. LOOKING AHEAD

The recent constitutional amendments also led to changes in the ordinary regulation. The most controversial is the new Law on Local Self-Government, providing for the powers and functions of new municipal mayors, as well as for their relationships and checks and balances with municipal councils. Even if no constitutional review case is initiated regarding the constitutionality of the above-mentioned constitutional amendments, a constitutional justice case is programmed regarding the repartition of powers between these two local self-government authorities.

Under the Constitution, the municipal council is the representative institution of the territorial community. The principle of the supremacy of the municipal council over other municipal institutions stems from the Constitution.[18] The mayor should be regarded as the executive at the level of local self-government. However, this does not stem from the Constitution directly and is provided for only by ordinary law. Furthermore, the Law on Local Self-Government empowers the mayor to participate in the work of the municipal council. These powers include calling the sessions of the council, the chairmanship of sessions, and drafting the agenda. This significant role of the mayor raises questions about the separation of powers at the municipal level or the question of the autonomy of the municipal council. It is doubtful whether the mayor, who is not part of the council anymore, could interfere with the organization of the work of the municipal council, decide on the content of sittings, etc.

The other two amendments do not seem to present any doubts about their constitutionality. The impact of these amendments on the state and its residents will be seen during the next presidential elections in May 2024 and parliamentary elections in October 2024. Those who have been impeached, including the impeached former President of the Republic, as well as certain parliamentarians whose mandate was revoked due to a breach of the oath or a gross violation of the Constitution, will have the ability to stand for election again. In addition, the amendments lower the age requirement for candidacy, allowing those who are 21 years and older to seek the parliamentary mandate.

Ultimately, the impact of these amendments on local government and democratic principles will be examined in the future elections of Lithuania.

V. FURTHER READING

Egidijus Kūris. On Jurisprudential Constitution and European Integration: The Case of Lithuania. In: I. Nguyen Duy, S. Bragdø-Ellenes, I. Lorange Backer, S. Eng, B. E. Rasch (eds.). *Uten sammenligning: Festskrift til Eivind Smith 70 år*. Oslo: Fagbokforlaget, 2020.

Egidijus Kūris. On constitutional amendments. In L. Beliūnienė, D. Jočienė & others (eds.). *Thirty years of constitutional justice: tempore et loco*. Vilnius: LRKT, 2023.

16 The ruling of 14 March 2006. See: https://lrkt.lt/en/court-acts/search/170/ta1357/content.

17 See more on the competence of the Constitutional Court to review constitutional amendments in the previous report, Birmontiene and Miliuviene "Lithuania" [2021] IRCR 150.

18 The ruling of 19 April 2021.

Grand Duchy of Luxembourg

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I. INTRODUCTION

In 2022, the long awaited constitutional reform finally crossed the finish line after a long and winding road. Indeed, the need to modernize and overhaul Luxembourg's Constitution has been discussed since the late 1980s. In 2009, after four years of preparatory and informal exchanges of knowledge and opinions, the Committee on Institutions and Constitutional Reform (CIRC) of the Luxembourg parliament presented a comprehensive proposal to overhaul the Constitution. These exchanges of opinions continued for almost ten years, and gave birth to more than 4000 pages of official parliamentary and preparatory documents. However, the reform proposal, which had even been reclassified in 2015 as "adoption of a new Constitution", ended unexpectedly in the summer of 2019, in the final phases, due to the sudden objection by the majority[1].

In May 2020[2], November 2020[3], April 2021[4] and June 2021[5], CIRC presented four separate "new" amendment proposals, repackaging in reality the failed ones. This committee is one of parliament's "working groups", and is composed of fifteen MPs, who are appointed by their respective party. Mirroring the proportional representation of parties in parliament, like all parliamentary committees, CIRC's mandate is to prepare constitutional reform and to submit bills aiming at implementing the Constitution. As a matter of fact, the final report of the competent committee sets the stage for debate and voting in parliament, being the most consulted document by MPs before voting.

Recently, in December 2022, parliament adopted the four constitutional amendment packages, each of them having been voted on twice without any further delay or unpredicted disturbance, as we will see below (II). The "amended" Constitution will therefore enter into effect on the 1st of July 2023. Parliament carefully avoided announcing the birth of a "new" Constitution, and it insisted on declaring that the four packages merely embrace various constitutional amendments and do not entail "brutal change" to the Constitution. However, our analysis will show that numerous provisions reflect a fundamental transformation of the Constitution (III), this transformation aiming at enhancing democracy, the rule of law, and the protection of human rights. The obvious and necessary constitutional (re)balancing of legislative, executive, and judiciary power will therefore have to be qualified as constitutional dismemberment.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Before going more in detail about the aforementioned constitutional amendment packages, it seems necessary to describe briefly the constitutional amendment procedure. As the parliamentary system of Luxembourg is unicameral, the constitutional reform procedure implies that parliament votes twice on any constitutional amendment, the two successive votes being separated by an interval of at least three months. Parliament's second constitutional vote might be replaced by a decision-making referendum if either at least one-quarter of the members of parliament (16 MPs) or if 25 000 voters, that are registered on the electoral lists for parliament elections, request it[6].

Despite the fact that major parties renewed their promise, in their election campaign programs in 2018, to promote a constitutional decision-making referendum, the quorum of sixteen MPs could not be reached in order to request such a referendum. On the contrary, the day before the first amendment package vote took place, several MPs, including members of the CIRC, of the governing coalition and of the opposition announced their intention not to initiate any referendum. Their main argument was that all vital questions had already been discussed and answered through the 2015 referendum and various participation initiatives[7].

Indeed, a referendum was held in 2015, and there was a negative outcome on each of the three referendum questions (right to vote for foreigners under certain conditions, lowering of the voting age to sixteen years, and limiting continuous ministerial function to ten years). This undifferentiated negative outcome was much unexpected, because

1 Carola Sauer, « Luxembourg – Report », *The 2020 International Review of Constitutional Reform*, 199; "Luxembourg's constitutional crescendo: will incremental reforms succeed where overhaul failed?", *ConstitutionNet - Voices from the field*, https://constitutionnet.org/news/luxembourgs-constitutional-crescendo-will-incremental-reforms-succeed-where-overhaul-failed [28 October 2021].

2 Parl. doc. No. 7575, Proposition de révision du Chapitre VI de la Constiution, 5 May 2020.

3 Parl. doc. No. 7700, Proposition de révision des Chapitres Ier, III, V, VII, [VIII], IX, X, XI et XII de la Constitution, 17 November 2020.

4 Parl. doc. No. 7755, Proposition de révision du Chapitre II de la Constitution, 29 April 2021.

5 Parl. doc. No. 7777, Proposition de révision des Chapitres IV et V*bis* de la Constitution, 29 June 2021.

6 Jörg Gerkrath, « Le mécanisme de la révision constitutionnelle au Grand-Duché de Luxembourg », *Journal des Tribunaux Luxembourg* 6[2006], 174-180.

7 For instance, in 2015 and 2016, parliament created various forums (e. g. website *www.ärvirschléi.lu*, roundtables and public conferences) on which public could propose and discuss ideas and which led to a final public parliamentary debate.

all major parties and even the opposition, except for the right-wing Alternative Democratic Reform Party (ADR), had strongly supported and promoted these three constitutional amendments during the preparation period of the 2015 referendum. It seems as if the negative outcome of the 2015 referendum heavily traumatized parliament. Although referenda had been widely accepted in Luxembourg, even appreciated, because they would have provided specific and high legitimization to the "new" Constitution, the parties therefore decided unanimously, in 2022, not to initiate another. In fact, since 2015, the referendum on the "new" Constitution is highly controversial and major parties undoubtedly fear that it gives rise to a general expression of popular discontent rather than generating approval.

The required number of the 25 000 voters registered on the electoral lists for parliament elections is rather high (in 2018, approximately 260 000 voters had been registered). The experience of 2022 showed (again) that it is unlikely that voters succeed in forcing a referendum: None of the four amendment packages passed by constitutional referendum.

The first amendment proposal covered Chapter VI dealing with the judiciary (later renumbered Chapter VII by the fourth amendment proposal). Parliament voted on it, for a first time, in October 2021. The amendments concerning the judiciary are widely accepted. For the first time, the Constitution explicitly mentions the judiciary power, thus recognizing it as the third power of the state. Furthermore, the amendments constitutionalize the National Council of the Judiciary, whose creation goes hand in hand with the entry into force of the Constitution[8]. The Council's mission is to guarantee the transparency of the judiciary, and to strengthen its legitimacy, by ensuring the proper functioning of tribunals and courts without undermining their independence (make recommendations on recruitment and training, draw up ethical rules and monitor compliance, render disciplinary proceedings strictly objective, etc.). Finally, yet importantly, the amendments strengthen fair trial rights, and guarantee judicial and prosecutorial independence.

The second amendment proposal covered not fewer than nine chapters of the Constitution and focused on executive powers and, in particular, on the powers of the Grand Duke, head of State. For instance, in the future, the Grand Duke will have no "powers", but only "attributions". Even more, he may face a statement of his "abdication", decided on by parliament (qualified majority of two-thirds of MPs), in case of "non-compliance with his attributions"[9]. Generally speaking, the amendments concern the organization of the State, its territory, its inhabitants, the constitutional monarchy, the Government and its competencies, the administration of the State, the relations between the State and religious communities, the public institutions of the State and professional bodies, the constitutional amendment procedure, the budget, etc. Besides, the future Constitution explicitly mentions separation of powers and rule of law as fundamental principles of governance, as well as the participation in the European Integration process, Luxembourg being one of the founding states of the EU. The second amendment proposal was voted on, for the first time, in January 2022.

The third amendment proposal was about Chapter II, Rights and Freedoms. The first vote on this proposal took place in March 2022. The amendment constitutionalizes some "new" rights and freedoms, which are generally inspired by foreign constitutional and international texts: e. g. the right to human dignity, the right to found a family, children's rights, the presumption of innocence, the right to a legal judge, non-retroactivity of punishment, the right to informational self-determination, and the right to asylum. What will have even more impact on human rights and freedoms debate in Luxembourg is the new article 37, a "cross-section clause" (FR: *clause transversale*) applying to all freedoms. This clause not only requires that each restriction of freedom has to be based on a statute (requiring therefore a legislative procedure), but it also enshrines the general principle of proportionality, a rather new general principle of law in Luxembourg. Moreover, the amended Constitution introduces the concept of "state goals of constitutional value": e. g. the promotion of social dialogue, the goal of suitable housing, the fight against climate change, and the freedom of scientific research.

The fourth and final amendment proposal covered Chapter V, which deals with parliament and legislative power, as well as Chapter V*bis*, which concerns the Council of State and whose constitutional mission it is to advise legislative and executive power in legislative and regulatory procedure. These amendments are particularly interesting with respect to (liberal) democracy because they essentially aim at modernizing the unicameral parliamentary system and at reinforcing the position of parliament vis-à-vis the Government. In particular, they establish new or strengthened parliamentary control mechanisms: e. g. by explicitly mentioning parliamentary control of government action, and by introducing the vote of (no) confidence as well as the possibility for the minority to request inquiry committees. Furthermore, the amendments introduce an innovative element of direct democracy, the citizens' legislative initiative right. This new tool will allow citizens and civil society to submit legislative ideas. Parliament will however decide in the end whether or not to embrace the initiative. Finally, Article 4 of the amendment package joins a "coordinated text" of the comprehensively amended Constitution. Parliament voted on this fourth proposal, for a first time, in July 2022.

On the 21st and 22 December 2022, parliament adopted the four amendment proposals by a second constitutional vote. Each of the four bills enters into force the first day of the sixth month following its publication in the Official Journal of Luxembourg, that day being the 1st of July 2023[10].

The day of the second and final parliament's constitutional vote on the future Constitution, parliament rejected another constitutional amendment proposal, which pursued the adoption of a new Constitution and had been proposed by the left-wing Party, *Déi Lénk*, in 2016[11]. The proposal mainly focused on strengthening social rights, anchoring the concept of a welfare state in the Constitution, and abolishing the Luxembourgish constitutional monarchy in favor of a republic with a president as head of state who has only very limited powers. In light of the long-lasting, profound, and concluding discussions within the constitutional reform process, the rejection of the amendment proposal was hardly surprising. Besides, the newly amended Constitution already integrates the most important social rights.

8 Loi du 23 janvier 2023 portant organisation du Conseil national de la justice et modification de la loi modifiée du 25 mars 2015 fixant le régime des traitements et les conditions et modalités d'avancement des fonctionnaires de l'État (Mém. A – No 41, 25 January 2023; Doc. Parl. No 7323A).

9 Art. 60 of the amended Constitution.

10 The four amendments have been promulgated by the Grand Duke, 17 January 2023, and published, 18 January 2023.

11 Parl. doc. No 6956, Proposition de révision portant instauration d'une nouvelle Constitution, 24 February 2016.

Also on the same day, the right-wing party, ADR, tabled a new amendment proposal aiming at introducing active voting rights for Luxembourgish non-residents[12]. In fact, Luxembourgish non-residents have the right to vote in parliamentary elections. However, the actual Constitution as well as the newly amended one does not give them the right to be elected to office. Again, the adoption of this bill seems highly unlikely, as a large majority of political parties represented in parliament have clearly and repeatedly expressed their support for this exclusion in the course of the constitutional reform process. Therefore, abandoning the obligation to be domiciled in the Grand Duchy of Luxembourg as a condition of eligibility for parliamentary elections "does not correspond to political demand", as the Government recently stated in its position paper[13]. The Council of State will issue its opinion on this amendment proposal in 2023.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Even though parliament repeatedly affirmed that the four amendment packages do not enact a new Constitution, the above-described adopted constitutional amendments (II) clearly dismember the existing constitutional text. We should note that, in Luxembourg, there is no distinction between "amendment" and "dismemberment", neither in political nor academic debate. The recent fundamental constitutional transformation is widely accepted and not seriously put into question, except for the fact that no decision-making referendum took place.

In fact, historic contextualization is essential. The current Constitution is still profoundly influenced by the political regimes and monarchies of the nineteenth century Europe. It is not only one of the oldest constitutional documents in Europe, but it is also considered to be outdated, in parts obsolete and ambiguous. First and foremost, it neither reflects political reality nor the interaction between the authorities. The same goes for the three powers of the state. Even worse, fractional constitutional amendments (and dismemberments) in the past 150 years have certainly not helped to improve the consistency and transparency of the constitutional text[14].

The whole reform process aimed at modernizing, replacing, and adapting the constitutional provisions. More precisely, the four amendments aim at avoiding ineffectiveness and, to some extent, at reducing the risk of worthlessness of some constitutional provisions or the Constitution as a whole. The parliament as the "constituent power" intended to establish a "living instrument" Constitution. The mere existence of the Constitutional Court, created in 1996/1997, still emphasized the urgency of constitutional reform because it is empowered to review the constitutionality of domestic statutes *a posteriori,* and it applied the Constitutional provisions literally and regardless of any changed political reality.

Finally, we should point out that there are no unamendable constitutional rules, and the Constitutional Court has no competence to review constitutional amendments.

In fact, this Court has considerably limited powers and is yet self-restraining its competencies. Composed of nine judges from judicial and administrative courts, who continue to exercise their function as "general" judges and meet once per week (Friday afternoon) to deliberate pending constitutional cases, the Constitutional Court can only control the constitutionality of legislative acts. Moreover, it decides solely upon a preliminary ruling request, which has to be initiated by a general court within a concrete dispute.

If the jurisprudence of the Constitutional Court reflects a certain evolution of its judges towards opening their interpretation methods to others than the literal one alone, it should yet be clearly noted that its decisions are strictly limited to the reasoning which is absolutely necessary. The Luxembourg constitutional judge answers only the request of the general judge, in order to allow him to solve his dispute. The Luxembourgish part-time constitutional judge, who remains a maintime general judge, applies in fact the same restraint vis-à-vis legislative power as he does as a general judge. The Court's decisions are short and concise, and seem to neither take into account any politically or philosophically influenced idea nor reflect any interest in majoritarian popular opinions. Thus, the role of the Constitutional Court seems neither to be representative nor enlightened.

Moreover, the Constitutional Court cannot "invalidate" unconstitutional legislative provisions. Since the constitutional amendment of 2019[15], the constitutional judge may declare it unconstitutional and this declaration is meant to produce its effects *erga omnes*. However, the Constitution is not clearly determining the precise legal *erga omnes* consequences of this declaration. The parliament's working group CIRC insisted in its final report on the 2019 amendment, that the effects of the Court's decision are not retroactive, therefore surely not invalidating the legislative provision. The question remains whether the Court's decision entails the abrogation *ex nunc* of the unconstitutional provision or its mere nonapplication. On the one hand, the *erga omnes* effects of the finding of unconstitutionality seem necessarily to imply the implicit abrogation of the provision in question. On the other hand, it is widely accepted that only parliament can abolish legislative acts. Howsoever, the role of the Constitutional Court seems only in parts to be counter-majoritarian, as the effects of its decisions are limited and meant to leave parliament's legislative power (almost) untouched.

IV. LOOKING AHEAD

It is clear that the amended Constitution needs to be implemented. New legislative acts have to be taken, in order to put into effect the numerous constitutional amendments. Although these amendments have been adopted by a large majority and although no public debate really questions any of them, the concrete implementation already reveals numerous inconsistencies and ambiguities within the future Constitution.

In particular, the jurisprudence of the Constitutional Court will show if the amended Constitution meets the expectation of being modern, clear, and protective of citizens' rights and freedoms and if it reflects political reality. The future is hard to predict, as the amended Constitution is, in reality, a substantively new Constitution that will now have to be interpreted, applied and followed by the people of Luxembourg, its representatives, its government and its judges.

12 Parl. doc. No 8125, Proposition de révision portant modification de l'article 52 de la Constitution, 22 December 2022.

13 Parl. doc. No 8125, Prise de position relative à la Proposition de révision portant modification de l'article 52 de la Constitution, 10 February 2023.

14 Carola Sauer, "Luxembourg. The state of liberal democracy", *2017 Global Review of Constitutional Law*, 184.

15 Carola Sauer, Les (nouveaux) effets des arrêts du juge constitutionnel", *Revue luxembourgeoise du droit public* August/2021, 51.

Malawi

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1 The views expressed herein are the author's own and do not reflect those of the institution.

I. INTRODUCTION

Since coming into power, the current administration in Malawi, the Tonse Alliance government, has continued with the trend set by its predecessors of continuously altering the country's supreme law, the Constitution of the Republic of Malawi, adopted in 1994 (hereinafter, the Constitution). This report discusses Malawi's 2022 modifications to the Constitution. In the next section, there is a summary provided of all the proposed reforms. Thereafter, the report discusses whether the reforms are amendments or dismemberments. It also examines the constitutional controls to the reforms and the court's role regarding these reforms. The report contends that all 2022 proposed constitutional reforms in Malawi are amendments that serve different purposes. It further argues that although Malawian courts have played a pivotal role in constitutional reforms in the country over the years, they did not have an important role in the 2022 reforms.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

An interesting fact about the 2022 constitutional reforms in Malawi is that all the proposed reforms relate to elections, notwithstanding that the country still has over two years from now before it holds its next general elections. Elections are key to democratic governance as they allow citizens to reflect on how those that they elected to power have governed. Citizens then get to decide if elected officials deserve to be entrusted with State power again. In a way, therefore, elections are a mode of allowing citizens to hold their elected representatives accountable in the discharge of their functions.[2] Acknowledging this enhanced importance of elections, Malawi's Constitution has a full chapter on the subject[3] and a number of statutes regulating the process.[4] Such statutes include the Electoral Commission Act,[5] the Presidential, Parliamentary, and Local Government Elections Act,[6] and the Political Parties Act.[7] The 2022 proposed constitutional reforms in Malawi deal with the name of the body entrusted with the role of regulating elections, the composition of such a body, the period for holding by-elections, the interval for re-demarcating constituency boundaries, and the manner and period for holding a second poll in the event that no presidential candidate attains an absolute majority of votes.

The first proposed reform relates to the name of the body entrusted with the role of managing elections in Malawi. Initially, the Constitution named such a body as the Electoral Commission.[8] The 2022 constitutional reforms, however, proposed a change of the body's name to "Malawi Electoral Commission."[9] Furthermore, the reforms proposed substituting the new name for the old name in any relevant provision under sections 75 and 76 of the Constitution.[10] This change in the name of the electoral body has equally been effected in other statutes such as the Electoral Commission Act.[11]

Again, in relation to the electoral body, while the Constitution previously prescribed the minimum number of members of the Electoral Commission,[12] it did not stipulate the maximum number of such members. Therefore, this left the appointing authority, the President of the Republic of Malawi,[13] with the power to appoint any number of commissioners provided they were not less than the prescribed minimum number, namely, six. The 2022 reforms have reduced the minimum number to four and prescribed six as the maximum number of commissioners that the President can appoint.[14]

The third 2022 proposed constitutional reform relates to the re-demarcation of constituency boundaries. The Constitution accords the Electoral Commission the power to determine constituency boundaries in a manner that ensures that constituencies contain approximately equal numbers of voters eligible to register.[15] The exercise of this power is subject only to considerations of population density, ease of communication, geographical features, and existing administrative areas.[16] But the determined constituency boundaries also require periodic reviews so as to maintain an equal distribution of voters eligible to register in the constituencies. In that regard, the Constitution also grants the electoral body the power to periodically review existing

2 Jacques Thomassen, 'Representation and Accountability' in Jacques Thomassen (ed), *Elections and Democracy: Representation and Accountability* (OUP 2014).
3 Chapter VII.
4 For a discussion on the electoral laws generally, see Mwiza Jo Nkhata, 'Tinkering with the Rules of the Game? Electoral Law Reform in Malawi' in Nandini Patel and Fidelis Edge Kanyongolo (eds), *Democracy Tested: The Case of Malawi's 2019 Tripartite Elections* (NICE 2021).
5 Chapter 2:03 of the Laws of Malawi.
6 Act No 10 of 2023.
7 Act No 1 of 2018.
8 The Constitution of the Republic of Malawi, 1994, ss 75 and 76 (The Constitution).
9 The Constitution (Amendment) Bill, 2022, s 3(a).
10 The Constitution (Amendment) Bill, 2022, ss 3(b) and 4(a).
11 Electoral Commission (Amendment) Act, 2023 (amending the name of the electoral body in the statute to Malawi Electoral Commission).
12 The Constitution, s 75(1)
13 Electoral Commission Act, s 4.
14 The Constitution (Amendment) Bill, s 3(a).
15 The Constitution, s 76(2)(a).
16 ibid.

constituency boundaries.[17] Initially, the Constitution required the reviews to be done at intervals of not more than five years.[18] The 2022 constitutional reforms, however, propose extending the interval to ten years.[19]

The fourth proposed reform relates to the period for holding by-elections. By-elections are a type of election conducted to fill the seat of a member of a National Assembly or councilor which has become vacant otherwise than by the dissolution of the National Assembly or the council.[20] Apart from the usual causes like death, resignation, assuming another post, or generally the occurrence of an act that disentitles the person from holding the position that he or she was holding, a vacancy in these political positions may also arise from the fact that the concerned constituency did not elect a representative on the election day due to technical failure or other reasons.[21] Regarding the procedure for filling vacant seats of members of the National Assembly, initially the Constitution provided that if a seat of any member falls vacant, the Speaker of the National Assembly must publish a notice in the *Gazette* and any by-election to fill the vacancy must be held within 60 days from the date that the seat fell vacant.[22] However, in the circumstances that the Speaker forms the opinion that the circumstances do not admit holding a by-election within that period, then the by-election must be held as expeditiously as possible after the expiry of the 60 days.[23]

However, the 2022 reforms propose altering the constitutional provision governing the holding of by-elections. The major proposed change is to adjust the period for holding by-elections from within 60 days of the seat falling vacant to the next quarter of the calendar year after the seat of the member becomes vacant.[24] The proposed provision, however, retains the prescription that if circumstances do not permit holding a by-election within the stated period (the next quarter of the calendar year), then such an election must be held as expeditiously as possible.[25] Also worth noting is the fact that, unlike the current provision which specifically mentions that it is the Speaker who has to form the opinion that it is not possible to hold a by-election within the prescribed period, the proposed provision is silent on who has to form such an opinion. Lastly, unlike the current constitutional provision, the proposed provision expressly bars the holding of a by-election where a vacancy arises within twelve months before the next general election.[26]

The final proposed reform relates to the holding of a second poll. Following the famous constitutional court decision nullifying the May 2019 presidential elections, Malawi adopted a fifty percent plus one system for electing the President as held by the Court.[27] In the same year, Malawi amended section 80 of the Constitution to ensure that a President must be elected with at least fifty percent of the vote.[28] The amended provision went further to provide that when no presidential candidate attains this threshold, the top two candidates must, within 30 days of the declaration of the results of the first poll, compete again to determine the winner. The 2022 constitutional reforms propose altering this provision in two ways. First, it extends the period for holding a second poll from 30 days to 60 days from the date of the declaration of the results of the first poll.[29] Secondly, it leaves it to an Act of Parliament to provide the procedures and other details of how a second poll must be carried out.[30]

The Bill containing these proposed reforms was duly passed by the National Assembly in December 2022.[31] However, as at the time of writing the report, it was still awaiting presidential assent. For that reason, it is accurate to say that the alterations remain merely proposed reforms as it remains a possibility for the President to withhold his assent.[32] Until the President grants his assent and the amendments are officially enacted, the reforms will not materialize.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. AMENDMENTS OR DISMEMBERMENTS

The 2022 proposed constitutional reforms are, strictly speaking, all amendments. They do not alter the original design of the Constitution or flout any of its core principles.

Starting with the change of the electoral body's name, initially, the body's legal name was "Electoral Commission." However, in ordinary usage, the body has popularly been referred to as the "Malawi Electoral Commission" since its establishment. The inclusion of the prefix Malawi distinguishes this management body from other electoral commissions around the world. For example, the media[33] and some scholars[34] have been using the name "Malawi Electoral Commission." Even the electoral body has been referring to itself by the name Malawi Electoral Commission or MEC as an acronym.[35] When it comes to the courts, there have been instances where conflicting signals occur regarding the name of the body. Some courts have allowed matters before them to proceed when the electoral body has been labeled as the Malawi Electoral Commission.[36] In other cases, judges have used the terms Electoral Commission and Malawi Electoral Commission interchangeably.[37] However, in one case, the Court emphasized the point that the body

17 The Constitution, s 76(2)(b).
18 The Constitution, s 76(2)(b).
19 The Constitution (Amendment) Bill, s 4(b).
20 Presidential, Parliamentary and Local Government Elections Act, 2023, s 2.
21 Lise Rakner, Mette Bakken and Nixon Khembo, 'Elections: Systems and Processes' in Nandini Patel and Lars Svåsand (eds), *Government and Politics in Malawi* (Kachere Series 2007) 188.
22 The Constitution, s 63(2) – proviso (b).
23 Ibid.
24 The Constitution (Amendment) Bill, 2022, s 2.
25 Ibid.
26 Ibid.
27 *Chilima and Chakwera v Mutharika and Electoral Commission (Constitutional Reference No. 1 of 2019) [2020] MWHC 2.*
28 Martin Chipofya, 'Malawi' in Luis Roberto Barroso and Richard Albert (eds), *The International Review of Constitutional Reform: 2020* (University of Texas 2021).
29 The Constitution (Amendment) Bill, 2022, s 5.
30 Ibid.
31 George Singini, 'Parliament Passes Electoral Reforms Bills' (*The Nation*, 14 December 2022) <https://mwnation.com/parliament-passes-electoral-reforms-bills/> accessed 2 March 2023.
32 The Constitution, s 73(1) allows the President to withhold his assent to a Bill passed by the National Assembly.
33 See for example, Serah Makondesa Chilora, 'Mec to Launch By-elections Tomorrow' (*The Times*, 5 October 2019) https://times.mw/mec-to-launch-by-elections-tomorrow/?amp=1 accessed 2 March 2023.
34 Nandini Patel and Arne Tostensen, 'The Legislature' in Nandini Patel and Lars Svåsand (eds), *Government and Politics in Malawi* (Kachere Series 2007) 83; Rakner and others (n 21) 183, 191.
35 See, for example, <https://mec.org.mw/about-mec/> accessed 1 March 2023.
36 See, for example, *Phoso v Malawi Electoral Commission* Civil Cause No. 1271 of 1996; *The Malawi Electoral Commission and others v The Republican Party* [2004] MLR 417; *Kanyinji v Malawi Electoral Commission* Miscellaneous Civil Cause No 21 of 2004; *Ambokire Bless Salimu v The Malawi Electoral Commission*, Judicial Review Cause No 30 of 2016.
37 For example, *Sabwera and another v Attorney-General* [2004] MLR 315.

created by the Constitution is the Electoral Commission and therefore regardless of the fact that the name Malawi Electoral Commission is in common use, it is not the legal name that the Constitutional assigned the electoral body.[38]

Despite such a proclamation, the name Malawi Electoral Commission continues to be used by both the electoral body and other people, and nothing was done to change the legal name of the body. The 2022 reforms, however, proposed changing the name of the electoral body to the one that was, for purposes of usage, preferred by the majority. The change of the electoral body's name does not alter any core value of the Constitution. Therefore, it is a corrective amendment that aligns with people's expectations of how the body should be called with the body's name in the supreme law. The reforms, however, have restricted themselves to sections 75 and 76 of the Constitution, and, in the process, have missed other constitutional provisions that contain the name Electoral Commission such as section 62(1). This section states that the number of seats in the National Assembly depends on the number of constituencies as determined by the "Electoral Commission". Also, while statutes such as the Electoral Commission Act have been amended to reflect the new name for the electoral body in that Act, other statutes like the Political Parties Act are yet to be amended despite containing provisions that refer to the electoral body by its original name.[39] Therefore, it is reasonable to expect that once the 2022 constitutional reforms have been assented to by the President, additional reforms will be proposed to reflect the electoral body's new name in all relevant constitutional and statutory provisions.

Another reform relating to the electoral body is with respect to the reconstruction of its membership. Similar to the reform in relation to the name of the electoral body, this reform does not alter or contradict any core value of the Constitution. Rather, it simply puts a limit to the number of commissioners that the appointing authority can appoint to the electoral commission and reduces the minimum number from six to four. In 2007, the Law Commission considered the provision detailing the composition of the electoral commission in light of the fact that it leaves the appointing authority with discretion to decide on the maximum number of commissioners.[40] The Commission found that by providing only the minimum number of commissioners, the provision gives the appointing authority an opportunity to abuse his powers.[41] Moreover, it noted that "previous experience has shown that it is possible for the appointing authority to exaggerate the membership for the wrong reasons resulting in compromising the effective functioning of an institution."[42] To control the number of persons that can be appointed as commissioners, both the 2007 Law Commission and the 2017 Special Law Commission on the Review of Electoral Laws proposed the prescription of a maximum number of commissioners.[43] The reform therefore clears the defect in the rule which exposed the provision to abuse by the appointing authority. It also reinforces the principles of transparency, accountability, and the rule of law which underlie the Constitution. Accordingly, the reform is an amendment performing a corrective function.

38 *Muluzi v Malawi Electoral Commission* Constitutional Cause No. 1 of 2009.
39 Political Parties Act No 1 of 2018, s 42(5).
40 Law Commission, *Report of the Law Commission on the Review of the Constitution* (Law Com Rep No 18, 2007).
41 ibid 61.
42 ibid.
43 ibid; Law Commission, *Report of the Law Commission on the Review of Electoral Laws* (Law Com Rep No 32, 2017) 86.

The third 2022 proposed constitutional reform concerns the extension of the period for reviewing constitutional boundaries. Recently, the Electoral Commission has been conducting constituency boundary re-demarcations. Since the re-introduction of the multi-party system of government in 1993,[44] the first constituency boundary review was conducted as the country was preparing for the first general elections which resulted in the increase of constituencies from 141 to 177.[45] After that, the next review occurred in 1998 which raised the number of constituencies to 193.[46] Since then, the next review was conducted 10 years later in 2008.[47] However, after the Electoral Commission proposed changes to constituency boundaries, Parliament decided against adopting its proposals.[48] Therefore, as of 2015 when the Electoral Commission started forming the idea of conducting another re-demarcation exercise, Malawi retained the constituency boundaries that were set in 1998.[49] While there was another attempt to conduct a re-demarcation exercise in 2017,[50] this also did not yield any tangible results with the country's constituencies remaining at 193 as of 2021.[51] Clearly, therefore, despite the constitutional requirement of conducting a constituency boundary review every five years, this has rarely been followed. Further even when these reviews have been conducted, Parliament has not always been keen to adopt the proposals emanating from the review exercise.

Aside from factors such as financial constraints,[52] another factor that has made it difficult for the Electoral Commission to review constituency boundaries every five years is the electoral body's reliance on population figures supplied by the National Statistics Office (NSO).[53] However, NSO conducts a population census every ten years thereby meaning that if the Electoral Commission were to stick to the five years scheme, it would, at some point, have had no data to rely on for the re-demarcation exercise. Noting this challenge, in 2017, the Special Law Commission on the Review of Electoral Laws proposed that the interval for constituency boundary reviews should be extended to match that for population census as done by the NSO.[54] This reform is a reformative amendment.[55] While acknowledging the importance of constituency boundary reviews (i.e. to maintain an equitable distribution of voters that are eligible for registration), it revisited the rule regarding the interval for reviewing the boundaries to ensure that every time the Electoral Commission is required to conduct these reviews, it has sufficient data available for the purpose.

44 Michael Chasukwa et al, 'Identity Entrepreneurs and Cultural Framers in Contemporary Ethnic Identity Mobilisation in Malawi' [2023] The African Review 1.
45 Malawi Electoral Commission, 'Boundary Review: History of Boundaries Review' <https://mec.org.mw/boundaryreview/> accessed 7 February 2023.
46 Ibid. See also Rakner and others (n 21) 193.
47 Duncan Mlanjira, 'MEC Faces Funding Gap in its Forthcoming Activities: Constituency and Ward Boundary Review Exercise' (*Nyasa Times*, 3 January 2022) <https://allafrica.com/stories/202201040056.html/> accessed 7 February 2023.
48 Ibid.
49 Meekness Simfukwe, 'MEC in Dilemma' (*The Nation*, 6 October 2015) <https://mwnation.com/mec-in-dilemma/> accessed 7 February 2023.
50 Victoria Milanzi, 'MEC to Re-demarcate Constituencies from this Month' (*Malawi24*, 1 March 2017) <https://malawi24.com/2017/03/01/mec-re-demarcate-constituencies-next-month/> accessed 7 February 2023.
51 Steve Chilundu, 'Cost of More Constituencies' (*The Nation*, 21 May 2021) <https://mwnation.com/cost-of-more-constituencies/> accessed 7 February 2023.
52 Rakner and others (n 21) 193.
53 Law Commission 2017 (n 43) 96.
54 Ibid.
55 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 79.

The fourth amendment relates to the period for holding by-elections. By-elections are necessary for a democratic system of government as they offer constituencies that have lost their political representatives a chance to replace them. However, conducting by-elections also entails the electoral body incurring additional costs. Whereas currently, the Constitution does not preclude the holding of by-elections even when the next general election is close, the proposed reforms require that when the next general election is within a year from the date when a vacancy arose, a by-election should not be conducted. This proposal, therefore, is essential for the purpose of saving the electoral body's resources. But apart from that, the proposed provision also affords the electoral body generally more time to plan for by-elections by extending the period for holding such elections from 60 days from the time the vacancy arose to the next quarter of the calendar year from the time of the vacancy. The proposed provision will enable the Electoral Commission to consolidate all the vacancies that would have arisen in that quarter of the calendar year and then prepare for the by-elections to be held in the following quarter. It is argued that, like the previous reform, this reform is also reformative in that it revises the rule on the holding of by-elections to give the electoral body more time to prepare for such elections and to formally remove the requirement to hold by-elections when the next general election is already close.

The final reform relates to the period for holding a second poll where no presidential candidate attains more than 50% of the votes in a presidential election. The proposed provision extends that period from 30 days to 60 days. The extension of the period will certainly give the electoral body more time to better organize and hold the second poll. Furthermore, the proposed provision, unlike the initial one, explicitly provides that the conduct of the second poll will be regulated by an Act of Parliament. By leaving it to an Act of Parliament, the provision gives room for the statute to give better and more detailed guidance on the holding of a second poll. Indeed, section 35 of the Presidential, Parliamentary, and Local Government Elections Act has gone ahead to provide more details on some aspects of the second poll. For example, it specifies who is eligible to participate in the second poll and states what should happen if a candidate that is supposed to compete in that poll dies or becomes incompetent. Since this reform does not alter any core feature of the Constitution, it is another amendment performing a reformative function.

2. CONSTITUTIONAL REFORM CONTROLS AND THE ROLE OF THE COURTS

The Constitution has inbuilt mechanisms that restrict some alternations until certain conditions, such as a referendum in the case of substantial amendments to entrenched provisions, are met.[56] Additionally, Malawian courts have, for a long time, played a crucial role in influencing constitutional reforms. The 2022 proposed constitutional reforms, however, were all minor and did not require serious conditions such as a referendum to be met. Secondly, although the issue of the legal name of the electoral body attracted judicial discussion at some point, that discussion had no bearing on the proposed reform. The court made its observations regarding the legal name of the body over a decade ago. Despite the court's comments, people and the body itself have continued to use the name Malawi Electoral Commission. Therefore, it is more likely that the impetus for the change of the name has emanated from other forces than the court's observations. Generally speaking, the courts have not played a pivotal role in the 2022 proposed constitutional reforms.

VI. LOOKING AHEAD

Malawi's Constitution continues to be altered, as has been the trend pre-Tonse Alliance administration. The 2022 proposed constitutional reforms are all amendments and deal with the subject that is crucial for democratic governance – elections. A critical look at the proposed reforms shows that they are not comprehensive in addressing the changes discussed in this report. If the Bill containing the reforms is assented to, more provisions in the Constitution and in other statutes will need to be amended. Ultimately, as we get closer to the next general election to be held in 2025, there is a possibility that more electoral law reform proposals will continue to emerge.

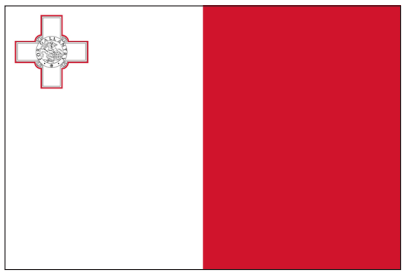
V. FURTHER READING

Chasukwa M et al, 'Identity Entrepreneurs and Cultural Framers in Contemporary Ethnic Identity Mobilisation in Malawi' [2023] The African Review 1

Nkhata MJ, 'Tinkering with the Rules of the Game? Electoral Law Reform in Malawi' in Nandini Patel and Fidelis Edge Kanyongolo (eds), *Democracy Tested: The Case of Malawi's 2019 Tripartite Elections* (NICE 2021)

56 Martin Chipofya, 'Malawi' in Luis Roberto Barroso and Richard Albert (eds), *The International Review of Constitutional Reform: 2021* (University of Texas 2022).

Malta



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I. INTRODUCTION

In recent years, Malta has undergone a comprehensive process of reforms that still seems to be far from achieving the ultimate goal. Since the assassination, in October 2017, of the journalist Daphne Caruana Galizia, whose investigations into corruptions cases uncovered the potential involvement of senior government figures, different international community institutions have been calling for systemic constitutional reforms to enhance the effectiveness of the rule of law in Malta and to update the system of checks and balances within the Maltese Government, with the ultimate aim of strengthening the separation of powers and the efficiency of government.

As a result, in 2020 and 2021, the Maltese Parliament passed several constitutional amendments and legislative reforms. Unlike a couple of preceding years, 2022 saw a single constitutional amendment concerning a minor matter. Despite this, numerous issues of constitutional concern have come to light over the past year.

Aside from the constitutional reform that was approved, over the past year, several international institutions have adopted resolutions or published reports on the current status of the Maltese reform process. On this basis, not without a heated debate between political actors involved, some proposals were submitted to Parliament and a few legislative reforms were approved.

Finally, several news events fueled a strong debate and discussion within the whole community on aspects related to the protection of fundamental rights and the role of key political institutions.

With this context in mind, this report presents the main aspects of the reforms passed by or submitted to Parliament and offers some remarks on their effectiveness or otherwise and on the possible way ahead.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

As previously mentioned, in 2022, the Maltese Parliament passed only one constitutional amendment concerning a minor issue. More specifically, on November 4th, the President of the Republic signed the Act No. XVI of 2022 that amended the provision of Art. 47 of the Constitution, broadening the list of disciplined forces with express reference to the Assistance and Rescue Force within the Civil Protection Department (Art. 5). This measure formed part of a complex reform aimed at reorganizing the Civil Protection Department; it established a new Director General, to replace the old position of Director, who is to be responsible for the appointment of different Directors in relation to specific areas. Within the overall reform, Parliament also approved a specific amendment of the Explosives Ordinance punishing the unauthorized discharge of fireworks.

Leaving aside that amendment, from the constitutional point of view, the most important event that took place in the past year was undoubtedly the presentation of a constitutional bill on the freedom of expression and the media. Based upon the reiterated petitions for the enhancement of democracy and the rule of law addressed to Malta by the international community after the assassination of the journalist Daphne Caruana Galizia, the legislative proposal establishes new regulations and guarantees concerning the freedom of expression, the right to privacy, and the freedom of the media.

With regard to the latter issue, the bill provides for a new Article 20B of the Constitution which expressly states that "the State recognizes the freedom of the media and the role of the media as a public watchdog together with the right to exercise free journalism as fundamental elements of democracy". Closely linked to this, the State has to "protect and promote freedom of the media including by providing for the protection of journalists and of their sources".

The role of the media has also been recognized with regard to the right to freedom of expression. According to the new draft of Article 41 of the Constitutional Charter, "this right shall include freedom of any person to hold opinions and to receive and impart information and ideas without interference by the public authority and regardless of frontiers". Within this framework, "the freedom and pluralism of the media and the importance of the role of journalists shall be respected".

Given the evolution of the system, the bill adds to the old reference to newspapers and journals the express provision of the protection of all kinds of "other published media". On the other hand, even in the new system, the exercise of the freedom of information may be subject to some conditions, formalities, or restrictions prescribed by law and necessary in a democratic society. In general, the bill specifies that no protection will be given to the "expression of hatred such as on the basis of nationality, race, gender or religion which, taking into consideration the circumstances in which it is done, constitutes incitement to discrimination, hostility or violence".

Finally, in line with the general approach of the proposal, the bill gives a clear and concise definition of the right to privacy by inserting into article 38 of the Constitution the declaration that "everyone has the right

to respect for his private and family life, home and communications".

Alongside the constitutional bill, the Government presented two other proposals respectively aimed at amending various laws to strengthen the protection of media and journalists and at establishing a Committee to recommend specific measures for the protection of persons in public life.

This Committee, made up of representatives from the police forces, security services, and armed forces and the Permanent Secretary of the competent Ministry, should be responsible for drawing up recommendations and a coordinated plan of measures (interim and permanent solutions) to respond to any serious risk or threat for the persons concerned.

With regard to the improvement of safeguards related to the activity of journalists and media workers, the Government bill establishes a prohibition on precautionary warrants in cases of lawsuits for libel or defamation under any law. Combined with this provision, in the event of the death of the author or editor summoned to court for defamation, the civil proceedings could be continued against the heirs but, in deciding on the merits, the court could no longer award any damages against them; only a declaration on whether or not there was defamation would be admissible. Also, damages could only be settled if a publisher or a person responsible for the broadcasting medium was involved in the original lawsuit against an author or editor who died during the trial.

Another form of protection for the journalists is represented by the prohibition on strategic lawsuits against public participation (SLAPP). In order to protect the activity of journalists, the bill states that, at the request of the defendant, the court could decide to dismiss the claim during the preliminary hearing if the action is found to be manifestly groundless. As the defendant merely should have the duty to give *prima facie* evidence that the action is manifestly groundless, the burden of proof, then, would shift to the plaintiff. In this way, journalists would be protected against the risk of intimidating lawsuits. In order to make this guarantee effective, the bill further states that in such cases national judges can dismiss the demand for enforcement of judgments issued by courts outside of Malta.

Again, as part of the main goal to respond to the demands of the international community to enhance the effectiveness of the rule of law, in early 2023 the Maltese Parliament approved two different bills, which had been presented by the Government in 2022. These bills were related to the prevention of money laundering and to the need to adopt anti-deadlock measures for the appointment of a core institutional position.

As regards the first point, Act No. VIII of 2023 amends the Prevention of Money Laundering Act in order to strengthen the Board of Governors of the Financial Intelligence Analysis Unit. In particular, with the aim of making investigations more effective, the statute requires the Commissioner of Police and the Commissioner for Revenue or their representatives to be members of the steering board of the financial intelligence body.

With regard to the second aspect, the Government was urged to overcome a political gridlock triggered by the end of the term of office of the Commissioner for Standards in Public Life. Due to the most recent reforms, the appointment of such an officer must be supported by a bipartisan vote of no less than two-thirds of all members of Parliament, the Government was unable to reach a general consensus on its proposal. Hence, after heated negotiations, it presented a reform bill that was eventually passed by the majority of Parliament on January 30, 2023. Act No. II of 2023 now states that if the House of Representatives is unable to pass a resolution supported by the votes of no less than two-thirds of all its members after two votes, the resolution may be approved by an absolute majority at the third vote.

In addition to the governmental proposals aimed at addressing the demands of the international community on the matter of the rule of law and the enhancement of democracy, in the report on constitutional issues that affected the Maltese system in 2022, specific focus must be placed on some legislative reforms or bills related to fundamental rights. In particular, during the past year, the Maltese Parliament amended the Embryo Protection Act of 2012 which regulates in vitro fertilization. Amongst other things, by emphasizing the role of the Embryo Protection Authority (EPA) to draft a protocol with a specific regulation based on scientific evidence, the reform raised, on one hand, the age for entitlement to free IVF from 42 to 45, and on the other hand the number of possible IVF cycles. Furthermore, it established the possibility of pre-implantation genetic testing to establish if there is any genetic predisposition to serious diseases, with embryos exhibiting genetic diseases being frozen and possibly given up for adoption in the future if a cure for the condition should become available. Finally, it opened the door to the donation and transfer of cryopreserved oocytes from abroad.

On the other hand, based on a news event involving two foreign tourists holidaying in Malta, the Government presented a bill aimed at legitimizing abortion, albeit in limited cases. In fact, Malta is currently the only European country with a blanket ban on abortion.

Leaving aside any remark on the content of these two different reforms, from the constitutional perspective, the main concern related to the position of the Head of State. Due to his religious beliefs, he refused to sign the Act amending the IVF regulation. This eventually forced the Government to appoint an Acting President who duly signed the statute. Furthermore, the President of the Republic has consistently reiterated that he will not sign the abortion reform which the Parliament is expected to pass. This position could trigger a new gridlock in the functioning of the constitutional system. Above all, these cases present a tricky challenge in defining the scope of the right to conscientious objection with regard to the Head of State and, in general, key institutional figures.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

After analyzing, in general, the reforms presented or passed in 2022, it can be said that none of these reforms represent a dismemberment of the constitutional system or provoke tensions with any non-amendable rules within the Constitution. Nevertheless, in each case, Parliament's activity has been based on or triggered by constitutional control from inside or outside the national system. From a different perspective, some of the proposals could give rise to serious issues of constitutional concern.

With regard to the constitutional reform definitively passed by Parliament with Act No. XVI of 2022, it can be said that the scope of the legislative action was twofold. On one hand, the House of Representatives was urged to intervene in the regulation of the unauthorized discharge of fireworks, as the national courts had repeatedly

pointed out that there was no distinction between serious cases and minor cases in which fireworks were let off unlawfully but caused no damage or injury. In every case, the perpetrators could face serious consequences, including fines of Đ15,000 and Đ50,000 or even imprisonment. In order to pass the court's proportionality strict scrutiny, Parliament lowered the amount of economic punishments in minor cases where no harm is caused, establishing fines of between Đ120 and Đ350.

On the other hand, the parliamentary statute strove to include the Assistance and Rescue Force within the Civil Protection Department as a disciplined force for the purposes of the Constitution of Malta as well as to review and upgrade the managerial structure of the Civil Protection Department. The main goal of this proposal was to strengthen the position of the Civil Protection system by providing the Department with a more articulated structure and ensuring the broader margins and guarantees of action granted to the armed forces by the Constitution. In fact, according to article 47 of the fundamental law, for those who are members of a disciplined force "nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions" related to the chapter of the constitutional charter focused on fundamental rights.

Considering the sensitive role traditionally played by the Civil Protection Department, the proposal achieved bipartisan support.

The analysis relating to the package of reforms concerning the freedom of expression and the freedom of the media, along with the legislative instruments focusing on the functioning of the institutional framework, is more complex. Unlike the constitutional amendment on the Civil Protection Department, this set of constitutional and legislative reforms was prompted by the increasing interest of the international community in the issue of the rule of law in Malta. As mentioned previously, since 2017 international organizations have raised serious questions about the effectiveness of the system of checks and balances, as well as the democratic guarantees outlined in the constitutional charter. Investigations into the involvement of key governmental figures in corruption cases, unresolved assassinations of media workers, and the substantial intermingling of politics and the economy have led to increasing calls for systemic reforms.

With the aim of responding to those demands, in recent years, the Maltese Parliament has passed several constitutional reforms concerning the judicial system as well as the election and functions of the Head of State, the Ombudsman, and the appointing powers of the Prime Minister. No substantial progress has been made with regard to corruption, freedom of the media, and other issues related to the system of checks and balances in Malta.

In 2022 some evaluation reports were published that noted the opportunity of adopting measures aimed at improving integrity, preventing corruption, and enhancing the effectiveness of the rule of law. Special attention has been given to the need to improve freedom of expression and protection of the media and journalists. Based upon the responsibility of the State for the assassination of the journalist Caruana Galizia, which was pointed out in the public inquiry report published in late 2021, the Commissioner for Human Rights of the CoE highlighted the lack of guarantees for media and journalists. Moreover, according to the report published following her visit to Malta, the media have to deal with a climate of public distrust which hinders their freedom and autonomy of information. Within this framework, journalists face forms of harassment and intimidation such as hate speeches, threats, and strategic lawsuits based on defamation and libel allegations. Furthermore, as noted in other international reports, the activity of media workers is limited by restrictions on access to public information.

Given this landscape, the HR Commissioner, in her report, called for systemic reform, to be achieved with the active engagement of civil society in the decision-making process. Aside from the overall project on the freedom of expression, the report called for the adoption of adequate measures to protect journalists from attacks or threats and to give them effective access to public information. However, these guarantees should not result in state interference in the regulation of media professions, as a system of self-regulation based on an agreed code of ethics would be more suitable.

Based on the results of the visit by the HR Commissioner, urged on by the opposition which had presented a bill on the same issues, in early 2022 the Government established a Committee of experts on the media, requesting an in-depth analysis of the sector and the identification of recommendations to be transformed into legislative proposals. Due to the early elections held last Spring and, above all, the highly sensitive nature of the topic, the Executive delayed publishing the results of the Committee's activity. Eventually, having received a recall by the HR Commissioner, without any further consultation with civic society, the Government decided to present the mentioned three bills which involved the organic reform of the matter.

With some minor exceptions, the project appears to respond to the demands of the international community, but it cannot currently be predicted if and when Parliament will approve the reform and if the Executive will actually implement it. As noted in some advisory reports, the actual approach of the Government towards journalists and media independence appears not to be consistent with the purpose of the proposed reforms.

Freedom of expression and autonomy of the media represent a part of the overall debate on the condition of the rule of law. In this regard, in 2022, further international reports stressed the need for Malta to progress with its ongoing reform process. However, the strongly polarized political landscape hampered the renewal of sensitive bodies, such as the Ombudsman and the Commissioner for Standards in Public Life, which, in line with the provisions of most recent constitutional reforms, must be appointed with a two-thirds majority.

In this context, the amendment of the Standards in Public Life Act passed with Act No II of 2023, is of particular interest.

This statute appears to act in response to repeated calls from the international community for an anti-deadlock mechanism. In particular, in its 2020 report, the Venice Commission pointed out the opportunity of introducing an anti-deadlock measure with regard to the election of the Head of State. Indeed, this international body had stated that such a measure would be appropriate for dealing with the case of a failed vote. Hence, the idea of a second vote - again with a two-thirds majority threshold - was put forward, followed by a third vote, to be held not earlier than seven days after the second, whereby a simple majority would suffice. It would be possible for new candidates to be presented in these further ballots.

While the mechanism introduced by the legislative reforms appears to be very similar to the suggestions expressed by the international body, the appointment procedure of the new Commissioner appears to have deteriorated the guarantee of the independence of this institution. While the anti-deadlock provision was adopted with a view of overcoming the failure of the Prime Minister to achieve a bipartisan agreement on the candidate, it is now possible for the Commissioner to be appointed with a simple majority vote, thus leading to a risk of a partisan appointment. Indeed, this is what happened in the immediate aftermath of the enactment of the law: the current Prime Minister insisted on his first candidate and, notwithstanding criticisms from the opposition, at the third vote got the chance to appoint him. As a consequence, this reform may contribute to weakening the trust and respect for this institution - the Commissioner for Standards - which holds the very delicate responsibility of investigating and controlling breaches of ethical and legal standards by political actors.

Finally, constitutional control lies behind the reforms adopted or proposed with regard to fundamental rights and specifically to procreation-related rights. In this context, it should be noted that the reform of the assisted procreation system was submitted by the Government a few days after a ruling delivered by the ECtHR affirming the infringement of the right to private and family life of a Maltese couple (*Lia v. Malta*, App no 8709/20 (ECHR 5 May 2022)). This case concerns a 2019 decision of the Maltese Constitutional Court which denied the couple's right to a second cycle of IVF treatment as the woman had passed the maximum age of 42. The European Court raised concerns about the Maltese system and ruled that the 'interference' in their private lives suffered by the applicants was not consistent with the provision of Art. 8 ECHR. Even though the majority had previously affirmed its will to intervene in the IVF system during the electoral campaign, the bill was only presented to the House of Representatives in the aftermath of the European Court ruling.

Similarly, the bill establishing an amendment to the complete prohibition on abortion was only presented to Parliament after a case of abortion involving a couple of American tourists last Summer. While on holiday in Malta, a pregnant woman from the US had started suffering from the symptoms of a miscarriage, so she was kept under health observation. Despite the risk to the woman's health and the fact that there was no chance of saving the baby, the doctors could not terminate the pregnancy as the heartbeat of the fetus was still active. Eventually, the woman had to be airlifted out of Malta to receive life-saving abortion care. Having been sued by the woman before the Constitutional Court for an alleged breach of basic human rights, the Government - asked to tackle the issue by the last report of the HR Commissioner - decided to present a bill aimed at introducing an exception to the blanket ban on abortion, decriminalizing pregnancy termination in circumstances where there are medical complications that may endanger the mother's life or seriously jeopardize her health.

Unlike the case of IVF reform, despite the narrow fissure in the blanket ban on abortion provided in the amendment bill, the Government proposal triggered a heated political and social debate which is still hindering the final approval of the reform.

That being said, as previously mentioned, alongside the considerations on fundamental rights issues, the two measures have given rise to a matter of constitutional concern: the limitations on the right of conscientious objection granted to the Head of State. In both cases, due to his religious beliefs, the current President of Malta has expressed his firm intention not to sign the reforms approved by Parliament.

In the first case, the Government managed to bypass this hurdle by exploiting a loophole. According to the Constitution, whenever the Head of State "is absent from Malta or on vacation or is for any reason unable to perform the functions conferred upon him" the Prime Minister, after consulting with the opposition leader, may appoint a person to perform the presidential duties (art. 49). Given the resistance expressed by the President with regard to the IVF reform, the Prime Minister took the opportunity of a presidential visit abroad to appoint an Acting President who promptly signed the act passed by the House of Representatives.

This solution could be adopted again for the promulgation of abortion reform. In fact, the President has repeatedly stated that he would rather resign than sign the act.

In any case, whatever decision he adopts, the two reforms have brought the constitutional issue of the role of the President and the material feasibility of his right to moral objection to the forefront of the political agenda. On one hand, the Constitution does not provide for such a possibility. Art. 72 of the constitutional charter simply states that the President has to "signify that he assents" to the law passed by Parliament. On the other hand, by using the expression "without delay", the Constitution does not establish a specific term for the promulgation. Therefore, according to Art. 48, in the case of any refusal to sign the act, the President could only be removed by a two-thirds majority vote of Parliament affirming his/her inability to perform his/her duties or misbehavior. However, in case of a polarized political landscape, also due to the lack of any effective constitutional control on this matter, this particular solution may not be successful, thus leading to an insurmountable deadlock.

IV. LOOKING AHEAD

Looking ahead, there are a number of factors worthy of attention by law scholars. After several years, the reform process of the Maltese legal system is still a work-in-progress. Many changes have been adopted but others remain on the backburner.

Aside from the uncertainty regarding when and if the proposed reform on the freedom of expression and the media will be enacted, focusing on the opinions delivered by the Venice Commission and other international bodies on which the Government based its actions, it should be noted, amongst other things, that no attempt has been made to strengthen the role of Parliament as guardian of the Executive. The independence and autonomy of parliamentary representatives are hindered by low salaries, no possibility of full-time work, deficiencies in the administrative structure of the House, and the lack of rules on incompatibilities between MP functions and governmental/public positions. Furthermore, no bill has been presented which would actually make the decisions of the Constitutional Court really binding. Rulings finding a legal provision unconstitutional still do not have the direct effect of rendering that legal provision void, as it is up to Parliament to repeal or amend such laws, something that does not always happen in practice.

From another perspective, some of the reforms that have just been

enacted have given rise to different constitutional concerns. The anti-deadlock mechanism adopted for the appointment procedure of the Commissioner for Standards in Public Life clearly highlights how solutions triggered by appropriate demands may cause distorted effects. Likewise, the outcomes of the political elections held last year prove that the reforms enacted in 2021 to encourage gender equality have not been effective. Aside from the constitutional claims raised by some political actors, which are still pending before the court, the provision of an extra number of parliamentary seats in order to give appropriate representation to the under-represented sex led to an increase in the number of women in the new Parliament but failed to enhance their role in the political campaign and in the political life of the country.

Furthermore, Malta's longstanding religion-based culture continues to raise issues of constitutional concern with regard to the protection of fundamental rights.

In conclusion, the final remarks expressed in the 2021 report appear to be confirmed: much has been done but there is still a lot more work to do.

V. FURTHER READING

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Mexico*

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I. INTRODUCTION

Regarding constitutional reforms, 2022 proved to be a highly intense and significant year for Mexico. While it may seem like an overstatement, given that the only constitutional amendment approved extended the transitory period of the 2019 National Guard constitutional reform from five to nine years, we argue in Section II that this amendment marks a crucial milestone in the long-standing dismemberment of the civic-military relationship that has characterized Mexico's constitutional system since the 1940s.

Given Mexico's extremely reformist path, the number of amendment proposals in 2022 was typical: 480 proposals were presented. Nevertheless, as we discussed in Section I, there were two failed constitutional amendments, both supported by President Lopez Obrador's coalition, extremely important in political and constitutional terms. The first proposed amendment aimed to guarantee the State's predominance of electricity production in the country. Its failure created a political upheaval between the governing coalition and the opposition. The amendment's failure also proved that the consolidation of the President's ambitious "transformation" of the country requires the support of a supermajority. The second failed amendment aimed to transform the structure of the electoral authority, the National Electoral Institute (INE), as well as the rules of public funding for electoral campaigns. Immediately after its failure, President Obrador's coalition presented and passed it as an ordinary law. This electoral law, known as "Plan B," has been challenged as unconstitutional to the country's Supreme Court. The constitutionality of "Plan B" will be without doubt at the center of the constitutional debate in 2023, and the consequences of this decision will be critical for the future of Mexico's democracy and Constitution.

II. FAILED AND SUCCESSFUL CONSTITUTIONAL REFORMS

Mexico experienced both typical and atypical circumstances in relation to its hyper-reformism in 2022.[1] In terms of the number of reform proposals, it was a typical year with 480 proposals, which is slightly below the average of President Lopez Obrador's first four years in office (491.5), but consistent with the upward trend over the past 25 years. However, in contrast to the seven, four, and eight constitutional reform decrees passed in 2019, 2020, and 2021, respectively, only one was passed in 2022, making it an atypical year in that regard.

In 2022, as has been the case since the beginning of the current administration, two-thirds of the proposed constitutional reforms were put forward by either President Lopez Obrador or his political party and the National Regeneration Movement (MORENA). The remaining third of the proposed reforms came from all the other opposition parties combined. As in previous years, the proposed reforms covered a variety of issues, ranging from establishing unemployment insurance at the constitutional level to granting Congress the authority to legislate on genocide and crimes against humanity.

Among the many constitutional amendment proposals presented over the year, two received the most attention: one aimed at strengthening the State's control over electric generation, and the other aimed at redesigning the structure and responsibilities of the National Electoral Institute (INE). These constitutional issues were of great relevance to Lopez Obrador's political agenda and gained significant prominence throughout the year. In this section, we present an account of them and explore their profound political implications.

On September 30, 2021, President Lopez Obrador submitted to the Chamber of Deputies a proposal to amend constitutional articles 25, 27, and 28 to ensure "energy security by establishing a reliable and affordable electric system that is committed to the People."[2] This proposal was in clear opposition to the 2013 constitutional amendment on energy, which expanded private participation in this sector. In contrast, the 2021 amendment proposal aimed to reduce private participation by introducing new constitutional provisions mandating that at least 54% of the total electric production be generated by the State-owned Federal Electric Commission. The 2013 energy reform was part of the "Pact for Mexico" (Pacto por México), a significant agreement that President Peña Nieto signed with opposition parties after his inauguration in December 2012. This pact brought significant changes to Mexico's Constitution regarding elections, education, energy, and communications.

1 See Francisca Pou Giménez and Andrea Pozas Loyo, 'The Paradox of Mexican Constitutional Hyper-Reformism: Enabling Peaceful Transition While Blocking Democratic Consolidation' in Richard Albert, Carlos Bernal and Juliano Benvindo (eds), *Constitutional Change and Transformation in Latin America* (Hart Publishing 2019); Andrea Pozas Loyo, Camilo Saavedra Herrera and Francisca Pou Giménez, 'When More Leads to More: Constitutional Amendments and Interpretation in Mexico 1917-2020' [2022] *Law and Social Inquiry*.

2 The Bill of the Federal Executive to reform articles 27, 27 and 28 of the Political Constitution of the Mexican United States in electric matters is available in Spanish at: http://sil.gobernacion.gob.mx/Archivos/Documentos/2021/10/asun_4226988_20211005_1633443485.pdf.

The electric reform proposed by President Lopez Obrador faced intense opposition and was ultimately unsuccessful. Currently, MORENA holds only 40.2% of the seats in the Chamber of Deputies. Despite the support of its allies, the Labor Party and the Green Ecologist Party of Mexico, the proposal failed to secure the necessary two-thirds vote of attending members required to amend the Constitution.[3] It is noteworthy that this proposal created diplomatic tensions with the United States and was strongly opposed by economically relevant sectors in the country. On April 18th, the Chamber of Deputies formally rejected Lopez Obrador's bill.

President Lopez Obrador responded swiftly to the rejection of the electric amendment proposal. He first accused opposition lawmakers of treason and later submitted a new reform to the Chamber of Deputies proposing a significant transformation of the electoral regime.[4] This reform would have a profound impact on the National Electoral Institute, the electoral authority in charge of managing elections in Mexico. The INE has enjoyed the status of an autonomous constitutional agency for over 25 years and is one of the most trusted institutions in the country, after the Armed Forces (AF).[5] One of the most controversial aspects of the reform proposals was the replacement of the General Council, which serves as the Institute's highest decision-making body, with 11 new members to be elected by popular vote.[6]

The proposal immediately became a symbol for opposition parties, with the leaders of the National Action Party (PAN), Revolutionary Institutionalized Party (PRI), and Party of the Democratic Revolution (PRD) agreeing on a "constitutional moratorium" in June 2022. This pact sought to prevent the approval of any constitutional amendment promoted by the governing coalition. However, the moratorium was only successful for just a few months. On November 18th, the only constitutional amendment of the year was published. The source of this reform was an executive order issued by President Lopez Obrador, but the amendment was formally submitted by the deputies of the PRI and was approved with their support. This amendment extended the validity of transitory clauses of the 2019 amendment that created the National Guard, from five to nine years. Further details on the reform are provided in the following section.

In November 2022, the opposition coalition was at a standstill due to the PRI's participation in the National Guard reform. However, the situation changed when the electoral reform was finally introduced for discussion in the Chamber of Deputies, triggering large protests supporting INE in Mexico City and other cities throughout the country. As a response, the government also turned to public mobilization. President Lopez Obrador convened a 'popular demonstration' on November 27th.

In this highly polarized context, a final decision was made on the electoral reform on December 6th, when the Chamber of Deputies officially rejected the proposal. However, on the very same day, President Lopez Obrador submitted an ordinary law proposal conveniently called "Plan B" that aimed to modify six pieces of electoral legislation through two legislative bills.[7] Since this proposal was not a constitutional amendment, its approval only required an absolute majority that MORENA and its allies could easily obtain. "Plan B" implies a significant reduction in personnel for the National Electoral Institute, which would significantly affect its ability to operate. Despite violating the norms that regulate the legislative process and require legislative committees to examine every proposal, the Chamber of Deputies passed the bill on the very same day it was presented and immediately sent it to the Senate, so that it could be approved before the end of the legislative term on December 16th. The Senate modified a few aspects of the electoral proposal but preserved its fundamental principles. The first part of President Lopez Obrador's "Plan B" was enacted on December 27th, and the second on March 3rd, 2023, once the Deputies Chamber approved the modifications made by the Senate.

In Mexico, the fundamental electoral guidelines, including the structure of the INE, have constitutional status. Therefore, it is not surprising that "Plan B", an ordinary law passed by the coalition in government, was immediately challenged as unconstitutional in the Supreme Court. By March 31st, 188 suits challenging the constitutionality of "Plan B" were presented.[8] As we discuss in the last section of this report, these suits will most probably be the center of the constitutional discussion in 2023.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

In this section, we argue that the 2022 constitutional amendment was the culmination of a long process of dismemberment that transformed the civil-military relations characterizing the Mexican constitutional system since the 1940s. This claim may seem blown out of proportion, as the constitutional amendment in question appears minor because it only extends the validity period of a transitory article from five to nine years. To support our thesis, we provide a brief account of the transformation of civil-military relations over the years. We argue that the road to this constitutional dismemberment began in the early 2000s with the *de facto* erosion of the role assigned to the Armed Forces (AF) by the 1917 Constitution. We contend that this change created pressure on the AF to provide a legal framework for their activities, and these pressures were finally successful during President Lopez Obrador's term. Over his first four years in office, the Armed Forces (AF) acquired a new role with significantly expanded capacities.[9]

3 The amendment formula defined in Article 135 establishes that for reforms to become part of the Constitution, the Congress of the Union must pass them by a two-thirds vote of the individuals present. They must be then approved by the majority of state legislatures (32, since 2011 when Mexico City was granted with a special regime that enabled its local congress to participate in the process).

4 Bill of the Federal Executive to reform diverse articles of the Political Constitution of the Mexican United States on electoral matters is available in Spanish at: http://sil.gobernacion.gob.mx/Archivos/Documentos/2022/04/asun_4362834_20220428_1651186182.pdf.

5 Francisca Pou Giménez and Rodrigo Camarena González, 'From Expertise to Democracy-Shaping: Constitutional Agencies in Mexico' (2022) 57 *Texas International Law Journal* 301.

6 "Encuesta de Cultura Cívica" 2020 INEGI https://www.inegi.org.mx/programas/encuci/2020/

7 The first proposed reforms to following legislation: *Ley General de Instituciones y Procedimientos Electorales, Ley General de Partidos Políticos, Ley Orgánica del Poder Judicial de la Federación, Ley General de los Medios de Impugnación en Materia Electoral*. This bill is available: http://sil.gobernacion.gob.mx/Archivos/Documentos/2022/12/asun_4461825_20221206_1670386755.pdf. The Second bill proposed reforms to the *Ley General de Comunicación Social and the Ley General de Responsabilidades Administrativas*. The bill is available in Spanish at: http://sil.gobernacion.gob.mx/Archivos/Documentos/2022/12/asun_4461821_20221206_1670386618.pdf

8 The Supreme Court created a special website that monitors the demands challenging the "Plan B". It is available at: https://www.scjn.gob.mx/rpe/.

9 On different types of dismemberment see Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) 43 *Yale J. Int'l L.* 1.

Mexico's 1917 Constitution was a product of a violent revolution that led to significant changes in the country. After a period of instability, Mexico achieved peace through the establishment of a hegemonic party system that lasted from 1940 to 2000. One of the fundamental principles of the 1917 Constitution was the subordination of the Armed Forces (AF) to civilian authorities and the confinement of their role to national security tasks. Article 21 explicitly stated the following: "Institutions responsible for public security shall be of a civil nature, disciplined and professional."[10] The constitutional limits of the AF were further reinforced by the civilian-military pact, which was established in the 1940s. Through this pact, a long-lasting period of relative peace and stability was obtained by securing military loyalty, subordination, and support for the civilian government in exchange for autonomy in internal military governance.[11]

While the 21st century has seen some positive developments in Mexico, including the expansion of democratic principles and values, the country also faces increasing security challenges from organized crime. The political response to these challenges, especially during President Calderon's term (2006-2012), was to *de facto* increase the sphere of action of the Armed Forces (AF) without a legal framework to ground such an expansion. The AF had been pushing for legal reforms for years, and in 2017, Congress approved the Interior Security Law. This law enabled the intensive deployment of federal forces, including the AF, in any region of the country after the President had issued a "Declaration of Protection to the Interior Security." While the deployment under this law was meant to only last for one year, it could be extended indefinitely by the President.

In November 2018, the Supreme Court declared the Interior Security Law unconstitutional. The Supreme Court argued the Interior Security Law was clearly unconstitutional since it permitted "the permanent participation of the Armed Forces in public security tasks despite its prohibition in Article 21 of the Constitution."[12]

One of the leading voices against the Interior Security Law's excesses was President-elect Andres Manuel Lopez Obrador. However, paradoxically, less than a month after assuming office in December 2018, Obrador pushed for a constitutional amendment to make such permanent deployment possible, but with a twist. In March 2019, this amendment was approved, resulting in the dissolution of the Federal Police, and creating the National Guard as the principal institution in charge of public security. This amendment was very controversial among human rights NGOs, international organizations, and specialists. Indeed, UN representatives argued that under this reform, "a militarized scheme for public security would be permanent."[13]

Several specialists noted that the 2019 amendment was inherently inconsistent as it claimed that the National Guard was civil despite its organizational structure and the training of its members being military. These critics argued that this inconsistency in the amendment guaranteed that the National Guard would function as a *de facto* military police, providing legal cover for the AF to participate in public security issues. as the vehicle through which the AF could participate in public security under legal cover. Additionally, many also opposed the transitory article that accompanied this amendment which enabled the AF's participation in public security tasks for five years, while the National Guard was being established, without clear boundaries for action and accountability mechanisms. Despite these concerns, Mexican society paid little attention to this consequential change. President Lopez Obrador had just taken office after a substantial electoral victory, and he had an impressive political capital. His first major investment was this militaristic reform which he had condemned as a candidate.

From 2019 to 2022, the Armed Forces increased their sphere of action, budget, autonomy, and power. This military expansion was achieved through a series of governmental decisions, among which the March 2020 presidential unilateral action known as the "Militaristic Agreement" is very notable.[14] The fears expressed by many specialists became a reality as the 2019 reform's abstract clauses mandating the creation of a National Guard "under civilian authority with the goal of "a progressive de-militarization of public safety tasks" was a façade. The creation of a National Guard did not prioritize civilian authority over the military, and the demilitarization of public safety tasks did not occur as planned. Additionally, the general requirement that the AF's deployment meets international standards lacked any concrete oversight mechanisms. To give a sense of how the AF's role has changed, let us list some of the many new tasks acquired during President López Obrador's administration:

- Construction of critical infrastructure such as the constitution of the International Airport Felipe Angeles, Tulum's Airport, 2700 branches of the Governmental "Welfare Bank" (*Banco del Bienestar*), important segments of the Mayan Train, the new National Guard quarters, and the renovation of 32 hospitals.
- Administration of critical airports, such as the International Airport of Mexico City and Chetumal, Quintana Roo, and Palenque airports.
- Immigration control in the borders and the administration and control of Custom offices.
- Support and supervision of critical social programs, such as the COVID vaccination, the delivery of books for elementary education and of medicaments, as well as direct cash delivery belonging to several social programs.
- Security of public figures, oil transportation, and tourist destinations in high season.

We now have all the elements to highlight why we argue that the 2022 amendment to the transitory clause, which extends the AF's participation in National Guard tasks, culminates in a long process of dismemberment of the role that the 1917 Constitution assigned to the military. To see why this is the case, let us discuss some of the consequences that the 2019 amendment, its transitory regulation, and the governmental decisions that followed have had:[15]

10 An English version of the 1917 Constitution is available at: https://www.constituteproject.org/constitution/Mexico_2015.pdf?lang=en.

11 See Julio Ríos-Figueroa, C*onstitutional Courts as Mediators: Armed Conflict, Civil-Military Relations, and the Rule of Law in Latin America* (Cambridge University Press 2016).

12 The judgment the Supreme Court rendered to the cases AI 6/2018 8/2018, AI, 9/2018, 10/2018: https://www.scjn.gob.mx/sites/default/files/proyectos_resolucion_scjn/documento/2018-10/7.0%20PROYECTO%20A.I.%206-2018%20y%20Acumuladas%2026-10-2018.pdf. See especially paragraph 146.

13 For a detailed account of the Pro p.54

14 The Agreement is Available at: https://www.dof.gob.mx/nota_detalle.php?codigo=5593105&fecha=11/05/2020#gsc.tab=0. Arguably the COVID pandemic made this transformation easier. For an argument about this, see http://www.iconnectblog.com/on-the-possible-legal-and-political-effects-of-the-covid-19-pandemic-in-mexico/.

15 Here we follow the report presented in the Integralia Special Report on Militarization in Mexico. The report: https://integralia.com.mx/web/reporte-especial-la-militarizacion-en-mexico-hacia-la-consolidacion-de-una-politica-de-estado-2006-2022/.

- The Army's role in the administration and delivery of basic public services (e.g., in health and education) has increased its weight in the decision process making of public areas not related to national security, subverting the civic-military balance in the public administration.
- The military enlargement has been accompanied by a very concerning weakening of the State's capacity in fundamental areas such as the professional administration of public programs. The loss of State capacity is worsened by the fact that the training and capacities of the AF do not equip them to accomplish these civil tasks.
- The militaristic approach to public security has also weakened federalism in Mexico. Local security organizations have not only not received the resources to fulfill their duties in the transitory clause, which stated that the deployment of the AF would only be temporary, and the aim was the demilitarization of public security. Ultimately, local policies have been relegated leading to the loss of differentiated public security strategies.
- The AF's expanded role has deep implications for transparency and accountability in public administration. The AF is not subject to transparency and accountability mechanisms required by the rest of public agencies, even though there is a good reason for this since national security requires special considerations. The problem is that this lack of transparency and accountability has expanded as AF's sphere of action has expanded, *de facto* weakening the transparency and accountability of large segments of the government.
- Another area of concern is the increasing weight military companies have in the economy and their impact on economic competition.
- Finally, the militarization of the civil sphere will likely bring about the politicization of the military.

The transitory article is the constitutional source that has provided legal ground to the new role the Armed Forces (AF) have acquired in this presidential term. Its expansion from five to nine years *de facto* will make these changes extremely hard to undo, since, by 2029, this new role will be consolidated.

IV. LOOKING AHEAD

2022 was a particularly intricate year related to constitutional terms. As previously mentioned, there was only one reform passed during the year, which is a small number by Mexican standards. Despite this, there was a heated constitutional debate that revolved around the presidential agenda, which was characterized by a fluctuating dynamic between an imperious executive and legislative branch where opposition was to veto constitutional reforms but not changes towards legislation.

Overall, the unified-government scenario, which emerged from the 2018 election and continued after the 2021 midterm election, has had an impact on constitutional politics, but it has not prevented the constant renovation of Mexico's constitutional text. It is still too early to say if we are witnessing the end of Mexico's hyper-reformism. However, the events of 2022 indicate that political polarization is likely to intensify and, because of that, the role of the Supreme Court as the political arbitrator and ultimate constitutional interpreter will be crucial.

In 2023, the implementation of constitutional amendments is highly unlikely due to the political turmoil in Mexico. President Lopez Obrador's term ends in 2024, and re-election is not permitted. With the presidential and federal congressional elections approaching, political polarization is expected to intensify. The President's coalition lacks the supermajority required for constitutional amendments, and in this context, it is unlikely that the opposition will support any proposed constitutional changes by the governing coalition, and vice versa.

Therefore, as we argued above, the constitutional discussion this year will most probably focus on the constitutionality of President Obrador's "Plan B." This electoral law could have a substantive effect on next year's general election as it lowers restrictions on the use of public funds for campaigning and therefore, arguably favors the coalition in power. Moreover, as we already discussed, "Plan B" would affect the National Electoral Institute's (INE) capacity to organize and manage the election which could lay off up to 80% of its personnel.

The Supreme Court must rule on the constitutionality of "Plan B" by June 1st, 2023, as no changes can be made to the electoral framework after that date. It is difficult to predict the Court's decision. On one hand, there are strong political pressures from the coalition in power, and President Lopez Obrador has publicly expressed the importance of this legislation to him. On the other hand, the Court recently elected its first female Chief Justice, Justice Norma Piña, who has been vocal in defending judicial independence.

The upcoming Supreme Court decision on the constitutionality of "Plan B" is expected to be one of the most significant rulings in Mexico's history; it will have crucial implications for the legitimacy and integrity of the 2024 presidential and legislative elections.[16] President Lopez Obrador has publicly expressed that the success of his political project, known as the "fourth transformation" of the country, relies on the ruling coalition having the supermajority required to amend the Constitution. If this happens, more constitutional changes may follow, leading to further dismemberment of the Constitution.

V. FURTHER READING

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Pozas-Loyo A, Saavedra-Herrera C and Pou-Giménez F, 'When More Leads to More: Constitutional Amendments and Interpretation in Mexico 1917-2020' [2022] *Law and Social Inquiry*

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16 See Julio Rios-Figueroa "Democratic Backsliding and the Supreme Court in Mexico" in: https://constitutionalconversations.substack.com/p/democratic-backsliding-and-the-supreme.

Mozambique

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I. INTRODUCTION

Because the Mozambican constitutional reform model has peculiar characteristics, this introductory topic is the main one in the text, given the need to explain how it works.

In summary, Mozambican constitutional history began right after the independence process with the 1975 Constitution, which had a socialist orientation, a centralized country, and a single party[1]. After 15 years, in 1990, the second Mozambican constitution was promulgated that "introduced the democratic rule of law, based on the separation and interdependence of powers and on pluralism and it laid down the structural parameters for modernization, making a decisive contribution to the beginning of a democratic climate that led the country to its first multiparty elections."[2] The new constitution gave birth to the Second Republic, which had a constitutional arrangement, at least textually, of a more westernized orientation: market economy, democratic, multiparty, with the institution of control over the constitutionality of normative acts and the establishment of the referendum institute[3]. However, despite the spirit of the constitution, the text was approved without the existence of a multi-party system in the country; the 1975 text remained in implicit force even after the end of the civil war in 1992 with the signing of the General Peace Agreement, which, was the great impetus for a new constitution, but this time approved by a diverse Assembly of the Republic, represented by multi-parties[4].

Thus, after this political and constitutional path, the Constitution of the Republic of Mozambique (CRM) was promulgated on November 16, 2004, which did not constitute a rupture, as usually happens with the advent of a new constitutional text but represented the improvement and continuity of the values established in the text of 1990, and the identity of the latter remained in that text[5].

Without getting away from the theme of the book, which is to explain the constitutional reforms that occurred in the year 2022 in the country reported here, it is necessary to delve a little into the Mozambican constitutional reform to understand the absence of amendments to the Constitution last year.

The constitutional reform is foreseen in Title XV, Chapter II, from Art. 299 to 304 of the CRM[6] - - in its original wording, the norms were found in Art. 291 to 296. The Mozambican model of constitutional reform is very similar to that of Portuguese-speaking countries, having been created under the influence of the Portuguese Constitution of 1976. Inclusively, for this reason, the CRM reproduces, in its Art. 301[7], that: "The Constitution may only be amended after five years have passed since the last amending legislation entered into force, except when a decision to assume extraordinary amending powers has been passed by a majority of three quarters of the deputies in the Assembly of the Republic." As can be seen, this is a temporal limit to the lawmakers to reform the constitution, which, by virtue of this and the other limitations imposed on constitutional change, makes the CRM a *hyper-rigid Constitution*[8].

These restrictions impose two constitutional duties: (i) (ordinary) constitutional reform can only be carried out after 5 years from the entry into force of the last constitutional reform, constituting a period of "constitutional prohibition;"[9] (ii) the CRM provides for the institute of extraordinary constitutional reform, which makes it possible, for an urgent reason, to change the constitutional text, even if the five-year period has not passed there should be an assumption of extraordinary amending powers that only take place with the permission of 3/4 of the deputies, in order to be "a safety valve to allow anticipating the revision, as long as it becomes indispensable and unpostponable."[10] In this way, the CRM seeks to ensure stability to the constitutional text while allowing changes to the Constitution when urgent[11].

1 Edson da Graça Francisco Macuácua, "O sistema de revisão constitucional em Moçambique" (2021) 21 Revista Jurídica UNIGRAM 42, p. 43.
2 Constitution of the Republic of Mozambique, 2004, Preamble.
3 Edson da Graça Francisco Macuácua, O sistema de revisão...., p. 43-44.
4 Jorge Bacelar Gouveia, *Direito Constitucional de Moçambique* (2015).
5 About the 2004 Constitution, Edson states that "in technical-legal terms, it is not materially a 'New Constitution' in relation to the 1990 Constitution (...) what the multi-party parliament did by approving the 2004 Constitution (as if it were new) was to confer legitimacy on the 1990 Constitution (approved by a single-party parliament)". Edson da Graça Francisco Macuácua, O sistema de revisão...., p. 44.
6 In a nutshell: Art. 299 (competence to propose a reform: President of the republic and at least 1/3 of the deputies of the Assembly of the Republic); Art. 300 (Restrictions as to Subject Matter); Art. 301 (Restrictions as to Time); Art. 302 (Restrictions as to Circumstances); Art. 303 (the form that constitutional amendments are gathered, through a revision law; the quorum required for approval, in which the President of the republic cannot refuse to promulgate the law); and Art. 304 (formal aspects of constitutional amendments).
7 The Mozambican text reproduces Art. 284 of the 1976 Constitution of the Portuguese Republic: "1. The Assembly of the Republic may revise the Constitution five years after the date of publication of the last ordinary revision law. 2. However, by a majority of at least four fifths of all the Members in full exercise of their office, the Assembly of the Republic may take extraordinary revision powers at any time."
8 Jorge Bacelar Gouveia, *Direito Constitucional*..., p. 664.
9 Jorge Bacelar Gouveia, *Direito Constitucional*..., p. 665.
10 Edson da Graça Francisco Macuácua, O sistema de revisão..., p. 22.
11 Edson da Graça Francisco Macuácua, O sistema de revisão..., p. 23.

Due to this constitutional rule, the CRM has not undergone any changes in its text in the last 5 years, with the last amendment in 2018, which was after the first that occurred in 2007.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The CRM has only undergone two constitutional reform processes: in 2007 and 2018. The first one, which occurred through the publication of Act n. 26/2007 of November 16, consisted of a specific amendment to allow, after several sectors of society protested, the postponement of the first elections of the provincial assemblies, which were previously scheduled to occur by the end of 2007, by Art. 304 of the CRM, and with the amendment the elections would occur in 2009, to "allow greater transparency to the electoral process, ensure greater quality to the acts and create conditions to improve the practical-organizational aspects."[12]

The 2018 constitutional reform, on the other hand, occasioned by Act n. 1/2018 of June 12 sought to adjust the CRM "to the process of consolidating the democratic reform of the state, deepening participatory democracy and guaranteeing peace, reiterating respect for the values and principles of sovereignty and the unicity of the state." This amendment had the main objective of improving the issue of decentralization of power, altering, suppressing, and adding new norms to the constitutional text, even causing a change in the numerical order of the articles.

Art. 1 of the Act n. 1/2018 altered arts. 8, 135, 137, 138, 139, 160, 166, 195, 204, 226, 250, 275, 292 and Title XII. At this point, attention is drawn to the alteration of Art. 292 (in its current wording Art. 300), which referred to the restrictions as to the subject matter of constitutional reform, which, in its topic j), now states that the future amendments must respect "the autonomy of the organs of decentralized provincial, district and local government."

In Art. 2, the amendment deleted Arts. 141, 142, 262, 263, 264, 271, 276, 277, 278, 279, 280, 281, 302, 303 and 304.

Next, and the most important point of the change, the amendment renamed Title XIV of the CRM from "Local Power" to "Decentralization" and added Arts. 270-A, 270-B, 270-C, 270-D, 270-E, 270-F, 270-G, 270-H, 270-I, 270-J, 270-K, 270-L, 270-M, 270-N, 270-O, 270-P, 270-Q, 270-R, and 270-S - in addition to Arts. 142-A and 301-A, which also refer to the decentralization process. Furthermore, Art. 4 of the act, on the transitional provisions, states that the norms referring to the provincial governing bodies would only come into force after the 2019 elections; the municipal elections scheduled for 2018 should already be under the shelter of these constitutional changes; and the first district elections should take place in 2024.

Following the publication of the 2018 constitutional reform, the 2018 local government elections were marked by a record turnout of 60%[13] of voters. And in 2019, Filipe Nyusi was reelected president with 73% of the vote, maintaining the hegemony of his party, FRELIMO (Frente de Libertação de Moçambique), which has been in power for almost 50 years[14].

In addition, as of 2023, there is constitutional permission for the CRM to be reformed again because, according to its Art. 301, it marks 5 years since its last revision, thus allowing the proposition, voting, and promulgation of a proposal for an amendment to the Constitution.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The authority that controls the Mozambican constitutionality is called the Constitutional Council and is defined by the CRM as "a sovereign public office with special jurisdiction to administer justice in matters of a legal-constitutional nature."[15] Despite the terminology - which may refer to political authority - and the fact that the competent court is not listed in Art. 222[16], which lists the kinds of courts in the country, "the Constitutional Council is a true supreme court and exercises judicial powers."[17] In other words, if formally it is qualified as a Council, materially, it is a "court, an authority of the administration of justice."[18]

Thus, from Title XI, from Arts. 240 to 247 of the CRM, and the Organic Law of the Constitutional Council - which deals with the organization, functioning, and the process of verification and of the constitutionality and legality control of normative acts and other competencies, we can characterize the judicial review in Mozambique, exercised by the Constitutional Council, as (i) jurisdictional; (ii) it occurs through abstract judicial review; (iii) it can be carried out both preventively and successively; (iv) there is only judicial review by action, there being no control by legislative omission; (v) control is only carried out over normative acts of State bodies, not reaching non-normative acts or normative acts of private entities, even if they violate fundamental rights[19].

Furthermore, it is interesting to mention that the Constitutional Council can be provoked by citizens for the abstract judicial review of a normative act if two thousand signatures are gathered, according to Art. 244, 2 of the CRM[20].

The Constitutional Council of Mozambique has already gained repercussions for some decisions in previous years, especially those related to elections in the country - as the court has the competence to judge electoral complaints.

At the 5th Assembly of the Conference of Constitutional Jurisdictions of Portuguese-Speaking Countries (CJCPLP), held in 2022, a report was drafted on the performance of the Mozambican constitutional

12 Act n. 26/2007 (Constitutional Amendment).

13 Centro de Integridade Pública, Boletim sobre o Processo Político em Moçambique – Eleições Autárquicas (2018), 68.

14 AFP. 'Filipe Nyusi é reeleito presidente de Moçambique' *Estado de Minas* (Minas Gerais, 27 October 2019) <https://www.em.com.br/app/noticia/internacional/2019/10/27/interna_internacional,1096200/filipe-nyusi-e-reeleito-presidente-de-mocambique.shtml> Accessed by 28 march 2023.

15 Art. 240, CRM.

16 Art. 222: In the Republic of Mozambique, there shall be the following courts:
a) the Supreme Court;
b) the Administrative Court;
c) the courts of justice.

17 Jorge Bacelar Gouveia, *Direito Constitucional*..., p. 533.

18 Edson da Graça Francisco Macuácua, "A jurisdição constitucional em Moçambique" (2022) 44 Cedipre online <https://www.fd.uc.pt/cedipre/wp-content/uploads/pdfs/co/public_44.pdf> Accessed 25 March 2023, p. 24

19 Edson da Graça Francisco Macuácua, A jurisdição constitucional...., p. 29

20 Art. 244. The following may request the Constitutional Council to pronounce upon the unconstitutionality of laws, or on the illegality of normative acts of State offices:
a) the President of the Republic;
b) the President of the Assembly of the Republic;
c) at least one third of the deputies of the Assembly of the Republic;
d) the Prime Minister;
e) the Attorney General of the Republic;
f) the Ombudsman;
g) two Thousand citizens.

court during the Covid-19 pandemic. The report showed that no issues about limitations on fundamental rights were brought before the court, largely because citizens did not have access to the Constitutional Council[21]. Thus, the report found that no constitutional jurisprudence has been developed concerning the impact of the Covid-19 pandemic on the rights of Mozambican citizens[22].

Despite the non-interference of the court, many measures adopted by the government after declaring a State of Emergency due Covid-19, were discussed, especially in the academic sphere, especially the criticism and the debate held on the constitutionality of the restrictions of fundamental rights carried out by means of Decree, and not Decree-Law[23]. As well as other administrative measures whose proportionality has been questioned, such as, for example, the apprehension of the moto-taxis work tools and the confiscation of certain products sold in supermarkets or the requisitioning of services from health professionals who as members of the public health network are not, under penalty of incurring the crime of disobedience, punishable by prison[24]. However, as said, the Constitutional Court has not ruled on any of these issues.

IV. LOOKING AHEAD

In 2023 it will be five years since the last constitutional reform in Mozambique, allowing, according to the CRM, for the text of the constitution to be changed. And that is what is about to happen.

On May 3, 2023, Frelimo, the party of the President of the Republic Filipe Nyusi, proposed to the Assembly of the Republic a punctual revision of the constitutional text to postpone the district elections that should take place in 2024, under the justification by the report presented by the Commission of Reflection on the Feasibility of Holding District Elections, that the country is not yet ready for the functioning of governments and district assemblies[25]. The Mozambican Parliament will meet in August, in an extraordinary session, to discuss this proposal for a constitutional review.

However, the Mozambican opposition, jurists[26] and journalists claim that the incumbent President intends to carry out a maneuver for a third term (not allowed by the current text of the CRM). Thus, Frelimo could reform the constitutional text to allow Filipe Nyusi another term as President of the Republic[27][28].

Therefore, the proposed reform that seeks to postpone district elections, with or without the President's interest in remaining in power, may be subject to analysis and judgment by the Constitutional Council, and we must remain attentive to political movements in Mozambique.

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Hugo Sauaia (org.), *O ativismo judicial e os desafios da jurisdição constitucional. Em homenagem ao Professor Elival da Silva Ramos* (2022)

Ricardo Campos, *Metamorfoses do Direito Global: Sobre a Interação Entre Direito, Tempo e Tecnologia* (2022)

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21 Conferência das Jurisdições Constitucionais dos Países de Língua Portuguesa (CJCPLP), *Conselho Constitucional de Moçambiqu*e (2022) p. 4.

22 CJCPLP, *Conselho Constitucional de Moçambique*..., p. 5.

23 CJCPLP, *Conselho Constitucional de Moçambique*..., p. 6

24 CJCPLP, *Conselho Constitucional de Moçambique*..., p. 6

25 Silaide Mutemba. Moçambique. 'Frelimo propõe revisão pontual da Constituição' *DW* (Mozambique, 04 May 2023) <https://www.dw.com/pt-002/mo%C3%A7ambique-frelimo-prop%C3%B5e-revis%C3%A3o-pontual-da-constitui%C3%A7%C3%A3o-para-adiar-elei%C3%A7%C3%B5es-distritais/a-65509638> Accessed by 05 May 2023.

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Myanmar

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I. INTRODUCTION

Myanmar's constitutional discourse has become increasingly fractured, with the February 2021 military coup resulting in a nationwide conflict that has intensified between the military junta and opposing pro-democracy forces. The political turmoil instigated a constitutional divide, with the military upholding a 2008 Constitution that enshrines its dominance in Myanmar's political system, while the pro-democracy resistance is pursuing a process to draft a new constitution. Throughout 2022, the persistence of Myanmar's conflict has allowed pro-democracy forces to advance their efforts, making the existence of rival constitutional orders an increasingly probable reality.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2022, Myanmar experienced the rise of rival constitutional orders, reflecting the political conflict resulting from the February 2021 military coup. In the coup, the Myanmar military, or Tatmadaw, overthrew a democratically elected civilian government. The coup contributed to widespread popular resistance, including nationwide street protests, labor strikes, a civil disobedience movement (CDM) encompassing all ministries and all levels of the state, and the establishment of a dissident shadow government.[1] As Tatmadaw suppression of the pro-democracy uprising escalated in violence, additional resistance emerged from community-level volunteer People's Defense Forces (PDFs) seeking to defend their neighborhoods and an array of ethnic armed organizations (EAOs) committed to resuming struggles for self-determination.[2] The unrest generated forms of political leadership, including a General Strike Committee (GSC) with national and local bodies to coordinate street protests. The Committee Representing the Pyidaungsu Hluttaw (CRPH) was also established, comprised of elected civilian parliamentarians that had escaped the coup. Then, the CRPH went out to create a National Unity Government (NUG) as an executive arm. Additionally, a National Unity Consultative Council (NUCC) was convened by the NUG to host a dialogue between representatives of the GSC, CDM, CRPH, EAOs, political parties, civil society organizations, and activist groups to create a new political system separate from the military junta.[3] The pro-democracy uprising extends to a constitutional agenda, with the CRPH announcing in March 2021 the annulment of the 2008 Constitution and the commencement of a process to create its replacement.[4] The CRPH initiated a constitutional drafting process under the NUCC, which set forth a 2021 Federal Democracy Charter (2021 Charter) outlining the procedure and principles for crafting a

1 Russell Goldman, Myanmar's Coup Explained, February 1, 2021, *New York Times* (2021), available at: https://www.nytimes.com/article/myanmar-news-protests-coup.html [hereinafter cited as Goldman 2021]; Jen Kirby, Myanmar's Pro-Democracy Protest Movement Is Strengthening, *Vox* (2021), available at: https://www.vox.com/22295138/myanmar-protests-strike-coup-military [hereinafter cited as Kirby 2021]; United States Institute of Peace, *Myanmar in the Streets: A Nonviolent Movement Shows Staying Power*, March 31, 2021 (2021), available at: https://www.usip.org/publications/2021/03/myanmar-streets-nonviolent-movement-shows-staying-power [hereinafter cited as USIP 2021a].

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3 BNI 2021c; USIP 2021b; Htet Myet Min Tun & Moe Thuzar, Myanmar's National Unity Consultative Council: A Vision of Myanmar's Federal Future, January 5, 2022, *Fulcrum* (2022), available at: https://fulcrum.sg/myanmars-national-unity-consultative-council-a-vision-of-myanmars-federal-future/ [hereinafter cited as Tun & Thuzar 2022]; Naing Lin, NUCC Outlines Goals As It Seeks to Widen Membership, November 21, 2021, *Myanmar Now* (2021), available at: https://www.myanmar-now.org/en/news/nucc-outlines-goals-as-it-seeks-to-widen-membership [hereinafter cited as Lin 2021]; Eleven Media, A General Strike Committee Formed, Made Up of Student Leaders & Political Parties, *Eleven Media Group* (2021), available at: https://elevenmyanmar.com/news/a-general-strike-committee-formed-made-up-of-student-leaders-and-political-parties ; Irrawaddy Staff, Millions Expected to Join General Strike in Myanmar on Monday to Oppose Regime, February 21, 2021, *Irrawaddy* (2021), available at: https://www.irrawaddy.com/news/burma/millions-expected-to-join-general-strike-in-myanmar-on-monday-to-oppose-regime.html ; Irrawaddy Staff, Who's Who In Myanmar's National Unity Government, April 16, 2021, *Irrawaddy* (2021), available at: https://www.irrawaddy.com/news/burma/whos-myanmars-national-unity-government.html

4 Burma News International Multimedia Group, *The Shadow CRPH Government Declares 2008 Constitution Abolished & Pledges a Charter for Federal Democracy* (2021), available at: https://www.bnionline.net/en/news/shadow-crph-government-declares-2008-constitution-abolished-and-pledges-charter-federal [hereinafter cited as BNI 2021a]; Irrawaddy Staff, Shadow Government Outlines Federal Union Plan for Myanmar's Future, April 5, 2021, *Irrawaddy* (2021), available at: https://www.irrawaddy.com/news/burma/shadow-government-outlines-federal-union-plan-myanmars-future.html [hereinafter cited as Irrawaddy 2021b].

new constitution, prescribing a federal democratic union with a civilian government.[5]

Consequently, the rise of rival constitutional orders, with the 2008 Constitution being associated with the military, while the 2021 Federal Democracy Charter represents the nascent steps towards establishing a new constitution.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

By explicitly declaring the annulment of the 2008 Constitution, the CRPH presented its ambitions as going beyond amendments. Instead, the CRPH hoped to reach the outright rejection of the existing constitutional system. While the 2008 Constitution includes provisions for amendment[6], the CRPH's call for a new constitutional drafting process indicates a scope of intended reform that goes outside the contents of the 2008 Constitution entirely. As a result, there was the emergence of two rival constitutional orders. While the 2008 Constitution represents an incumbent status quo tied to the Myanmar military, the ongoing NUCC-based constitutional process represents a nascent challenge advanced by pro-democratic forces. The differences between the two opposed orders will be summarized through the comparison below.

1. 2008 CONSTITUTION

Myanmar's 2008 Constitution is a product of a military-controlled constitutional drafting process that began in 1990 to enshrine Myanmar's military in the country's political institutions and legitimize its power in the country's political system.[7] In the years ensuing after 1990, the military worked to manipulate the constitutional convention by criminalizing criticism, suppressing debates, excluding political dissidents, and silencing opposing political parties.[8] While its goal was to solidify its domination over the country, the Tatmadaw also sought to diversify its international partners by appealing to a larger global community, including those in the West.[9] The outcome of such ambitions is an instrument with a veneer of democratic principles that overlay components preserving military authority. Specifically, the democratic features encompass provisions for multi-party democracy[10] such as the separation of powers and checks and balances between the legislative, executive, and judicial branches.[11] For instance, an elected parliament is responsible for creating legislation that will be enacted by the executive branch.[12] Additionally, principles such as the rights to free expression, free assembly, free conscience, privacy, and participation in politics protect individual liberties in a democratic system .[13]

Despite such democratic components, however, the pro-military orientation of the 2008 Constitution is apparent within its other provisions. In particular, Articles 109 and 141 reserve 25% of the seats in both chambers of the parliament to military personnel appointed by the Tatmadaw.[14] Article 20 places the military, police, and border security under the control of the Tatmadaw's Commander-in-Chief.[15] It is also important to note that Article 232 requires that the Ministers for Defense, Home Affairs, and Border Affairs to all be military officers.[16] Furthermore, Article 445 accords immunity to any member of the military for actions committed in the performance of their duties.[17] The 2008 Constitution also allows for the military seizure of the state, with Articles 40 and 417-420 prescribing states of emergency under which the Tatmadaw Commander-in-Chief can assume executive, judicial, and executive powers, as well as eliminating all individual rights.[18] The 2008 Constitution's demarcation of military power extends to the process of amendment. Specifically, Article 436 requires that bills for amendment must exceed a margin of 75% in both chambers of parliament to pass.[19] Since the Tatmadaw holds 25% of the parliamentary seats, they hold an effective veto over any attempts to Myanmar's Constitution.

In February 2021, the nature of the 2008 Constitution was exposed when the Tatmadaw conducted its coup, at which time the military removed elected civilian parliamentarians, declared a state of emergency, placed senior military generals in control of the country, and altered laws to suppress popular resistance.[20] In doing so, the Tatmadaw eliminated fundamental rights such as free speech, free assembly, and privacy, while expanding military powers of surveillance, arbitrary searches and seizures, and violence against unarmed civilians.[21] The military also imposed martial law in areas of the country, effectively terminating civilian protections for entire portions of the country's population.[22] Such efforts demonstrate the Tatmadaw's

5 BNI 2021a; Irrawaddy 2021b; Committee Representing the Pyidaungsu Hluttaw, *Federal Democracy Charter* (2021) available at: https://crphmyanmar.org/wp-content/uploads/2021/04/Federal-Democracy-Charter-English.pdf [hereinafter cited as 2021 Charter].

6 *Myanmar Constitution 2008*, Article 436.

7 Nyi Nyi Kyaw, 'Putting Their Guns on the Scale: Constitution-Making in Burma/Myanmar Under Military Command' [2019] *Chinese Journal of Comparative Law* 7, 309 [hereinafter cited as Kyaw 2019]; State Law & Order Restoration Council Announcement No. 1/88 1988 < https://www.burmalibrary.org/en/slorc-order-no-188 > accessed 21 August 2022.

8 Kyaw 2019; Janelle Saffin, 'Seeking Constitutional Settlement in Myanmar' in Andrew Harding & Khin Khin Oo (eds), *Constitutionalism & Legal Change in Myanmar* (Hart Publishing 2017); Robert Taylor, *The State in Myanmar, 2nd ed.* (NUS Press 2009); Janelle Diller, 'The National Convention: An Impediment to the Restoration of Democracy' in Peter Carey (ed), *Burma: The Challenge of Change in a Divided Society* (St. Martin's Press 1997).

9 Jonathan Chow & Leif-Eric Easley, 'Persuading Pariahs: Myanmar's Strategic Decision to Pursue Reform & Opening' [2016] *Pacific Affairs* 89, 521; David Williams, 'What's So Bad about Burma's 2008 Constitution? A Guide for the Perplexed' in Melissa Crouch & Tim Lindsey (eds) *Law, Society, & Transition in Myanmar* (Hart Publishing 2014).

10 Myanmar Constitution 2008 Art. 6.

11 Ibid. Art. 11.

12 Ibid. Arts. 12, 16, 17, 86, 105, 109, & 141.

13 Preamble & Arts. 6, 21, 34, 354, 355, 457, & 369.

14 Myanmar Constitution 2008: Arts. 109 & 141.

15 Myanmar Constitution 2008: Art. 20.

16 Myanmar Constitution 2008: Art. 232.

17 Myanmar Constitution 2008: Art. 445.

18 Myanmar Constitution 2008: Arts. 40 & 417-420.

19 Ibid., Art. 436.

20 Alice Cuddy, Myanmar Coup: What Is Happening & Why?, April 1, 2021, *British Broadcasting Corporation* (2021), available at: https://www.bbc.com/news/world-asia-55902070; Reuters Staff, Statement from Myanmar Military on the State of Emergency, February 1, 2021, *Reuters* (2021), available at: https://www.reuters.com/article/us-myanmar-politics-military-text-idUSKBN2A11A2; Russell Goldman, Myanmar's Coup, Explained, February 1, 2021, *New York Times* (2021), available at: https://www.nytimes.com/article/myanmar-news-protests-coup.html; Narayanan 2021.

21 HRW 2021; Strangio 2021

22 Irrawaddy 2021a

posture towards using the law, including the constitution, as an instrument of military power. Hence, the 2008 Constitution exists as a tool to support military control over Myanmar. As a result of the Tatmadaw's constitutional process, its orientation is to empower the military in Myanmar's political system. In doing so, the Constitution represents a status quo constitutional order centered on incumbent military dominance over Myanmar.

2. NUCC CONSTITUTIONAL PROCESS & THE 2021 FEDERAL DEMOCRACY CHARTER

As a response by pro-democracy forces against the Myanmar military junta, the NUCC functions to challenge the existing constitutional order. To the extent that the NUCC is advancing a drafting process for a new constitution, it presents a growing effort to supplant the 2008 Constitution with a new constitutional order. While such an effort is still nascent, some indications of the parameters of a new constitutional order are apparent in the NUCC's 2021 Federal Democracy Charter. The 2021 Charter presents itself as a preliminary document leading towards a more comprehensive instrument, with the Introduction in its Part I asserting that it provides:

"…standards and values for the eradication of dictatorship and emergence of Federal Democratic Union with the political road map that will be implemented in steps, basic principles for the development of the constitution, and fundamental policies."[23]

The 2021 Charter is divided into two parts. Part I focuses on addressing goals, participants, steps, principles, and policies for a constitutional drafting process. Part II establishes an interim system for a legislature, governance, justice, and roles of the NUG and NUCC.[24] Part I explicitly states a goal of abolishing the 2008 Constitution and convening a constitutional convention to create a "Federal Democracy Constitution."[25] In seeking a new constitution, the 2021 Charter asserts a set of values encompassing rights regarding democracy, human rights, gender, equality, self-determination, non-discrimination, and the protection of minorities.[26] In addition, it calls for a state structure hosting separation-of-powers and checks-and-balances between the legislative, executive, and judicial branches.[27] The 2021 Charter goes further, however, to seek the formation of several independent commissions dedicated to topics of anti-corruption, election, human rights, information, and gender-based violence.[28] Part II complements Part I by prescribing an interim National Unity Government (NUG) that will function during the constitutional drafting process. Specifically, Part II establishes a bicameral parliament with powers to craft legislation, articulates an executive responsible for administering laws and policies, and sets directives to form a new judiciary.[29] Part II declares that the mandate of the NUG is to weaken the military junta, repeal laws that oppress the populace, adopt laws that promote human rights, and support the Civil Disobedience Movement that opposes military authority.[30] Perhaps the most notable aspect is that both Part I and Part II omit any provisions that would allow for the military to play a role in politics. In contrast to the 2008 Constitution, the Charter establishes a direct opposition to military power.

Following its release, the 2021 Charter received varying levels of support from the various pro-democracy forces. The CDM protesters, PDFs, and the CRPH displayed greater commitment towards the Charter. On the other hand, the the EAOs and ethnic political parties maintained their skepticism as a result of their respective struggles for greater autonomy throughout Myanmar's history.[31] However, while ethnic suspicions pose a potential obstacle to the constitutional drafting process set forth by the NUCC and 2021 Charter, their willingness to participate in the NUCC suggests a measure of good faith involvement under the 2021 Charter in the process for a new constitution.

IV. LOOKING AHEAD

Looking forward, the central concern for Myanmar is the ultimate outcome of its internal conflict. The hardening of both military and pro-democracy resistance in the conflict renders the prospects for an immediate resolution uncertain. Independent observers of Myanmar assert the continuing lack of military control over the majority of the country, and documents originating from the military junta indicate the Tatmadaw's continuing difficulties to suppress pro-democracy resistance.[32] As a result, Myanmar's conflict offers little indication of a decisive outcome, whether in favor of military rule or a democratic uprising. The persistence of conflict means a continuation of the opposing constitutional orders, with a growing rivalry between the 2008 Constitution versus the ongoing efforts of the NUCC to draft a new constitution. While the military may be associated with the 2008 Constitution, the growing momentum of the NUCC constitutional drafting process increasingly raises the prospects for an alternative constitutional order.

23 2021 Federal Democracy Charter: Part I, Introduction [hereinafter cited as 2021 Charter].
24 2021 Charter.
25 2021 Charter, Part I, Chapters I & III.
26 Ibid., Part I, Chapter IV.
27 Ibid., Part I, Chapter IV.
28 Ibid., Part I, Chapter IV.
29 Ibid., Part II, Chapters 2, 3, & 6.
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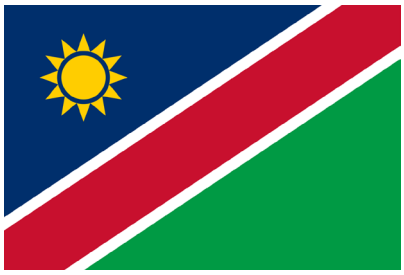
Namibia



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I. INTRODUCTION

This report inspects the constitutional reforms in Namibia in 2022. These developments unfolded as the Southwestern African nation is bracing itself for upcoming general elections in 2024, and as it witnessed fiercely contested same-sex marriages cases, grappled with a stagnating economy, and strove to bring down youth unemployment. Specifically, this report discusses key issues arising from the Supreme Court of Namibia's judgments and the laws enacted by Parliament in 2022, including the distinct jurisdictions of the High Court and Labor Court, labor disputes between unions and employers, and the balancing of interests in public health emergencies.

The Namibian Parliament approved a diverse set of laws that led to constitutional reforms, such as the Repeal of Obsolete Laws Act 12 of 2022, which repealed outdated laws, particularly from the Apartheid Era. The Parliament also approved the Access to Information Act 8 of 2022, which strengthens Namibia's stellar credentials for press freedom. Furthermore, it amended three laws addressing gender rights, rape, domestic violence, and value-added taxes. As for the executive branch, the President dissolved the Ministry of Public Enterprises, merging it with the Ministry of Finance to create 'the Ministry of Finance and Public Enterprises,' hoping to improve the efficiency of state-owned enterprises.

The report divided its content into three sections. The first section spotlights the reforms that the legislature brought in 2022, and the second section analyzes the controversies broached by the Supreme Court of Namibia in 2022 and the judgments that sought to resolve them, for instance, the *Shoprite v NAFAU* case and *the President of the Republic of Namibia v Namibian Employers' Federation*, which assessed the constitutionality of COVID-19 pandemic regulations. Looking forward to 2023, the third section briefly reflects on four salient High Court judgments that the Supreme Court may authoritatively settle in the short term.

The four cases from the High Court (i.e., *Attorney-General v Gondwana Collection Ltd*, *Digashu*, *Witbooi,* and *Nghipunya*) could potentially reform core aspects of Namibian constitutional law and point toward the direction of future constitutional reforms. However, except for *Digashu,* which the Supreme Court decided on May 16th, 2023,[1] these cases remain subject to appeals or reviews.

By examining the constitutional reforms in 2022, this report aspires to enlighten lawyers, policymakers, scholars, and other stakeholders involved in Namibian law and comparative constitutional law. It will help these stakeholders identify trends and areas of further research on this African Roman-Dutch common-law country. This will foster keener insights into the Namibian system of laws to inform decision-making amid the pressing challenges and debates the country faces.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

This section of the report delves into complicated issues that have progressed or could soon progress into constitutional reforms. These issues emerged from the Supreme Court's judgments and the laws enacted by Parliament in 2022, all within the larger context of upcoming general elections in 2024, which has created heated debates on same-sex marriages, changes to rules on Namibia's monetary integration with Southern Africa, and the sensitive topic of land reform. This section deals with the issues that arose from the laws passed last year; the next section dissects the judgments where the courts sought to adjudicate on these issues.

In addition to the Supreme Court judgments explained in the next section, it is important to note that the Namibian Parliament approved a diverse set of laws that effected constitutional reforms. The most far-reaching of these, the Repeal of Obsolete Laws Act 12 of 2022 repeals many old laws, and above all, laws passed during the Apartheid Era. In the field of human rights, the most significant reform is the Access to Information Act 8 of 2022, which entrenches Namibia's position as a country with Africa's best and one of the world's best records on press freedom.[2] Similarly, to advance gender rights, Parliament amended three laws regarding rape, domestic violence, and value-added taxes. Also, the President of the Republic dissolved the Ministry of Public Enterprises and fused it with the Ministry of Finance to create 'the Ministry of Finance and Public Enterprises.'[3] Hopefully, this restructuring of the

1 *Digashu and Another v GRN and Others; Seiler-Lilles and Another v GRN and Others* (SA 6/2022; SA 7/2022) [2023] NASC 14 (16 May 2023).

2 See Reporters Without Borders, 'World Press Freedom Index 2023' <https://rsf.org/en/index> accessed 14 May 2023 (ranking Namibia as 22nd globally and as Africa's top-scoring nation on press freedom, followed by South Africa and Cabo Verde).

3 See Government Gazette of the Republic of Namibia, Proclamation No 29: Announcement of dissolution and establishment of Ministry, and appointment of Minister and Deputy Minister: Namibian Constitution, GG7965.

executive will enable state-owned enterprises (SOEs) to function efficiently after the spectacular demise of high-profile SOEs, such as the national air carrier 'Air Namibia,' which declared bankruptcy in 2021.

In the final days of December, the President of the Republic signed into law the Repeal of Obsolete Laws Act 12 of 2022. As its name indicates, this legislation amends a series of antiquated laws or eliminates them from the statute books altogether. While some of the repealed laws will not amount to constitutional or major reforms, others will change important aspects of Namibian society, especially the racist and segregationist laws enacted during the Apartheid Era—from 1948 to the country's hard-won independence in 1990. These repealed laws include the Crown Lands (Trespass) Proclamation No 7 of 1919, the Natives Minimum Wage Proclamation No 1 of 1944, the Promotion of the Density of Population in Designated Areas Act 18 of 1979, and the Travelling Privileges Ordinance No 9 of 1980.

Last year, Namibia launched its first law consecrating the right to access information. The Access to Information Act 8 of 2022 entitles people to access information held by public and private entities while exempting those entities from disclosing certain types of information. The Act prescribes the form of creating and managing information to ensure transparency, accountability, good governance, and access to information. Moreover, it empowers the state to appoint independent and fair-minded information commissioners.

The Namibian Parliament amended three laws in order to combat gender-based violence and advance women's rights. First, Parliament amended the Combating of Rape Act 8 of 2000 to achieve several purposes. Chief among these goals, the drafters of the Combating of Rape Amendment Act 4 of 2022 expanded the circumstances that qualify as 'coercive' in terms of that Act. These drafters clarified that all forms of rape are 'scheduled crimes' (i.e., the most serious offenses in terms of Namibia's prison law) and that the minimum sentences for rape apply equally to rape under the common law and to its inchoate forms, to wit: attempt, conspiracy, and incitement to commit rape. Furthermore, it grants judges the power to impose bail conditions necessary to protect the complainant.

Secondly, the legislature amended the Combating of Domestic Violence Act 4 of 2003 to strengthen it by, for example, adding safeguards against the intimidation of complainants. Specifically, the Combating of Domestic Violence Amendment Act 6 of 2022 extended the scope of 'domestic relationship' to the primary caretaker of a child and clarified that a domestic relationship between a child and a parent continues even after the child has attained the age of 18 years (i.e., the age of majority). The Amendment Act 6 of 2022 also modifies many provisions relating to procedure, including the protection of vulnerable witnesses. Last but not least, Namibian lawmakers amended the Value-Added Tax Act 10 of 2000 to zero-rate (i.e., to exempt from taxes) the supply of sanitary pads.

The controversies which emanated from laws adopted by Parliament evolved against the backdrop of upcoming general elections, debates on same-sex marriages, land reform, and changes to Namibia's monetary integration within Southern Africa. Notably, lawmakers passed into law the Repeal of Obsolete Laws Act, the Access to Information Act, and amendments to laws fighting gender-based violence and exempting sanitary pads from taxes. These reforms reflect Namibia's ongoing commitment to social progress, protection of human rights, and transparency. Having explored the legal reforms passed in 2022, the report now turns its attention to the second section, which dives into the key issues tackled by the Supreme Court of Namibia in 2022 and the judgments that sought to resolve these challenges.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

This section delves into five judgments from the Supreme Court of Namibia, addressing a wide array of big-picture questions, such as the distinct jurisdictions of the High Court and the Labour Court, as well as disputes between unions and employers, for instance, the *Shoprite v NAFAU* case. This section also checks out the balancing of interests in confronting public health emergencies, as seen in *President of the Republic of Namibia v Namibian Employers' Federation*, which took on the constitutionality of regulations issued by the government to respond to the COVID-19 pandemic.

1. THE PUBLIC'S RIGHT TO ACCESS THE COURTS: EX PARTE JUDGE-PRESIDENT OF THE HIGH COURT: IN RE KAZEKONDJO

In *Ex parte Judge-President of the High Court: In re Kazekondjo v Minister of Safety and Security and Others*[4] (hereinafter referred to as the '*Kazekondjo*' case), the High Court of Namibia, in April 2019, issued a court order which acknowledged a settlement agreement in a case where inmates had alleged that officials from Namibia's prison service (i.e., the Correctional Service) assaulted them. The settlement agreement was made confidential and handled *in camera* (i.e., in judges' chambers behind closed doors), thus preventing the public and the media from accessing it. Later, the Judge-President of the High Court, Petrus Damaseb, requested that the Chief Justice review the High Court's ruling under section 16 of the Supreme Court Act 15 of 1990.[5]

Supreme Court Justice David Smuts, writing for the majority, emphasized that the fairness of a trial depended on the ability of the public to access courts and that the legitimacy and independence of the courts relied on their openness. The Court declared that the *Kazekondjo* matter did not relate to any exceptions to the open court principle established in the Constitution, so the public had the right to access court proceedings and information.

Smuts JA criticized the presiding judge in the lower court (court a quo) who had ruled that the journalist's interest in the proceedings was outweighed by the litigants' interest in confidentiality. The learned judge found that this ruling fundamentally offended the Constitution's principles of accountability, the right to a fair trial, and freedom of the press. He concluded that the order making the settlement confidential and *in camera* conflicted directly with the Constitution and the High Court Act 16 of 1990, amounting to an irregularity that warranted the order's review and justified the Supreme Court in setting it aside.

4 *Ex parte Judge-President of the High Court (Attorney-General of Namibia intervening): In re Kazekondjo and Others v Minister of Safety and Security and Others* 2022 (1) NR 1 (SC).

5 Section 16 of the Supreme Court Act 15 of 1990 provides for the review jurisdiction of the Supreme Court.

2. LABOUR COURT PART OF THE HIGH COURT: *MASULE V PRIME MINISTER*

Mr. Masule, a public servant employed by the Anti-Corruption Commission (ACC), sought relief from the High Court in a case involving termination of employment. The High Court had dismissed his case, finding that it lacked jurisdiction because the Labour Court's had exclusive jurisdiction over that sort of case.

On appeal to the Supreme Court, the apex court contradicted the High Court when it held that the High Court does have jurisdiction.[6] The Supreme Court interpreted Articles 78(1) and 80(2) of the Constitution regarding the structure of the Namibian judiciary and the High Court's original jurisdiction, respectively. From sections 115-116 of the Labor Act, the Supreme Court concluded that the Labour Court is a "division of the High Court" rather than a separate or independent court.[7] Damaseb DCJ distinguished between geographical divisions (for example, "the Northern Local Division (NLD)" of the High Court) and subject-matter divisions (for example, the Labour Court and the Electoral Court).[8]

The Supreme Court underscored the importance of interpreting labor laws in light of the Constitution and the High Court's original jurisdiction. The Constitution prevails over all other laws, and the constitutional provisions on the High Court's original jurisdiction cannot be diminished by the content of any legislation.

The *Masule* matter should be heard in the High Court, ruled the Supreme Court. In its ruling, the Windhoek-based court rejected the line of High Court precedents which reinforced the flawed idea that the jurisdiction of the Labour Court differed from that of the High Court.[9] The real dilemma did not pertain to the jurisdiction of the High Court or Labour Court, but rather to the relief sought by the plaintiff. The Supreme Court referred the case back to the High Court (Labour Division) to determine its merits.

3. DURING PANDEMICS, EMPLOYERS HAVE CONSTITUTIONAL RIGHTS TOO: *PRESIDENT OF THE REPUBLIC OF NAMIBIA V NAMIBIAN EMPLOYERS' FEDERATION*

This case dealt with the constitutionality of regulations introduced by the President to overcome the COVID-19 pandemic, which suspended the provisions of certain laws, such as the Labour Act. The High Court had determined that the President exceeded the authority granted to him by the Constitution because the regulations did not address the situation that necessitated the state of emergency declaration but rather its consequences. More specifically, the Court declared Regulation 19 and other regulations unconstitutional and invalidated the President's delegation of powers to ministers to issue directives.

On appeal, the Supreme Court ruled that the delegation of powers was not *ultra vires* and that people should read implied powers into the relevant article of the Constitution.[10] However, the Court agreed with the High Court's finding that Regulation 19 appeared unreasonable and irrational—as it failed to balance the interests of employers and employees—thus disproportionately harming employers.

Ultimately, the Supreme Court upheld the High Court's order striking down Regulation 19, but not for the same reasons. The Supreme Court found that the underlying policy of the regulation was not reasonable or rational due to its disproportionate harm to employers and its single-minded focus on short-term employee income gains, disregarding the long-term consequences that could occur if employers impacted by the suspension regulations collapsed.

4. EMPLOYERS HAVE NO DUTY TO HELP WORKERS STRIKE: *SHOPRITE NAMIBIA (PTY) LTD V NAMIBIA FOOD AND ALLIED WORKERS UNION*

This judgment concerns a dispute between Shoprite, Africa's largest supermarket retailer, and a Namibian trade union (i.e., NAFAU), which emerged from deadlocked negotiations on wage and service conditions. NAFAU (Namibia Food and Allied Workers Union) accused Shoprite of employing temporary fixed-term employees during a strike period, contending that Shoprite used these employees to perform the work of striking employees, thereby violating the Labour Act 11 of 2007 and the agreed strike rules. The Labour Court granted an interdict against Shoprite, which then appealed the decision.

The Supreme Court disagreed with the Labour Court's interpretation of section 76(3) of the Labour Act, stating that the provision restricted an employer's freedom of contract and right to carry on a trade or business protected by the Constitution.[11] The Court also declared that the employer has no duty to ensure that its employees' rights to strike and associate were fulfilled. As the union failed to show that Shoprite required seasonal and managerial employees to do the work of the striking employees, the Court concluded that the union did not establish that Shoprite violated section 76(3), properly interpreted. Therefore, the Supreme Court upheld Shoprite's appeal, reversing the Labour Court's decision.

5. DISTINGUISHING A CASE OR CONTRAVENING THE *STARE DECISIS* DOCTRINE? *MINISTER OF FINANCE OF THE REPUBLIC OF NAMIBIA V KRUGER*

In *Minister of Finance v Kruger*,[12] the Supreme Court reprimanded a High Court judge for his "untenable"[13] refusal to apply the *stare decisis* doctrine, which the Namibian Constitution establishes in Article 81. In *Kruger,* the appellants appealed against the High Court's finding that section 83(1)(b) of the Income Tax Act 24 of 1981 infringed the fair trial rights enshrined in Article 12 of the Constitution, as it allegedly allowed the Finance Minister to obtain a civil judgment without any

6 *Masule v Prime Minister of the Republic of Namibia and Others* 2022 (1) NR 10 (SC).
7 ibid [47].
8 ibid [44].
9 ibid [49].
10 *President of the Republic of Namibia and Others v Namibian Employers' Federation and Others* 2022 (3) NR 825 (SC).
11 *Shoprite Namibia (Pty) Ltd v Namibia Food and Allied Workers Union and Another* 2022 (2) NR 325 (SC).
12 *Minister of Finance of the Republic of Namibia NO and Others v Kruger and Another* 2022 (3) NR 785 (SC).
13 ibid [38].

pleadings, service, or notice to the taxpayer. The High Court had differentiated this case from earlier decisions in *Hindjou v Government of the Republic of Namibia (Receiver of Revenue)*.[14]

The Supreme Court held that the High Court judge erred, as his findings resulted from an isolated reading of section 83(1)(b). Chief Justice Shivute, who wrote the majority opinion, found that the taxpayer was given an opportunity to object to the assessment of his tax liability and follow the established process. The Supreme Court also ruled that the High Court made a mistake by not recognizing that the constitutionality and validity of section 83(1)(b) had already been decided by both the full bench of the High Court and the Supreme Court in *Hindjou*, a decision that was binding the High Court in the *Kruger* matter as well. By refusing to follow and apply the decision in *Hindjou,* High Court Judge Masuku breached the *stare decisis* doctrine, as reflected in Article 81 of the Constitution. Consequently, the Supreme Court upheld the Finance Minister's appeal.

This section of the report pored over five notable Supreme Court of Namibia judgments that tackled a wide range of litigated issues, from the jurisdictions of the High Court and Labour Court to the (pro-business) balancing of interests during public health emergencies, chiefly the COVID-19 pandemic. The next section, 'Looking Ahead,' appraises the near future of constitutional reforms in Namibia and considers what these legal developments may imply for Namibian politics and society.

IV. LOOKING AHEAD

This section of the report presents a forward-looking analysis of four salient High Court judgments that the Supreme Court may definitively resolve in 2023, within the larger context of the upcoming general (i.e., presidential, and legislative) elections, heated debates on same-sex marriages, changes to rules on Namibia's monetary integration with Southern Africa, and the sensitive electoral topic of land reform. On the bright side, the ruling SWAPO[15] party elected in November 2022 Netumbo Nandi-Ndaitwah as the party's Vice President and candidate for the presidential elections, paving the way for Namibians to elect their first-ever female President.

As mentioned, four High Court cases that touched upon a variety of aspects—and what they portend—will likely shape the constitutional reform agenda in this nation of about 2.6 million people:

- *Attorney-General v Gondwana Collection Ltd,*[16] where the Court held that the government could not invoke the secrecy and confidentiality of Cabinet documents when the people requested such documents without justifying why they invoke such secrecy; such invocation of secrecy could adversely affect fair trial rights.
- *Digashu v Government of the Republic of Namibia*,[17] where the High Court addressed the desirability to recognize same-sex marriages in a functioning democracy and properly apply international law in that respect.
- *Witbooi v Minister of Urban and Rural Development*,[18] where the High Court ruled that the Witbooi customary law discriminated against women in that it disqualified from serving as *kaptein* any candidate born from the royal house for no other reason than that he or she was an offspring from the matrilineal line of the royal family.
- *Nghipunya v Minister of Justice*,[19] which canvassed the words "in the interest of the public or the administration of justice" with respect to bail hearings.

These four cases could potentially reform some salient facets of Namibian constitutional law, but they all remain subject to appeals or reviews, save for *Digashu*. Still, like *Gondwana Collection Ltd,* some of those cases point to the directions that constitutional reforms may take in Namibia. Others like *Nghipunya* and *Digashu* have exposed rifts that the Supreme Court may need to bridge. In *Digashu,* though the High Court recognized the binding nature of the unfavorable Supreme Court decision in *Frank,*[20] the High Court nonetheless held that the Supreme Court construed international law 'wrongly'[21] and that international conventions ratified by Namibia, such as the International Convention on Civil and Political Rights (ICCPR), bind Namibia.[22] This holding will leave international law experts dismayed, considering that the question as to the status and application of international law in Namibia remains unsettled.[23] The High Court should know better: In the *South African Poultry Association,*[24] The Supreme Court of Namibia remitted a case back to the High Court so that it could ventilate and authoritatively fix that question. Likewise, the fact that the three judges in the *Nghipunya* case had differing opinions on the words "in the interest of the public or the administration of justice" in section 61 of the Criminal Procedure Act 51 of 1977 affords the Supreme Court an opportunity to iron out inconsistencies in the Namibian legal system.

14 *Hindjou v Government of the Republic of Namibia (Receiver of Revenue) and Another* NAHC 97/1996, and *Hindjou v The Government of the Republic of Namibia (Receiver of Revenue) and Another* 1997 NR 112 (SC).

15 'SWAPO' is an acronym for 'South West Africa People's Organization', the ruling party in Namibia.

16 *Attorney-General and Another v Gondwana Collection Ltd and Others* 2022 (1) NR 38 (HC).

17 *Digashu and Others v Government of the Republic of Namibia and Others* 2022 (1) NR 156 (HC).

18 *Witbooi and Others v Minister of Urban and Rural Development and Others* 2022 (2) NR 383 (HC). For another High Court case decided in 2022 that involved rights to equality and non-discrimination, see *S v Guriras* 2022 (4) NR 929 (HC) (where the court ruled that sentencing convicted persons differently solely because of their role as primary caregivers to minor children would trample on the right to equality in Article 10 of the Constitution, notwithstanding Article 30 of the African Charter on the Rights and Welfare of the Child, which concerns children of imprisoned mothers).

19 *Nghipunya v Minister of Justice and Others* 2022 (4) NR 970 (HC).

20 *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC).

21 *Digashu* [103], and [118]-[121].

22 ibid [118].

23 See also Dunia P Zongwe, 'A Chronicle of How Judges Have Internalized International Law in Namibia' (2021) 44 South African Yearbook of International Law 1.

24 *South African Poultry Association and Others v Minister of Trade and Others* 2018 (1) NR 1 (SC).

V. FURTHER READING

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The Netherlands

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I. INTRODUCTION

The Dutch Constitution ("Grondwet")[1] famously holds little relevance in political and legal discourse. Its rigidity, the impossibility of judicial constitutional review, and other factors make it far from a living or inspiring document.[2] Yet, in many ways 2022 posed an exception; with six proposed amendments accepted and one rejected, the Constitution saw its biggest update since 1983, and the introduction of constitutional judicial review is being considered. However, these developments should not be overstated, as for the largest part, they are technical changes with limited practical consequences, reaffirming the notion of the Dutch Constitution as "quiet property"[3].

Before discussing the proposed amendments, we will briefly examine the Dutch process for constitutional reform. Constitutions are changed via bill, introduced either by the government or by one or more individual members of the lower house of parliament. Bills proposing an amendment need to pass both houses of parliament twice. The process is as follows. The bill first needs to pass both houses of parliament with a regular majority. The process then continues after elections have been held. These generally occur for both houses at different points in time. After both houses have been re-elected, the bill needs to pass them both with a qualified (2/3rd) majority. Meaning, constitutional reform takes long by design and needs broad support in parliament. Due to the length of this process, technically several constitutional amendments are currently under review. For brevity's sake, **Part II** discusses only proposals that have been accepted or rejected in the second reading in 2022.

This report is structured as follows. **Part II** examines seven proposals, of which six were accepted and one was rejected. **Part III** subsequently analyses these proposals, while **Part IV** focuses on the most important potential future constitutional amendment – the introduction of judicial constitutional review. **Part V** contains some recommended reading.

1 For a translation, see https://www.denederlandsegrondwet.nl. All translations of articles and proposed amendments in this report are also taken from this site. Furthermore, it served as a general source for this report.

2 Gerards J, "The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It" (2016) 77 Revue interdisciplinaire d'études juridiques 207.

3 Kortmann C, 'Prof. Mr. J.A. Peters, Wie beschermt onze Grondwet?' (Review), [2003], p, 314.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. INTRODUCTION

In 2022, seven proposals for constitutional amendment were subject to their second reading. We first discuss the six successful proposals, roughly in order of their estimated respective importance: the introduction of a General Provision at the beginning of the Constitution (II.2), the introduction of the right to a fair trial (II.3), the amendment of an article enabling Dutch citizens living abroad to vote for the Upper House (II.4), updating the privacy of correspondence to include modern forms of communication (II.5), changing the procedure for constitutional amendment itself (II.6), and the removal of some transitional articles from previous constitutional changes (II.7). Lastly, we discuss the failed proposal to introduce a binding, correctional referendum (II.8). These changes are merely outlined here and more elaborately analysed in **Part III** of the report.

2. GENERAL PROVISION

The most important, or at least most visible, change is the introduction of a General Provision at the beginning of the Constitution. The Dutch Constitution does not have a preamble or other kind of introductory texts, meaning it simply began with Article 1 (the codification of the principle of equality). The Constitution now starts with a General Provision, which reads: "The Constitution guarantees fundamental rights and democracy based on the rule of law."

It is of note, that this is the only "Provision" in the whole constitution, the rest of the document consisting of "Articles". This provision has a long history[4] and only found its final shape after an elaborate debate. Its exact purpose is subject to discussion, but there seems to be support for the notion that it "codifies the most fundamental principles of Dutch society".[5] But, due to the ban on constitutional judicial review, the practical consequences of the implementation seem to be very limited.

Two aspects of the Provision are especially noteworthy. The first is a rather unique part of its history. After an Advisory Committee

4 See for a brief discussion https://www.denederlandsegrondwet.nl/id/vklqlw5yh-8jf/algemene_bepaling_grondrechten_en, §2.

5 See for example *Handelingen I* 2017/2018, nr. 20, 7.

proposed the implementation of a preamble, the Dutch government was not very enthusiastic. They only changed their mind and published a memorandum outlining different options after the Upper House of Parliament (the Senate) passed a motion urging it to do so. The Upper House is generally expected to play a reluctant and apolitical role in the legislative process, and its members lack the right to initiate or amend an act. The Upper House initiating an act – especially one to amend the Constitution – by motion is certainly peculiar and some even doubted the constitutionality of this route.[6]

The second aspect to note is the final wording of the Provision. The Government proposed the provision ,"The Constitution guarantees democracy, the rule of law and fundamental rights." The provision was then changed to its current wording by amendment. This was done to reflect the order of the Constitution itself, which starts by outlining fundamental rights, but also to reflect that "democracy" and "rule of law" cannot be separated.

3. RIGHT TO A FAIR TRIAL

2022 also saw the incorporation of a new fundamental right to a fair trial. Member 1 of Article 17 now reads, "Everyone shall have the right, in the determination of his rights and obligations or of any criminal charge against him, to a fair trial within a reasonable time before an independent and impartial court."

The previous first member of this article, containing the *ius de non evocando*, is now the second member. The absence of a constitutional right to a fair trial until very recently might seem puzzling at first glance, but the article is unlikely to make a significant practical difference for two key reasons. First, because different aspects of the right to a fair trial (such as the impartiality of the judiciary and the ius de non evocando) were already outlined at different places within the constitution, and second because Article 6 of the European Convention on Human Rights contains a very similar right and has direct and binding force in the Netherlands.[7] Due to the ban on judicial constitutional review, Article 6 will probably remain the most relevant.

4. VOTING FOR THE SENATE BY CITIZENS LIVING ABROAD

On the national level, The Netherlands has two houses of parliament. The lower house, which has the most members, is directly elected, while the second legislature, the upper house, also called Senate, has the right to reject laws (but not to initiate them or amend proposals) and is largely elected by members of the representative bodies of the 12 provinces. This system created problems for the small group of Dutch citizens not living in a province, as they were affected by laws passed or rejected by the Upper House but did not have an indirect, right to vote for its members. For Dutch citizens living in the former colonies of Bonaire, St. Eustatius, and Saba, a solution has previously been found that allows their representative bodies to vote for the Senate. This constitutional amendment creates a solution for the second group, Dutch citizens living abroad. It allows them to vote for an "Electoral College non-inhabitants" which has the sole function of voting for the Senate. The amendment reads, "For Dutch nationals who are not resident in the Netherlands and who satisfy the requirements laid down for elections to the Lower House of the States General, elections shall be held for an electoral college for the Upper House. The members of this electoral college shall be directly elected by these Dutch nationals. The same conditions apply to membership. Article 129, paragraphs 2 to 6 shall apply mutatis mutandis."

5. UPDATE OF THE RIGHT TO PRIVACY OF CORRESPONDENCE

Article 13 of the Constitution contains the right to privacy of correspondence. In its previous wording, the article only explicitly granted the right to the protection of privacy for letters and telegraph messages. Modern forms of communication were not explicitly protected. This desuetude did not pose a practical problem, as in the few cases that courts examined, Article 13 of the Constitution was interpreted broadly and also incorporated the protection of other modes of communication. Moreover, the main Right to privacy, including modern correspondence, was already guaranteed by Article 8 ECHR (see II.3). The practical consequences of the amendment are therefor limited. Article 13 now reads:

> "1. Everyone shall have the right to respect the privacy of his correspondence and telecommunications.
> 2. This right may be restricted in the cases laid down by the Act of Parliament with the authorization of the courts or, in the interests of state security, by or with the authorization of those designated for the purpose by the Act of Parliament."

6. RECALIBRATION CONSTITUTIONAL AMENDMENT

As outlined in **Part I**, a constitutional amendment requires passing in two *readings* in both houses of parliament, with a regular majority in the first reading and a 2/3rd majority in the second one. However, the relevant article of the Constitution did not specify when these readings ought to take place. This led to strategic behavior, as after an article passed in the first reading, the government, or the member of parliament who initialized the proposal, would simply wait until a house that was likely to pass the constitutional amendment was elected. This meant proposals for a constitutional amendment would sometimes be "under discussion" for over ten years, a situation generally considered undesirable and, according to some, unconstitutional.[8] The relevant article has now been changed to guarantee that a newly elected lower house will discuss a proposal in the second reading. If they do not, the proposal fails. The amendment also entails a minor change to certain terms, but that does not bear further elaboration here.

The new article 137, including the changed third paragraph, reads:

> "1. An Act of Parliament shall be passed stating that an amendment to the Constitution in the form proposed shall be considered.
> 2. The Lower House may divide a Bill presented for this purpose

6 *Handelingen II* 2017/2018, nr. 81, 7.
7 See for example article 117 and article 17 (old).
8 See for an elaborate discussion Breunese H, 'Wijziging van de grondwetsherzieningsprocedure' (2021) 12 118.

into a number of separate Bills, either upon a proposal presented by or on behalf of the King or otherwise.

3. **The Lower House elected after the Act of Parliament referred to in the first paragraph has been published shall consider, at second reading, the Bill for the amendment of the Constitution as referred to in the first paragraph. If this Lower House does not decide on the Bill, the Bill will fall by operation of law. As soon as this Lower House has passed the Bill, the Upper House shall consider it at second reading. The Bill shall be passed by both Houses only if at least two-thirds of the votes cast are in favour.**

4. The Lower House may divide a Bill for the amendment of the Constitution into a number of separate Bills, either upon a proposal presented by or on behalf of the King or otherwise, if at least two-thirds of the votes cast are in favor."

7. ADDITIONAL ARTICLES

The Dutch Constitution also contains "additional articles". These have a procedural nature and are mainly used for transitional law, for example when a constitutional amendment is passed that requires other legislation to be updated. Two of these articles, postponing the entry into force of an article arranging the replacement of ill or pregnant members of parliament and removing the right to vote of individuals respectively, had lost their function due to time and have thus been removed.

8. FAILED AMENDMENT: CORRECTIVE REFERENDUM

The Netherlands lacks a formal constitutional procedure for referenda. That does not mean referenda have never taken place, as from July 1st, 2015 to September 9th, 2018, the Netherlands had an act on "consultative referenda".[9] After 10,000 and then 300,000 citizens, in the first and second phases respectively, had expressed support, a referendum took place regarding an act that had been passed by both houses of parliament. If the turnout was at least 30% and a majority voted against the proposal, the referendum was to be treated as a "verdict advising rejection," and the act would have to be debated once again in parliament. Under this procedure, two referenda took place: one about an act confirming a treaty with Ukraine – which was generally seen as a broader vote on the EU – and one on added competencies for the Dutch intelligence services. In both referenda, turnout was low and there was a lot of debate about the proper interpretation of the result. Therefore, the act was revoked.

After a committee advised the introduction of a binding corrective referendum, a member of the Lower House proposed an amendment to that end. This differed in two ways from the procedure described above. First, the result would be binding and not merely advisory, and second, there would not be a turnout-related threshold, but an outcome one, meaning an absolute number of people would have to vote against a proposal for it to be rejected. In the original proposal, the number of votes required to reject an act was to be determined by a regular act. Through an amendment, however, this was changed to "a number of votes at least equal to the majority of the votes cast during the last elections for the Lower House".[10] This passed amendment was seen as a "kiss of death," as people deemed it highly unlikely that so many people would vote in a referendum, rendering the proposal effectively meaningless. This made reaching a 2/3rd majority very hard. In the second reading, the member of parliament defending the proposal split it[11] into an amendment allowing referenda at a local level and one at a national level, hoping at least one would pass. This was ineffective, and both proposed amendments failed.

The same party then entered a very similar proposal, which passed the first reading in the Lower House with a regular majority. That proposal is now due to be debated in the Upper House.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. NATURE OF THE CHANGES

As mentioned above, the passed amendments are largely technical and relatively inconsequential in nature. Furthermore, they seem to fit relatively well in the broader system of the Dutch constitution, as they do not require many other linked amendments or create a change to the fundamentals of the Dutch constitution. Hence, it seems safe to say all amendments do indeed qualify as amendments, rather than dismemberments. In this light, it is interesting to note that the most far-reaching amendment, the one allowing a binding correctional referendum, failed.

The limited scope and impact of the passed amendments should be considered a feature, and not a bug. The Dutch constitution was designed in a way where stability and continuity are prioritized at the expense of limited legal value.[12] The amendment on a referendum can serve as an example, as it reached a significant majority in both readings – 87 out of 150 votes in the Lower House in the second reading – but still filled to pass the 2/3rd majority requirement. This shows that it is very hard for amendments that are consequential, and hence more likely to be politically divisive, to pass. The fact that the passed amendments of 2022 are considered the biggest change since 1983, which in itself is a largely technical overhaul, illustrates this point as well. This difficulty is only strengthened through the Netherlands being "a country of minorities," having many different religious, ethnic, and social groups, and having an electoral system of proportional representation. This makes it even harder for any controversial proposal to reach an adequate majority.

In this light, it is also noteworthy that all passed proposals were made by the government, in one case after being urged by parliament in a motion, whereas the failed proposed amendment was submitted by a member of parliament. Both the government and individual members of parliament are authorized to propose constitutional amendments and there is little formal difference, but the "passing rate" of governmental proposals is generally higher. This is largely due to the (non-codified) principle of "constitutional ripeness": meaning the government only submits a proposal if there is a broad and consistent consensus on the proposed amendments.[13] This makes it more likely for a proposal to reach the high threshold but concurrently makes it

9 See https://wetten.overheid.nl/BWBR0036443/2017-04-01.

10 *Kamerstukken II* 2020-2021, 35129, nr. 14.

11 *Kamerstukken II* 2020-2021, 35129, nr. 15-16.

12 Gerards 2016.

13 Gerards 2016, referring to the memorandum of the minister of the Interior and

even harder to change the Constitution, especially in a politically controversial way.

This constitutional rigidity, and the largely technical and inconsequential character of the amendments following it, is also shown by applying the typology of Albert. Most of the passed amendments can be classified as corrective: the recalibration of the procedure for constitutional amendment makes it clear through its name, as does the "update" of the privacy of correspondence – even if they have no real practical consequences. The only elaborative amendments then, are the procedure allowing citizens living abroad to vote for the Upper House and the right to a fair trial. A full attempt at an explanation for the support for these amendments would go beyond the scope of this report, but they seem to follow quite naturally from a changed view on the role of the Upper House and added attention for this right, respectively. The removal of the additional articles seems harder to classify, but since they had gotten fully obsolete, reformative also seems the best qualifier: the amendments mean a constitutional change in a non-transformative way. No amendment can be classified as restorative. This might also be explained by constitutional rigidity, which makes it less likely for mistakes that require correction to occur.

The implementation of the General Provision seems the hardest to qualify. One of the reasons for this difficulty is the fact that, as mentioned above, its practical consequences are unclear. It has been said that the Provision forms an additional assessment framework for future regulation, but the wording appears too vague to be of real additional value to the specific constitutional articles. Yet the same time, it has a big and important symbolic function.

2. JUDICIAL REVIEW

This subsection can be short, as the Dutch Constitution knows no unamendable rules, and constitutional changes are not subject to judicial review. Theoretically, articles of the Dutch Constitution can lose binding force when they violate European Union law or other international law with binding effect.[14] However, this situation seems likely to remain hypothetical, due to the technical nature of the clauses.

Part of the procedure for constitutional amendments is the advice of the Advisory Department of the Dutch Council of State. This advice focuses on higher law, the technical aspects of the amendment, and potential policy consequences. The advice is not binding but is generally regarded as authoritative.

The subtlety of its power also became clear in these amendments, as its influence was, for example, limited when it offered highly critical advice on the amendment proposing a General Provision, but the government still introduced it, just with more elaborate reasoning. However, with regards to the amendment introducing a binding corrective referendum, it did propose incorporating the outcome threshold in the Constitution itself, one of the reasons it eventually failed.

Kingdom Relations, Kamerstukken II 2014/15, 31570, no 25, p. 4; the Cabinet's response to the report of the State commission on constitutional revision, *Kamerstukken II* 2011/12, 31570, no 20; Council of State, *Kamerstukken II* 1995/96, 24431, no A, p. 1; C.A.J.M. Kortmann, Weg met de Grondwet!, in: H.R.B.M. Kummeling and T. Zwart, *Constitutioneel lapwerk: over de lotgevallen van voorstellen tot grondwetsherziening in de periode 1997 tot 2000*. p. 45.

14 See Article 93 and 94 Constitution.

IV. LOOKING AHEAD

1. AMENDMENT OF ARTICLE I

At the beginning of 2023, the Dutch Upper House passed another amendment in the second reading. Article I, containing the principle of equality, bans discrimination in general but also lists several specific characteristics on the basis of which discrimination is illegal. To these specific characteristics, sexual orientation and disability were added. The amendment might have some very minor practical consequences but will be discussed elaborately in next year's report. The article now reads as follows:

"All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, sex, **disability**, **sexual orientation** or on any other grounds whatsoever shall not be permitted."

2. JUDICIAL CONSTITUTIONAL REVIEW

As mentioned above, the Netherlands is the last nation in Western Europe not to allow constitutional review by the courts. That does not mean Dutch citizens are void of all legal protection, as international law, including the European Convention on Human Rights ("**ECHR**"), has direct effect in the Netherlands, and its clauses supersede all national law, including the Constitution.

The debate about whether constitutional review should be introduced in the Netherlands has been taking place for a long time, and a constitutional amendment introducing some form of constitutional review has passed the first reading as recently as 2014. The reason the subject has recently gotten back into the center of attention is the Childcare Benefits Scandal. Thousands of parents were forced to pay back benefits they received to pay for childcare, even if they had done little or nothing wrong. This led to huge debts, with devastating personal consequences. Some parents turned to the courts to stop the repayments, but their pleas were generally dismissed. Briefly put, the highest administrative court ruled that the obligation to pay back all benefits was laid down in an act passed through parliament, meaning that it was not qualified to waive the repayment obligation. As the benefits were not protected by an ECHR right, no adequate legal protection could be offered to the benefit recipients. This led to renewed calls for the abolition of the ban on constitutional review.

Allowing constitutional review by the courts was part of the coalition agreement by the next Dutch government, and recently a memorandum came out in which the government showed support for constitutional review, stating that the courts should be allowed to disapply specific laws if they violate the "classic" rights laid down in the constitution. A constitutional amendment allowing this is expected to be introduced somewhere in the coming year(s).

This expected amendment is even more interesting since the role of the courts in the Dutch legal system seems to be subtly changing. Originally, Dutch courts played a very reluctant role and left a great room for discretion to parliament and executive authorities. In Barroso's typology, they seem to play a classic counter-majoritarian role. However, recently, there are some indications that the court is starting to take a more reflective or even enlightened role, especially

when it concerns environmental matters. The most prominent example is *Urgenda*,[15] where the Dutch Supreme Court was the first in the world to rule that the state had an obligation based on human rights to prevent carbon dioxide emissions. A local court took this one step further in *Milieudefensie t. Shell*, where it ruled oil corporation Shell has a duty to limit its own emissions and needed to take serious efforts to limit the emission of its clients. It would be interesting to see how these developments and the debate on constitutional review interact.

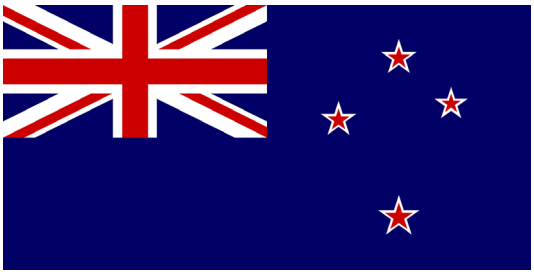
V. FURTHER READING

Gerards J, "The Irrelevance of the Netherlands Constitution, and the Impossibility of Changing It" (2016) 77 Revue interdisciplinaire d'études juridiques 207

Boogaard G, "De Grondwet waarborgt de 'gemengde democratie'" [2018] RM Themis 240

15 [2019] HR 20 December 2019, *Urgenda v. the Dutch State*, ECLI:NL:HR:2019:2006.

New Zealand



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I. INTRODUCTION

The difficulties with conceptualizing reform in an unwritten constitutional context, noted in the contributions to the two previous editions of this publication, remain ever-present. Formal reform efforts shade into both organic development and changes of approach. This is not just a question of where to draw the line between 'reform' in a formal sense and more informal developments. Any change is functionally equivalent to reform in an unwritten constitutional context. As such a mere continuation of, or change in, constitutional practice can signify, precipitate, or conclude important changes in how New Zealand's constitution operates. It is left for the constitutional scholar to judge the significance and likely permanence of any change, as best they can.

And indeed, it has been 'reform' through the development of general practice that has been key in New Zealand in 2022, with the New Zealand Supreme Court extending its jurisdiction to declare legislation inconsistent with fundamental rights, continuing to affirm the relevance of tikanga Māori as the first law of New Zealand, and addressing free speech issues. These rulings may be more readily understood as 'developments' rather than reform proper, but as already noted in an unwritten constitutional context the distinction is a fine one. Each of the key decisions solidifies basic constitutional principles, and so the Constitution has been incrementally but sustainably reformed in each case.

In respect of deliberate reform efforts, the key vehicle is legislation. The attempts here have been modest. Two legislative reforms addressed constitutional matters previously raised by the judiciary – one about the constitutionality of disproportionately harsh criminal sentencing and the other about the declarations of inconsistency for rights breaches. But an aborted attempt to legislatively entrench public ownership of water infrastructure as part of wider sector reforms was the most significant reform effort. The attempt to entrench substantive policy rather than constitutional fundamentals was quickly and heavily criticized, and the government soon walked back its entrenchment proposal. Ultimately, respect for New Zealand's distinctive constitutional arrangements was maintained.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

New Zealand is an unwritten constitution that has traditionally adhered to a comparatively absolutist interpretation of parliamentary sovereignty. In the rights protection context, the conventional position has therefore been that there is no recourse if parliamentary legislation breaches human rights. In 2018, the New Zealand Supreme Court qualified this conventional understanding by ruling that the courts have jurisdiction under the New Zealand Bill of Rights Act 1990 to issue declarations of inconsistency where protected rights have been breached.[1]

Two modest but important developments have occurred with respect to the declaratory jurisdiction. First, Parliament enacted the New Zealand Bill of Rights (Declarations of Inconsistency) Amendment Act 2022, which sets out the steps Parliament must take in response to a declaration of inconsistency. In brief, the Attorney-General is required to formally bring the declaration to Parliament's attention, and the responsible Minister must present the Government's response to the declaration within 6 months. The amending legislation is short but importantly passed with unanimous support in the House of Representatives signaling Parliament's comfort with the new, judicially-created jurisdiction. It is anticipated that changes will also be made to the Standing Orders of the House to accommodate the new jurisdiction.

The second development was the Supreme Court's decision to grant a declaration of inconsistency in *Make It 16 Inc v Attorney-General*.[2] The case concerned the minimum voting age in New Zealand, which is currently set at 18 years old.[3] Make It 16 is a youth organization whose members prefer that the guaranteed minimum age for voting be set at 16 years old, and so they applied to the Court for a declaration that a minimum age of 18 years old was inconsistent with the right set out in section 19 of the New Zealand Bill of Rights Act, to be free from age-based discrimination. For the purposes of the right to be free from discrimination, "age" is defined in s 21(1)(i) of the Human Rights Act 1993 as 16 years of age or older.

The core issue for present purposes was whether or not the apparent age discrimination could be justified. Counsel for the Attorney-General took the unusual approach of conceding that the threshold of 18 years was essentially arbitrary but argued that there was no objectively correct threshold in any case, and so the Court should defer to parliamentary judgement on the issue as expressed in the current

1 *Attorney-General v Taylor* [2018] NZSC 104.
2 [2022] NZSC 134.
3 See Electoral Act 1993, ss 3(1), 60 and 74; and Local Electoral Act 2001, ss 20, 23 and 24.

legislation. Rejecting this argument, the Court found that a positive justification was necessary before any limit on the right to be free from age-based discrimination could be considered reasonable. Therefore, the Court issued a declaration of inconsistency despite conceding that the age limit could possibly be justified reasonably at a later stage if a genuine effort was made to do so.

The Court's decision has a modest reformist element in that it is the first time a declaration has been made where a potentially justifiable limit on protected rights remains unjustified for the time being. This is an extension of the Court's jurisdiction albeit one that aligns with the principles and purpose of rights protection. The decision means that Crown counsel cannot demur and must proactively place a justification before the courts for assessment if they expect to resist an application for a declaration. While this may raise the burden on the Attorney-General in such cases, we should expect Crown counsel to be fully engaged as a vital component of a responsible rights protection regime.

Contributions to previous editions of this publication have noted the increasing willingness of the courts to recognize tikanga Māori — the legal principles and concepts of New Zealand's indigenous Māori population — as a valid (and sometimes controlling) source of law. As yet, the Supreme Court had not had the opportunity to contribute much to this development until two cases it decided this year. The first was the much-anticipated decision in *Ellis v R*.[4] Mr. Ellis sought to have historical sexual offending convictions against him quashed by the Court, but he died before the Court could hear a substantive argument. This might usually render the legal action moot, but it was argued at the prompting of the Court that under tikanga principles reputational issues were relevant even after death. Experts on tikanga gave evidence to the Court, and a majority of the judges agreed that the appeal should proceed (partly) on the basis of tikanga, even though Mr. Ellis was not Māori.

The second decision was *Wairarapa Moana Ki Pouākani Inc v Mercury NZ Ltd*.[5] The Waitangi Tribunal, a commission of inquiry that functions as a kind of truth and reconciliation commission, recommended that certain land be used by the Crown to help settle and compensate for historical injustices with a particular iwi (Māori tribe). Unusually, however, that land was located outside of the iwi's traditional area of mana whenua (the area of tribal authority), meaning that the same land was unavailable to settle historical claims in respect of iwi who did claim mana whenua over that land. Mana whenua is a principle of tikanga, and the core issue was whether the Tribunal's jurisdiction to recommend the return of land was limited by tikanga in this instance or not. A majority of the Court found that mana whenua is a vitally important principle although it does not outright limit the recommendations that the Tribunal can make. Other principles of tikanga are also relevant and, if addressed more fully, may resolve the conflict between each of the iwi groups seeking to claim the disputed land.

The *Ellis* decision in particular confirms and solidifies the importance of tikanga as the 'first law' of New Zealand. Both decisions afforded the Supreme Court an opportunity to discuss the ramifications of tikanga recognition in general terms. However, beyond a shared view that tikanga should be taken seriously in the application and development of the law, there is as yet no unified vision from the Court as to the precise role tikanga can play. Is tikanga a relevant consideration? Is it influential in the development of the common law? Is it a source of rights in itself? Is it merely a useful framework to parse the issues before the Court? Much is yet to be developed in this space. It is more than obvious, however, that the courts are engaged in a long-term project of reform that will result in more and deeper recognition of tikanga Māori.

The Three Strikes Legislation Repeal Act 2022 reformed the criminal sentencing policy in New Zealand by repealing a 'three strikes' sentencing regime that mandated disproportionately severe sentences after multiple convictions. The constitutional dimension to this reform is that application of the three strikes policy conflicted with the right to be free from disproportionately severe treatment or punishment, protected in section 9 of the New Zealand Bill of Rights Act 1990. In a high-profile Supreme Court case, *Fitzgerald v R*,[6] the constitutional concerns identified were so severe that the Court effectively 'read in' an exemption to the clear statutory wording that harsh sentences were not discretionary. The statutory reform was apparently adopted independently of the Supreme Court ruling, but in any case, the movement of the judicial and political branches of government into alignment on this issue solidifies the reform.

Exemplifying the unwritten nature of the Constitution, the most significant constitutional development was something that ultimately did not happen. In the course of progressing legislation to reform water infrastructure management, the Water Services Entities Act 2022, a last-minute amendment was tabled and voted into the proposed legislation that would have legislatively entrenched public ownership requirements. Amendment or repeal of the ownership requirements would have required a super-majority of 60 percent of members of the House of Representatives (rather than the usual bare majority of 50 percent plus one), or the support of a majority of voters measured in a national referendum. The amendment was reversed when constitutional scholars drew public attention to the amendment and its implications.

New Zealand constitutional practice has an uneasy relationship with entrenchment. The concept of constitutional entrenchment is alien to the unwritten constitutional tradition, but very limited use has been made of legislative entrenchment which purports to prescribe the 'manner and form' of any amending or repealing legislation. Previous examples of legislative entrenchment have focused on constitutionally significant issues such as democratic maintenance of the electoral system, and have mandated a 75 percent support threshold in order to demonstrate bi-partisan political support. The aborted Water Services Entities Act amendment would have extended entrenchment to a partisan policy position and would have engaged a threshold that favored the current center-left government rather than seeking bi-partisan support for an entrenched position. Both aspects risked eroding the legitimacy and efficacy of entrenchment as a stabilizing tool in respect of constitutional matters.

In the context of this contribution, the Water Services Entities Act might best be described as a failure of proposed constitutional reform. However, it is to the credit of the New Zealand Government, and a testament to the normative gravity of constitutional principles, that the amendment was reversed once the constitutional implications were identified and understood. The incident is a rare overt example of 'soft'

4 [2022] NZSC 114 and 115.
5 [2022] NZSC 142.
6 [2021] NZSC 131.

limits shaping what is possible in legislation in New Zealand and reaffirms the alignment between theoretically unlimited legislative power and constitutional principle.

The judiciary has also developed our rights jurisprudence in important ways in *Moncrief-Spittle v Regional Facilities Auckland Ltd*.[7] The facts of the case concerned the cancellation for safety reasons of a speaking event featuring high-profile, 'alt-right' personalities, in light of threats from protestors to disrupt the event. That cancellation decision was challenged as interfering with the protected right to freedom of expression under the New Zealand Bill of Rights Act. In dismissing the challenge, the case extended the scope of rights obligations over commercial entities and also addressed the issue of reasonable limits on the right to freedom of expression.

In terms of scope, the Supreme Court found that despite being a private entity (a limited liability company), the facility operator was undertaking public functions imposed on it by the relevant legislation. The High Court had initially found that the requisite 'publicness' was absent,[8] and indeed, part of the rationale for locating such facilities under the management of a private company seems to have been to disassociate facility management from the local public authority, Auckland Council. The Supreme Court preferred the view that the facility operator effectively stood in the shoes of Auckland Council by providing a service that is intended for the social well-being of the community. There was, therefore, a relevant governmental and therefore public aspect to the function of making venues available for use. The public nature of the function meant that the New Zealand Bill of Rights Act applied, and the facility operator had an obligation to protect the rights contained in it.

In terms of the right to freedom of expression itself, the Court found that while the right was interfered with, that interference was reasonable and justified. Cancellation was reasonable given the health and safety issues that arose. This finding aligns with the so-called 'reasonable' Bill of Rights approach in New Zealand that does not take rights protection as an axiomatic pre-requisite for constitutional government. Absolutist claims to freedom of expression are now clearly rejected in New Zealand, although the Court did emphasize that giving due weight to rights issues remains important.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The examples of reform outlined above are mostly incremental changes. They track against basic constitutional principles (either from a comparative constitutionalist or New Zealand-centric perspective) and align with the broad momentum of constitutional development in New Zealand. In this sense, there are no real issues with constitutional dismemberment or unamendability as the comparative constitutional literature generally understands those concepts.

It may be surprising to many outside of New Zealand that there has been such a focus on reform efforts led by the judiciary. Judicial decision-making itself and its potential to encourage statutory reform might usually be framed as falling outside of the scope of 'reform' understood as a formal and conscious effort to reshape constitutional matters at a high level of abstraction. In an unwritten constitutional context (and perhaps in other contexts as well) judicial decision-making can be the place where constitutional principles are considered most in-depth, and so a decision of a court to push against legislation or confirm basic principles carries developmental weight. Where our constitutional understandings change as a result, it is right and proper to consider this an instance of constitutional reform.

The critical exception to constitutional reform understood as incremental (and often judicial) development in the last year is the aborted efforts at legislative entrenchment. It is extremely difficult and controversial to theorize the role of entrenchment in New Zealand's constitution accurately. The unwritten nature of the New Zealand constitution does not lend itself to categorical restrictions on official action. The collection of impulses and pressures that align official conduct with expectations of constitutional propriety are, therefore, mostly and most prominently non-legal in nature. This is often leveled as a criticism of the New Zealand constitutional system. One implication is that, at a formal level, our constitution is quite flexible, even in the face of strong constitutional pressures that count against change. But the correlative implication is that political action can be effectively and efficiently undone when popular support changes. Government decision-making, whether political, policy-driven, or constitutional in nature, must maintain support over time if it is to endure.

As a result, attempts at entrenchment ought to be approached cautiously because they have the potential to interfere with the ability of the Constitution to self-correct through the ordinary operation of political processes. The unwritten constitution is in fact premised on stability through maintenance of these processes rather than formal entrenchment at the constitutional level, and so the idea of entrenchment is not a comfortable one in our constitutional tradition. Previous examples of legislative entrenchment have in fact been used solely to protect the ability of the political system to reinvent and self-correct on an ongoing basis. So, the Electoral Act 1993 purports to entrench via manner and form restrictions on several provisions related to the timing and conduct of national elections.[9]

All this is to say that further efforts at entrenchment ought to be approached cautiously to ensure that they do not, without very good reason, violate basic constitutional principles and processes native to the unwritten constitutional tradition. The attempt to include a 60 percent threshold for repeal or reform of certain ownership requirements in the Water Services Entities Act did not approach the issue in a constitutionally appropriate way. It proceeded by way of a last-minute amendment (via a Supplementary Order Paper late in the legislative process that avoided most opportunities for scrutiny) and appeared to seek to lock in a politically partisan policy preference on the basis of a transient parliamentary majority. However, legislative entrenchment is thought about in New Zealand, this example seemed to violate basic constitutional common sense.

It may be argued this example demonstrates a need for an expansive constitutional amendment in legislation or to the Standing Orders of the House on the basis that it exposes the vulnerability of constitutional mechanisms to political manipulation. However, my interpretation differs. It is notable, in my view, that when the constitutional impropriety

7 [2022] NZSC 138.
8 *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2019] NZHC 2399.
9 Section 268.

of the proposed entrenchment was notified to the Government, steps were immediately taken to understand the problem and work toward a resolution. This indicates to me that constitutional considerations are taken seriously at a political level, and conventional standards still have the potential to guide and shape appropriate political behavior. Ultimately New Zealand's unwritten, political constitution has been tested and survived. One can have confidence as well as hope that it will rise to the occasion once again if tested in the future.

IV. LOOKING AHEAD

In 2022 the Government appointed an expert Electoral Review Panel to investigate potential reform of the electoral system.[10] The Review is timely as New Zealand faces many of same the challenges arising in modern democracies around the world – declining party membership and voter turnout, deepening political polarization, and increasingly prevalent corruption in relation to campaign financing. Broadly, the Panel will report on the overall design of the legislative framework for the electoral system; maintaining a fit-for-purpose electoral regime for voters, parties, and candidates; and the term of Parliament. The Panel is due to report back by the end of 2023.

The prospects of any proposed reform being adopted are mixed. Electoral reform in New Zealand is subject to soft conventions of bi-partisan political support and popular approval. The likelihood of the Panel's recommendations being implemented will to a material extent turn on the ability to garner political and popular support.

It is also potentially of significance that New Zealand will undertake a national election in late 2023. While it is still too early in the electoral cycle for major policy to be announced, there is a chance that many recent developments will be tested at the ballot box. The current Government's 'co-governance' policy, which seeks to devolve governmental authority directly to iwi Māori in a limited way in areas such as local government and healthcare, is one area that is likely to come under considerable scrutiny by opposition parties. We will have to wait and see how much these issues matter to the New Zealand public.

V. FURTHER READING

Sarah Down "Tikanga Māori – Recognition but Key Questions Unanswered – *Ellis*" [2022] *Māori Law Review* online.

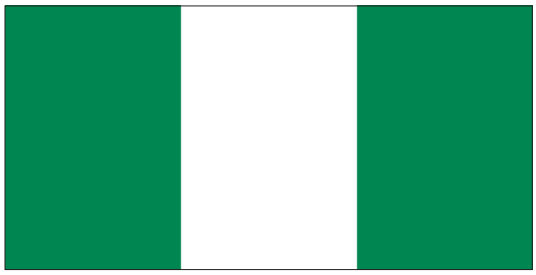
Independent Electoral Review "Consultation Document: An Invitation to Tell Us What You Think about Our Electoral System", available at https://electoralreview.govt.nz/assets/PDF/independent-electoral-review-consultation-document.pdf

Geoffrey Palmer "A Chink in the Armour of Parliamentary Sovereignty" [2022] *New Zealand Law Journal* 181.

Edward Willis "Judging the Minimum Voting Age" [2023] *New Zealand Law Journal* 17.

10 https://electoralreview.govt.nz/.

Nigeria



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I. INTRODUCTION

The constitutional reform programme of the 9th assembly, whose tenure ended on June 5, 2023, was completed with the assent of outgoing President Buhari (tenure ended May 28, 2023) of the Constitution Fifth Alteration Bills in April 2023. Both chambers of the National Assembly commenced the process to amend the constitution with public hearings in August 2020.[1] Forty-four alteration bills were passed by the National Assembly on March 2, 2022, and transmitted to the state legislatures on May 29, 2022. However, by December 2022, a majority of State Houses of Assembly had not voted on the Alteration Bills.[2] The leadership of the National Assembly alleged that State Governors' interference with the constitution reform process at the State Assemblies was responsible for this.[3] Though neither the Constitution nor judicial interpretation has assigned any role to State Governors, the lack of autonomy of State Assemblies from executive control ensures the governors' informal hegemony over the legislature.[4]

The procedure for the alteration of the Constitution involves a synergy between the National and State legislatures[5] and the President.[6] A bill for the alteration of the Constitution, which may originate from either chamber of the National Assembly (Senate or House of Representatives), must be passed by a two-thirds majority of each house and ratified by not less than two-thirds of the State Assemblies (which amounts to at least 24 states).[7] The alteration of sections 8, 9, and Chapter IV of the Constitution requires a higher voting threshold of four-fifths of each chamber of the National Assembly and subsequent approval of at least 24 State Assemblies.[8]

1 Maryam Hassan, "Senate begins Constitutional Amendment, calls for Memoranda," August 27, 2020 < https://dailynigerian.com/senate-begins-constitutional-amendment-calls-for-memoranda/>; Leke Baiyewun, "Reps begin Constitution Amendment Process, call for Memoranda," November 17, 2020 < https://punchng.com/reps-begin-constitution-amendment-process-call-for-memoranda/>

2 See "Why Constitution Amendment may not be completed before end of Ninth Assembly – Gbajabiamila" December 12, 2022 <https://www.premiumtimesng.com/news/headlines/570170-why-constitution-amendment-may-not-be-completed-before-end-of-ninth-assembly-gbajabiamila.html>

3 Udora Orizu, "Constitution Amendment: Another Exercise in futility?" December 27, 2022 < https://www.thisdaylive.com/index.php/2022/12/27/constitution-amendment-another-exercise-in-futility/>

4 See Gabriel O. Arishe, *Developing Effective Legislature* (Paclerd Press, 2017) 432.

5 S. 9 of the 1999 Constitution.

6 *Olisa Agbakoba v National Assembly & Attorney General of the Federation* [ruling delivered Novermber 8, 2010 by Mr. Justice Okechukwu Okeke of the Federal High Court sitting in Abuja].

7 S. 9(1) of the 1999 Constitution.

8 S. 9(2).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. PROPOSED REFORMS

Sixty-eight bills were recommended to the National Assembly for consideration by the joint constitutional reform committee of both chambers.[9] A summary of the reform proposals, as earlier reported in the 2021 review, showed that they were mainly on the below items:[10]

a) The federal structure and power devolution.
b) Public revenue, fiscal federalism, and revenue distribution.
c) State police.
d) Gender equity/increased participation of women and vulnerable groups in governance.
e) Local government administration and autonomy.
f) Judicial reform.
g) Socio-economic rights.
h) Equal rights for residents who are non-natives where they reside.
i) Removal of immunity for the President and Governors.

Both chambers rejected 24 of the recommended alterations but passed 44.[11] The rejected alterations included a simplified mode of overriding a presidential veto, gender equity/increased participation of women and vulnerable groups in government, and constitutional immunity for the legislative and judicial branches of government.[12] The 44 approved alterations were sent to the State Assemblies for approval. Six months after they were received from the National Assembly, 25 of the 36 State Assemblies failed to vote on the 44 alterations, demanding additional constitutional amendments including state police, state judicial council (similar to the National Judicial Council), streamlined procedure for removing presiding officers of State Houses

9 Queen Esther Iroanusi, "For the Record: 68 amendment bills proposed by Senate, Reps on Review of 1999 Constitution" February 28, 2022 < https://www.premiumtimesng.com/news/headlines/514423-for-the-record-68-amendment-bills-proposed-by-senate-reps-on-review-of-1999-constitution.html?tztc=1>

10 Solomon Ukhuegbe and Gabriel Arishe, "Nigeria" in Luis Roberto Barroso and Richard Albert (eds.), *International Review of Constitutional Reform* (2021) 168-174.

11 Amos Abba, "Constitution Amendment: How the National Assembly voted on 68 bills," March 2, 2022 < https://www.icirnigeria.org/constitution-amendment-how-the-national-assembly-voted-on-68-bills/>

12 Queen Esther Iroanusi, "How National Assembly voted on Constitution Amendment bills" March 2, 2022 < https://www.premiumtimesng.com/news/headlines/514738-how-national-assembly-voted-on-constitution-amendment-bills.html>

of Assembly, and institutionalisation of legislative bureaucracy in the constitutional reforms.[13] After prolonged horse trading, twenty-seven State Assemblies voted on the alterations, which ratified 35 of the 44 alterations. The 9 alterations rejected by the State Assemblies included financial and administrative autonomy for local government councils, an item that has a long history of rejection in successive constitutional reforms in the country.[14] The National Assembly transmitted the ratified 35 alteration bills to President Buhari in January 2023 for his assent. In March 2023, President Buhari assented to 16 of the alterations, vetoing 19.[15] Thus, of the 44 constitutional alterations passed by the National Assembly, only 16, or 36 percent, became constitutional amendments. The high attrition rate of constitutional alteration bills in Nigeria was analyzed in the 2020 review.

2. SUCCESSFUL REFORMS

The successful constitutional reforms by category are as follows: [16]

A) THE FEDERAL STRUCTURE AND POWER DEVOLUTION.

1. "Prisons" were renamed "Correctional Services" and removed from the Exclusive Legislative List to the Concurrent Legislative List.
2. "Railways" removed from the Exclusive Legislative List to the Concurrent Legislative List.
3. States are legally empowered to generate, transmit, and distribute electricity in areas covered by the national grid.

B) PUBLIC REVENUE, FISCAL FEDERALISM, AND REVENUE DISTRIBUTION.

Alterations rejected by the National Assembly.

C) STATE POLICE.

Alteration not proposed to the National Assembly by its joint reform committee.

D) GENDER EQUITY/INCREASED PARTICIPATION OF WOMEN AND VULNERABLE GROUPS IN GOVERNANCE.

Alterations rejected by the National Assembly.

E) LOCAL GOVERNMENT ADMINISTRATION AND AUTONOMY.

The alterations on administrative and financial autonomy were rejected by the State Assemblies while approving the change of names for some local governments only, which is an inconsequential amendment.

4. Renamed Afikpo North and Afikpo South Local Government Areas.
5. Renamed Kunchi Local Government Area.
6. Renamed Egbado North and Egbado South Local Government Areas.
7. Renamed Atigbo Local Government Area.
8. Renamed Obia/Akpor Local Government Area.

F) JUDICIAL (AND LEGISLATIVE) REFORM

9. Strengthened financial independence of State Houses of Assembly and Judiciaries.
10. Regulates the first session and inauguration of members-elect of the National and State Houses of Assembly.
11. Deletes reference to the Criminal Code, Penal Code, Criminal Procedure Act, Criminal Procedure Code, and Evidence Act from the Constitution.
12. Excludes the period of intervening events in the computation of time for determining pre-election petitions, election petitions, and appeals arising from them.
13. Provides for the post-call qualification of the Secretary of the National Judicial Council.

G) SOCIO-ECONOMIC RIGHTS.

14. Obligates the government to direct its policy towards ensuring the right to food and food security in Nigeria.

H) EQUAL RIGHTS FOR RESIDENTS WHO ARE NON-NATIVES WHERE THEY RESIDE.

Alterations rejected by the National Assembly.

I) CONSTITUTIONAL IMMUNITY FOR THE LEGISLATURE AND JUDICIARY.

Alteration rejected by the National Assembly.

J) OTHERS

15. Obligation on the President and Governors to submit the names of persons nominated as Ministers or Commissioners within sixty days of taking the oath of office for confirmation by the Senate or State House of Assembly.
16. Correction of the error in the definition of the boundary of the Federal Capital Territory, Abuja.

13 Queen Esther Iroanusi, "Updated: 25 States refuse to vote on constitution amendment bill, give reasons," October 18, 2022 < https://www.premiumtimesng.com/news/headlines/560217-updated-25-states-refuse-to-vote-on-constitution-amendment-bill-give-reasons.html>

14 Sunday Aborisade, "Constitution Amendments: State Assemblies reject LGs autonomy, eight other bills," January 25, 2023 <https://www.thisdaylive.com/index.php/2023/01/25/constitution-amendments-state-assemblies-reject-lgs-autonomy-eight-other-bills/> The following States did not vote in the amendment process: Gombe, Jigawa, Kebbi, Kwara, Oyo, Plateau, Sokoto, Taraba, and Zamfara.

15 Bakare Majeed, "UPDATED: Constitution Amendment: Buhari signs state assembly, judiciary independence bill, 18 others into law" March 17, 2023 < https://www.premiumtimesng.com/news/588145-updated-constitution-amendment-buhari-signs-state-assembly-judiciary-independence-bill-18-others-into-law.html>

16 See "List of the 16 constitutional alteration bills signed into law by President Buhari," March 17, 2023 < https://nta.ng/2023/03/17/list-of-the16-constitutional-alteration-bills-signed-into-law-by-president-buhari/>

3. FAILED REFORMS

There were recurrent failed reforms like financial and administrative autonomy for local governments. This failure, like many others, was occasioned by the resistance of informal veto players like State Governors who leverage their dominance of state assemblies to control the reform process. Some rejected proposals by the National and States Assemblies are examined below.

3.1. PROPOSALS REJECTED BY THE NATIONAL ASSEMBLY

3.1.1. SIMPLIFIED MODE OF OVERRIDING PRESIDENTIAL VETO

A key indicator of an effective legislature is the power to override an executive veto.[17] No doubt, the Constitution grants the legislature the authority to override the veto of the president, but the judicial interpretation of the override power has been rather prohibitive. Consequently, at the expiration of the tenure of each assembly, the bills without presidential assent lapse without the possibility of passage by a new assembly. The refusal of presidential assent paves the way for veto override by the legislature as provided for in section 58(5) of the Constitution:

> (5) Where the President withholds his assent and the bill is again passed by each House by two-thirds majority, the bill shall become law and the assent of the President shall not be required.

The veto override provision has rarely been utilized because of the uncertainty about the effect of a presidential breach of the time limit for giving or refusing assent, contrary to other instances with clear consequences. For example, the Constitution expressly creates a reversionary budget on recurrent expenditure for the president in default of appropriation for at least six months into a new financial year and also provides in clear terms that ministerial appointees are deemed to have been properly appointed in the absence of ratification within twenty-one working days of the receipt of presidential nomination by the Senate. On the contrary, the Constitution is neither compulsive on assent nor explicit as to the consequence of breaching the timeline for assent. The Constitution simply provides in section 58(4) that 'where a bill is presented to the President for assent, he shall within thirty days thereof signify that he assents or that he withholds assent.' Whether or not a failure to comply with the time stipulated in section 58(4) of the Constitution paves the way for a legislative override in subsection 5 is ambivalent. Presidential assent or communication on bills pending assent in thirty days has rarely happened. Presidential assent to a bill is usually open to conjectures and apprehension, consequently filibustering potential legislative override. During the waiting time, legislative support for the bill may wane, or the tenure of the assembly may expire, causing the bill to lapse. The Constitution is, however, explicit as to the consequence of the failure of presidential assent within the thirty days stipulated with regard to money bills. It provides in section 59(4)) that:

> (4) Where the President, within thirty days after the presentation of the bill to him, fails to signify his assent or where he withholds assent, then the bill shall again be presented to the National Assembly sitting at a joint meeting, and if passed by two- thirds majority of members of both Houses at such joint meeting, the bill shall become law and the assent of the President shall not be required.

The failure of presidential assent within thirty days is tantamount to a veto paving the way for a legislative override. However, the veto override provisions are cumbersome as judicially elucidated that a repetition of the entire procedure for passing a bill together with a super-majority (two-thirds of each chamber for non-money bills and two-thirds of both chambers at a joint sitting for money bills)[18] is required. In *National Assembly v The President and Others*,[19] the Electoral Bill 2002 was passed by the National Assembly in February 2002 and presented to President Obasanjo for assent. Following communication of the refusal of assent, the Senate on September 25, 2002, and the House of Representatives on the following day passed motions to override the President by a two-thirds majority of members present (55 in the Senate and 204 in the House of Representatives) as against their total membership of 109 and 360 respectively. Consequently, the Independent National Electoral Commission (INEC) sought judicial clarification of the status of the Electoral Act passed on September 25 and 26 of 2002 through veto override. The Federal High Court declared the Electoral Act unconstitutional, and the National Assembly appealed. The Court of Appeal held that what the National Assembly did was 'merely to pass a motion for veto override,' which falls short of a repetition of the entire process of passing the bill contemplated by section 58(5).[20] The appellate court held further that the National Assembly was not properly constituted at the time it overrode the President's veto in that the majority used for the purpose was only two-thirds of members present instead of that of the entire membership.

These two requirements have made veto override difficult. The rejection by the National Assembly of the proposed amendment to simplify the veto override procedure was a missed opportunity to strengthen its legislative authority.

3.1.2. GENDER EQUALITY/INCREASED PARTICIPATION OF WOMEN AND VULNERABLE GROUPS IN GOVERNANCE

The Inter-Parliamentary Union's toolkit advances the expectations and requirements for a 'democratic parliament' with clear indicators, one of which is: 'How careful parliament is in ensuring a gender-equality

17 Arishe, *Developing Effective* Legislature, 235-246; M. Steven Fish and Matthew Kroenig, *The Handbook of National Legislatures – A Global Survey* (Cambridge University Press, 2009) 5-13.

18 Ss. 58(5) and 59(4).

19 [2003] 9 N.W.L.R. (pt. 824) 104.

20 *Ibid*, 132 (per Oguntade, J.C.A.). While the court came to the conclusion that the Electoral Act of 2002 was not properly passed, it however refused to nullify it because elections were already billed to be held based on it.

perspective in its work.'[21] Though gender representation is one of the many normative problems that surround democratic representative government, the African Union has declared its support for the "promotion of political pluralism or any other form of participatory democracy and the role of the African civil society, including enhancing and ensuring gender balance in the political process."[22] An outright rejection of the constitutional reform to enhance gender equity and participation of women and the vulnerable in government is retrogressive and a detraction from democratic representation.

3.1.3. CONSTITUTIONAL IMMUNITY FOR LEGISLATIVE AND JUDICIAL ARMS OF GOVERNMENTS

One of the criticisms against the immunity contained in the Constitution, apart from its absolute nature, is its elitism in immunizing the president/vice president and the governor/deputy governor from the legal process. The immunity of the judiciary is based on common law. That of the legislature, though statutorily provided for,[23] has had its originally limited protection further circumscribed by judicial nullification.[24] The elevation of the immunity of the other branches to a constitutional one would have balanced the status of the branches to a great extent, but this opportunity was missed again. The judiciary has expanded its immunity, though, through judicial interpretation. The courts have now established the rule that the removal[25] or prosecution[26] of a serving judicial officer is unconstitutional without the recommendation of the National Judicial Council. While judicial immunity has been expanded, the legislature rejected the proposal to give itself additional immunity for official acts, and this is not the first missed opportunity.[27]

3.2. PROPOSAL REJECTED BY STATE ASSEMBLIES

The State Assemblies failed to vote on the two bills that gave financial and legislative autonomy to local governments. By section 7 of the Constitution, States are to ensure the existence of a democratic system of local governments, but whether States can create new local governments received an ambivalent answer from the Supreme Court.[28] Given their supervisory role, States receive from the Federation Account for disbursement of the monthly statutory allocation due to local governments in their territory.[29] There have always been allegations of non- or under-disbursement of allocated funds by States, consequently starving local governments of operational funds. In order to cure this, the National Assembly had in the past made laws to compel actual disbursement by States but failed after States challenged the constitutionality of the laws. In *Attorney General of Ogun State v. Attorney–General of the Federation*,[30] the Supreme Court ruled that the National Assembly law that compelled the direct allocation of funds from the Federation Account to local councils was unconstitutional in light of section 162(5)(6). Thereafter, the Monitoring of Revenue Allocation to Local Governments Act 2005 was enacted. The apex Court again ruled that the obligation the law imposed on States to render an account of monthly disbursements to their local councils to the Federation Account Allocation Committee, a federal body, violated the principle of federalism in the Constitution.[31] Previous attempts at amending section 162(5(6) to permit the direct allocation of funds to local councils failed at the State Assembly level. It is, therefore, not surprising that State Assemblies again rejected the amendment. The persistent rejection appears to give credibility to allegations of under-disbursement by States.

3.3. PROPOSALS REJECTED BY THE PRESIDENT

Most of the alterations rejected by the President were reforms targeted at compelling executive accountability.[32] Some of them are:

1. Authorization of the National and State Assemblies to summon the President and Governors to answer questions on issues of governance.
2. Making obedience to legislative summons obligatory for persons.
3. Compulsory state-of-the-nation and state-of-the-State addresses by the President and Governors, respectively.
4. Time limit for the presentation of the Appropriation Bill before the National and State Assemblies.

The rejection of these alterations indicates a predominance of authoritarianism in the constitutional order.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

While the amendments on the prison (now Correctional Services) and electricity are significant on devolution, the other changes are less substantial. What the amendment on state judiciary and legislature's financial independence achieves is difficult to assess at the moment. Already, sections 84 (2) (4) (7) and 121 (3) of the Constitution, the latter introduced by the 4th alteration of 2017, mandates fiscal autonomy for State Assemblies and Judiciaries. Section 121 provides that:

21 Marilyn Achiron, *Evaluating Parliament: a Self-assessment Toolkit for Parliaments* (Geneva: Inter-Parliamentary Union, 2008).
22 Lome Declaration (of July 2000) on the Framework for An OAU Response to Unconstitutional Changes Of Government (AHG/Decl.5 (XXXVI)) < https://au.int/sites/default/files/decisions/9545-2000_ahg_dec_143-159_xxxvi_e.pdf>
23 Legislative Houses (Powers & Privileges) Act Cap. L12 Laws of the Federation of Nigeria 2010.
24 Arishe, *Developing Effective Legislature*, 309-321.
25 *Hon. Justice Raliat Elelu-Habeeb and Anor v AG Fed and 2 Ors* [2012] 13 NWLR (pt. 1318) 423 – 546.
26 *Honourable Justice Hyeladzira Ajiya Nganjiwa v Federal Republic of Nigeria* (2017) LPELR-43391(CA).
27 Arishe, *Developing Effective Legislature*, 309-322.
28 *Attoney General Lagos State v Attorney General Federation* [2004] 18 NWLR (pt. 904) 1.
29 S. 162(5)(6).
30 [2002] 18 N. W. L. .R. (pt. 798) 232.
31 [2006] 9 M. J. S. C. 1.
32 Tope Omogbolagun, "NASS to probe 19 Bills rejected by Buhari – Lawan" March 21, 2023 < https://punchng.com/nass-to-probe-19-bills-rejected-by-buhari-lawanf>

(3) Any amount standing to the credit of the –
(a) House of Assembly of the State; and
(b) Judiciary;
in the Consolidated Revenue Fund of the State shall be paid directly to the said bodies respectively; in the case of the judiciary, such amount shall be paid directly to the heads of the courts concerned.

However, there is no symmetry between text and reality, given the financial stifling of state judiciaries.[33] The fight for financial autonomy by the judiciary has been a long and tortuous one.[34] Renowned lawyer Mr. Olisa Agbakoba SAN, in a suit against the Attorney-General of the Federation, the National Judicial Council (NJC), and the National Assembly in February 2013 at the Federal High Court, Abuja,[35] challenged the methods of appropriation of the judiciary's budget in light of provisions of the Constitution. In that case, Justice Ahmed Mohammed ordered (on May 26, 2014) that money belonging to the judiciary in the consolidated revenue of the federation must be 'fully paid directly' to the NJC who prepares the judiciary's budget as charged upon the Consolidated Revenue for submission to the Accountant-General of the Federation. Justice Mohammed further restrained the federal government and the National Assembly from reducing the budgetary allocation of the judiciary submitted by the NJC judiciary in the annual Appropriation Act.[36]

In an earlier case, Justice Adeniyi Ademola of the Federal High Court Abuja made an order to abolish 'piecemeal payments/allocations of funds through states' ministries of finance to states' judiciary directing that the various state governments should pay the 'funds/amounts standing to the credit of the state's' judiciary in the federation/consolidated revenue fund to the heads of courts in the various state.'[37] Both rulings were not obeyed. This led to the strike action by the bureaucracy of state judiciaries under the Judiciary Staff Union of Nigeria (JUSUN)) to pressure for compliance but without success.[38]

The Constitution (4th Alteration) Act (which came into existence on the 7th of June, 2018 following the assent of President Mohammadu Buhari) was received with enthusiasm that a change to fiscal independence for the judiciary had been endorsed by the political branches.[39] Other than the optimism of endorsement, the excitement about the 4th Alteration was unwarranted because it only extended the application of the section to State Assemblies; the initial section 121(3) of the Constitution already granted direct funding for the State Judiciaries.[40] In spite of this, since 2018, the funding model of State Assemblies and Judiciaries remains unchanged. It remains to be seen what the latest alteration will achieve. Nonetheless, the latest alteration might as well be a restatement of the financial autonomy already provided for by the Constitution.

IV. LOOKING AHEAD

The 10th National Assembly will be inaugurated on June 5th, 2023. As was with previous assemblies, it is expected that constitutional reform will top its agenda. Agitation for constitutional reforms remains high due to ethnic nationalism exacerbated by the selection of candidates by political parties for the 2023 general elections.[41] Most of the reforms are likely to be on power devolution, given the persistence of the agitation for 'true' federalism. Financial and administrative autonomy for local governments will most likely recur on the reform agenda. The effect of the 5th Alteration Act on the funding model for state assemblies and judiciaries will be an important assessment index for the latest alterations. The new time limit of sixty days for the submission of ministerial and commissioner nominees by the President and Governors (which surprisingly was not vetoed) should hopefully eliminate inordinate delay in the selection of cabinet ministers, such as the four months it took President Buhari to send names of ministerial nominees to the National Assembly in 2015.[42] The test will be whether the incoming President faithfully complies with this constitutional mandate.

33 Oladotun Gbolagunte, 'An Independent Judicial System in Nigeria: The Challenges', *Linkedin* (March 1, 2016) - <https://www.linkedin.com/pulse/judicial-system-nigeria-challenges-oladotun-gbolagunte>

34 See Kazeem Ugbodaga, 'Lagos chief judge cries for financial autonomy', *The News Nigeria* (Oct 3 2015 - 6:31pm) - <http://thenewsnigeria.com.ng/2015/10/lagos-chief-judge-cries-for-financial-autonomy/>

35 *Olisa Agbakobav v FGN, The NJC & National Assembly*, Suit No: FHC/ABJ/CS/63/2013 - <https://olisaagbakoba.wordpress.com/2013/02/07/olisa-agbakoba-vs-fg-the-njc-national-assembly/>

36 The Cable, 'Executive loses control over judiciary budget' May 27, 2014 - <https://www.thecable.ng/executive-loses-control-over-judiciary-budget>; Tobi Soniyi, 'Nigeria: Judiciary Must Be Paid from Consolidated Fund, Court Rules' *All Africa* (May 27, 2014) - <https://allafrica.com/stories/201405270444.html>

37 Mary Ebimiesinde and Michael Oche, 'Financial Autonomy: We Hope to See a New Judiciary – JUSUN', *Leadership* Newspaper (June 12, 2018) - <https://leadership.ng/2018/06/12/financial-autonomy-we-hope-to-see-a-new-judiciary-jusun/>

38 Favour Percy-Idubor, 'Strike: JUSUN Shut Supreme Court, Others,' *The Pointer* - <http://thepointernewsonline.com/?p=35202>; 2018; Metrowatch, 'Courts Closed, Lawyers Groan as JUSUN Begins Indefinite Strike', January 6, 2015 - <https://metrowatchonline.com/courts-closed-lawyers-groan-jusun-begins-indefinite-strike/>

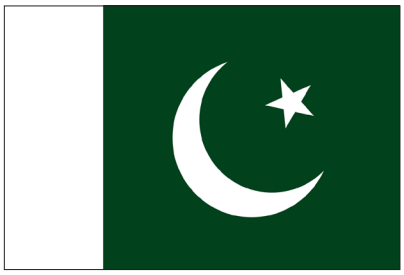
39 See Senator Ita Enang, "Assent to Constitution of the Federal Republic of Nigeria, 1999 Alteration Acts," 2(7) (2018) Legislative Digest, 31.

40 See s. 121(3) of the Constitution of the Federal Republic of Nigeria, 1999 (Lagos: Federal Government Press, 1999).

41 See Gboyega Akinsanmi, "Fresh Agitation after Constitutional Amendment," March 26, 2023 < https://www.thisdaylive.com/index.php/2023/03/26/fresh-agitations-after-new-constitution-amendment/>

42 Henry Umoru and Joseph Erunke, "At last, Buhari Sends Ministers' List to Senate" October 1, 2015 < https://www.vanguardngr.com/2015/10/at-last-buhari-sends-ministers-list-to-senate/>

Pakistan



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I. INTRODUCTION

In spite of the introduction of the Eighteenth Constitutional Amendment in 2010, which aimed at decentralization, restoring parliamentary character, and redefining the relationship between parliament and judiciary, Pakistan continues to face power struggles, centralization issues, enhanced bureaucratization, corruption, military control, and attacks on judicial independence.[1] The year 2022 has been marked by a deepening constitutional crisis, with economic and political turmoil becoming increasingly significant. After a vote of no-confidence was passed against Imran Khan, the then Prime Minister, the government ended abruptly. However, Shehbaz Sharif, who became the head of the incumbent government, failed to revive the economy and limit political interference from the military establishment.[2] With high inflation rates and international debt crippling the economy, the Supreme Court of Pakistan was faced with important constitutional issues, and one example is the Court's decision about the Presidential reference regarding voting by people against party lines.[3] Despite the political chaos in Pakistan, the country made history when Justice Ayesha A. Malik took oath as the First Female Justice of the Supreme Court of Pakistan.[4] It is important to note that the courts in Pakistan were crucial in delivering important judgments. For instance, the Lahore High Court struck down Section 124-A of the Pakistan Penal Code (1860) as being violative of the fundamental rights of citizens under Articles 19 and 19A of the Constitution.[5] Additionally, the Federal Shariat Court (FSC) held that the Punjab Protection of Women Against Violence Act (2016) does not breach Islamic law as established in the Holy Quran and Sunnah of the Holy Prophet (PBUH).[6]

1 Rana, M. A. (2020). Decentralization Experience in Pakistan: The 18th Constitutional Amendment. Asian Journal of Management Cases, 17(1), 61–84. https://doi.org/10.1177/0972820119892720.

2 Salman Rafi Sheikh, 'Pakistan needs to go beyond the 18th amendment to end military's role in politics' (*Himal South Asian*, 30 January 2023) <https://www.himalmag.com/pakistan-military-beyond-18th-amendment-constitution-politics/> accessed 30 April 2023.

3 Nasir Iqbal, 'Defectors' votes on motion don't count' (*Dawn*, 18 May 2022) <https://www.dawn.com/news/1690249/defectors-votes-on-motion-dont-count-sc-holds> accessed 30 April 2023.

4 Haroon Janjua, 'First Female Judge at Pakistan's Top Court' (*DW*, 17 January 2022) <https://www.dw.com/en/ayesha-malik-how-this-pakistani-female-judge-shatters-the-glass-ceiling/a-60450671> accessed 30 April 2023.

5 Rida Tahir, 'Lahore High Court Strikes Down Pakistan's Colonial-era Sedition Law' (*Oxford Human Rights Blog* 11 May 2023) <https://ohrh.law.ox.ac.uk/lahore-high-court-strikes-down-pakistans-colonial-era-sedition-law/> accessed 11 May 2023.

6 Rida Tahir, 'Pakistan's Federal Shariat Court Affirms that the 'Punjab Protection of Women Against Violence Act 2016' Aligns with Islamic Injunctions' (*Oxford Human Rights Blog* 2 February 2023) <https://ohrh.law.ox.ac.uk/pakistans-federal-shariat-court-affirms-that-the-punjab-protection-of-women-against-violence-act-2016-aligns-with-islamic-injunctions/> accessed May 1, 2023.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. PROPOSED AMENDMENT TO PAKISTAN ARMY ACT, 1952

The Pakistan Government sought to introduce a constitutional amendment to empower the Prime Minister to retain the Army Chief with a mere notification. In accordance with the proposed amendment to Section 176 of the Pakistan Army Act (PAA), 1952, which is titled "Power to make Rules," the word 'retention' shall be inserted after 're-appointment' and the word 'resignation' would be inserted after the word 'release.'[7] The proposed amendment aims to empower the Prime Minister to retain any candidate with a simple notification rather than undergoing a complex constitutional process involving the role of the President. Considering that the role of the Army Chief wields huge power, such a step would unduly affect the constitutional equilibrium. The proposed amendment would be put before the Cabinet Committee for Disposal of Legislative Cases (CCLC) following the approval by the Ministry of Defence, the proposed amendment would be sent to the Parliament. However, the news earlier had been officially denied by Khawaja Asif, the defense minister, stating that the Government is not officially considering such an amendment to the PAA.[8]

2. PAKISTAN'S PRESIDENT RETURNS ISLAMABAD CAPITAL TERRITORY LOCAL GOVERNMENT BILL UNSIGNED

The political instability in Pakistan continued as the President, Dr. Arif Alvi, returned the Islamabad Capital Territory Local Government (Amendment) Bill, 2022, unsigned based on clause (1) (b) of Article 75 of the Constitution, which deals with the President's assent to bills.[9]

7 Riazul Haq, 'Legal tweak to allow PM to retain army officers with stroke of pen' (*Dawn*, November 16, 2022) < https://www.dawn.com/news/1721171> accessed on 28 April, 2023.

8 'Pakistan Government not considering 'Major Changes' in the Army Act – Defense Minister' (*Arab News*, October 19, 2022) <https://arab.news/yt2cg> accessed 28 April 2023.

9 PR No. 01/2023, 'President returns ICT Local Government (Amendment) Bill unsigned' (*The President of Pakistan*) <https://president.gov.pk/news/president-returns-ict-local-government-amendment-bill-unsigned#:~:text=President%20returns%20ICT%20Local%20Government%20(Amendment)%20Bill%20unsigned&text=Islamabad%2C%2001%20January%202023%3A%20President,Article%2075%20of%20the%20Constitution.> accessed 28 April 2023.

The bill aimed at further delaying the conduction of elections, and the refusal to sign the bill would lead to further political turmoil and legal struggles between the various stakeholders. The President officially stated that the "Actions of the Federal Government taken in hurry resulted in delaying the election process twice, which was anathema to democracy." Furthermore, the President asserted that the elections could not be held due to *malafide* actions of the Federal Government in the Islamabad Capital Territory (ICT).[10]

3. DRACONIAN ORDINANCE CURBS FREE SPEECH IN THE NAME OF CURBING FAKE NEWS

The freedom of speech and expression was allegedly further compromised with the government's introduction of what many consider a draconian ordinance, a law that is considered excessively harsh. On February 18, 2022, the Government of Pakistan passed an ordinance amending the Pakistan Electronic Crimes Act (PECA), 2016, to make online "defamation" of authorities, including the military and judiciary, a criminal offense with severe penalties.[11] International organizations such as Amnesty International have voiced concerns about the chilling effect on freedom of speech in Pakistan and have urged the government to repeal the amendment. This is touted as not only a law that violates the Constitution of Pakistan, but it is also an instrument that endangers the life of journalists, political opponents, or anybody who criticizes the government.[12]

4. SUPREME COURT ISSUES DETAILED JUDGMENT ON DISMISSAL OF RESOLUTION OF NO-CONFIDENCE MOTION AGAINST THE THEN PRIME MINISTER IMRAN KHAN

A significant intervention, through a short order, of the Supreme Court of Pakistan was vital in preventing constitutional chaos. The Court provided a detailed order with reasons regarding its decision in July 2022. In April 2022, a political and constitutional crisis emerged in Pakistan when National Assembly's Deputy Speaker, Qasim Khan Suri, dismissed a no-confidence motion against then-Prime Minister Imran Khan. This dismissal occurred during a session in which the motion was expected to be taken up for a vote. In his decision, Suri alleged that a foreign country's involvement in the regime change was contradictory to Article 5 of the Constitution of Pakistan.[13] On the same day, the President dissolved the National Assembly on the advice of the PM under Article 58.[14] In response to the ongoing situation, the Supreme Court of Pakistan (SCP) took a Suo Motu, "on its own motion" notice. The SCP ruled that the dismissal of the no-confidence motion, the prorogation of the National Assembly, the advice from Imran Khan to President Arif Alvi to dissolve the National Assembly, and the subsequent dissolution of the National Assembly were unconstitutional. In a unanimous 5-0 decision, the Court overturned these actions.[15] The Supreme Court's ruling during the political turmoil was a significant development in the constitutional ecosystem of Pakistan. During these tough times, the Supreme Court of Pakistan's decisions restored popular faith in the Constitution and ensured democratic stability.

5. DEBATES OVER THE 15TH CONSTITUTIONAL AMENDMENT ACT, 2022 IN AZAD JAMMU & KASHMIR

The proposed 15th Constitutional Amendment Bill to the Azad Jammu & Kashmir (AJ & K) interim Constitution Act, 1974, instigated uprisings even before being tabled for its overreaching agenda to overturn the historic 13th Constitutional Amendment and divest the financial, administrative, and constitutional powers of the Kashmir Council.[16] The bill envisages reconstitution of the Kashmir Council under the Chairmanship of the Prime Minister and other changes which include the prior approval from the Government of Pakistan for the proposed amendment to the Constitution of AJ&K, the authority of the Prime Minister to appoint the Supreme Court Justices, Chief Election Commissioners, and Auditor Generals. These appointments shall not be challenged in any court and suggest a shift of certain powers that were previously under the prerogative of the President and Legislative Assembly of the AJ&K.[17] On August 13, 2022, the bill was presented in the House and was later sent to a ten-member committee for discussion and deliberations.[18]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

It has been stated by Imran Khan, the Chief of Pakistan Tehreek-e-Insaf (PTI), that the proposed amendment to the Pakistan Army Act, 1952, is unconstitutional and the same would be subjected to challenge before the Supreme Court after it materializes. On the date of the submission of the report, there was no updated news on the status of the proposed amendment. However, if the amendment is passed as per the mandate provided under the Constitution, it would present an illustration of dismemberment rather than a constitutional amendment. In T*Fazlul Quader Chowdhry v. Muhammad Abdul Haque*, the Pakistani Supreme Court ruled that the provisions could not be significantly

10 See, *Haroon Farooq v Federation of Pakistan*, W.P No.59599 of 2022 and *Muhammad Ibrahim Khan v. Province of Punjab*. <https://www.federalshariatcourt.gov.pk/Judgments/Shariat%20Petition%2003-I%20of%202016%20Prof%20M%20Ibrahim%20Khan%20-%20Women%20Protection.pdf> accessed on April 30, 2023.

11 News Report, 'Pakistan: Repeal Amendment to Draconian Cyber Law' (*Human Rights Watch*, February 28, 2022) <https://www.hrw.org/news/2022/02/28/pakistan-repeal-amendment-draconian-cyber-law> accesed on 30 April 2023.

12 News Desk, 'Govt urged to repeal amendment to 'draconian' PECA Ordinance' (*The Express Tribune*, 1 March 2022) <https://tribune.com.pk/story/2345673/govt-urged-to-repeal-amendment-to-draconian-peca-ordinance> accessed on 30 April 2023.

13 The Constitution of Pakistan 1973, art. 5.

14 The Constitution of Pakistan 1973, art. 58.

15 Express Web desk, 'Pakistan Supreme Court quashes Deputy Speaker's ruling, PM Imran Khan to face no-trust vote on Saturday' (*The Indian Express*, 8 April 2022) < https://indianexpress.com/article/pakistan/imran-khan-no-trust-vote-pak-sc-quashes-dy-speaker-ruling-national-assembly-dissolution-7858622/> accessed 2 May 2023.

16 Ashok Bhan, 'Pakistan pushes PoJK to the verge of major crisis' (*The Sunday Guardian*, 6 August 2022) <https://sundayguardianlive.com/legally-speaking/pakistan-pushes-pojk-verge-major-crisis> accessed 5 May 2022.

17 Sabur Ali Sayyid, '15th Constitutional Amendment Bill in AJ&K' (*Institute of Policy Studies, Islamabad*, 25 October 2022) <https://www.ips.org.pk/policy-brief-15th-constitutional-amendment-bill-in-ajk-background-controversies-and-proposed-course-of-action/> accessed 5 May 2022.

18 Daily Parliament Times, '15th Amendment Act 2022 presents in AJK Legislative Assembly' (*Parliament Times*, 14 August 2022) <https://www.app.com.pk/domestic/15th-constitutional-amendment-bill-lands-in-ajk-assembly-for-deliberations/> accessed 5 May 2022.

altered to change the very nature and foundation of the Constitution.[19] It is important to note that potential consequences such as opposition from various stakeholders, political instability, and enhanced role of Pakistan's Army, could topple the functioning of the government and its adherence to constitutional mandates. The Supreme Court of Pakistan has already been at an overly critical juncture in its relationship with other branches of the government. With Pakistan being a state wherein power remains contested, the judiciary is placed in a unique position leading to the judicialization of politics.[20] Since the Chief Justice has the power to decide benches that hear matters regarding constitutional interpretation, there are serious concerns regarding the Chief Justice manipulating the Court to reach desired outcomes.[21]

By returning the Islamabad Capital Territory Local Government (Amendment) Bill of 2022 unsigned, the President has raised important constitutional questions in Pakistan. However, this action taken by the President has been justified by clause (1) (b) of Article 75 of the Constitution. As one of the key developments in the front of democracy, this action of the President comes at a time when political and economic instability is looming large over the country. If the President denies assent to the bill passed by the Parliament, it is deemed to have been given within a period of 10 days. This is not the first time that the President returned the bill unsigned. Since the change of Government on April 10, 2022, the President has returned unsigned amendments in the NAB law, the National Accountability (Second Amendment) Act, 2022, the Elections (Amendment) Act, 2022, and the Pakistan Institute of Medical Sciences (PIMS) Act, 2023.[22] The Local Government Elections were scheduled to be held on December 31, 2022, but could not be held on this day. On December 30, the Islamabad High Court Bench ordered the Election Commission to conduct the polls, but the Federal Government decided to challenge the decision. Because of the Pakistani government's challenge, the Election Commission could not implement the court's decision to conduct the polls due to a lack of time and resources.[23] The struggle over the bill continued with the Federal Government and Election Commission of Pakistan (ECP) proceeding against the Islamabad High Court's (IHC) order. Additionally, the Pakistan Tehreek-e-Insaf's (PTI) petition sought contempt of court proceedings against the center.[24]

The Government of Pakistan's ordinance amending the Pakistan Electronic Crimes Act (PECA), 2016 has, in the garb of reform, contributed to protests amongst human rights defenders, opposition politicians, and journalists across the nation. Although it is not a constitutional amendment, the amendment can be fairly categorized as constitutional dismemberment as it aims to repudiate the essential feature of the Constitution, which is free speech in this instance. The law has also received criticism from stakeholders as it is a direct attempt to suppress free expression in the name of curbing fake news. The Ordinance (2022) expands upon these provisions to include criticism of government bodies and the military by inserting a new definition of "person" that refers to "any company, association, or body of persons, institution, organization, authority, or other body established by the Government under any law or otherwise." By expanding the definition of what a "person" is, associations and institutions can claim defamation—something which is unheard of in common law. The ordinance also makes defamation a non-bailable offense and expands the definition of those who can initiate criminal proceedings. It is interesting to note that Pakistan has ratified the International Covenant on Civil and Political Rights (ICCPR), which protects the right to freedom of expression that works as a constitutional control. Although it is a temporary order, the Islamabad High Court directed the authorities to not make arrests under this provision. However, the draconian law does not protect the fundamental right to free speech nor curbs cybercrime.[25]

On July 13, 2022, the Supreme Court of Pakistan (SCP) published the detailed judgment giving the reason for its order on April 7, 2022, ruling that the dismissal of the no-confidence motion, the prorogation of the National Assembly, the advice from Imran Khan to President Arif Alvi to dissolve the National Assembly, and the subsequent dissolution of the National Assembly were unconstitutional. The Court unanimously overturned these actions in a 5-0 vote.[26] The court's decision was instrumental in strengthening individuals' trust in the institution and was no less than a reform. Although it was not a law or amendment from the legislature, the effects of this judgment were coherent with the ideals of liberal constitutional values, rarely seen in the democratic sphere of Pakistan. The judgment took a progressive leap in the jurisprudence of Judicial review in Pakistan as the court held, "*[W]hen national security is taken as a defence to sustain a decision by the Government that is prima facie unconstitutional then the Government is under an obligation to substantiate the bona fides of its defence. To do so, the Government must produce evidence to demonstrate the defence to escape legal scrutiny of its impugned action.*"[27] In these challenging times of constitutional turmoil, the judgment is a silver lining that could be a tool to successfully strengthen the institution and tackle the ongoing crisis.

Introduced as a reform, the 15th Constitutional Amendment Bill to the Azad Jammu & Kashmir (AJ & K) Interim Constitution Act (1974) has attracted immense protest. What does it aim to do? The bill makes significant changes such as "*Reconstitution of the Kashmir*

19 *Fazlul Quader Chowdhry v. Muhammad Abdul Haque*, PLD 1963 SC 486.

20 Yasser Kureshi, 'At the Center of the Storm: Pakistan's Political Crisis and the Supreme Court' (*IACL-AIDC Blog*, May 6, 2022) <https://blog-iacl-aidc.org/new-blog-3/2022/5/6/at-the-center-of-the-storm-pakistans-political-crisis-and-the-supreme-court> accessed 29 April 2023.

21 L. Ali Khan, 'Pakistan's Chief Justice Undermines Supreme Court Credibility', (*Jurist*, July 27, 2022) <https://www.jurist.org/commentary/2022/07/pakistans-chief-justice-undermines-supreme-court-credibility/> accessed on 29 April 2023.

22 Pakistan Institute of Legislative Development and Transparency 'Update on the Performance of Democratic Institutions' (*PILDAT*, 10 February 2023) <https://pildat.org/inter-institutional-relations/update-on-the-performance-of-democratic-institutions-january-2023> accessed 29 April 2023.

23 Nausheen Yusuf, 'Anathema to Democracy: President Returns Bill Proposing Increase in UCs of Islamabad' (*Geo News*, January 01, 2023) < https://www.geo.tv/latest/462247-anathema-to-democracy-president-returns-bill-proposing-increase-in-ucs-of-islamabad > accessed on 29 April 2023.

24 Awais Yousafzai, 'IHC to hear govt, PTI and ECP pleas on capital local body polls next week' (*Geo News*, December 31, 2022) <https://www.geo.tv/latest/461987-govt-ecp-to-challenge-ihcs-order-to-hold-lg-polls-in-capital-today> accessed on 29 April, 2023.

25 News Report, 'Pakistan: Cybercrime Bill Threatens Rights' (*Human Rights Watch* 15 April 2015) <https://www.hrw.org/news/2015/04/20/pakistan-cybercrime-bill-threatens-rights> accesed 30 April 2023.

26 *Supra* note at 15.

27 *Pakistan People's Party Parliamentarians (PPPP) through its Secretary General Mr. Farhatullah Babar and others v. Federation of Pakistan through Secretary M/o Law and Justice Islamabad and others* SUO MOTO CASE NO.1 OF 2022.

Council under the Chairmanship of the Prime Minister of Pakistan with members including the Foreign Minister, the Interior Minister, and the Finance Minister of Pakistan." "No amendment in the constitution of AJ&K is to be made without seeking prior approval from the Government of Pakistan " etc. Thus, equivocal amendments lead to strong public reactions detrimental to the existing Kashmir struggle.[28] However, the fate of the bill was locked as protests started to occur, the bill was withdrawn by the AJ&K government.[29]

IV. LOOKING AHEAD

As we draft this report, Pakistan has slumped into an unprecedented constitutional crisis.[30] This crisis started last year (2022) with an attempt to dissolve the national assembly, defy the general election in the country, suppress free speech, and illegally arrest former Prime Minister Imran Khan. Since then, the democratic divide in Pakistan has only deepened. In this context and the development quoted above, 2023 will be a significant year in determining the constitutional aspirations of the country which is currently facing political turmoil. It is no surprise that the Army in Pakistan has played and continues to play a significant role in determining the political course of the country in terms of its leadership, government, and policies. However, with the ascent of Imran Khan to the Prime Minister's role, that assertive figure of the Army was briefly sidelined. Thus, it is assumed that the arrest of the ex-Prime Minister Imran Khan from the premises of Islamabad Court is indicative of concerns of the Army. Many individuals believe this may very well be a resurgent step taken to gain control of governance. Consequently, it is also a tactical coup over a democratically elected government. Therefore, the role of courts in 2023 will be worth keeping an eye on as they may be instrumental in being the hope of constitutional commitments and a barrier to the Army. Regarding this context, the release of Imran Khan ordered by the court becomes pertinent when it comes to the future of the country. Lately, the court has played an immensely positive role in ensuring democratic stability and constitutional norms. Additionally, Pakistan also saw the law passed by Parliament curtailing the power of the Chief Justice.[31] The judiciary's response to this law will be another important development to closely examine this year. Therefore, this year will be a focal year for Pakistan from a constitutional and democratic perspective. It will also be crucial to see how the Pakistani government responds to the looming threat of democratic backsliding, specifically to the draconian laws limiting free speech. Additionally, the severe allegations of corruption within the judiciary will also require attention to uphold the integrity and independence of the judiciary branch.

28 *Supra* note at 17.

29 Tariq Naqash, 'AJK Government withdraws 15th Amendment Bill' (*Dawn*, 19 August 2022) <https://www.dawn.com/news/1705609> accessed 5 May 2022.

30 Simon Fraser & Caroline Davies, 'Imran Khan: Pakistan's Supreme Court rules arrest was illegal' (*BBC News* 12 May 2023) < https://www.bbc.com/news/world-asia-65561807> accessed 13 May 2023.

31 Asif Shahzad, 'Pakistani Parliament approves new law to curtail chief Justice's powers' (*Reuters*, 31 March 2023) <https://www.reuters.com/world/asia-pacific/pakistani-parliament-approves-new-law-curtail-chief-justices-powers-2023-03-31/> accessed 10 May 2023

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Palestine

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I. INTRODUCTION

The situation in Palestine has been declining steadily due to ongoing challenges in various areas such as the economy, political stability, human rights, social security, and the rule of law since 2007. The primary reason for this downturn is due to the continuous imposition of a state of emergency since parliament's suspension in 2007. In a ruling by the Palestinian Supreme Constitutional Court (SCC), the democratically elected Palestinian Legislative Council was dissolved in 2018. President Abbas, also known as Abu Mazen, has been exploiting the state of emergency to maintain his power and keep his inner circle together. Abbas's autocratic rule can be seen in two significant events that occurred recently: the assassination of political and human rights activist Nizar Banat and the delay of parliamentary and presidential elections.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The main development in the constitutional field was the appeal submitted by Atlas Law Firm to the Court of Cassation in its capacity as an Administrative Court regarding the decree-by-law pursuant to postponing the elections, issued by the President in April 2021.

Dr. Bassam Qawasmeh was the Applicant in this appeal, the head of one of thirty-six electoral lists registered as admitted runners for the parliament. On the other side, the respondents were the President and the Central Elections Commission. In the appeal, the Applicant made the following central arguments:

- The Court of Cassation in its capacity as an Administrative Court has jurisdiction to hear this appeal as per Articles 20(1)(B) of the Decree-by-Law no. 21 of 2020 pertaining to Administrative Courts, which stipulates that Administrative Courts hear appeals against final administrative orders, and the above-mentioned decree-by-law is a de facto administrative order. Additionally, Administrative Courts have jurisdiction to assess the constitutionality of presidential decrees since the Supreme Constitutional Court's jurisdiction is solely limited to assessing the constitutionality of law and bylaws. The Palestinian Constitutional Court has the authority to evaluate presidential decrees and other similar administrative orders.
- The decree-by-law violates Article 26 of the Basic Law of 2003, which stipulates that: "Palestinians shall have the right to participate in political life, both individually and in groups. They shall have the following rights in particular: the right to vote, nominate candidates, and run as candidates for election. These rights allow Palestinians to have representatives elected through universal suffrage in accordance with the law.
- The decree-by-law violates Article 3 of Decree-by-Law No. 1 of 2021 regarding general elections. Article 3 states that the President has the right to exclusively declare the commencement of the electoral process, which means that the President has no right to postpone or cancel it. Additionally, it is false to argue that since the President has the right to declare its commencement, then he also has the right to postpone or cancel it. The President taking such actions would unduly affect the legal interests of the registered electoral lists and deprive them of their constitutional rights.

The respondent, a member of the public prosecution defending the decree-by-law, provided two counter-arguments in the memo he presented to the Court:

- The Presidential Decree is an 'Act of Sovereignty', which is excluded from the Administrative Courts' jurisdiction as per Article 20(3) of the Decree-by-Law no. 21 of 2020 pertaining to Administrative Courts, which stipulates that these courts have no jurisdiction to hear cases related to appeals or requests regarding acts of sovereignty.
- The decree-by-law was issued as a means of protecting the public interest and the common good of the Palestinian people by not allowing the Israelis to prevent Palestinians from exercising their sovereignty during the electoral process in Jerusalem.

In the Applicant's response to both arguments, a rebuttal was filed against the respondent's memorial discrediting both counterarguments by affirming that:

- On procedural grounds, the respondent signed and stamped his memorial as a prosecutor before the High Court of Justice, which was dissolved when the Decree-by-Law pertaining to Administrative Courts entered into force, last January. Therefore, the respondent has no capacity—even more so no standing—to submit memorials to the Court.
- Responding to the first counterargument, acts of sovereignty, as per Palestinian courts' precedents and scholarly jurisprudence, do not include acts that violate constitutional rights. Claiming the opposite leads to an

unreasonable conclusion that the President may violate any constitutional article and not be held accountable under the pretext that such violation was a result of an act of sovereignty. The Applicant relied on what the High Court of Justice had declared back in December 2010 in case 575/2010, in which that Court declared the illegality of postponing the local councils' election by an order that the Council of Ministers issued, and dismissed the claim that such postponement was an act of sovereignty.

- Responding to the second counterargument, the Applicant provided evidence that more than 30 of the 36 electoral lists legally registered for the elections have expressed disagreement and fierce opposition to the Presidential Decree.

The Court declared its judgment on October 6th, 2021, affirming that it lacks jurisdiction over the decree-by-law because it is an "act of sovereignty." Excluding acts of sovereignty from judicial review is common in many Arab judicial systems. Many authoritarian legal systems decided to disregard acts of sovereignty from judicial review in order to protect the ruling President from constitutional scrutiny. In these circumstances, there is no hope that fair elections will take place any time soon.

On a final note, it is noteworthy that the Chief Judge who decided on the appeal, Hazim Idkaidek (ÐÐÐÐ ÐÐÐÐÐÐ), had previously shown a great degree of integrity and independence, especially in declaring the illegality of the decree by law to expropriate a large area of Islamic-endowment lands in Hebron to the Russian Church. It is unclear why, in this case, he chose not to stand against the interests of Abbas and his clique.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

President Abbas (Abu Mazen), is still maliciously exploiting the state of emergency to maintain his grip on power and preserve his clique cohesion. This was noted in two significant events that have taken place in the last year:

- the assassination of the political and human rights activist Nizar Banat
- the postponement of the parliamentary and presidential elections.

First, let's examine the assassination of human rights activist Nizat Banat who had been under the spotlight as a rigorous, well-reasoned critic of the Palestinian Authority's practices. He was charged with igniting divisive fanaticism and was often brought to trial before criminal courts for crimes such as insulting senior figures. Before the dawn of June 24th, 2021, a squad of the Palestinian security apparatus invaded the basement that Nizar took as a refuge. These security guards violently arrested, beat, and tortured Banat by spraying his face with pepper until he died.

Nisar's assassination sparked one of the largest-ever protests against Abbas and Fatah's regime in the West Bank within the last two decades. It became clear to the majority of Palestinians that Abbas and his clique were not concerned with protecting human rights as their main concern was silencing their opposers through abuse, prison sentences, and even assassinations.

Secondly, let's discuss the postponement of elections. In February 2021, President Abbas issued a decree-by-law, declaring that parliamentary elections will take place on the 22nd of May, and 24th of July for Presidential Elections.

This declaration came after fifteen years of living under an emergency regime in the West Bank, when Fatah, the losing party in the 2006 parliamentary elections, refused to make a peaceful transition of power to the winning party of Hamas.

Therefore, President Abbas's sudden decision to hold the elections led many to believe that the reason behind this move was to test the waters and assess the people's real support for the Fatah regime. Rather than focusing on the election results, the people's attention was directed to the outcome of pre-election campaigns and the registration of electoral lists running as candidates throughout the 16 Palestinian governorates. These Palestinian elections mattered for the people because regardless of the election outcome, it would have brought "an end to the authoritarian, emergency regime that has darkened the public life of Palestinians for the last fifteen years and caused the establishment of a deep structure of corruption in all of Palestine."

After it was clear that Abbas' clique would lose the elections, he issued a decree-by-law, in which he postponed the elections until further notice. All human rights activists and institutions, both local and international, criticized the decree-by-law and affirmed that it blatantly violates the fundamental constitutional rights of Palestinians. The decree-by-law was challenged before the Court of Cassation—the Administrative Court—and unsurprisingly, the Court dismissed the case on merits as explained in the next section.

IV. LOOKING AHEAD

Indeed, President Abbas and his clique are taking all necessary measures to remain in power, which is a typical attitude of ruling parties in authoritarian regimes. There has not been a Parliament since June 2007, and the Palestinian President is the sole legislator in the current legal system who has the authority to issue decrees-by-law that has the power of statutory laws under Article 43 of the Palestinian Basic Law.

Moreover, the Israeli authorities decided to provide financial support to the Palestinian Authority to enable the latter to suppress all public protests. Surely, the Israelis know that if Abbas' clique is gone, the alternative might be in favor of the view that most Palestinians hold: Palestinians exercising their internationally recognized right to self-determination against the brutal Israeli occupation.

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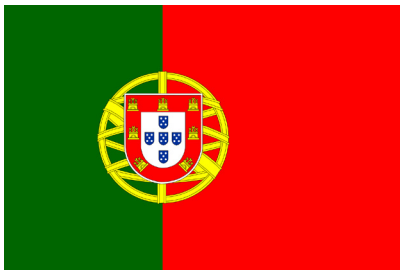
Portugal



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I. INTRODUCTION

As stated in our 2020 and 2021 reports, the Constitution of the Portuguese Republic (hereinafter 'Constitution' or 'Portuguese Constitution') was passed on April 2, 1976, and empowers the Parliament ('Assembly of the Republic') to revise the Constitution, subject to specific limits. The applicable provisions are outlined in Articles 284-289 and included in Title II (Revision of the Constitution) of Part IV of the Constitution (Guaranteeing and revision of the Constitution).[1]

It is important to bear in mind that while Article 284(1) of the Constitution (on competence and time for revisions) enables the Assembly of the Republic to revise the Constitution *five years after the date of publication of the last ordinary revision law*, Article 284(2) allows the Assembly to take *extraordinary revision powers at any time, by a four-fifths majority of all the Members in full exercise of their office*. In each case, *amendments to the Constitution require passage by a majority of two thirds of the Members of the Assembly of the Republic in full exercise of their* office, according to Article 286(1).

In 45 years, Portugal has used this prerogative to amend the Constitution seven times in the following years: 1982, 1989, 1992, 1997, 2001, 2004, and 2005.[2] As of March 2023, the seventh and last constitutional revision was passed over 18 years ago. Because of this constitutional revision, a new provision (Article 295) was added to the Constitution.[3] Since 2005, there have been no more revisions enacted, and the appropriate timing for a new revision was debated. While some argued that 18 years is too long of a time to go without revising the Constitution in a changing democratic society, others contended that a constitutional revision at this time would be for "questionable" political reasons, especially given the country going through a pandemic, economic crisis, war, and political turmoil.[4]

1 Title I concern the 'Review of Constitutionality.'
2 For an overview of each constitutional revision's scope, see the Parliament website here: https://www.parlamento.pt/sites/EN/Parliament/Paginas/Constitutional-revisions.aspx, [last accessed: 06.03.2023].
3 *Lei Constitucional 1/2005* – Constitutional Law no. 1/2005 (Diário da República, I Série A, n.º 155, 12 August 2005). In what concerns the participation on the European process, the need for a revision was clearly pointed out by the Portuguese Constitutional Court on its ruling no. 704/2004, of 17 December 2004. On this specific revision, see also Rui Machete, 'O Referendo Português sobre a Constituição Europeia. Uma Nova Forma de Revisão constitucional?' (Revista de Relações Internacionais, no. 5, 2005) 22.
4 For an overview among others: https://www.noticiasmagazine.pt/2023/%EF%BB%BFalterar-a-constituicao-um-erro-ou-uma-necessidade/historias/284179/, [last accessed: 06.03.2023].

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

As stated in the previous report for the year 2020, the COVID-19 pandemic crisis caused a declaration of a state of siege and emergency in Portugal. Article 289 of the Portuguese Constitution states that during a state of siege or state of emergency, constitutional revisions will be restricted.[5] In 2020, the constitutional revision procedure that was initiated had to be suspended due to the nation's state of emergency. After the pandemic was no longer considered a state of emergency, this constitutional revision resumed on April 20, 2021. The installation of the *Ad-hoc* Committee for Constitutional Revision took place on May 13, 2021. On May 25, 2021, the discussion regarding the installation of this project was carried out in record time. Following the debate, all the proposals included in Project for Revision No. 3/XIV/2. a (CH) were rejected and highly criticized by other parties and the general public. This criticism might explain why the discussion lasted less than two hours and led to the unanimous rejection by all involved parties—except Chega's leader, who voted in favor of this project. The Committee approved its final report and ended its activities in June 2021.[6]

By Decree no. 91/2021 on December 5th, the President of the Republic decided to dissolve the Assembly of the Republic, and legislative elections were scheduled for January 2022. In accordance with Article 172(3) of the Constitution, dissolution does not prevent the continuation of the deputies' term of office until the first sitting of the Assembly after elections. However, during periods in which the Assembly of the Republic is dissolved, its Standing Committee is in session, as stated by Article 179. As a replacement body, the competencies of the Standing Committee are reduced and do not include revision powers (Article 179(3)). Therefore, the possibility of constitutional revision was blocked until February 2022.

In October 2022, a new constitutional revision procedure was initiated.

5 See: www.parlamento.pt/ActividadeParlamentar/Paginas/DetalheIniciativa.aspx?BID=45430, [last accessed: 06.03.2023].
6 See the Activity Report of the Committee of May 2021, available at https://www.parlamento.pt/sites/COM/XIVLeg/CERC/Paginas/RelatoriosActividade.aspx, [last accessed: 06.03.2023].

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

2022 marked the 40th anniversary of the first constitutional revision in Portugal.[7] There was a delay caused by the general elections on an intended constitutional reform. The question attracted wide media coverage and public debate.[8] *The Chega* party was once again the first to initiate the project in October 2022.

Because of Article 285(2) (Initiating revisions) (*Once a draft revision of the Constitution has been submitted, any others shall be submitted within thirty days*), the installation of the *Ad-hoc* Committee for Constitutional Revision took place on January 4, 2023.[9]

Eight proposals are under discussion, within the scope of this Committee[10]:

- Constitutional revision project no. 1/XV – A Constitution for Portugal's future; *Chega* parliamentary group (CH) [Projeto de Revisão Constitucional n.º 1/XV – *Uma Constituição para o futuro de Portugal*];
- Constitutional revision project no. 2/XV – New rights, solidarity and climate: a Constitution for the 22nd century; *Bloco de Esquerda* parliamentary group (BE) [Projeto de Revisão Constitucional n.º 2/XV – *Novos direitos, solidariedade e clima: uma Constituição para o século XXII*];
- Constitutional revision project no. 3/XV; *Partido Socialista* parliamentary group (PS) [Projeto de Revisão Constitucional n. º 3/XV];
- Constitutional revision project no. 4/XV – A liberal reform of the Constitution; *Iniciativa Liberal* parliamentary group (IL) [Projeto de Revisão Constitucional n.º 4/XV - *Uma reforma liberal da Constituição*];
- Constitutional revision project no. 5/XV – Increasing rights, protecting the planet, extending the democratic regime; sole representative from *Livre*'s Party (L); [Projeto de Revisão Constitucional n. º 5/XV -*Aumentar direitos, proteger o planeta, alargar o regime democrático*];
- Constitutional revision project no. 6/XV – *Partido Comunista Português* parliamentary group (PCP) [Projeto de Revisão Constitucional n. º 6/XV];
- Constitutional revision project no. 7/XV – A realistic, reformist and differentiating constitucional revision project – 40 proposals in the 40 years since 1982's constitutional revision – *Partido Social Democrata* parliamentary group [Projeto de Revisão Constitucional n.º 7/XV – *Um projeto de revisão constitucional realista, reformista e diferenciador – 40 propostas nos 40 anos da revisão constitucional de 1982*];
- Constitutional revision project no. 8/XV – Approves the eighth revision of the Portuguese Constitution; sole representative from Party – *Pessoas – Animais – Natureza* (PAN) [Projeto de Revisão Constitucional n. º 8/XV – *Aprova a oitava revisão da Constituição da República Portuguesa, de 2 de abril de 1976*].

The constitutional revision projects consist of 393 proposals aimed at amending, repealing, and adding Articles to the Constitution, divided as follows:[11]

PROPOSTAS DE ALTERAÇÃO, REVOGAÇÃO E ADITAMENTO DOS ARTIGOS DA CONSTITUIÇÃO

Preâmbulo/ Artigos	CHEGA	Bloco de Esquerda	PARTIDO SOCIALISTA	Iniciativa Liberal	LIVRE	PCP	PSD	PAN
Alterados	61	41	20	38	20	69	71	21
Revogados	5	3	-----	14	-----	5	5	-----
Aditados	-----	5	1	2	2	6	4	-----
Total	66	49	21	54	22	80	80	21

Despite their cross-cutting nature, there are certain Articles that are more open to changes regarding their wording. These include Articles 64, 66, and 149, which relate to Health, the Environment and Quality of Life, and Constituencies respectively, with seven amendments. In addition, Articles 9, 35, 59, 65, and 74 which are about the Fundamental Tasks of the States, Use of Information Technology, Workers' Rights, Housing and Urban, and Education respectively, with six amendments. Finally, Articles 7, 33, and 49 which pertain to Education, International Relations, Deportation, Extradition, and the Right of Asylum respectively, have had five amendments.

Several of the proposed amendments concern fundamental rights provided for in Part I of the Constitution (Fundamental Rights and Duties) and address global concerns such as the impact of digitalization on fundamental rights or environmental protection (among which, the consecration of the right to water). These proposed amendments are also related to issues that are perceived as 'hot topics' in Portuguese political and social arenas such as housing rights and policies, isolation on public health grounds,[12] and metadata.[13] Other projects address the issues of free preschool education, the guarantees of workers in disciplinary proceedings, and the introduction of animal welfare protection in the Constitution.[14]

Some of the draft amendments have a direct impact on the nation's political system (Part III: Organization of Political Power) and concern the electoral system, the mandate of the President, and the elimination or replacement of the Representatives of the Republic for the Autonomous Regions at the regional level. Certain individuals in Portugal are concerned about the neglect or sidelining of justice in these proposals.[15]

7 With many initiatives like this one: https://www.icjp.pt/conferencias/33766/programa#modulo-33764, [last accessed: 06.03.2023].

8 Among others: https://www.jornaldenegocios.pt/economia/detalhe/provedora-de-justica-admite-que-revisao-constitucional-pode-resolver-alguns-problemas; https://www.publico.pt/2022/11/29/opiniao/opiniao/oito-projetos-revisao-constitucional-2029488;https://expresso.pt/opiniao/2022-11-21-A-Revisao-Constitucional-normalmente-acaba-mal-4604695b;https://portal.oa.pt/comunicacao/imprensa/2022/11/15/uma-revisao-constitucional-para-restringir-o-direito-a-liberdade/, [last accessed: 06.03.2023].

9 Check: https://www.parlamento.pt/sites/COM/XVLeg/CERC/Apresentacao/Paginas/default.aspx, [last accessed: 06.03.2023].

10 The original designations (in Portuguese) are in italics.

11 Check 'Assembleia da República, Apresentação Comparada dos Projetos de Revisão Constitucional – 2022', https://www.parlamento.pt/ArquivoDocumentacao/Paginas/Dossies-e-folhas-de-informacao.aspx, [last accessed: 06.03.2023].

12 For an overview of the case law of the Constitutional Court on the issue of isolation for public health reasons during the pandemic, see Tribunal Constitutional, *Acórdãos do Tribunal Constitucional relativos à pandemia Covid-2019*, 2022, available at https://www.tribunalconstitucional.pt/tc/file/dossier_covid_outubro2022.pdf?src=1&mid=6909&bid=5516, [last accessed: 06.03.2023].

13 In particular, in light of the Constitutional Court decision in case no. 268/2022, available at https://www.tribunalconstitucional.pt/tc/acordaos/20220268.html, [last accessed: 06.03.2023]. On the question of whether the ongoing work on constitutional revision has something (or nothing has) to do with several decisions annulled in national courts in the last months regarding access to metadata "for the purposes of criminal investigation" (a different topic from that of "access by intelligence services"), see https://expresso.pt/politica/parlamento/2023-03-21-Revisao-constitucional-PS-e-PSD-concordam-que-secretas-devem-poder-aceder-a-metadados-67ece875, [last accessed: 22.03.2023].

14 Faced with the issue, the Constitutional Court answered in the negative to the question of whether the Constitution already protects animals *per se*. See among others, the judgment in case no. 867/2021, available at https://www.tribunalconstitucional.pt/tc/acordaos/20210867.html, [last accessed: 06.03.2023].

15 See https://rr.sapo.pt/noticia/politica/2023/03/18/marcelo-diz-que-revisao-constitucional-e-momento-unico-para-reformas-na-justica/324375/, [last accessed: 22.03.2023].

Additionally, there are also concerns regarding Parts II (Organization of the Economy) and IV (Guaranteeing and Revision of the Constitution) of these proposals. Specifically, there is a proposal about the elimination of basic sectors close to the private economy. There is also a proposal to make renewable energies a state priority. Moreover, the establishment of the amparo appeal or the removal of all or some of the material limits on constitutional revision. There are two projects which introduce changes to the Preamble of the Constitution, generally seen as a birth certificate of the Constitution, which has remained untouched since the passing of the text in 1976. Ultimately, these proposals have contributed to debates around the nation about the impact they could have on the economy, energy sector, and political system of Portugal.

IV. LOOKING AHEAD

Prospective challenges for 2023 derive from major topics and discussions that are not completely new, including:

a) The scope and extent of the matters that constitutional revision laws shall respect (material limits of revision).
b) The possible reform of the conditions for declaring a state of siege or state of emergency, notwithstanding the need to guarantee political checks and balances and citizens' rights.[16] There is also the possible application of Article 15 of the European Convention on Human Rights, in light of the advantages of a multilevel system.
c) The recurrent discussion on the reform of the electoral system, whose major features are established by the Constitution, namely concerning proportional representation and the type and design of the electoral constituencies.[17]
d) The question on the electoral law, enhanced by the 'episode' that, in early 2022, led to the repetition of general elections and the need to await the results of the votes of the Portuguese abroad, causing a three-month delay in the beginning of Government functions, even though none of the projects explicitly deal with extraterritorial voting.
e) The increase in President of Republic powers, namely the extension of its term of office (a single mandate of 7 years, instead of a mandate of 5 years, with the possibility of re-election) and the power to appoint members of other constitutional organs such as the Governor of *Banco de Portugal* (proposals that were already criticized since they might jeopardize the Portuguese government system—semi-presidentialism).
f) The possible reform of the methods of appointing judges of the Constitutional Court, considering the most recent controversies and difficulties arising from the system of co-optation by those appointed by the Assembly of the Republic.[18]
g) The potential revision of the Constitution to overcome difficulties arising from the approval of the Metadata Law within the current constitutional framework.
h) The fact that, most likely, some matters will not be discussed in this constitutional revision, namely the reform of the justice sector or the regionalization process.

While some of these projects are feasible and reasonable proposals, such as the requirement of a judicial decision for isolation decisions, access to metadata by information services, or the provision of an 'Amparo appeal' to the Constitutional Court, other proposals are much more vague. For instance, using terms like "intergenerational justice," "environmental health," "effective system of environmental protection," and "liberal democracy" is very general and open to multiple interpretations.

The proposals also establish grounds for discussion on controversial ideas such as the reduction of the number of MPs, appointments to the Constitutional Court, a single mandate for the presidency, making the vote age requirement 16 years old, and a zero deficit by creating a limit of public debt. Some of these proposals are not even feasible from a constitutional perspective, because of the limits on revision (Article 288). This is the case with the establishment of life imprisonment and chemical castration.

Regarding "circumstantial drawbacks," many individuals argue that the timing is unsuitable for a steady and thoughtful revision, due to the framework of uncertainty determined by the war, galloping inflation, and the looming economic crisis. Others show concern for the Assembly of the Republic's composition. In fact, this revision may result from exclusive negotiations between the two major parliamentary groups, the PS (Party Socialist Party) and PSD (Social Democratic Party). For these proposals to be approved, there needs to be the support of at least 154 deputies—a number which is easily and (most probably only) reached with the deputies' votes of the two biggest parliamentary groups. Currently, the PS holds 120 seats at the Assembly of the Republic and the PSD has 77 deputies. Due to how powerful these two major parties are, this may lead to less representative discussions and, consequently, fewer proposals from the smaller parties.[19]

On the other hand, while the Prime Minister has opened the possibility of a "surgical constitutional revision" because of the Metadata Law's rejection by the Constitutional Court, the exact scope (and extension) of this type of possible revision seems controversial. Despite the wishes of the two major parliamentary groups, the other parties seem very reluctant on the matter, and the President of the Republic has called for some quietness and discretion in the debate.[20] Overall, the ongoing debate regarding the proposals is far from reaching a consensus as there is discomfort and internal contestation among the majority of the country's political wings. Additionally, there are also concerns related to possible restrictions on one's fundamental freedoms.

16 A topic that is considered by many the most controversial issue in the constitutional review proposals: https://www.dn.pt/sociedade/confinamentos-da-enorme-restricao-da-liberdade-ao-equilibrio-de-direitos-15387630.html, [last accessed: 22.03.2023].
17 While Article 149 is among those Articles that most proposals want to change, the project of *Partido Socialista* (with the majority of MPs) does not touch upon it https://www.dn.pt/politica/deputados-tentam-novo-acordo-de-revisao-constitucional-18-anos-depois-15561948.html, [last accessed: 22.03.2023].
18 See https://www.publico.pt/2023/03/08/politica/noticia/presidente-vice-constitucional-prolongam-mandato-falta-substitutos-2041670, [last accessed: 06.03.2023]. Also, https://rr.sapo.pt/noticia/politica/2023/03/07/presidente-da-republica-devia-poder-nomear-juizes-do-constitucional-sim-defende-vitalino-canas/322911/, [last accessed: 22.03.2023].
19 See https://www.publico.pt/2022/12/10/opiniao/opiniao/revisao-longe-2030440, [last accessed: 06.03.2023].
20 See: https://expresso.pt/politica/parlamento/2023-03-21-Revisao-constitucional-PS-e-PSD-concordam-que-secretas-devem-poder-aceder-a-metadados-67ece875, [last accessed: 22.03.2023].

Despite its cross-cutting nature, there are some important topics, such as justice, that are being neglected when it comes to constitutional revision projects. Regarding justice, the President of the Republic affirmed that a reform of the justice sector should also have been included in these revision projects.

When it comes to the work of the *Ad-hoc* Committee for Constitutional Revision, it is worth mentioning that, by March 2023, discussions on some of the proposals mentioned above have already occurred. The *Ad-hoc* Committee for Constitutional Revision meetings are taking place without time constraints, to ensure a wide-ranging discussion. Such a scenario might change soon, due to delays in the process (already expected to last one year).[21]

In view of the most recent discussions of the *Ad-hoc* Committee for Constitutional Revision, it is anticipated that some of the proposals will likely be approved in the future (e.g., the insertion of the "right to digital oblivion"). On the flip side, *Chega*'s proposals on the consecration of life imprisonment will probably be rejected by all the other parliamentary groups.[22]

The *Ad-hoc* Committee for Constitutional Revision has many responsibilities when it comes to the constitutional revision process in Portugal. For instance, its duties include assessing the eight proposals for constitutional revision and submitting them to other deputies, which is currently ongoing as of March 2023. Other responsibilities include systematizing the proposals to be discussed and voted on by the Assembly of the Republic's plenary. Finally, the Committee helps produce the final version of the constitutional revision and incorporate the amendments to the Portuguese Constitution.

V. FURTHER READING

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21 Among others, https://www.jn.pt/nacional/revisao-constitucional-pode-demorar-um-ano-a-ficar-concluida-15990904.html, [last accessed: 22.03.2023].

22 See: https://www.publico.pt/2023/03/10/politica/noticia/partidos-concordam-consagrar-direito-esquecimento-digital-constituicao-2041834; https://www.publico.pt/2023/03/14/politica/noticia/debate-prisao-perpetua-constituicao-gera-troca-acusacoes-chega-be-2042432; https://www.tsf.pt/portugal/politica/prisao-perpetua-proposta-pelo-chega-e-rejeitada-por-todos-aquece-debate-sobre-a-constituicao-16004027.html, [last accessed: 22.03.2023].

Republic of the Congo

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I. INTRODUCTION

This report delves into the constitutional reforms that took place in 2022 in the Republic of Congo, famously known as 'Congo-Brazzaville', a country that gained independence from France on the 15th of August 1960. Ruled by Dénis Sassou Nguesso, who has been in power for more than 36 years (making him one of Africa's longest-serving Presidents alive), the oil-rich country has experienced significant political upheavals and constitutional changes since then. The Congolese people adopted a new Constitution in October 2015 by referendum, repealing the 2002 Constitution. In 2022, the country has undergone further constitutional reforms, including notably those relating to the state of health emergency, the procedure for amending the Constitution, and gender-based violence.

The report is divided into three sections. The first one provides an overview of the constitutional reforms that the Congo implemented in 2022: changes to the procedure for amending the Constitution, the state of health emergency, anti-corruption, gender-based violence, and the Freedom of Communication Council, among others. The second section examines the controversies and litigation that arose from these reforms, focusing on the Constitutional Court's decisions and opinions. Finally, the report reflects on the future of constitutional law in Congo-Brazzaville, with particular attention to the State Reform Plan, anti-corruption, and the constitutional amendment procedure.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The Congo embarked on several constitutional reforms in 2022. These range from reforming state-of-emergency rules to the law on anti-corruption, to the procedure for amending the Constitution. Specifically, this section of the report focuses on five reforms, namely those pertaining to (1) the procedure for amending the Constitution, (2) the state of health emergency, (3) anti-corruption, (4) gender-based violence, and (5) the Freedom of Communication Council.

1. PROCEDURE FOR AMENDING THE CONSTITUTION

By far the most dramatic constitutional reform took place in the opening days of 2022, when on 6 January the government published in the official gazette[1] (in French, 'Le Journal officiel') an organic law that established the procedure for amending the 2015 Congolese Constitution.

The Organic Law No. 1-2022 of 6 January 2022 sets forth the procedure for amending the Constitution. The process to adopt this new organic law had started earlier, on the 30th and 31st of December 2021, when the Senate and the National Assembly approved, during an extraordinary session, the procedure for amending the Constitution of 25 October 2015. Gazetted on 6 January 2022, the new Organic Law No. 1-2022 endows the President of the Republic and members of Parliament with the authority concurrently to initiate a constitutional amendment bill, with the President's bill being called a "*projet de révision*" (an amendment project) and the Parliament's bill a "*proposition de révision*" (an amendment proposal).[2]

The law outlines two methods for amending the Constitution: either by referendum or by the Parliament, convened in Congress (hereinafter referred to as 'the Congress'). If the bill emanates from a referendum, the Organic Law outlines the voting process, including the roles of the National Electoral Commission (referred to in French as 'la Commission nationale électorale indépendante') and the Constitutional Court.

On the other hand, if Parliament initiates the bill, the law provides a detailed procedure for deliberating and voting, with a three-quarters majority of both chambers required for approving the bill. In both cases, the law ensures transparency and fairness in the process, such as public sessions, the recording and control of delegated votes, and the announcement of voting results. However, Article 19 of the Organic Law No 1-2022 forbids anyone from initiating or continuing an amendment process during an interim period or when the integrity of the national territory is compromised. Moreover, the statute states that neither the President nor Parliament may seek to amend the republican form and secular character of the state. Last but not least, upon adopting an amendment bill through a referendum or by Congress, the President shall sign the bill into law.

2. STATE OF HEALTH EMERGENCY

After the President promulgated on 6 January 2022 the organic law on the procedure for amending the Constitution (Organic Law No.

1 République du Congo, Sécrétariat Générale du Gouvernement, 'Journal officiel', <https://www.sgg.cg/fr/le-journal-officiel/le-journal-officiel.html> accessed 2 July 2023.
2 Article 2 of the Organic Law No. 1-2022.

1-2022), the Congolese Parliament, convened in Congress, started a process aimed at amending the Constitution to extend the state of health emergency. Published in a special issue of the gazette on 10 January 2022, Constitutional Law No. 2-2022 amended Article 157 of the Constitution by extending the duration of states of emergency to 90 days, instead of the 20 days provided for in the former Article 157. The amended Article 157 empowers the President to declare a state of emergency, as well as a state of siege, during meetings of the Council of Ministers, on all or part of the national territory for a period not exceeding 90 days.3

3. ANTI-CORRUPTION

On 11 March, the President replaced a 2009 law on anti-corruption when Law No. 9-2022 on the prevention and combatting of corruption came into effect. Law No 9-2022 sets up a national framework for facilitating international cooperation and technical assistance, in order to ensure the effectiveness of anti-graft measures and improve the conditions necessary for moralizing public life and promoting integrity, transparency, accountability, and sound public management. Through Law No. 9-2022, the Congolese Parliament intends to strengthen national mechanisms involved in fighting corruption and related offenses. Given that last year Transparency International ranked the Congo in its *Corruption Perception Index* as the 164th most corrupt country (out of 180 countries) on Earth,[4] upgrading the framework for combating corruption comes across as no small feat, though it remains to be seen how the government will implement this new law.

4. GENDER-BASED VIOLENCE

Furthermore, on 4 May, the Congo enacted the Mouebara Law No. 19-2022, which prohibits violence against women and girls. Named after President Nguesso's mother, Émilienne Mouebara, this Law tackles diverse forms of violence against women and girls, including physical, psychological, sexual, and economic violence. Also, the Law covers violence in different settings, such as domestic, educational, professional, and religious environments. The Mouebara Law defines specific types of violence, for instance, cultural violence related to widowhood and traditional practices, as well as social violence that consists in pressuring and constraining women through society's norms. Lastly, the statute addresses sexual assault and harassment. Unlike the reforms relating to the constitutional amendment procedure and the actual amendment of the Constitution to extend the state of health emergency, this Law has been acclaimed by women's rights groups and other segments of civil society.

5. THE FREEDOM OF COMMUNICATION COUNCIL

On the 29th of June, Parliament passed Organic Law No. 27-2022 to amend the organic law on the Freedom of Communication Council ('le Conseil supérieur de la liberté de la communication'). Established in terms of Articles 212-213 of the 2015 Constitution and of Organic Law No. 4-2003, the Council ensures the effective exercise of the freedom of information, gives technical advice, and puts forth recommendations on issues related to the field of information and communication. The 2022 amending organic law (i.e., Organic Law No. 27-2022) lengthened the term of Council members from three to four years. In addition, Article 9 of the amending law changed the Council's composition, which now comprises 11 members appointed by the President of the Republic, the Senate President, the Speaker of the National Assembly, the Prime Minister, the Supreme Court, a specified advisory council representing civil society and non-governmental organizations (NGOs), and two professionals in information and communication.

The Congolese government and Parliament succeeded in adopting or implementing the constitutional reforms described in this section. Stakeholders had mixed reactions to these reforms. On the one hand, civil society welcomed the Moubara law on gender-based violence. On the other hand, civil society and the opposition have decried some of these reforms, especially the constitutional amendment procedure and the state-of-emergency extension rules. The next section of this report sums up these criticisms.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The Constitutional Court heard and issued decisions and opinions (*'avis'*) in cases dealing with (1) the procedure for amending the Constitution, (2) the extension of the state of health emergency, (3) the nexus between the implementation of that state of emergency and the Bill of Rights, (4) the protection of children's rights, (5) electoral disputes, (6) the standing orders of parliamentary houses, (7) the disclosure of assets by members of Parliament, and (8) the Freedom of Communication Council. Of all these cases, electoral disputes dominated the agenda of the Constitutional Court in 2022, as dramatically exemplified by Issue No 38 of the official gazette 'Journal officiel',[5] which featured no less than 33 decisions or opinions on those disputes.

1. THE PROCEDURE FOR AMENDING THE CONSTITUTION

The cases brought before the Constitutional Court have stirred controversies for several reasons. This section speaks to those issues in each case before the Congo's highest constitutional jurisdiction. First, critics of the Organic Law establishing the constitutional amendment procedure deplored that the law has made it easier for the President of the Republic and the ruling party in Parliament to amend the Constitution, thereby undermining the rule of law and constitutionalism in the Congo. Indeed, Article 7 of Title III of the Organic Law No. 1-2022 empowers the President to submit his or her amendment project, after the Supreme Court approves it, to the Parliament convened in Congress (i.e., 'the Congress'). Similarly, by virtue of Article 8 of that Law, Parliament may submit its amendment proposal to Congress directly. Thus, any amendment to the Constitution, even the one related

3 Article 1 of the Constitutional Law No. 2-2022.

4 Transparency International, 'Corruption Perceptions Index 2022' <https://www.transparency.org/en/cpi/2022> accessed 3 July 2023.

5 The Congolese government publishes decisions and opinions of the Constitutional Court in the official gazette. For more information on Issue No 38 of the gazette, see République du Congo, Sécrétariat Générale du Gouvernement (2023) 64 Journal officiel No 38, <https://www.sgg.cg/JO/2022/congo-jo-2022-38.pdf>.

to the mode of election of the President, can directly be done in a rubber-stamp Parliament, without public debates or referendums.

In its opinion (*'avis'*) dated 6 January 2022 (Avis n° 001-ACC-SVC/22), the Constitutional Court determined that Organic Law No. 1-2022 establishing the procedure for amending the Constitution does not contravene the Constitution and that, therefore, the President could promulgate it.

2. THE EXTENSION OF THE STATE OF HEALTH EMERGENCY

The President succeeded in amending the Constitution to extend the state of emergency. However, the opposition and civil society feared that this was but a maneuver by those in power to change the fundamental text significantly. The government had justified this constitutional reform by the necessity to enhance efficiency. As a matter of time, since the coronavirus pandemic broke out in the Congo in March 2020, the government had already renewed the state of health emergency 30 times. As a consequence, the government considered this renewal exercise exhausting, painful, and costly; it was therefore seeking to modify its implementation deadlines so as to adapt them to the current realities.

Political activist Amedé De l'eau Loemba commenced legal action before the Constitutional Court, praying the court to annul the vote organized by Parliament to amend Article 157 of the Constitution. Loemba alleged that the vote violated Articles 240 and 241 of the Constitution. These two provisions outline the procedure for amending the Constitution and require that constitutional amendment bills be submitted to a referendum. Nonetheless, in its judgment Décision n° 003/DCC/SVA/22, the Constitutional Court ruled on 14 April 2022 that its jurisdiction, as defined by the Constitution, does not extend to the annulment of votes organized by the Parliament convened in Congress. Hence, it lacked the competence to annul votes organized by the Congress.

3. THE NEXUS BETWEEN THE IMPLEMENTATION OF THAT STATE OF EMERGENCY AND THE BILL OF RIGHTS

Coupled with the Constitutional Law that amended Article 157 of the Constitution, the question of the state of health emergency declared by the President also cropped in litigation relating to the Bill of Rights and the implementation of that declaration. Mr. Stevy Juvadel Poaty brought a case before the Constitutional Court challenging the constitutionality of certain provisions of the Law No. 21-2020 on the conditions for implementing a state of emergency and a state of siege in the Congo. Poaty specifically challenged the constitutionality of Articles 8(9), 8(10), 8(19), and 18 of the Law, which he claimed violated several fundamental rights and freedoms enshrined in the Constitution, including privacy, fair trial, property, and freedom of movement. The petitioner contended that the impugned provisions of Law No. 21-2020 went beyond the permissible limits of restrictions that can be imposed on these rights during a state of emergency or a state of siege.

On April 14, the Constitutional Court ruled on the challenged provisions of Law No. 21-2020 and the constitutionality of Constitutional Law No. 2-2022, which amended Article 157 of the Constitution. To begin, the court found that the provisions of Law No. 21-2020 on the implementation conditions for states of emergency complied with the Constitution and did not violate the rights and freedoms guaranteed by it. The Court reasoned that the provisions were necessary and proportionate measures aimed at preserving public order and protecting the nation from a variety of threats during a state of emergency or a state of siege. The Court rejected Poaty's claims and dismissed the case. Then, the Court held that it lacked the competence to review the constitutionality of Law No. 2-2022, which amended Article 157 of the Constitution, as this fell outside its jurisdiction.

4. THE PROTECTION OF CHILDREN'S RIGHTS

Still on the Bill of Rights front, the Constitutional Court dealt with one case concerning the right to religion and the medical care of children. The petitioner, Mr. Christian Matondo Louppe, filed a case arguing that Paragraph 4 of Article 26 of Law No. 4-2010 on the protection of children disproportionately affects Jehovah's Witnesses. The petitioner insisted that this children's protection law denies anyone the right to refuse the medical care of a child based on religious and cultural considerations. Matondo Louppe claimed that Paragraph 4 of Article 26 of that law offends Articles 24 of the Constitution and 18 of the Universal Declaration of Human Rights, which guarantees freedom of thought, conscience, and religion. He emphasized that Jehovah's Witnesses' religious beliefs may prohibit certain medical treatments, such as blood transfusions, making them particularly vulnerable to the law.

On 1 February 2022, the Constitutional Court acknowledged, in its judgment (Décision n° 001/DCC/SVA/22), the importance of balancing the protection of children's best interests with the right to freedom of thought, conscience, and religion. On balance, the court underscored the necessity of the restriction imposed by Paragraph 4 of Article 26 to protect the health and well-being of children in a democratic society. Ultimately, the court deemed Matondo Louppe's petition admissible but upheld the constitutionality of Paragraph 4 of Article 26, even in the case of Jehovah's Witnesses.

5. ELECTORAL DISPUTES

On Sunday 14 August 2022, the Constitutional Court of Congo Brazzaville validated the results of the legislative elections held on 10 and 31 July. The ruling Congolese Labour Party ('Le Parti Congolais du travail', known by its acronym as 'PCT') won those elections comfortably, with 111 seats out of a total of 151 in the National Assembly. L'Union des democrates humanistes (UDH-Yuki), translating as 'The Union of Humanist Democrats', came in second place with four elected members, followed by l'Union panafricaine pour la démocratie sociale (UPADS), 'the Pan-African Union for Social Democracy', which secured three seats.

The public hearings lasted three days. On Sunday 14 August, Auguste Iloki, the President of the Congolese Constitutional Court, announced that the Court had rejected 30 appeals filed by the plaintiffs for the annulment of the legislative elections. The Court thus validated

the final legislative results. Particularly, Issue No 38 of the gazette (22 September 2022) featured no less than 33 decisions or opinions on those disputes. Those disputes involved parties requesting the Court to disqualify certain candidates; to order the reimbursement of expenses incurred; to suspend or annul the legislative elections altogether; to contest or reformulate the election results; and to correct errors in the number of seats won.

6. THE STANDING ORDERS OF PARLIAMENTARY HOUSES

While on the subject of the legislature, the Speaker of the National Assembly called upon the Constitutional Court on October 4th to examine the question of whether Article 190 of the Standing Orders (i.e., internal regulations) of the National Assembly conformed to the Constitution. According to Article 190, the Standing Orders of the National Assembly have the force of an organic law and must be submitted to the Constitutional Court for an opinion as to its conformity with the Constitution. However, the Court noted in its opinion on October 4th (Avis n° 003-AVC-SVC/22) that Article 190 of the Standing Orders contradicted Article 121(2) of the Constitution, which lays down that the standing orders of each house of Parliament shall have the force of an organic law *after* the Court declares their conformity to the Constitution. Therefore, the court advised that Article 190 be rewritten to reflect the constitutional requirement that the Court's declaration of conformity come before, and not after, the standing orders acquire the status of an organic law.

7. THE DISCLOSURE OF ASSETS BY MEMBERS OF PARLIAMENT

Clément Mierassa requested the Constitutional Court to declare that Article 6 of Law No. 4-2019 on the mandatory declaration of assets by senior civil servants does not align with the Constitution, and to order the legislator to modify or withdraw the said article. In particular, the petitioner submitted that Article 6(1) of Law No. 4-2019 went against Article 55(1) of the Constitution by obliging every senior civil servant to declare his or her assets within three months after assuming office and at the end of his or her term of office. In a judgment handed down on April 14th (Décision n° 002/DCC/SVA/22), the Court agreed with the petitioner when it ruled that Article 6(1) of Law No. 4-2019 violated Article 55(1) of the Constitution, which required that senior civil servants declare their assets *at the time* they assume office and when they leave office, and not within three months thereafter.

8. THE FREEDOM OF COMMUNICATION COUNCIL

Last but not least, the Constitutional Court examined on the 9th of June the constitutionality of certain provisions of an organic law that amends Organic Law No. 4-2003 on the Freedom of Communication Council. The court found that Articles 2, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 18, 21, 22, and 23 of the amended law do not flout the Constitution; therefore, the President can promulgate the amended law.

IV. LOOKING AHEAD

In 2023 and the years ahead, three reform areas will make the headlines and mold constitutional law in Congo-Brazzaville, namely the State Reform Plan, the constitutional amendment procedure, and anti-corruption law. This concluding section of the report briefly reflects on the State Reform Plan.

On 16 December 2022, the Congolese government ran a workshop and validated its draft State Reform Strategic Plan, *'le Plan stratégique de la réforme de l'État'* (PSRE). The plan is structured around five strategic axes aimed at improving the organization, functioning, and management of the Congolese State. Participants in the workshop scrutinized different aspects of the plan, consolidating proposals gathered during the consultation phase, and assessed the relevance, coherence, and operational mechanisms of the strategic framework. The five strategic axes of the PSRE are: 1) strengthening the rule of law; 2) reforming the economic and financial management framework; 3) rationalizing the state; 4) reforming territorial governance; and 5) promoting electronic administration. The government intends to endow the country with a reference framework for state reform, which will revamp the way the state manages human, budgetary, and financial resources. The plan, which is multisectoral and will be implemented at local, global, and sectoral levels, will be submitted for government approval and then sent to parliament for adoption in accordance with the Constitution.

Looking ahead, constitutional law and constitutionalism will improve depending to a great extent on whether the State Reform Strategic Plan succeeds. As Congo-Brazzaville seeks to optimize the functioning and management of the state. The five strategic axes of the PSRE (which consist in strengthening the rule of law, reforming the economic and financial management framework, rationalizing the state, reforming territorial governance, and promoting electronic administration) will need to be effectively implemented at local, global, and sectoral levels if the government genuinely wishes to accomplish the goals of the PSRE. Ultimately, the success of these reforms will hinge on the government's commitment to transparency, accountability, and good governance.

V. FURTHER READING

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Mfoutou Kokolo, José Lenor, *La Cour Constitutionnelle de la République du Congo: Institution Politique ou Juridictionnelle* (Éditions Universitaires Européennes 2021)

Omboula, Sergelin Briguel, 'Le Chef de l'Opposition Politique en République du Congo', (2022) Revue des Réflexions Constitutionnelles. <https://shs.hal.science/halshs-03788481/>

Zongwe, Dunia, 'Update: The Legal System of the Congo (Congo-Brazzaville): Overview and Research' *GlobaLex* (May/June 2023) <https://www.nyulawglobal.org/globalex/Congo_Brazzaville1.html> accessed 3 July 2023

Romania

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I. INTRODUCTION

The year 2022 did not bring visible steps in amending the Romanian Constitution. The citizens' initiative launched in 2019 (which we analyzed in the previous Reports[1]) is still in the parliamentary procedure[2], so we cannot frame it in terms of the effects. Citizens also tried in 2022 to promote an initiative to amend the Constitution, but it received a negative opinion from the Legislative Council (LC)[3]. We will briefly refer to the latter one, the context in which we will present procedural elements specific to the initiatives for the revision of the Constitution promoted by citizens.

However, 2022 was a year of reflection regarding the need to revise the Constitution. The 30th anniversary of the establishment of the Constitutional Court (CCR) has given rise to numerous debates on the necessity and topics of the revision of the Constitution, aspects that we have mentioned in the previous Report. Likewise, in 2022, discussions continued regarding the relationships between national law and that of the European Union (EU), including whether to revise the Constitution to clarify these relationships. The debates were enhanced by the preliminary referrals of the Romanian courts of law and the tensions in constitutional justice, in a broad sense (CCR and European Court of Justice) developments that ultimately led to legislative amendments in Romania, to which we will refer further.

It should be also noted the initiative of the Institute of Legal Research to prepare the centenary year 2023, with a symbolic meaning, namely 100 years since the adoption of the Constitution of Romania unified, an occasion for reflection on the evolution of constitutionalism.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The new citizens' initiative had as its object, as it follows from the Opinion of the LC[4], the constitutional provisions enshrined in Article 85 – *Appointment of the Government*, Article 89 – *Dissolution of Parliament*, Article 103- *Investiture* (A/N of the Government), Article 113 – *Motion of censure,* and Article 114 – *Assumption of responsibility by the Government*. Over time, these texts have raised debates in their enforcement, being at the origin of legal disputes of a constitutional nature settled by the CCR[5]. Likewise, a part of them was the subject matter of an initiative for the revision of the Constitution promoted by the parliamentarians in 2014, which was not completed[6].

For that matter, the LC, considering that "*the initiators modify the procedure for appointing the candidate for the office of prime minister in a manner similar to that proposed by the (...) Legislative Proposal for the revision of the Constitution, on which the CCR adjudicate by Decision No 80/2014*", justifies its negative opinion by citing that decision[7]. The LC concludes in this regard: "*taking account of those held by the Constitutional Court, we consider that the texts proposed by the draft for Articles 85 and 103 of the Constitution violate the limits of the revision provided for by Article 152 (2) of the Fundamental Law in that they suppress a guarantee of the right to vote, namely complying with the result of the freely expressed vote. Since the provisions to amend the two articles are of the very essence of the draft, the legislative proposal cannot be promoted*".

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The mentioned initiative gives us the opportunity to present specific elements of the citizens' initiatives for the revision of the Constitution.

The constitutional framework of the procedure (Articles 150-152 of the Constitution) and the main stages are the same, regardless of the

1 Initiated by over 800,000 citizens, aiming at the amendment of the provisions of Article 37 of the Constitution – *the right to be elected*, in terms of excluding the citizens definitively sentenced to custodial sentences for crimes committed with intent, until it occurs a situation that removes the consequences of the conviction

2 Pl-x nr. 237/2019, http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?cam=2&idp=17842

3 Nr.1039/15.09.2022, http://www.clr.ro/wp-content/uploads/2022/09/Aviz_1039_2022.pdf

4 "*specialized advisory body of the Parliament, which endorses draft normative acts in order to systematize, unify and coordinate all legislation and keeps official records of Romanian legislation*" (Article 1 of Law No 73/1993, republished in the Official Gazette of Romania, Part I, no. 1122 of 29 November 2004

5 See M. Safta - Appointment/dismissal of ministers. Interpretation of Article 85 of the Constitution – *Appointment of the Government*. Interim office of minister. Interpretation of 107 of the Constitution – *Prime Minister,* https://www.juridice.ro/657460/nota-de-jurisprudenta-a-curtii-constitutionale-30-septembrie-4-octombrie-2019.html*;* M. Safta – Government's liability to a draft law, https://www.juridice.ro/674451/nota-de-jurisprudenta-a-curtii-constitutionale-3-28-februarie-2020-angajarea-raspunderii-guvernului-asupra-unui-proiect-de-lege.html, M. Safta, The legal regime of the censure motion, https://www.juridice.ro/702893/nota-de-jurisprudenta-a-curtii-constitutionale-12-octombrie-2020-6-noiembrie-2020-limitele-legiferarii-prin-legile-de-aprobare-a-ordonantelor-ordonantelor-de-urgenta-ale-guvernului-regim.html

6 this initiative was found partially unconstitutional by Decision No 80/2014, Official Gazette of Romania, no. 246 of 7 April 2014

7 Decision No 80/2014, cited above

initiators (the President upon the proposal of the Government, parliamentarians, or citizens): the initiation of the revision, the review carried out by the CCR over the draft/legislative proposal, the parliamentary debate and the adoption of the law for the revision of the Constitution, the review carried out by the CCR over the law adopted by the Parliament, the referendum for the approval of the law for the revision of the Constitution. What distinguishes citizens' legislative initiatives from other initiatives for the revision of the Constitution is the inherently more laborious first stage of preparing and supporting the proposal, which has a separate regulation through Law No 189/1999 on the exercise of the legislative initiative by citizens[8].

According to Article 2 of the Law, the promotion of the initiative is ensured by an initiative committee made up of at least ten citizens with the right to vote, which cannot include persons elected to office by universal suffrage, members of the Government, persons appointed by the prime minister or who cannot be members of political parties. The establishment of the initiative committee shall be made by an authenticated statement to a public notary. Its composition is announced, together with the legislative proposal that is the subject of the initiative, by publication in the Official Gazette of Romania. Article 3 of the Law stipulates that the legislative proposal shall be drawn up in the form required for the bills and shall be accompanied by an explanatory memorandum signed by all the committee members. For publication, the legislative proposal shall, in advance, be endorsed by the LC. The legislative proposal shall be published in the Official Gazette of Romania, Part I, within 30 days from the issuance of the Opinion by the Legislative Council.

According to Article 4 of the Law, the promotion of the legislative proposal is based on the adhesion of citizens. Thus, the proposal must be supported by at least 500,000 citizens with the right to vote, belonging to at least half the number of the counties in the country. In each of the respective counties or the Municipality of Bucharest, at least 20,000 signatures must be recorded in support of this initiative [Article 150 (1) of the Constitution]. The lists of supporters shall be established in compliance with the administrative-territorial organization of the country and shall be kept in the files, by localities, snugly and signed for the attestation of the content, on the second cover, by a member of the initiative committee or by another person empowered in writing by the committee to draw up the list. These lists are attested by the mayor of the locality, either personally or in urban localities, and through the officials of the mayor's office empowered by the mayor for this purpose.

The legislative proposal, accompanied by the explanatory memorandum and the originals of the lists of supporters, shall be registered at the competent Chamber of Parliament at the application signed by the initiative committee. The Chamber of Parliament shall send the originals of the lists of supporters to the CCR, keeping a copy of them.

The CCR shall verify the constitutional nature of the legislative proposal (namely, if it complies with the limits of the revision outlined in Article 152 of the Constitution), fulfilling the conditions regarding the publication and if the lists of supporters presented are attested; the minimum number of supporters as well as respect for territorial dispersion in counties and in the Municipality of Bucharest. The Court shall issue a decision which shall be communicated to Parliament, from which point the procedure will continue according to the general provisions applicable to the revision of the Constitution. Therefore, also in the case of the citizens' initiative, the limits established by Article 152 of the Constitution are applicable, according to which: *"(1) The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and the official language shall not be subject to revision. (2) Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof. (3) The Constitution shall not be revised during a state of siege or emergency, or in wartime."*

Returning to the citizens' legislative initiative from 2022, we note that the Legislative Council invoked exactly these limits, relying on the solution and recitals of the CCR Decision No 80/2014. Thus, according to the initiators' proposal to amend the procedure regarding the appointment of the candidate for the office of Prime Minister (cited in the Opinion), "*The President of Romania must appoint as a candidate for the office of Prime Minister/Minister the representative proposed by the party that won the elections. The condition for the party that won the elections to be able to establish the Government by itself consists in obtaining a percentage of at least 33% of the votes of the electorate, expressed in the last parliamentary elections. Otherwise, it is necessary to establish a parliamentary party alliance that meets the condition of the 33% threshold. If the party that won the election refuses to participate in the government or the proposed candidate resigns. The President of Romania must appoint as a candidate the representative proposed by the party that obtained the second place in the parliamentary elections*".

Concerning the solution proposed by the initiators, the LC considered that the following recitals held by the CCR in Decision No 80/2014 are applicable and, therefore, also the solution of unconstitutionality adjudicated at that time: "*the proposed text, through the mechanisms of designation of candidates for the position of Prime Minister, establishes a monopoly for the political party or political alliance participating in elections which obtained the highest number of seats, without holding an absolute majority, on the proposal of the representative to be designated as a candidate, failing to take account of the need to ensure the governance act in the conditions of parliamentary support. (...) It is disregarded the vote freely expressed by voters in the parliamentary elections, as it creates the premises for the designation of the candidate from amongst the members of the political party or political alliance with the greatest number of votes or seats at the detriment of a postÐelection political alliance which can secure parliamentary support for obtaining the vote of confidence of the Parliament. Thus, the result of the elections, representing the will of the electoral body expressed through the ballot, requires the President of Romania to designate as a candidate for the position of Prime Minister the representative proposed by the political alliance or political party that possesses the absolute majority of parliamentary seats or, if no such majority exists, the representative proposed by the political alliance or political party which can provide support to a parliamentary vote of confidence of the Parliament. To regulate, even at a constitutional level, the right of a parliamentary minority to invariably propose the designation of the candidate for the position of Prime Minister is to accept*

8 Republished in the Official Gazette no.516 of 8 June 2004

that a government without electoral legitimacy may obtain the investiture. Not to take account of the fact that citizens have opted in favor of some election competitors that are forming or may form an absolute majority, which could ensure the investiture of the Government, is to affect decisively the right to vote, as the right to vote directly concerns Parliament's political configuration and, indirectly, the investiture of the Government. Under these circumstances, the Court finds that the proposed text removes a guarantee of the right to vote, i.e. the respect for the outcome of the free suffrage. For these reasons, by majority vote, the Court finds the unconstitutionality of the amendment to Article 103 (1) and (3) of the Constitution, as well as of the completion to Article 103 of the Constitution with three new paragraphs, paragraphs (3^1)—(3^3), relating to the method of designation by the President of the candidate for the position of Prime Minister, as contravening the revision limits set forth in Article 152 (2) of the Constitution." (Paragraphs 321-326)

The basis for the invocation by the LC of this solution consists of the provisions of Article 147 paragraph (4) of the Constitution, enshrining the general binding nature of the CCR decisions. In established case law, the CCR held that this binding nature refers both to the solution and the recitals of the decision issued. Thereby, even if the opinion of the LC is advisory, by invoking and due to the legal force of the decisions of the CCR, the initiatives contrary to the Constitution are prevented.

IV. LOOKING AHEAD

It can be noted that the topic of the revision presented is circumscribed to the relations between public authorities of constitutional rank, which have often been, in the recent history of Romania, the subject of legal conflicts of a constitutional nature. However, in this type of regulation, the opinion of a prudent approach focused on the idea of the stability of the Constitution was expressed. Thus, during the debates on the occasion of the 30th anniversary of the adoption of the Constitution, it was argued in this regard that *"the flaws in the text of the fundamental law and the disturbances manifested in the functioning of the authorities that carry out the three powers in the State can be corrected and have been corrected in part by the set of constitutional traditions and by the case-law of the constitutional court"*; *"the adoption of a new Constitution or the frequent revision of the existing one would endanger the results of the three-decade effort to create the premises of a national constitutional tradition."*[9] In this regard, the amendment of the Constitution seems to be understood as *"fine adjustments in the way the State operates, based on the previous experiences and taking account of the conduct of the public institutions."*[10] In another opinion, it was expressed the idea[11] that the amendments can be approached from at least three perspectives: technical (removing from the text of the Constitution certain terms that lost the constitutional significance they had 30 years ago); or political option (in terms of reconfiguring certain constitutional concepts and procedures); innovative (in terms of introducing new elements resulted from the social and even scientific developments).

Apart from these main topics, a theme that continued to be discussed in 2022 was the relationship between national law and EU law. In the previous Report, we presented the current constitutional framework (Article 148 of the Constitution). The vivacity of the debates and the importance of the topic determined the organization of a national Conference, at the beginning of 2022, under the title *CJEU-CCR, A necessary dialogue*[12]. The conference benefited from a significant representation of academics and practitioners in the field. Its works led to a volume entitled *CJEU and CCR, Identities in Dialogue*, published at the end of 2022[13], including relevant articles on the relationship between EU law and national law, between Courts at the EU level, and the national constitutional identity. On that occasion, it was debated the idea of revising the Constitution, *inter alia*, to facilitate harmony in this complicated legal environment.

It is worth mentioning that the idea of amendment of the Constitution as a precondition for the enforcement of certain CJEU judgments appeared in a press release of the CCR given as a response to the CJEU judgment that raised the issue of the effects of the CCR decisions. Thus, by the Judgment of 21 December 2021, CJEU held, *inter alia*, that "*the principle of primacy of EU law is to be interpreted as precluding national rules or a national practice under which national ordinary courts are bound by decisions of the national constitutional court and cannot, by virtue of that fact and without committing a disciplinary offence, disapply, on their own authority, the case-law established in those decisions, even though they are of the view, in the light of a judgment of the Court of Justice, that that case-law is contrary to the second subparagraph of Article 19(1) TEU, Article 325(1) TFEU or Decision 2006/928.*" In December 2021, after the pronouncement of the cited judgment, the CCR issued a press release in which *"having regard to the judgment delivered on 21 December 2021 by the Court of Justice of the European Union (CJEU) in Joined Cases C-357/19 Euro Box Promotion, C379/19 DNA- Serviciul Teritorial Oradea, C-547/19 AsociaÐia «Forumul JudecÐtorilor din România », C-811/19 FQ and Others and C-840/19 NC, which gave rise to public debates on its impact on the Romanian Constitutional Court"***,** it emphasized that **"***according to Article 147 (4) of the Constitution, the decisions of the Constitutional Court are and remain generally binding. (...). However, the conclusions of the CJEU ruling that the effects of the principle of the primacy of EU law apply to all organs of a Member State, without national provisions, including those of a constitutional nature, being capable of hindering this, and according to which national courts are obliged to disapply, of their own motion, any national legislation or practice contrary to a provision of EU law, requires revision of the Constitution in force. From a practical point of view, this judgment can only produce effects after the revision of the Constitution in force, which, however, cannot be done by operation of law, but only on the initiative of certain subjects of law, in compliance with the procedure and under the conditions laid down in the Romanian Constitution itself.*"

As regards the position expressed by the CCR and the tensions that arose in the dialogue with the CJEU, some authors believe that the revision of the Constitution is "*an extreme solution*[14]" and that "*the*

9 V.Stoica, Keeping the current form of government, in the Constitutional Notebook 1991-2021, 30 years since the adoption of the Constitution, Coordinators R.M. Cazanciuc, C.Pârvulescu, Monitorul Oficial Publishing House, Bucharest, 2021, pp. 33-44

10 Ş.Deaconu, The importance of the Constitution for citizens, in the volume Caiet ConstituÐional...(Constitutional Notebook....), cited work, page 57

11 R.M. Cazanciuc, Constitutional argument, in the volume Caiet ConstituÐional ... ...(Constitutional Notebook....), cited work, page 7

12 https://evenimente.juridice.ro/cjue-ccr-un-dialog-necesar

13 V Stoica (coord), Universul Juridic Publishing House, Bucharest, 2022

14 C.Pintilie, Is dialogue possible in the absence of the revision of the Constitution? In CJUE and CCR. Identities in dialogue, coordinator V. Stoica, Universul Juridic Publishing House: 2022, pp.353-364

current constitutional framework allows a dialogue between the CCR and the CJEU and a priority of systematic application of EU law, and the mechanism of the preliminary reference can be a good means to enhance this dialogue"; "*from a pragmatic view, the dialogue between the CJEU and the CCR represents the path that can ensure a reconciliation of the possible divergent interests, in line with the European integration process.*"

Other preliminary references of the Romanian courts of law led to the pronouncement by the CJEU, at the beginning of 2022, of a decision of great significance for the European constitutional justice. Thus, by the Judgment delivered in Case C-430/21-RS[15], CJEU (Grand Chamber) ruled, *inter alia*:"(...) *2. The second subparagraph of Article 19(1) TEU, read in conjunction with Article 2 and Article 4(2) and (3) TEU, with Article 267 TFEU and with the principle of the primacy of EU law, must be interpreted as precluding national rules or a national practice under which a national judge may incur disciplinary liability on the ground that he or she has applied EU law, as interpreted by the Court, thereby departing from case-law of the constitutional court of the Member State concerned that is incompatible with the principle of the primacy of EU law."* Subsequently, in the new laws of justice adopted in Romania at the end of 2022, the disciplinary liability of judges for non-compliance with the CCR decisions was no longer regulated as a separate offense[16]. Called to rule on the constitutionality of the new laws, the CCR held that "*in examining the text of Article 271 of the criticized law, it is found that the failure to comply with the decisions of the Constitutional Court or the decisions given by the HCCJ in resolving appeals in the interest of the law was no longer regulated as a separate disciplinary offense in the text of the pre-referred law. However, this does not mean that failure to comply with them cannot give rise to disciplinary liability of the judge or prosecutor to the extent that it is demonstrated that he has exercised his office in bad faith or gross negligence.*" (par. 139[17]) To this effect, the CCR invoked the general constitutional framework of judges' liability, applicable when they act *in bad faith or gross negligence.*

We could say that it was found (with many controversies and debates) a kind of way to comply with the general binding nature of the CCR decisions, the binding nature of the CJEU judgments, and the independence of judges in the current constitutional framework of the relationships between national and EU law. Moreover, the end of 2022 brought the two Courts into direct dialogue through their presidents. A meeting took place on 30 September 2022 in Bucharest on the anniversary Conference *"Evolution of the European Union Law - Dialogue between the Court of Justice of the European Union and the Constitutional Courts,"* organized by the National Institute of Magistracy. On the same day, the president of the CJEU and the Romanian judge of the CJEU had a meeting with the president and the judges of the CCR at the headquarters of this Court, where the mutual desire for dialogue was expressed. These aspects are recorded in the press release of the CCR[18], where the following was also noted in the speech of President Lenaerts: "*The CJUE does not rule on the EU law in a crystal ball, but interprets it in such a way that it is uniformly and equally applied in all the Member States of the European Union. The EU law has the same meaning in Romania, Belgium, Portugal, Estonia, Greece, and all 27 Member States. But to do so, the CJUE needs the contributions of the national constitutional courts, which discover problems relating to the EU law and possible aspects of the interaction between the EU law and national law, including the national constitutional law, which refers questions to the Court of Justice for a preliminary ruling, and the Court of Justice seeks to interpret the European law in such a way as to harmonize the rich constitutional traditions common to the Member States."* It should be seen further how the new legislative amendments will materialize in practice and, in itself, the dialogue of the courts at the national and supranational level, all the more so as the CJEU still has preliminary referrals from the Romanian courts of law concerning decisions of the CCR.

The end of 2022, under the perspective of the centenary year 2023, provides the view of extensive debates on Romanian constitutionalism. The general context will enhance these debates, 2023 being a preparatory year for the political confrontations determined by the overlap in 2024 of the local, parliamentary, and presidential elections.

V. FURTHER READING

(CJUE and CCR. Identities in dialogue, coordinator V. Stoica, Universul Juridic Publishing House: 2022)

15 https://curia.europa.eu/juris/document/document.jsf?docid=254384&doclang=ro&mode=req&occ=first&part=1&cid=2515584&fbclid=IwAR2tcN3E-WYEhLej1beZeiHQS1eCM2uKMuiAe-E4jsLPn6o4xYatklE-GZE

16 the disciplinary offense related to *„non-compliance with the decisions of the Constitutional Court and the decisions issued by the High Court of Cassation and Justice in the resolution of appeals in the interest of the law*" was introduced by art. I point 3 of Law no. 24/2012 for the amendment and completion of Law no. 303/2004 on the status of judges and prosecutors and Law no. 317/2004 on the Superior Council of Magistracy; the new laws on justice abrogated the previous regulations

17 Decision 520/2022, Official Gazette No 1100, 15 November 2022

18 https://www.ccr.ro/comunicat-de-presa-30-septembrie-2022-2/

San Marino

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I. INTRODUCTION

When approaching the issue of constitutional reforms in San Marino, it is important to recall some characteristics of the Sammarinese system of sources of law.

The Sammarinese sources are characterized by centuries of stratification.

At the constitutional level, there are the *Leges Statutae* (dating back to 1600), their subsequent reforms (so-called *Reformationes*), and the Ancient Customs, integrated by the *ius commune*. Only in 1974, very recently when compared to most continental Europe legal systems, San Marino decided to adopt the *Dichiarazione dei diritti dei cittadini e dei princìpi fondamentali dell'ordinamento sammarinese* (Declaration of Citizens' Rights and of Founding Principles of the Sammarinese Legal System, hereinafter DD). Afterward, in 2002, an important reform of the DD was implemented as a part of the Sammarinese legal system. By incorporating this crucial reform in its legal system, San Marino acknowledged the European Convention of Human Rights and international covenants which serve to protect natural rights and individual freedoms.

As the naming of the document suggests, the DD is not exactly a proper constitution. Nevertheless, following the 2002 amendment, in Article 3bis, the DD specifically provides for constitutional laws to enact the principles stated in the DD. To be more precise, according to the transitory norms of the DD—introduced as well by the 2002 amendment—these constitutional laws must be passed within 3 years from the enforcement of the DD. Moreover, the procedure to pass constitutional laws requires a supermajority vote (two-thirds) by the Consiglio Grande e Generale (Grand and General Council), whilst, in the case of an absolute majority, a referendum must be held afterward.

The very same procedure is provided in Article 17 to amend the DD. This article, again introduced by the 2002 amendment, gives the DD the rigidity it was previously lacking.

Moreover, the 2002 amendment also introduced the Collegio Garante della Costituzionalità delle Norme (Guarantors' Panel on the Constitutionality of Rules), which is the Sammarinese equivalent of a constitutional court.

It can be concluded that, even though the DD still has the name of a declaration, it has progressively acquired a constitutional character.

In the year 2022, there were no amendments to the DD which were either proposed or approved. There also were not any constitutional and qualified laws proposed or approved to San Marino's declaration.

This constitutional immobilism is quite striking, considering that in 2020, a consensus within the Sammarinese institutions was reached regarding the necessity for the Sammarinese legal system to undergo significant constitutional reform in the upcoming years. The fact that no formal road map with a clear schedule has been released so far allows one to believe that the reform process will span several years.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Even though no reform, either successful or unsuccessful, characterized the year of 2022, it is appropriate to briefly address const. law 1/2021, discussed in last year's issue. The reform of the civil liability of the members of the judiciary was carried out to have the Sammarinese judiciary comply with the practices of the Council of Europe. Indeed, in the fourth evaluation round which dealt with "Corruption Prevention in Respect of Members of Parliament, Judges, and Prosecutors, released in June 2022, GRECO praised the Sammarinese constitutional reform.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Even though no proposed amendments to the DD were passed in 2022, it is noteworthy to point out two key elements which will affect future reform: the scope of any amendment and the role that may be played by the Collegio Garante della Costituzionalità delle Norme (Sammarinese Constitutional Court).

Regarding constitutional reforms, Article 17 DD reads that any provision of the Declaration can be amended. Hence, no provision is explicitly qualified as unamendable. The procedure to pass amendment laws is the same as the one to pass constitutional laws—either a vote by 2/3 by the Consiglio Grande e Generale or by an absolute majority vote followed by a popular referendum. The fact that the DD does not provide for any unamendable rule reflects its character of not being a proper constitution. Moreover, as previously discussed, even the rigidity of the DD is quite recent, dating back only to 2002.

The Collegio Garante della Costituzionalità delle Norme has been one of the major innovations introduced by the 2002 DD reform. To better understand the innovative character of this body, it is significant to note that it is the only Sammarinese institution that is not provided

for in the *Leges Statutae* of 1600. Until 2022, the lack of some sort of rigid constitutional document made a body like the constitutional court almost useless.

With respect to the sources, the Panel can scrutinize only primary legislation and customs having the force of law. Nonetheless, it is worth recalling that since the 2002 DD reform, the European Convention of Human Rights and the international covenants which serve to protect individual liberties and fundamental freedoms have become constitutional parameters.

A further element to take into account is San Marino's membership in the Council of Europe, which closely scrutinizes the implementation of the rule of law in small jurisdictions.

The Collegio Garante is a significant court in Sammarinese institutional architecture. Despite being a relatively young court that was only established in 2002, the Collegio Garante plays an important role as a counter-majoritarian institute. Nevertheless, when considering the diminutive size of the Sammarinese jurisdiction, concerns persist regarding the independence of the judiciary. However, as it usually happens in small jurisdictions, most of the members of the Collegio Garante are Italian citizens, the outsourcing of recruitment favoring the independence of the judiciary.

It is worth noting that the Collegio Garante delivered a decision on Const. Law (1/2021) on the civil liability of the judiciary in June 2022. The scrutiny of the challenged provision (art. 16, par. 7) did not identify any constitutional illegitimacy.

IV. LOOKING AHEAD

In 2021, San Marino was bound to start a significant institutional reform to further modernize the constitutional arrangements and to align the Sammarinese system to the best practices requested by the Council of Europe. San Marino considers that it is of paramount importance to integrate the new instances and the challenges of the twenty-first century within the Sammarinese institutional tradition. The decision regarding Const. Law (1/2021) has been the first step in this direction, even though the most significant reforms are expected for 2023, rather than for 2022 as originally planned. It is worth noting that the Capitani Reggenti—Captains Regent, the two-heads head of state—has stressed the importance of linking the institutional reforms to the Association Agreement with the EU, which must be discussed by the Consiglio Grande e Generale during 2023.

However, the extension of the reform process in San Marino cannot be appreciated just yet. Like all other continental microstates, San Marino tends to modernize slowly and respect the principle of institutional continuity that has guided the country's reforms so far.

V. FURTHER READING

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Sierra Leone

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I. INTRODUCTION

In 2021, Sierra Leone opened a new phase of the constitutional review process with the release of the report on the review of the 2017 Government White Paper on the country's 1991 constitution. The 1991 Constitution introduced a multi-party democratic dispensation and replaced the one-party system established in 1978. However, the 1991 Constitution was adopted in an autocratic environment with little popular input. Consequently, the Constitution had failed to adequately address various issues including accountability, socio-economic justice and rights, gender equality, the death penalty, the over-centralization of powers in the executive, natural resource governance, the environment, and the role and status of chiefs. These among other factors have triggered calls for a constitutional reform process, whose root can be traced back to the 1999 *Lome Peace Accord* that aimed at ending the Sierra Leonean civil war. Arguably, the 2021-22 constitutional reform efforts in Sierra Leone were solely a phase in an over twenty-year-long process.

After the provision for constitution review in the 1999 *Lome Peace Accord*, the push for constitutional reforms gained a major thrust after the release of the 2004 report by the Truth and Reconciliation Commission (TRC)—a transitional justice mechanism established as part of the healing process for the wounds inflicted on the nation by the civil war. The TRC report identified a lack of sufficient public participation in drafting the 1991 constitution as a major issue that impacted its legitimacy. Consequently, TRC recommended that a new constitution be adopted through a thorough consultative process with wide public participation. Subsequently, there have been efforts to review the constitution characterized by the establishment of several committees or commissions to spearhead the task. The 2021 constitutional review is part of the continuous efforts geared towards having a new Constitution. This report examines the reforms focusing on the 2021 constitutional review efforts.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The 2021-22 constitutional reforms were initiated when President Julius Maada Bio unveiled the White Paper about constitutional reforms in a glamorous ceremony. The White Paper was a review of the 2017 recommendations on constitutional reforms by the Constitution Review Commission. The President stated that his government had already accepted some of the recommendations of the review as part of the government's ongoing process of reforms. Emphasizing his campaign promise of a new direction for the nation, President Bio compared himself with his predecessor who supposedly neglected the TRC recommendations. On the other hand, President Bio's administration had implemented over half a dozen of governance and legislative recommendations in the TRC Report. As aforementioned, creating a new Constitution was part of the TRC recommendations.

The White Paper accepted some of the recommendations and rejected others. One of the key recommendations accepted include the separation of the office of the Attorney-General from the Justice Ministry. The government accepted the recommendation that the Attorney-General shall be the principal legal adviser to the Government but not a Minister. Within the same recommendation, the government also proposed that the age of eligibility for the position of Attorney-General be reduced from 20 years to 15 years of legal practice, and that the Justice Minister remains a cabinet position. However, the government rejected the recommendation that the appointment of the Solicitor-General be subject to Parliamentary approval. The government also dismissed the recommendation that the retirement age be increased from 65 years to 70 years. In rejecting the proposal, the government argued that a Parliamentary approval of the Solicitor-General is unnecessary, since he is only the principal assistant to the Attorney-General. It was further proposed that the age for qualification for appointment as Solicitor-General be reduced from fifteen years to twelve years. Additionally, the proposal that it should no longer be a function of the Secretary to the President to serve as principal adviser to the President on public service matters was rejected. The government maintained that current provisions in the Constitution are adequate and have worked well. Hence, the argument that section 67(2)(a) of the 1991 Constitution should be retained.

The recommendation that Presidential, Parliamentary, and Local Government elections be held on the same day was also accepted. The government proposed that the day should be the second Saturday of March in the election year. However, the suggestion to amend the composition of the Electoral Commission and limit it to the Chief Electoral

Commissioner who shall be the Chairperson, along with four other members, was rejected. The government contended that the existing provisions have worked well and insisted that the composition of the Electoral Commission should be a Chief Electoral Commissioner and such other members as Parliament may by law prescribe.

The government accepted the recommendation that at least 30 percent of participants in public elections (Presidential, Parliamentary and Local Council elections) should be women. In line with this, the government proposed that section 38 of the Constitution should be amended to provide for proportional representation to achieve this threshold of women's participation in public elections. Furthermore, the government accepted the recommendation to draft a new section 27 of the 1991 Constitution to provide for gender inclusivity, protection from discrimination, promotion of female rights, and the empowerment of women in line with Government's policy. However, the government rejected the recommendation that no less than 30 percent of Members of Parliament should be women, details of which should be prescribed by an Act of Parliament. In rejecting this proposal, the government maintained that this issue should be addressed in a different legislation other than the Constitution.

The recommendation to establish a fixed date for the inauguration of an elected President was also accepted, resulting in the amendment of section 43 accordingly, where April 27th in the election year was the preferred date. However, the government proposed that a threshold of more than fifty percent of the valid votes cast should suffice for a candidate to be elected President instead of the fifty-five percent threshold written in Section 42 of the Constitution. The government also accepted the recommendation that a loss of party membership should not nullify or result in the removal of a sitting President or Vice-President from office. However, the government proposed that a subsection should be added which required the party under whose ticket the President or the Vice-President was elected to send the resignation or expulsion notice to Parliament. This notice would lead to a debate and vote, which would require two-thirds majority of all Members of Parliament for the said President or Vice-President to be removed.

Some of the recommendations accepted on fundamental human rights and freedoms included the abolishment of the death penalty accordingly amending section 16(1). By accepting this recommendation, the government noted that it was in support of the Government's belief in the sanctity of life as well as the intent to place the State alongside other progressive countries in the world. The recommendation to reduce the age at which an individual may be deprived of his personal liberty for the purpose of his education or welfare from 21 to 18 years was accepted. Thus, section 17(1)(g) is to be amended accordingly to set the age limit to eighteen years in line with the age of consent in Sierra Leone. Additionally, the government accepted the recommendation to amend section 17(3)(a) and (b) to reduce the detention period prior to being brought to court to seven days from ten days for heinous offenses and forty-eight hours from seventy-two for other offenses, respectively. Moreover, the recommendation that freedom of movement may be curtailed in the interest of national security was accepted accordingly, requiring the addition of 'national security' in section 18(3)(a). The government also accepted the proposal to draft a new chapter on citizenship in the Constitution.

However, the government rejected the recommendation that the condition stipulated in section 18(3) on freedom of movement be amended to read, "Provided that no court or other authority shall prohibit any such person from entering into or residing in any place to which she/he is a citizen." The government argued that freedom of movement is not an absolute right to citizens and may be restricted in the interest of national security, defense, public safety, etc. Consequently, the government maintained that section 18(3) of the 1991 Constitution should be retained. Moreover, the government also rejected the recommendation that section 23(10) of the Constitution be replaced by a new subsection conferring on persons detained including persons serving a term of imprisonment and persons in detention awaiting trial, the right to conditions of detention that are consistent with human dignity and to communicate with and be visited by those persons' spouses or partners, religious counselors, medical practitioners and legal counsel etc. Regarding this recommendation, the government argued that the matter should not be dealt with in the Constitution; it should be dealt with in other legislations such as the Sierra Leone Correctional Services Act 2014 and the Criminal Procedure Act 1965. The government further rejected the recommendation to make the fundamental principles of State policy contained in Chapter II of the 1991 Constitution justiciable by amending section 14 of the Constitution. In rejecting this recommendation, the government argued that the fundamental principles as contained in Chapter II of the Constitution are clear and should continue to serve as a guide in the governance of the State and in law making. Hence, section 14 of the 1991 Constitution was retained.

On matters pertaining to the Legislature, the Government accepted the recommendation to reduce the time for public officers to resign to contest from twelve months provided for in section 76(1)(b) to six months. The recommendation to amend section 79(1) on electing a Speaker of Parliament was also accepted, proposing that only individuals who are members of Parliament or are qualified to be elected as such, as well as those who are qualified to be appointed as Judges of the Superior Court of Judicature can be elected as Speakers of Parliament. However, the recommendation that a National House of Chiefs be established and enshrined in the Constitution was rejected. In rejecting this recommendation, the government maintained that the provisions dealing with the composition of Parliament are adequate, and that creating a National House of Chiefs is unnecessary. The government also rejected the proposal to remove Paramount Chiefs as part of the composition of Parliament by amending section 74 of the constitution. The government maintained that the current composition of Parliament enabled Paramount Chiefs to participate in the legislative process, hence retained section 74 of the Constitution.

Regarding the structure and functions of the Judiciary, some of the key recommendations accepted include the recommendation to increase the number of Supreme Court Justices. This is to be affected by amending section 121(1)(b) of the 1991 Constitution to read "... not less than seven other Justices of the Supreme Court" instead of "...not less than four other Justices of the Supreme Court." The recommendation to increase the number of Justices in the Court of Appeal to no less than nine and the number of Justices in the High Court to no less than fifteen was accepted. However, the recommendation to increase the age at which a Judge of the Superior Court of Judicature should vacate office from sixty-five to seventy years was rejected. The government argued that the current age requirement applies to other public officers and should be maintained. Moreover, the government rejected the

proposal that a Justice or a Judge of the Superior Court of Judicature shall be removed from office only by the President, which would have required section 137(7) of the Constitution to be amended.

Furthermore, the government accepted the recommendation for the Chief Justice—instead of Parliament—to create divisions of the Court of Appeal as may be necessary. The recommendation for the addition of the Court Martial in the Constitution was accepted. Moreover, the government accepted the recommendation to make the Judicial and Legal Services Commission (JLSC) fully functional with funding from the consolidated fund. However, on the recommendation to expand membership of JLSC, the government proposed that the expansion should only include the Financial Secretary, but the other proposed representatives should not be included. The government also rejected the proposal that the power vested in the JLSC to appoint persons and to exercise disciplinary control over persons holding certain Judicial and Legal Offices shall be to the exclusion of any other body or authority. In this regard, the government held that the current provision is adequate, hence retained section 141(1) of the 1991 Constitution.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The 2021-22 constitutional reforms in Sierra Leone, especially the ones that were successfully accepted by the government, are mostly amendments. This is because most of them are consistent with the existing framework, design and the basic presuppositions of the 1991 Constitution. Although there were some attempts to dismember the Constitution through some of the proposed reforms which were rejected by the government. For instance, the proposed amendment of section 74 of the Constitution which would have removed Paramount Chiefs as part of the composition of Parliament would have amounted to dismemberment of the Constitution.

It is important to underscore that the 2021-22 constitutional review efforts under the administration of President Julius Maada Bio was a rejuvenation of the constitutional reform process after four years of inaction. This inaction disregarded repeated calls from constitutional reformist and civil society groups that urged the government to fulfill its election promise of reforming the 1991 Constitution. The reforms were not a novel initiative of President Julius Maada Bio. Rather, they were a phase in advancement of efforts to undertake constitutional reforms in the light of identified weaknesses of the current 1991 Constitution. The first attempt to review Sierra Leone's 1991 Constitution was started by a former president who was also the leader of Sierra Leone People's Party (SLPP) then, Ahmad Tejan Kabbah in 2007. This was in consideration of the 2004 TRC report that had recommended constitutional reforms.

The constitutional reforms are a culmination of various constitution review commissions over time which have had some of their recommendations rejected and accepted. Kabbah established the first Dr. Peter Tucker Constitutional Review Commission to review the 1991 Constitution in January 2007. The Commission submitted its report with several proposed amendments in January 2008, a few months after Kabbah's term had ended in September 2007. Kabbah's successor, President Ernest Bai Koroma who was also the leader of All People's Congress (APC)—-the opposition party which abandoned the constitutional reforms process and prioritized the economy, energy, infrastructure, and other public services instead.

In 2012, the constitutional reforms process was revived by President Koroma after his re-election. However, the Koroma administration decided to conduct a fresh review. Accordingly, shortly after beginning his second term, the President established another Constitutional Review Commission in July 2013, led by the late Justice Edmond Cowan to spearhead the constitutional reform process. The Commission presented its report with various recommendations to President Koroma in January 2017. Subsequently, the government released a White Paper that was gazetted on November 10th, 2017, rejecting most of the progressive recommendations. Thus, the recommendations were shelved again.

When President Koroma's term came to an end in 2017, in a twist of events, SLPP won the 2018 presidential election with its leader Julius Maada Bio being elected the president. President Julius Maada Bio had promised to revisit the reform process during his election campaigns. However, since his election, president Bio only rejuvenated the constitutional reform process towards the end of 2021, which is less than two years to the next general election scheduled on June 24th, 2023, where SLPP has endorsed President Bio to seek re-election for a second term). The reforms discussed in part II is a constitutional review that the SLPP administration under the leadership of President Bio undertook by revisiting the actions of its predecessor. The Court did not exercise a major control of the constitutional reforms process. President Bio's administration had a twelve-member Technical Committee that reviewed the 2017 recommendations by the Justice Cowan Committee, which was to issue another White Paper in 2021 stipulating the government position on the constitutional reforms.

IV. LOOKING AHEAD

Sierra Leone's next election is scheduled to take place in June 2023. Whether President Julius Maada Bio of SLPP will be re-elected or the opposition party (APC) will win is not clear. The trajectory of the constitutional reforms in Sierra Leone shows that every regime upon coming into power opts to have a new approach to implement constitutional reforms without necessarily adopting or continuing with the approach that the predecessor regime had set up. Although recent population statistics have indicated that there has been an increase in population especially in areas where SLPP has the majority support, the possibility of the APC winning the election cannot be ruled out. With the various hurdles that are often present when seeking to implement constitutional reforms, whether President Bio will be able to establish a Constitution to reflect the reforms before the expiry of the current Legislature remains unclear. However, whichever regime may be in power at any point, the constitutional reforms need to be prioritized ensuring there is enough time for adequate consultation and engagement of the public. It is very significant for constitutional reforms to not be politicized for the greater of the nation. The success of constitutional reforms will depend on the commitment from the government to implement these reforms without the conflict of political interests in the process.

V. FURTHER READING

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The Slovak Republic

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I. INTRODUCTION

In early 2022, it seemed that after two years of the COVID pandemic, Slovak society would return to "normalcy." On February 23, 2022, the state of emergency, which had imposed various human rights restrictions, ended.[1] However, on the very next day, the Russian soldiers invaded Ukraine. The weeks of heightening tensions on the Ukraine–Russia border culminated in a full-scale war that sought to redraw the internationally recognized borders. This unprecedented European crisis triggered substantial military, humanitarian, economic, and energy consequences.

Even though the military conflict has not affected Slovakia directly, Slovakia had to adjust its migration, educational, and humanitarian policies to assist Ukraine in defending its sovereignty. The country also had to learn how to manage the influx of refugees. The collective West, comprising the EU member states, the USA, and other democracies, has committed to supporting Ukraine with military equipment and significant economic aid. These countries also implemented waves of economic sanctions against Russia for its aggression.

The attitudes towards the Russian invasion revealed deep cleavages within Slovak society. The societal differences on whether to continuously support Ukraine in an ongoing war emerged from various sources. Undoubtedly, broad dissatisfaction with the Slovak Government's mismanagement of the COVID-pandemic and a relatively strong pro-Russian sentiment in Slovakia exacerbated the situation. Populist politicians have exploited divergent, often unfounded views for political gains, regardless of potentially threatening democracy and the rule of law in Slovakia. As a result, Slovak politics has become as polarized as ever.

The recent cacophony of various crises culminated in a deep dissatisfaction with the chaotic decision-making of the Government and distrust in the state institutions, international order, and European Union.[2] This unfortunate situation resulted in numerous, often detestable populist agendas within the political arena and during the constitution-making process in 2022.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In 2022, the Parliament considered 19 constitutional proposals. Of these 19 constitutional proposals, 15 were constitutional amendments, three were amendments to stand-alone constitutional acts, and one was a proposal of a new constitutional act.[3] The constitutional bills addressed various issues, including a requirement of mental fitness evaluations for the prime minister and the protection of the right to receive cash payments. Other constitutional bills dealt with the recognition of wood as a natural resource or a guarantee of military neutrality of Slovakia, a blatant populist plea revolving around anxiety that the war in Ukraine could somehow directly affect Slovakia. The most recurring topic of the constitution-making process in 2022, just like in 2021, was the request to entrench the possibility of ending the Parliament's term early, either by a referendum or a vote in Parliament. This topic culminated after the no-confidence vote against the Government in early 2023 (see Part IV).

There were only two successful constitution-making processes in 2023. The first was a constitutional amendment dealing with the term of the public defender of rights ("ombudsman"). The amendment resulted from a previous experience in which the preceding ombudsman's term ended in late March 2022. The new ombudsman could take office only in December 2022. In other words, the position was vacant for nearly nine months due to the Parliament's inaction. Therefore, the constitutional alteration stipulated that the ombudsman's term would extend until the new one took office. This new rule did not apply to the former ombudsman but only to those elected after the constitutional amendment was enacted. The second successful constitution-making process in 2022 dealt with a minor (formal) wording modification of the stand-alone constitutional act.[4]

Two constitution-making processes that started in 2022 were also discussed in 2023. While the first process concerned the individual right to a cash payment, the second unfinished constitution-making process related to the already mentioned topic of early elections

1 <https://korona.gov.sk/nudzovy-stav-a-zakaz-vychadzania-od-25-novembra-2021/>

2 Standard Eurobarometer 98 - Winter 2022-2023. See < https://europa.eu/eurobarometer/surveys/detail/2872>

3 The 2022 constitution-making rate returned to its pre-pandemic level, as the average submission rate for 2015-2019 came close to 17 bills a year. During the 2020 COVID year, the Parliament discussed only five constitutional bills. Based on data reported by the Parliament. Accessible at: <https://www.nrsr.sk/web/ Default.aspx-?sid=zakony/sslp>

4 The Constitutional Act no 254/2006 Coll. on the establishment and powers of the Committee of the National Council of the Slovak Republic reviewing the decisions of the National Security Office.

following a dissolution of the Parliament (see Part IV). All remaining constitutional bills failed to progress through the legislative process and died. Most of these bills failed in the first reading, i.e., in the initial phase of the constitution-making procedure. Ultimately, these bills were irrelevant from the start of the constitutional-making process.

The MPs proposed all but one constitution-making process. Therefore, the Government initiated just one constitutional bill in 2022. The proposal sought to unify the election dates for the European Parliament and the second round of the presidential election , ensuring that both events would take place in 2024, resulting in electoral mandates for the same period of five years. However, the bill failed in the final, i.e., the third parliamentary reading. The last governmental constitution-making initiative, still ongoing in 2022, has been a holdover since 2020[5].

The almost exclusive constitution-making initiative of MPs seems part of a broader trend. Historically, out of the 21 approved direct constitutional amendments, only eight were proposed by the Government. Half of those eight bills were approved using a fast-track procedure. In contrast to the "ordinary" legislation process, the constitution-making process should be more thoughtful, deliberative, and, most importantly, inclusive. However, its Slovak embodiment, in which the Parliament wields all power, has been traditionally transactional, based on *ad hoc* political bargains. Therefore, the Government did not need to introduce constitutional bills in recent years. Undertaking the governmental constitutional initiative would require the involvement of various stakeholders and more extended consideration, subjecting it to closer public scrutiny. Engaging in such a transparent approach and facilitating public discussions could undermine secret political agreements, often crafted solely for their efficiency. As a result, the Government, acting behind the Parliamentary curtains, has routinely moved its constitutional proposals via MPs bills. The swift advance of this procedure has often resulted in unsatisfactory quality and practical problems of adopted constitutional acts which require further amendments.[6] On the other hand, the opposition MPs have used their power to propose constitutional bills primarily to promote their populist, sometimes implausible, agenda without any meaningful prospect of success.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Both formal constitutional amendments passed in 2022 had little impact on the Slovak constitutional system. Therefore, the report will examine informal constitutional amendments. This part will discuss three significant decisions of the Constitutional Court of the Slovak Republic ("SCC") that modified the constitutional system in 2022. One of those decisions might be denoted as a constitutional dismemberment.

1. THE SCC DECISION ON A POPULAR INITIATIVE TO REMOVE THE GOVERNMENT (PL. ÚS 11/2022)

After two unsuccessful attempts in 2000 and 2004, the idea to demand early parliamentary elections through a referendum emerged again in Slovakia in 2021. The 2000 and 2004 referendums, in that matter, failed due to a low voter turnout.[7] The initiative to hold these referendums came formally from popular petitions, with the support of several opposition political parties.[8] In 2021, the petition with a similar question to hold a recall referendum was, for the first time, preventively reviewed by the SCC at the request of the Slovak President.

In PL. ÚS 7/2021, the SCC declared the recall initiative (as a question proposed for a referendum) unconstitutional. It confirmed that a validly adopted referendum result was directly binding and had a legal status of a constitutional act. According to Article 99 (1) of the Constitution, the Parliament may amend or annul a referendum result by the constitutional act, but no sooner than three years after the result came into effect.

When considering the implicit limits of the questions proposed for a referendum, the SCC referred to the rule of law and linked it with a principle of the generality of legal norms. The SCC declared that a referendum question involving early parliamentary elections would be contrary to this principle because a validly adopted result would, in one case, disrupt the constitutional rule concerning the term of the Parliament. At the same time, such an outcome would also violate the principle of separation of powers. The Constitution solely allowed for a possibility to dissolve the Parliament by a presidential decision. This presidential power, however, was conditional upon exceptional circumstances, such as prolonged gridlock. Consequently, the Constitution did not consider a referendum to dissolve the Parliament. The SCC explained that the people in the referendum do not act as an original (limitless) constitution-making power (*pouvoir constituent*), but as a rule-bound legislative power (*pouvoir constitué*). The SCC held that a question posed in a referendum could not break the constitutional rules, i.e., it must remain within the constitutional confines.

Furthermore, the SCC ruled that the subject of the proposed referendum was in violation of Article 93 (3) of the Constitution. This provision forbids lowering fundamental human rights standards using a referendum. In this case, the result of a referendum could infringe upon the right to equal access to elected and other public offices.

Finally, the SCC did not reject the idea of recalling the Parliament through a referendum in the future. It emphasized the need for a general rule enacted by a constitutional amendment as a prerequisite for such a procedure.[9]

The sketched details of PL. ÚS 7/2021 are vital to comprehend the argument developed in PL. ÚS 11/2022. After failing to persuade the SCC of the constitutionality of the recall referendum initiative in 2021, some

5 The constitutional amendment to the Constitutional Act no 493/2011 Coll. on Budgetary Responsibility has been pending since 2020. Its final vote in the Parliament was postponed indefinitely (see also the chapters on Slovakia in The International Review of Constitutional Reform from 2020 and 2021).

6 An extreme example of such an approach was the constitution-making process in 2011 that resulted in the Constitutional Act no 356/2011 Coll. amending the Constitution. This purely political procedure of the constitution-making process, producing the constitutional amendment, took only 35 minutes. The interpretative problems of this amendment have been unresolved to this very day.

7 See Marian Giba and Vincent Bujňák, 'Referendum on early elections: The case of Slovakia in the European context' [2021] 8 European studies: The review of European law, economics, and politics, 37

8 According to Article 95 (2) of the Slovak Constitution, the President declares a referendum upon a petition submitted by at least 350,000 citizens (approximately 8 % of eligible voters) or upon a resolution of the Parliament (approved by a simple majority of its members).

9 For more on PL. ÚS 7/2021 see the chapter on Slovakia (Baraník, Drugda) in The International Review of Constitutional Reform 2021, p. 207 – 208.

opposition parties used a popular petition to raise another constitutionally problematic question in 2022. This time, the initiative focused on two questions. The first question demanded for the Government's immediate resignation ("*Do you agree that the Government of the Slovak Republic should resign without delay?*"). The second one sought to establish a constitutional basis for the termination of Parliament's term through a referendum or its resolution.

Since the President did not consider the second question constitutionally dubious, the SCC only reviewed the first question. The SCC emphasized that the result of a validly adopted referendum was directly binding and had the legal status of a constitutional act. However, regarding the first question, if the result were to be approved, it would oblige the current Government to resign. Thus, the implications of such a referendum would demand a specific action against a particular Government. This request seemed recurring to what was already considered in PL. ÚS 7/2021. The SCC held that the Constitution contained no provisions under which the Government's term would be terminated because of a valid referendum. The SCC also underscored that a referendum could be used to introduce a general rule that would force the Government to resign. However, an *ad hoc* decision adopted via referendum would disrupt other constitutional rules. The referendum cannot lead to the short-term and temporary suspension of a general constitutional norm that forms a part of the substantive constitutional core. The SCC upheld the PL. ÚS 7/2021 reasoning and declared the challenged question unconstitutional.

As noted, the SCC decision did not address the second question proposed for the referendum. Therefore, on January 21, 2023, the referendum proposing the constitutional basis for the termination of Parliament's term through a referendum or its resolution took place. However, the referendum was invalid due to a low turnout, i.e., below 50% (27.25%).

2. CONSTITUTIONALITY OF NARROWING THE JURISDICTION OF THE CONSTITUTIONAL COURT (PL. ÚS 8/2022)

According to Article 125 (1) of the Constitution, the SCC decides on the compatibility of statutory legislation with the Constitution, constitutional acts, and international treaties. The SCC is not explicitly authorized to review the constitutional acts and the Constitution. However, in January 2019, the SCC issued a landmark decision that could be easily indicated as a constitutional dismemberment. In PL. ÚS 21/2014, the SCC ruled on the existence of an implicit material core of the Constitution. It divided constitutional norms into two categories: the core constitutional norms and other constitutional norms. The second category could not reverse the first category of constitutional norms. Quite shockingly, this SCC decision declared a part of the Constitution unconstitutional as it violated the core constitutional norms. The SCC based this authority on Article 124 of the Constitution, which defines the SCC as an independent judicial body charged with the protection of constitutionality. In this decision, the SCC limited the ultimate power of the Parliament to amend the Constitution how it sees fit.[10]

Two years after PL. ÚS 21/2014 decision, the Parliament, in a direct rebuke, amended the Constitution. The altered Article 125 (4) explicitly prohibited the SCC from reviewing the conformity of constitutional acts. The opposition MPs challenged this amendment, and in May 2022, the SCC delivered its decision in PL. ÚS 8/2022. The decision navigated between striking down the contested constitutional provision, which would be an act of directly overstretching its powers, and completely retreating from its previous confident position. Indeed, the SCC found itself between the mythical Scylla and Charybdis.

In PL. ÚS 8/2022, the SCC emphasized respecting the Parliament as a constitution-making body. However, it simultaneously formulated a specific reservation for future cases constituting an undue interference with the substantive core of the Constitution. Ultimately, the SCC dismissed the challenge as unfounded but was open to address future decisive constitutional challenges. The SCC did not want to abandon its role as the ultimate protector of the Constitution. The PL. ÚS 8/2022 reasoning can be considered another episode of a constitutional dialogue between the SCC and the Parliament, a sole constituting-making body. This decision subtly preserved the central holding established by the constitutional dismemberment of PL. ÚS 21/2014. It seems PL. ÚS 8/2022 was a discreet yet resolute SCC commitment to possess a mystical "final word" in all constitutional disputes of the highest legal magnitude.

3. THE CONSTITUTIONAL ENTRENCHMENT OF FISCAL RESPONSIBILITY (PL. ÚS 13/2022)

In 2012, the Parliament adopted the Constitutional Act no 493/2011 Coll. on fiscal responsibility. It regulates the establishment and powers of the Fiscal Responsibility Council, fiscal responsibility rules, and fiscal transparency rules. Some scholars denoted this constitutional act as the first component of the Financial Constitution.[11] Its possible second element was enacted in 2020 when Parliament constitutionally entrenched the principles of fiscal responsibility and long-term economic sustainability. Until 2022, the SCC had not reviewed the statutory regulation against the constitutional rules of fiscal responsibility. The turning point came after passing the so-called "anti-inflation legislation" through a fast-track legislative procedure. Numerous politicians termed this legislation a "pro-family package" because of its considerable child tax benefits. However, this regulation, calling for excessive expenditures, raised significant concerns regarding fiscal policies. Arguably, it triggered negative monetary ramifications, primarily affecting local municipalities whose budgets depend heavily on the income taxes of their residents. In response to these concerns about financial sustainability, the President challenged this statutory package.

PL. ÚS 13/2022 acknowledged that the constitutional fiscal responsibility rules were directly applicable. The SCC robustly rejected the idea that the constitutionally enacted fiscal rules were irrelevant proclamations whose meaning should solely be determined by implementing legislation. The decision clarified the substantive and procedural dimensions of these constitutional rules. The SCC held that the substantive dimension required a balance with other constitutional values. Although fiscal responsibility rules were not merely proclamations, they were not absolute, i.e., they can be limited. Their procedural

10 See Tomáš Ľalík, "The Slovak Constitutional Court on Unconstitutional Amendment (PL. ÚS 21/2014)" [2020] 16 European Constitutional Law Review, 328

11 See Marián Giba, Vincent Bujňák, Frédéric Delaneuville, "Caractéristiques et conséquences des dispositions constitutionnelles relatives á la responsabilité budgétaire en Slovaquie" [2021] 21 International and Comparative Law Review, 227

dimension required a possibility for an exhaustive debate among the MPs before the final vote in the Parliament. The debate should also consider the views and interests of the respective stakeholders (e.g., the local municipalities). The SCC further highlighted the role of the Fiscal Responsibility Council as an independent constitutional authority. It explained that if the Parliament intended to approve fiscally sweeping legislation using a fast-track procedure, it must ensure that the Fiscal Responsibility Council had enough time to prepare the evaluation, enabling the MPs to adopt an informed decision. In the case of the challenged legislation, the SCC found infringements of the constitutional fiscal responsibility rules. Therefore, it declared the so-called anti-inflation legislation as unconstitutional.

The SCC's future responsibility in this economic field will be to ensure a balance between preserving the necessary degree of discretion for the elected representatives on the one hand and respecting and enforcing the constitutional rules of budgetary responsibility on the other.

IV. LOOKING AHEAD

The Parliament approved the constitutional amendment stemming from the 2022 severe political battles in early 2023. This constitutional amendment granted Parliament with the power to dissolve itself, but without the option to recall the Parliament in a referendum. Additionally, the constitutional amendment also entrenched proportional representation and the existence of one electoral district as essential elements of the Slovak electoral system in the parliamentary elections. Without meaningful datasets, MPs who backed this proposal argued that the future Parliament might alter the electoral system, contributing to a democratic back-sliding. Consequently, this part of the constitutional amendment was promoted as a democracy-protecting measure.

The main driver of this constitution-making process was a successful non-confidence vote against the Government in December 2022. The subsequent failure to form another parliamentary majority that would support a new government pushed MPs to solidify the possibility of unlocking the Parliament's deadlock by calling an early election. The Parliament's decision to hold early polls has not been uncommon in the Slovak constitutional system.[12] Nevertheless, the legality of such a practice has been questioned since the arguments from the newest SCC decisions. Therefore, the constitutional amendment introduced a legal option to hold an early election.

In late January, the Parliament decided on its dissolution. At the same time, it ruled that the early elections would be held in late September 2023.[13] The Parliament granted itself a period of eight months without a majority supporting the Government. This prolonged interregnum has already caused disturbing constitutional challenges. The first half of 2023 seems to be politically heated, as this period is expected to be dominated by populist agenda proposed by the *ad hoc* majorities in the Parliament. Hopefully, the constitution-making process will not become a hostage in irresponsible political campaigning before the upcoming elections. The level of political culture and the experience with the Parliament from the last few years does not give much desire for optimism.

12 The Parliament voted for its dissolution three times. Early elections took place in 1994, 2006, 2012.

13 "Slovakia is waiting for a campaign in the summer. Parliament narrowly approved early elections in September" <https://domov.sme.sk/c/23123805/volby-2023-datum-konania-termin-schvalenie.html>

V. FURTHER READING

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Marek Domin, "Can People Ask for Early Elections? Slovak Constitutional Court Says No" (IACL-IADC Blog, September 2, 2021) https://blog-iacl-aidc.org/2021posts/2021/9/2/can-people-ask-for-early-elections-slovak-constitutional-court-says-no

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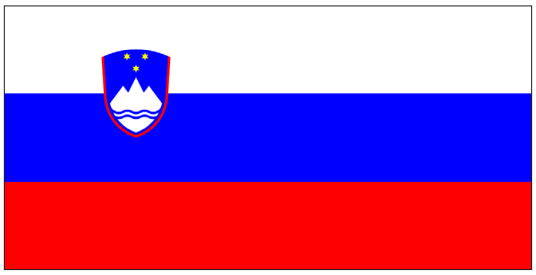
Slovenia



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I. INTRODUCTION

After a livelier 2021, when Article 62a was added to the Slovenian Constitution, guaranteeing the 'free use and development of the Slovenian sign language,'[1] the landscape of constitutional reform in Slovenia was slightly more serene in 2022. However, this does not mean that it was completely uneventful. While there have been no constitutional reforms that were either rejected or passed, a wide-reaching proposal for constitutional reform was made by all the MPs of parties that form the newly elected governing coalition. The proposal pertains to the independence of the judiciary, as well as the allocation of powers between the three branches and the system of checks and balances among them more broadly. At the time of writing, in March 2023, the proposal is still being deliberated in Parliament[2] and is in the early stages of the constitutional reform process.

Another notable development that is relevant to the process of constitutional reform is the outcome of the parliamentary election that took place in April 2022. The outcome delivered by the electorate resulted in a centre-left coalition Government that possesses a strong majority in the Parliament – in a 90-seat National Assembly, the coalition MPs have taken 53 seats,[3] which is only 7 seats shy of the 2/3 qualified majority that is required for a constitutional reform to pass.[4] A centre-right opposition party, with 8 parliamentary votes at their disposal, has already expressed a strong willingness to provide their support to open a Pandora's box of deeper structural constitutional reforms, which has for years remained closed due to the lack of a parliamentary majority required for such constitutional reforms to pass. The constellation of political forces in the National Assembly that has resulted from the 2022 election provides a particularly fertile ground for constitutional reform in the remaining years of their 4-year term. Because of this, the final section of this report affords some attention to rather preliminary and undefined plans for constitutional reform that might, in other circumstances, be unworthy of attention but are likely to materialise in one way or another in the coming years due to the strong parliamentary majority and the willingness of one of the opposition parties to contribute its votes for certain constitutional changes.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In September 2022, all 53 MPs forming the governing coalition submitted a formal proposal to the Parliament to initiate the procedure for amending the Constitution.[5] The leitmotif of the proposed changes is to allegedly strengthen judicial independence and weaken the influence the legislature can wield over judicial appointments. The proposal, if passed in Parliament, would bring changes to four interconnected constitutional provisions: Article 129 (permanence of judicial office), Article 130 (election of judges), Article 132 (termination of and dismissal from judicial office), and Article 134 (immunity of judges). The main objective of the proposed changes is to diminish the powerful influence the legislature currently has over the composition of the judiciary and, therefore, rearrange the balance of powers between the three branches of government. It aims to do so via three separate mechanisms.

Firstly, and perhaps most importantly, it proposes to transfer the power to elect judges away from the Parliament and instead grant the President the power to appoint them. As the proposal explains, transferring the appointment power to the President, who would appoint judges on the proposal of the Judicial Council[6], aims to prevent the current politicization of the judicial appointment process, strengthen the independence of the judiciary, and strengthen the principle of

1 Arne Marjan Mavčič, 'Slovenia' in Luís Roberto Barroso and Richard Albert (eds), *The International Review of Constitutional Reform 2021* (Program on Constitutional Studies 2022).

2 Please note that because of the asymmetrically bicameral nature of the Slovenian Parliament, we refer to the National Assembly—the lower house of the Parliament—interchangeably as "the Parliament", "the National Assembly" or the "legislature" throughout this text. Whenever we refer to the National Council—the upper house of the asymmetrically bicameral Parliament—we make this reference explicitly and advisedly.

3 National Electoral Commission of the Republic of Slovenia, 'National Assembly Elections – Outcome of the Vote' (DVK, 24 April 2022) <https://www.dvk-rs.si/arhivi/dz2022/#/rezultati> accessed 23 March 2023.

4 Article 169 of the Constitution of the Republic of Slovenia (Constitution), Official Gazette of the Republic of Slovenia no. 33/91-I *et seq*.

5 Full text of the proposal is accessible on the National Assembly's official website. See: National Assembly, 'Text of the Proposal to initiate the procedure for amending the Constitution of the Republic of Slovenia' (26 September 2022) <https://www.dz-rs.si/wps/portal/Home/zakonodaja/izbran/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfIjo8zivSy9Hb283Q0N3E3dLQwCQ7z9g7w8nAwsnMz1w9EUGAWZGgS6GDn5BhsYGwQHG-pHEaPfAAdwNCBOPx4FUfiNL8gNDQ11VFQEAAXcoa4!/dz/d5/L2dBISEvZ0FBIS9nQSEh/?uid=C87544570D6C43AAC12588D2003503C9&db=pre_akt&mandat=IX&tip=doc> accessed 27 March 2023.

6 The Judicial Council is the national Council for the Judiciary. It is an autonomous and independent body, the purpose of which is to protect the independence of the judiciary. For more on the Councils for the Judiciary in the European legal tradition, please see the overview of the composition and competencies of the national Councils for the Judiciary that has been compiled by the European Network of Councils for the Judiciary (ENCJ). Accessible at: <https://www.encj.eu/members>.

separation of powers. As envisioned by the proposal, judges would be screened and selected by the Judicial Council—as they have been thus far—and later appointed to office by the President instead of being elected in Parliament.

Secondly, keeping with the throughline of narrowing the influence the legislature wields over the judiciary, the proposal also includes changes to the constitutional provision that regulates the dismissal from judicial office. Under the current constitutional setup, it is the legislature that may dismiss a judge from office at the proposal of the Judicial Council or on its own motion when a judge commits a criminal offence through the abuse of judicial office. The proposed constitutional reform would transfer the power to dismiss a judge away from the legislature and give it to the President.

Finally, the proposal also foresees changes to the constitutional provision related to the immunity of judges. Currently, it is the legislature that must consent to the detention and criminal prosecution of a judge who is suspected of having committed a criminal offence in the performance of judicial office. The proposed change would transfer the power to waive the immunity of judges from the Parliament to the Judicial Council.

Though these three changes would primarily change the structure of checks and balances between the judiciary, on the one hand, and the legislature and the executive, on the other hand, the proposal would also importantly strengthen the powers of the Judicial Council. This has stirred up debates about the appropriateness of its composition. According to Article 131 of the Constitution, the Judicial Council is composed of 11 members, five of whom are elected by the Parliament on the proposal of the President amongst legal experts, and six of whom are elected by judges from among their own number. Some experts and opposition parties have expressed concerns that transferring the power to appoint judges would require a rethinking of the Judicial Council's composition to maintain a suitable balance between the three branches of government. Therefore, it is not entirely unlikely that the composition of the Judicial Council enshrined in Article 131 of the Constitution might be reformed in the future as well.

In addition to the proposed changes, which aim to strengthen the independence of the judiciary by rendering it more independent from the day-to-day politics of the legislature, the proposal would also introduce changes to the constitutional provision related to the permanence of judicial office. Article 129 of the Constitution foresees that the office of a judge is permanent; a judge, once elected, is immediately elected to permanent office. According to the proposed changes, however, judges would first be appointed for a three-year term and only then appointed to a permanent judicial office. Some commentators have argued that this might potentially run contrary to the principle of judicial independence.

It should be noted, however, that the proposal is still in the very early stages of the parliamentary procedure, and substantive changes to the proposal for reform are still not only possible but likely. Before being voted on at a plenary parliamentary session, the proposal will be discussed by the Constitutional Commission, an ad-hoc working body of the Parliament, consulted by a group of constitutional law experts.[7] The Constitutional Commission will be in charge of preparing the final content of the proposed constitutional reform before being voted on in a plenary session.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Whatever the specifics of the final content of the envisaged reform might be, it is unlikely that it would amount to a dismemberment of the Constitution. The proposed changes would not fundamentally transform the Constitution, nor would they remake its structural core. They are still very much in line with the fundamental structural principle of the separation of powers and the associated notion of checks and balances. Indeed, the proposed reform aims to alter the way the three branches of government interact with each other in order to strengthen judicial independence.

Instead, the proposed reforms could be characterised as a restorative constitutional amendment, which aims at 'returning the constitution to what it was prior to a transformative [...] new political practice that threaten[ed] to erode a deeply held understanding about what the constitution means and allows.'[8] This characterisation resonates with the proposed reform because the intention of the original structural makeup of the Constitution was not for the legislature to be a gatekeeper in the selection process of judges. Instead, it imagined the National Assembly as a body that would only confirm the election of judges that were pre-screened and pre-selected by the Judicial Council and thus give the election process a democratic undertone. With time, the legislature has moved away from this understanding of constitutional structure and began rejecting the election or the promotion of judges that were chosen as the best candidates for judicial office by the Judicial Council. This included, in some instances, judges that were deemed politically inopportune by the governing coalition at the time. The proposed reform is attempting to break this harmful political practice and restore the original constitutional meaning, albeit not by clarifying the powers of the legislature in electing the judges, but by removing its power to elect them altogether. Transferring the appointment power to the President admittedly does break the impugned practice, making this essentially a restorative constitutional amendment. However, the reform does not come without risks of its own. There is nothing in the text of the proposal that would prevent the President from following the same practice established by the legislature, that is to understand this newly established appointment power as also including the power to reject the appointment of a judge that was selected for appointment by the Judicial Council. Because the remainder of the proposed reforms (other than the proposal pertaining to the permanence of judicial office) naturally follow from the fundamental reform of transferring the appointment power, they can, in the same vein, be considered as part of the overall restorative nature of this reform process.

It should also be noted that the proposed reforms do not raise tensions with unamendable rules of the Constitution because unamendable rules do not exist in the Slovenian constitutional order. There is a strong

7 For the composition of the Constitutional Commission, see: National Assembly of the Republic Slovenia, 'Constitutional Commission' (2022) < https://www.dz-rs.si/wps/portal/Home/pos/dt/izbranDT/!ut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfIjo8zinfyCTD293Q0N3IMN3QwCzcPCghzdzQwNAkz1w8EKvCy9Hb3ACoyCTA0CXYycfIMNjA1MnAz0o4jRb4ADOBKpH4-CKPzGF-SGhoY6KioCAMkPKqk!/dz/d5/L2dBISEvZ0FBIS9nQSEh/?idSubjekt=DT030> accessed 27 March 2023.

8 Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (Oxford University Press 2019) 81.

conceptual nexus between this and the fact that the Constitutional Court of the Republic of Slovenia does not have the power to review constitutional changes.[9] The power of the Constitutional Court to review Acts Amending the Constitution is limited only to cases of abuse of form (i.e. if the legislator would attempt to avoid constitutional review by adopting a "pretend" constitutional amendment without actually aiming to reform the Constitution).[10] As this is patently not the case with the proposed reforms, it cannot be expected that the proposed changes would be subjected to any form of constitutional control.

IV. LOOKING AHEAD

In October 2022, the Prime Minister hosted a meeting with representatives of all parliamentary political parties to discuss potential constitutional changes. In addition to the proposed changes to the constitutional provisions relating to judicial appointments (discussed above), all present at the meeting have allegedly shown political support for future constitutional changes in five areas: (i) the powers of the Constitutional Court, (ii) the procedure through which the Prime Minister and other Government Ministers are elected, (iii) the rules governing the publication of municipal regulations in the official gazette, (iv) the electoral system, and (v) the restructuring or the complete abolition of the National Council.[11] All these potential constitutional changes are still in the very early stages of political discussions and will be prepared gradually, depending on the expected support from the opposition parties. However, the currently available information allows us to make out at least a general idea of the envisioned changes that might be put to a vote in the near future.

(i) The first potential constitutional amendment refers to the powers of the Constitutional Court. The proposal is reportedly already being prepared by the Ministry of Justice and would bring changes to Article 160 of the Constitution, which determines the powers of the Constitutional Court. The main objective of the amendment would be to reduce the Court's excessive workload by allowing the Court (limited) flexibility to grant or deny hearing a case, as well as to transfer some of its powers to lower administrative courts.

(ii) The second amendment being discussed concerns the constitutional provisions relating to the procedure through which the Government is elected. Currently, the election of the Government is entirely in the hands of the National Assembly, which elects the Prime Minister and appoints its Ministers in a two-stage election process. While the amendment would keep the National Assembly as the body that elects the Prime Minister, it would transfer the power to appoint Government Ministers from the National Assembly to the President of the Republic, who would not have the power to reject candidates proposed by the Prime Minister. This new appointment process would necessarily imply that the National Assembly would also lose the power to pass a vote of no confidence in the work of an individual minister but would retain this power regarding the work of the Government as a whole. According to the currently available information, such a proposal would enjoy the political support of the coalition government and one of the two opposition parties.

(iii) The third potential amendment concerns the rules governing the publication of municipal regulations in the official gazette. Currently, all national legislation is published in the national gazette, while municipal regulations are published in an official gazette designated by the local authorities. With the aim of increasing transparency and legal certainty, the amendment would unify the publication of laws at the national and local levels.

(iv) The fourth potential reform refers to the electoral system, a reoccurring topic in Slovenia's constitutional architecture. It is said to have the least support among the parliamentary political parties. Nonetheless, the coalition government has announced a continuation of public discussions about the potential changes, including the possibility of introducing preferential voting and abolishing electoral districts.

(v) The final potential amendment refers to yet another recurring topic in the national constitutional discourse, that is, the constitutional position of the National Council, the upper house of the Slovenian Parliament. The National Council represents social, economic, professional, and local interests in the Slovenian asymmetric bicameral parliamentary system and has limited influence on the legislative function of the Parliament. In addition to having the legislative initiative, the National Council can pass a suspensive veto on any legislation passed by the National Assembly, which can be overridden by an absolute majority in the National Assembly. The discussed constitutional amendment would either abolish the National Council entirely or – with the aim of enhancing the representation of local interests – make changes to its composition. However, talks about amendments to the constitutional provisions relating to the upper house of the Slovenian Parliament have died down, despite the initial political support.

The momentum of constitutional reform under the current coalition Government continues beyond the subject areas agreed upon in October 2022 – additional initiatives are being discussed at the time of drafting this report, including an initiative to confer constitutional status to the State Attorney's Office by including it in the Constitution. Unlike the previous years (and even decades), it seems that the remaining years of the incumbent Government's term will be the years of constitutional reforms.

9 The powers of the Constitutional Court are laid out in Article 160 of the Constitution. According to the Court's settled case law, it does not have the power to review the compatibility of two acts of the same legal force. Since the Act Amending the Constitution is an "act of constitutional nature", the Constitutional Court does not have the power to assess its constitutionality (see, for example, decisions of the Constitutional Court no. U-I-32/93, 13 July 1993, no. U-I-332/94, 11 April 1996, no. U-I-214/00, 19 September 2000).

10 See, for example, the Constitutional Court's decision no. U-I-214/00, 14 September 2000.

11 See the Government's press release (24 October 2022) <https://www.gov.si/novice/2022-10-24-premier-golob-za-dolocene-spremembe-ustave-se-morda-nakazuje-ustrezna-vecina/> accessed 27 March 2023.

V. FURTHER READING

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Jaka Kukavica, 'Matej Avbelj and Jernej Letnar Černič, The Impact of European Institutions on the Rule of Law and Democracy: Slovenia and Beyond (Hart 2020)' (Book Review) (2022) 14 European Journal of Legal Studies 267.

South Africa

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I. INTRODUCTION

In South Africa, Parliament consists of the National Assembly and the National Council of Provinces. The two institutions share legislative competency to amend the Constitution of the Republic of South Africa, 1996. Section 74 of the Constitution sets out special procedures and special majorities for amending the Constitution. Section 74 sets out different procedures and majorities depending on the section or part of the Constitution that is to be amended. In some limited cases, the National Assembly can amend the Constitution without the cooperation of the National Council of Provinces.

Regarding constitutional amendments, 2022 was a relatively quiet year compared to debates and processes until the end of 2021, when the amendment of section 25 (the property clause) of the Constitution was considered. The amendment proposed that the amount of compensation for expropriation may be nil in appropriate circumstances. Regardless, during the period under review, a notice of intention to amend the Constitution was given in relation to the introduction of a Cyber Commission in chapter 9 of the Constitution. A second amendment, which was already in bill form, concerns the amendment of the Constitution to include South African sign language as an official language in the Republic.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In late 2022, a member of the official opposition party, the Democratic Alliance, published a notice in the Government Gazette[1] indicating an intention to introduce a private member's bill to amend the Constitution to include a Cyber Commissioner in Chapter 9 of the Constitution. Chapter 9 of the Constitution contains a number of independent institutions, such as the Public Protector, the South African Human Rights Commission, and the Auditor-General, amongst others. The mandate of the Chapter 9 institutions (which can also be described as guarantor or integrity institutions, or fourth branch institutions) is to strengthen constitutional democracy. The background to the intention to include a Cyber Commission is the inability of government and state-owned entities to effectively implement cyber security in order to curb the increase and prevalence of cybercrime, which impacts negatively on fundamental human rights. In the notice of intention, it is stated that the Cyber Commission 'will be tasked with supporting and strengthening constitutional democracy in South Africa by advising, monitoring and establishing cyber security capabilities in the public sector and will work with tertiary institutions and the private sector to establish minimum good standards, build capacity and create awareness.'[2] Comments on the intention to table the amendment bill closed towards the end of 2022, but no further developments in this regard have yet been observed.[3]

A further bill to amend the Constitution was also tabled during the period under review. The Minister of Justice and Correctional Services invited comments on the proposed Constitution Eighteenth Amendment Bill, published in the Government Gazette on 19 July 2022.[4] The Bill provides for the amendment of section 6(1)(a) of the Constitution and would include South African sign language as an official language in the Republic.[5] It also sets out to remove the obligation imposed on the Pan South African Language Board by section 6(5)(a)(iii) to promote and develop sign language. Sign language will therefore be promoted from a developmental language to an official language. Due to delays on the side of the Department of Justice and Correctional Services, the Bill was formally tabled in the National Assembly on 12 January 2023 and discussed at the Portfolio Committee on Justice and Correctional Services on 27 January 2023. On 7 March 2023, public hearings were held on the Bill, and it appears from the reports that there is broad support for this amendment.[6]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The amendment to include a Cyber Commission in Chapter 9 of the Constitution, as well as the amendment to elevate sign language from

1 Republic of South Africa Government Gazette 9 November 2022 (47478).

2 Republic of South Africa Government Gazette 9 November 2022 (47478) page 3.

3 The bill has not yet been formally introduced in the National Assembly.

4 Republic of South Africa Government Gazette 19 July 2022 (47049). This amendment should not be confused with the failed Constitution Eighteenth Amendment Bill that sought to amend the property clause to specifically allow for expropriation without compensation.

5 The 11 official languages in South Africa are: Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, and isiZulu. The first request to include sign language as an official language in the Constitution was made in 2007.

6 See https://pmg.org.za/committee-meeting/36483/ (accessed 13 March 2023).

a development language to an official language, can be regarded as amendments that retain the 'existing design, framework, and fundamental presuppositions of the Constitution.'[7] The elevation of sign language to an official language serves to complete a constitution-making project, as it has always been the intention that when there is sufficient development of South African sign language, it will be elevated to an official language. Indeed, the Constitution itself mandated the Pan South African Language Board to promote the development and use of sign language.

The inclusion of an additional Chapter 9 institution can also be regarded as a continuation of the constitutional commitment to ensure accountable and responsive government. The inclusion of a Cyber Commission does not alter the basic premise of the Constitution nor the structure of the Constitution. It merely serves to enhance the Constitution's ability to protect fundamental rights and constitutional democracy that is necessitated due to technological advances. Therefore, both these amendments can be regarded as amendments, as opposed to dismemberments.[8]

Section 74 of the Constitution sets out different procedures and majorities to amend the different chapters or parts of the Constitution. To amend the founding provisions in section 1 of the Constitution, 75% of the members of the National Assembly needs to vote in favour of the amendment. Additionally, 6 out of the 9 provincial delegations to the National Council of Provinces need to support such an amendment. To amend Chapter 2 of the Constitution, which contains the Bill of Rights, 66% of the members of the National Assembly and 6 out of the 9 provincial delegations need to vote in support of the amendment. To amend any other part of the Constitution, which is the category under which the two amendments under discussion will fall, 66% of the members of the National Assembly need to vote in favour of the amendment. Due to the operation of section 74(3), the National Council of Provinces would not have a vote on the two amendments under discussion as it deals with any other part of the Constitution and does not affect the Council or the provinces.

The majorities required in the National Assembly to amend the Constitution would make it difficult to pass any amendment unless there is political support across the major political parties. Currently, the governing party, the African National Congress (ANC), occupies 57.5% of the seats in the National Assembly. The official opposition, the Democratic Alliance, holds 20,7% of the seats, and the Economic Freedom Fighters holds 10,79% of the seats in the National Assembly. The other 11 political parties combined hold the remaining 11% of the seats of the National Assembly.

On amending the Constitution to include South African sign language, it is highly probable that there will be political support across the major political parties and that this will be an uncontested amendment.

Amending the Constitution to include a Cyber Commission may be politically contested. The amendment was introduced by a member of the Democratic Alliance, and it is possible that the ruling ANC party will not be in support of this amendment. The bill would not be able to pass if the ANC does not support the amendment. In the current political climate, it is unlikely that the ANC would support the Democratic Alliance's proposed amendment to include a Cyber Commission in chapter 9 of the Constitution.

The Constitutional Court of South Africa is the only court with jurisdiction to decide on the constitutionality of an amendment to the Constitution.[9] However, it appears that in South Africa, the Constitutional Court can only test whether the proper procedure was followed in adopting the amendment. This was confirmed in *United Democratic Movement v President of the Republic of South Africa*,[10] where the Constitutional Court held that once an amendment to the Constitution has been passed in terms of the procedure outlined in section 74, that amendment becomes part of the Constitution. It would, therefore, not be possible to consider the amendment for constitutionality against any other provision of the Constitution. The provisions in the Constitution, of which the amendment is now part, must be interpreted in harmony with one another.[11] Consequently, 'there is little if any scope for challenging the constitutionality of amendments that are passed in accordance with the prescribed procedures and majorities.'[12]

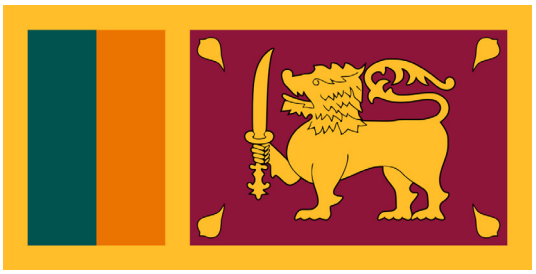
The Constitutional Court's limited power to decide on the constitutionality of an amendment of the Constitution purely on procedural grounds is different from the higher courts' power to invalidate legislation that may conflict with the Constitution. When the courts invalidate legislation because it conflicts with a provision in the supreme Constitution,[13] the courts may play a counter-majoritarian role, a representative role, and an enlightenment role.[14] As the Constitutional Court can only test amendments to the Constitution based on procedural grounds, it appears that the Court does not have an opportunity to play these roles where it decides on the constitutionality of amendments to the Constitution.

IV. LOOKING AHEAD

National elections are set to take place in 2024, and it is predicted that no one party will obtain over 50% of the vote.[15] That would result in coalition government at the national level. In 2023 it is unlikely that new amendments to the Constitution will be tabled, given that it takes several years for an amendment to pass, and with elections looming, driving an amendment through will be stifled by any opposition who may think it would be in a stronger position after the general elections. The results of the 2024 elections will also provide a stronger footing to make predictions of any possible constitutional amendments once a new government is formed.

7 Richard Albert, *Constitutional Amendments* (OUP 2019) 79.
8 Richard Albert, *Constitutional Amendments* (OUP 2019) 76-94.
9 S 167(4)(d) of the Constitution.
10 2003 1 SA 495 (CC).
11 *United Democratic Movement v President of the Republic of South Africa* 2003 1 SA 495 (CC) para 12. See also P de Vos & W Freedman (eds), *South African Constitutional Law in Context* (2nd edn, OUP 2021) 239.
12 *United Democratic Movement v President of the Republic of South Africa* 2003 1 SA 495 (CC) para 12. See also AK Abebe, 'The Substantive Validity of Constitutional Amendments in South Africa' (2014) 131 *SALJ* 656.
13 See ss 1,2 and 172 of the Constitution, 1996.
14 See LR Barrosso, 'Countermajoritarian, Representative, and Enlightened: The Role of Constitutional Court in Democracies' (2019) 67 *The American Journal of Comparative Law* 109.
15 Based on a recent poll done by Rivonia Circle: https://rivoniacircle.org/new-nationally-rep-poll-by-the-rivonia-circle-shows-that-an-electoral-breakthrough-is-possible-in-election-2024/ Most of the polls currently conducted confirm the view that the current governing party, the ANC, will not obtain more than 50% of the votes.

Sri Lanka



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I. INTRODUCTION

Sri Lanka has alternated between constitutional democracy and constitutional authoritarianism over the past fifty years. The country received limited self-government in 1931 while still a British colony, and since independence in 1948, has had three constitutions. The independence constitution provided a framework for the country's independence, and the 1972 constitution severed ties completely with the British, and the country became a republic, with power concentrated in a strong Parliament. In 1978 a new constitution introduced semi-presidentialism and focused powers in a highly centralized elected presidency. Since then, the constitution has been amended on 20 occasions.[1]

The Thirteenth Amendment, the Seventeenth Amendment, and the Nineteenth Amendment made crucial changes to the scheme of constitutional government enhancing democracy and constitutionalism. The Thirteenth Amendment introduced a scheme of symmetrical devolution, which continues today, even though its implementation has been problematic. The Seventeenth Amendment introduced the Constitutional Council which acted as a check on the President's power to make appointments to the higher courts and the independent commissions. The Nineteenth Amendment altered the balance of power between the executive and the legislature and made the President amenable to the fundamental rights jurisdiction of the Supreme Court.[2] However, the Eighteenth Amendment abolished the Seventeenth Amendment, and the Twentieth Amendment abolished the Nineteenth Amendment.[3] The Twenty-First Amendment re-introduced the Constitutional Council in a modified form. This is discussed below.

In 2022 the country went through an economic crisis that spawned a constitutional crisis. Declining foreign reserves generated severe shortages in food, fuel, and medicines and resulted in lengthy power outages.[4] The currency depreciated by over 50 percent, and inflation varied between 60 – 90%.[5] In April 2022, the country defaulted on its foreign debt for the first time.[6]

The economic crisis generated a social movement, bringing together people of different socioeconomic backgrounds and ethnicities.[7] The main demands of the social movement were for a reform of the political culture and political institutions and more transparent and inclusive governance. One of the key demands of the social movement was for the reform of the Presidency, which many in the movement credited with having caused the economic crisis.

In May, the Prime Minister resigned and in July, protestors stormed the Presidential office and residence.[8] The President sought exile and then submitted his resignation. In terms of the constitution, Parliament elected a new President to serve the remainder of the previous President's term. Because the former President's party commanded a parliamentary majority, it was able to get a candidate of their choice elected as President. The economic and constitutional crisis of 2022 resulted in a new constitutional amendment, the Twenty-First Amendment, passed at the end of October 2022.

This chapter discusses the changes brought about by the Twenty-First Amendment, which were a timid attempt at responding to the social movement for constitutional and political change.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Two amendments were placed before the Parliament in 2022, both of which were inspired by the protest movement. However, only one of them was enacted. The first was the Twenty-First Amendment to the Constitution drafted by a group led by the main opposition party, the Samagi Jana Balawegaya (SJB), which was placed before Parliament on 7 June 2022.[9]

The (first) Twenty-First Amendment sought to radically rewrite the Constitution. The Amendment sought to transform the executive

1 The 12th Amendment to the Constitution was tabled, but not enacted.

2 Mario Gomez, *'The Courts Respond to Executive Tyranny in Sri Lanka'*, Int'l J. Const. L. Blog, Jan. 24, 2019, at: http://www.iconnectblog.com/2019/01/the-courts-respond-to-executive-tyranny-in-sri-lanka.

3 See generally, Dinesha Samararatne, 'Sri Lanka's constitutional ping pong: The 20th Amendment in historical perspective' (25.09.2020) <https://www.himalmag.com/sri-lankas-constitutional-ping-pong-2020/> accessed 15.04.2023.

4 Niha Masih, 'A country in pain: Voices of Sri Lankans reflect its desperate times' (18.07.2022) <https://www.washingtonpost.com/world/2022/07/18/sri-lanka-crisis-future/> accessed 15.04.2023.

5 Noah Smith, 'Why Sri Lanka is having an economic crisis' (12.07.2022) <https://noahpinion.substack.com/p/why-sri-lanka-is-having-an-economic?utm_source=substack&utm_medium=email> accessed 15.04.2023.

6 Meera Sirinivasan, 'Sri Lanka announces $51 – billion debt default to combat crisis (12.04.2022) <https://www.thehindu.com/news/international/sri-lanka-opts-for-pre-emptive-debt-default-to-combat-crisis/article65314691.ece> accessed 15.04.2023.

7 Dinesha Samararatne, 'The People in the Palace' (15.07.2022) <https://verfassungsblog.de/the-people-in-the-palace/> accessed 15.04.2023.

8 Binendri Perera, 'The People v The President: The Sri Lanka's Struggle to Reassert Constitutionalism' (18.07.2022) < https://verfassungsblog.de/the-people-vs-the-president/> accessed 15.04.2023.

9 Parliament of Sri Lanka, 'Parliamentary Debates (Hansard)' (07.06.2022).

presidency to a ceremonial presidency and to introduce a Parliamentary system based on the Westminster model. The presidency would be stripped of its executive power, and the president would be required to act solely on the advice of the Prime Minister and the Cabinet of Ministers. The amendment proposed that the president be elected by Parliament and not have the power to dismiss the Prime Minister. Instead, the Prime Minister would continue in office so long as they commanded the confidence of Parliament.

The Amendment also proposed that the President's powers to dissolve Parliament be abolished. Provinces would be administered by a Board of Ministers, and the Governor of the Province, currently a Presidential nominee, would exercise very few powers. The Amendment proposed a Constitutional Council that would not contain a nominee of the President. To strengthen the party's control over its members, the Amendment sought to remove the provision in the current constitution that allows Members of Parliament to seek review in the Supreme Court if they are expelled from their party and are therefore required to give up their seat in Parliament.[10]

Overall, the Twenty-First Amendment sought to elevate Parliament as the central institution in constitutional governance, as found in most parliamentary systems. The Prime Minister and the Cabinet of Ministers would exercise executive powers while President would be transformed into a ceremonial figurehead. However, the recognition of the Constitutional Council ensures that the parliamentary system proposed therein is more constrained than the Westminster model. Bruce Ackerman argues for a modified parliamentary model that is constrained by a system of checks and balances consisting of people's participation through referenda, judicial review by courts, a second chamber in Parliament, and fourth branch institutions as an optimal model of constitutional governance.[11] The model proposed by the Twenty-First Amendment Bill falls short of Ackerman's constrained parliamentarianism only because it does not recognize the post-enactment judicial review for courts and the absence of a second chamber in Parliament.

The Supreme Court, after reviewing the Twenty-First Amendment, determined that many of the provisions violated the entrenched provisions in Article 83 of the constitution and therefore could only be enacted with a two-thirds majority *and* the approval of the people at a referendum.[12] That process of constitutional reform came to an end with the Supreme Court's determination on its constitutional validity.

The second amendment of the year was initially presented as the Twenty-Second Amendment to the Constitution and tabled in Parliament on September 6, 2022. By then, Ranil Wickremasinghe had been elected as President by Parliament following the resignation of Gotabhaya Rajapaksa on July 13, 2022. Therefore, the Twenty-Second Amendment was presented by the government led by Wickremasinghe. The Supreme Court, in reviewing the constitutionality of the Bill, held that the amendment could be passed with a two-thirds majority only and without a referendum.[13] Accordingly, the Bill was renamed the Twenty-First Amendment to the Constitution and came into operation on October 31, 2022.[14]

The (second) Twenty-First Amendment reintroduced the Constitutional Council, which replaced the previously ineffective Parliamentary Council introduced by the Twentieth Amendment. The Constitutional Council under the Twenty-First Amendment will consist of seven members of Parliament and three members from outside Parliament. The Speaker, the Prime Minister, and the Leader of the Opposition will be *ex officio* members of the Council. In terms of balance, one shall be a nominee of the majority of the members of Parliament, one shall be a nominee of the party to which the Leader of the Opposition belongs, one shall be a nominee of the parties other than the parties to which the Prime Minister or Leader of the Opposition belongs, and one shall be a nominee of the President. Three members from outside Parliament shall be appointed based on a joint agreement between the Prime Minister and the Leader of the Opposition. Article 41A (4), as amended, requires that the five members nominated reflect 'the pluralistic character of Sri Lankan society, including professional and social diversity.'

The composition of the Constitutional Council is almost identical to that of the Constitutional Council provided for by the Nineteenth Amendment (2015). The difference is that the Twenty-First Amendment gives a majority in parliament the right to nominate two members to the Constitutional Council from the government and the main opposition group in parliament (previously, the members were nominated by the Prime Minister and the Leader of the Opposition).

The Constitutional Council's recommendations are binding on the President. According to Article 41B, the Constitutional Council makes recommendations to the President regarding appointments to the Elections Commission, the Public Service Commission, the National Police Commission, the Human Rights Commission, the Commission to Investigate Allegations of Bribery or Corruption, the Finance Commission, the Delimitation Commission, the Audit Service Commission, and the National Procurement Commission.

Article 41C provides that the Constitutional Council must approve the President's recommendations to the Supreme Court and Court of Appeal, the members of the Judicial Service Commission other than the Chief Justice, the Attorney General, the Auditor General, the Inspector General of Police, the Ombudsman, the Secretary General of the Parliament, and the Governor of the Central Bank (a new addition). This addition was prompted by the public dissatisfaction with the Governor's partisan decisions that worsened the economic crisis and the consequent call for ensuring the independence of the Governor of the Central Bank.

The Twenty-First Amendment also restored the constitutional status of the Audit Services Commission, the National Police Commission, the Commission to Investigate Allegations of Bribery or Corruption, and the National Procurement Commission, which had been previously removed by the Twentieth Amendment in 2020.

Other than reintroducing the Constitutional Council and restoring the constitutional status of the Commissions, the Amendment does not limit the President's power in any significant manner. Article 44 (2) specifically mentions that the President shall hold the portfolio of defense and that the President can allocate any other ministerial post to themselves in consultation with the Prime Minister. However, this consultation does not detract from the ultimate authority of the President as the exclusive holder of executive powers (see, *Special Determination on Twenty-Second Amendment Bill 2022*). Therefore, the Executive President continues to hold extensive powers despite the public demands for reform of the presidency.

10 Art 99 (13) of the constitution.
11 Bruce Ackerman, 'The New Separation of Powers' (2000) 113 Harvard Law Review 633-729.
12 Parliament of Sri Lanka, 'Parliamentary Debates (Hansard)' (21.06.2022) 817-819.
13 Parliament of Sri Lanka, 'Parliamentary Debates (Hansard)' (06.09.2022) 1170-1171.
14 Twenty-First Amendment to the Constitution, certified on 31st October 2022 <https://www.parliament.lk/uploads/acts/gbills/english/6261.pdf> accessed 15.04.2023.

III. THE SCOPE OF REFORMS AND THE CONSTITUTIONAL CONTROL

The Supreme Court of Sri Lanka played a pivotal role in the failure of the Twenty-First Amendment Bill of June 2022 and the success of the Twenty-Second Amendment Bill of October 2022. The Constitution of Sri Lanka does not contain unamendable provisions. Amendments to Sri Lanka's constitution can be introduced by a two-thirds majority except where the amendment infringes on any of the entrenched clauses in Article 83. The entrenched provisions relate to the unitary nature of the state (Articles 1-3), the status of Buddhism (Article 9), the rights to freedom of conscience, belief, and religion, and freedom from torture or cruel or inhuman treatment, found in Articles 10 and 11, the extension of the president's term of office (Article 30(2)) and the extension of the terms of Parliament (Article 62(2)).

The Supreme Court has exclusive jurisdiction to interpret the Constitution (Article 120). The role of the Supreme Court in relation to constitutional amendments is only to determine whether an amendment should be passed with a two-thirds majority in Parliament or whether the amendment also requires the approval of people at a referendum, in addition to a special majority (Article 120). A referendum is required if the amendment infringes on any of the entrenched provisions referred to in Article 83 of the Constitution.

The main issue before the court in *In re Twenty-First Amendment* was whether the amending of Article 4 on executive powers amounted to a violation of Article 3.[15] Article 3 is an entrenched provision that recognizes the sovereignty of the people. Article 4 is not entrenched by Article 83, but the courts, as well as scholars, have debated whether Article 3 and 4 should be read together given that Article 4 lays out how governmental powers (legislative, executive, and judicial powers), fundamental rights, and franchise of the people should be exercised.

The Supreme Court traced the history of the 1978 Constitution. The court noted that the president was elected by the people to ensure stability and facilitate everyone to express their views concerning the executive, and this is the most salient feature of the 1978 constitution. Considering this, the court first explored whether the president is the 'sole repository of executive power.' Whereas the Supreme Court, in its determination *In re Nineteenth Amendment* (2015), disagreed with this position, the court cites *In re Thirteenth Amendment* (Decisions of the Supreme Court on Parliamentary Bills 1978-1983) and *SC Reference 2/2003* as decisions that support this position. The courts follow the latter decisions reaffirming the executive president-centered regime of the 1978 Constitution. Accordingly, the court establishes a violation of Article 4 of the constitution and focuses on whether this affects Article 3.

The Supreme Court in *In re Thirteenth Amendment (1987) 2 Sri LR 312* held that Article 4 is not entrenched firstly because the drafting history showed how this Article was deliberately left out by the parliament and secondly because the function of Article 4 was to set out modalities of exercising sovereignty of people. Therefore, the court was of the view that Article 4 can be amended without affecting Article 3 so far as it does not undermine the sovereignty of the people. However, the court in *In re Twenty-First Amendment* held that this statement in *In re Thirteenth Amendment* was *obiter dicta*.[16] Instead of being bound by this determination, the court chooses to follow *In re Nineteenth Amendment (2002)* and *In re Twentieth Amendment (2020),* which read Articles 3 and 4 together.

The court proposes the delegation test and the alienation test to ascertain whether a change to Article 4 also violates Article 3. According to the delegation test, the President, as the 'sole repository of executive power' according to Article 4 (b), cannot delegate such power that he cannot supervise. Sharing the executive power with the Cabinet of Ministers and having to rely on their advice for the exercise of executive power envisaged by the Twenty-First Amendment is just such a delegation that impinges on the sovereignty of people even if it is not an alienation of executive power. Therefore, the court takes a conservative interpretation of Article 4 without regard to the constitutional principles of constitutionalism and the checks and balances that enhance the sovereignty of the people.

The court's responses to the subsequent issues are colored by the same approach that affirms the president's power without due regard to the autonomy of other branches of the state. Firstly, the court states that the President not being elected directly by the people is a violation of the people's franchise (Article 4(e)). Secondly, the court insists that there must be a sufficient link between the President and the Constitutional Council to signify that the Council derives power from the President and that it is exercising the President's executive power. Thirdly, the court states that Article 70 (1), empowering the President to dissolve parliament prematurely, cannot be removed as it is a check on parliament. Fourthly, the court holds that the President must continue to provide directions to the Governor of the Province to ensure that he remains a delegate of the President exercising the executive powers derived from the President. Fifthly, the court stresses that the head of the proposed National Security Council should be the President, as the President oversees defense and is the commander-in-chief of the armed forces. The court also states that the restriction of the court from reviewing the procedural propriety of the expulsion of MPs from a party is an undue restriction of the judicial power of the people.

Therefore, the court was of the view that the Twenty-First Amendment should be approved by the people at a referendum. But the President did not submit the question to the people. This denied the people the opportunity to achieve the 'system change' that they advocated for through protests and activism.

In reviewing the constitutional validity of the Twenty-Second Amendment (subsequently renamed the Twenty-First Amendment), the Supreme Court stated that the President is the 'sole repository of executive power,' that Articles 3 and 4 should be read together, and stated that any diminishment of the supreme power of the President would amount to a violation of the sovereignty of people.[17] Accordingly, the Constitutional Council was required to maintain its link with the President as a body deriving its powers from the President. The initial amendment contained a provision stating that if the President fails to make appointments to the Constitutional Council, the nominees will automatically be appointed after an expiry of fourteen days. The Attorney-General defended the provision on the basis that it was a

15 Parliament of Sri Lanka, 'Parliamentary Debates (Hansard)' (21.06.2022) 729-753.

16 ibid 745.

17 Parliament of Sri Lanka, 'Parliamentary Debates (Hansard)' (06.09.2022) 1157-1160.

procedural step that does not undermine the President's discretion, but the court did not agree.

The court further insisted that the President must not be made to act on the advice of the Prime Minister in allocating ministries but rather should act 'in consultation with the Prime Minister.' The power of the President to remove the Prime Minister at will was also retained.

The Twenty-First Amendment passed in October 2022 does not amount to a dismemberment of the Constitution. It enhances democracy by reducing the President's discretion concerning appointments to the courts and other public institutions. However, it is a weak response to the call that emanated from a large section of the public for a radical reform of semi-presidentialism in Sri Lanka. To Albert, amendments can be corrective, elaborative, reformative, or restorative.[18] Whether an amendment corrects, elaborates, reforms, or restores, it must always 'cohere' with the existing constitution. If this is not the case, it goes beyond an amendment and amounts to constitutional dismemberment.[19] The Twenty-First Amendment 'coheres' with the existing constitution and does not amount to dismemberment of the existing constitution.

IV. LOOKING AHEAD

Presidentialism was introduced in 1978, and since then has been one of the most contested issues in constitutional politics. Several aspirants for Presidential office promised to abolish it, but once assuming office, find its powers too tempting. The Nineteenth Amendment, passed in 2015, trimmed the President's powers substantially, but this amendment was reversed by the Twentieth Amendment, passed in 2020.

In 2022 there was a huge groundswell of public opinion that favored the abolishment of the Presidency, linking the misuse of the powers of the office with the unprecedented economic crisis that gripped Sri Lanka. However, as we discussed above, the constitutional change that occurred made only marginal changes to the President's powers. While some scholars have argued that the Presidency can be converted from its current dispensation to a ceremonial position with a two-thirds parliamentary majority only, the Supreme Court, in many of its determinations on constitutional amendments, has stated that dilution of presidential powers will require a referendum, in addition to a special majority.[20] Democratization of constitutional government in the country will require significant reform of the Presidency or its abolishment. However, this will be unlikely without a referendum. A referendum, first introduced in the 1978 constitution, has been used only once to extend the term of Parliament without a Parliamentary election in 1982.[21]

Power-sharing between the majority Sinhalese community and the Tamil and Muslim minorities in the North and Eastern parts of the country also remains a contested issue that requires constitutional reform. The Thirteenth Amendment to the Constitution introduced a system of symmetrical provincial government. However, its implementation has been uneven, and all provincial councils stand dissolved at the time of writing. In the Northern Province, Tamils make up almost 90% of the population, and in the Eastern Province constitute roughly one-third. The Tamil claim for autonomy is rooted in the idea of discrimination: mainly in employment opportunities in the public sector, a denial of language rights and Tamil identity, and access to an equal share of resources. However, the claim of discrimination is contested by many Sinhalese who instead contends that the Tamils were a privileged minority during colonial times.

Buddhism has been assigned the 'foremost' place in Article 9 of the constitution, which also remains controversial. Many Tamil and Muslim actors have argued for a secular state, but the constitutional priority given to Buddhism is unlikely to be changed. Other constitutional issues also simmer. These include the electoral system for national, provincial, and local elections; the question of a mandatory quota to increase women's representation in political institutions; the expansion of the Bill of Rights to include economic and social rights, environmental rights, and the right to life; the applicability of the Bill of Rights to private action; the reintroduction of a second chamber; and the reintroduction of the power of the courts to strike down legislation, a power the courts exercised for 25 years under the 1947 constitution.

Transitional justice also remains divisive and controversial. The previous government pledged to establish four mechanisms to address the past. These included an Office on Missing Persons (OMP), an Office of Reparations, a Truth Commission, and a special court and prosecutor with the participation of foreign judges. The OMP was set up under statute and has developed an initial record of disappearances. The Reparations Office has also provided compensation in select cases. The other two mechanisms were not established and are unlikely to be set up in the near future, despite pressure from international actors, including the UN Special Procedures and the Human Rights Council.

V. FURTHER READING

Binendri Perera, 'The People v The President: The Sri Lanka's Struggle to Reassert Constitutionalism' Verfassungsblog (18.07.2022) < https://verfassungsblog.de/the-people-vs-the-president/>

Dinesha Samararatne, 'The People in the Palace' Verfassungsblog (15.07.2022) <https://verfassungsblog.de/the-people-in-the-palace/>

Mario Gomez, 'Constitutional Struggle in Sri Lanka'. (2022) Federal Law Review, Australian National University.

Mario Gomez, 'The Failure of Transformative Constitution Making in Sri Lanka'. In *Asian Comparative Constitutional Law Volume 1 - Constitution-Making* (Eds: Ngoc Son Bui and Mara Malagodi, Hart, 2023).

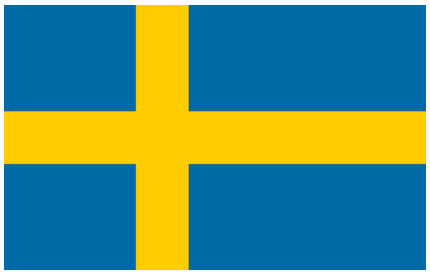
18 Richard Albert, Constitutional Amendments, (OUP 2019) 92.

19 ibid.

20 See Nihal Jayawickrama, 'The 20th Amendment–A Flawed Determination?' on file with the authors; and Jayampathy Wickramaratne, Fundamental Rights in Sri Lanka (Stamford Lake Publication, 3rd ed, 2021) 90–91 who both contend that the Presidency can be abolished by a two-thirds majority and without a referendum. However, see the Supreme Court Determination on the 21st Amendment.

21 The fourth Amendment to the Constitution, certified on 23rd December 1982, extended the term of Parliament elected in 1977 to August 1989.

Sweden



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I. INTRODUCTION

The Swedish Constitution is comprised of four fundamental laws, the Instrument of Government (IoG), the Act of Succession, the Freedom of the Press Act (FPA), and the Fundamental Law on Freedom of Expression (FFE). During the year, there have been several amendments to the Swedish Constitution in all of the fundamental laws besides the Act of Succession.

It is important to bear in mind that constitutional amendments are common in Sweden and since the enactment of Sweden's current Constitution in 1974, there have been amendments to the Constitution after every general election besides after the election in 2006. The reason there were no amendments after 2006 was that there was a parliamentary committee working on a more substantial review of the Constitution that was enacted after the election in 2010.

When it comes to the Instrument of Government, there has been two minor amendments and two amendments that are more substantial. The first minor amendment was to expand the list of institutions that can obtain the opinion of the Council of Legislation. The second minor amendment was to make the regulation on how government decisions is signed technology neutral.

The first more substantial amendment relates to the central bank of Sweden (The Riksbank). The amendment was meant to clarify the tasks of the Riksbank in the Constitution. The last amendment, and the most controversial one, is the possibility to limit the freedom of association for organizations that engages in or support terrorism.

In the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, there have been amendments concerning foreign espionage that have been controversial, especially from different outlets of the media. In the Act Fundamental Law on Freedom of Expression there are amendments clarify responsibility for live feeds on the Internet.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. THE INSTRUMENT OF GOVERNMENT

During 2020 the former government of Sweden, led by the Social Democratic Party, proposed legislation that targeted organizations that engaged in or supported terrorism. During the legislative process, it became clear that the proposal was not possible because it violated the freedom of association in Chapter 2 article 1 of the IoG. According to the regulation on limitations on freedom of association in chapter 2 article 24 of the IoG, it was not possible to limit the freedom of organizations that engage in or support terrorism. Because of this setback, the government proposed an amendment to chapter 2 article 24 of the IoG which made it possible to limit the freedom of association for organizations that engage in or support terrorism. The Riksdag approved this amendment in the fall of 2022.

In 2016, a parliamentary committee was assembled to present a proposal on a new law regulating the central bank of Sweden (Riksbanken). Their proposal was presented in 2019, and it included some amendments to the IoG aimed at clarifying the role of the Riksbank and strengthening its independence. The proposal was incorporated in a Government bill laid out before the Riksdag in 2022. The Riksdag approved the amendment in the Fall of 2022.

Prior tothe amendment, chapter 9 article 13 of the Iog stated that "The Riksbank is responsible for monetary policy." After the amendment, it is instead stated that it is the responsibility of the Riksbank to

– design and implement monetary policy,
– carry out currency interventions,
– hold and manage a currency reserve,
– promote a well-functioning payment system, and
– perform other basic tasks that follow from special law.

Besides this clarification, the organizational structure of the Riksbank was slightly altered, and the independence of the Riksbank was moved to its own paragraph in chapter 9 article 15 of the IoG. Finally, the regulation on the possibility to delegate lawmaking powers to the Riksbank was extended to include regulations during times of crisis.

In May 2021, a public enquiry proposed that the regulation concerning the signing of decisions from the Government should be technology neutral. Chapter 7 article 7 was amended in the Fall of 2022 so that it is now possible to sign government decisions digitally.

In the Fall of 2022, the Riksdag decided to amend the regulation on the Council of Legislation in chapter 8 article 21 of the IoG to expand the list of institutions within the Riksdag that can obtain the opinion of the Council of Legislation. This amendment was made to enable

the Riksdag Board to be able to obtain an opinion from the Council of Legislation.

2. THE FREEDOM OF THE PRESS ACT AND THE FUNDAMENTAL LAW ON FREEDOM OF EXPRESSION

The rules on espionage were expanded to include a new crime called foreign espionage. This new crime was intended to strengthen the protection of information obtained through participation in international organizations and international cooperation. If a person were to pass on information to a foreign state or entity that could harm Swedish relations with other countries or international organizations, you were to be sentenced to imprisonment.

According to the Swedish regulation in the Freedom of the Press Act and the Fundamental Law on Freedom of Expression, one cannot be sanctioned for something that has been published or broadcasted unless it is also a crime in these two fundamental laws. Because of this, the new crime called foreign espionage was also entered into the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.

To limit the possibility to avoid responsibility regulated in the Fundamental Law on Freedom of Expression, the territorial scope of application of the freedom of expression was extended to include certain satellite broadcasts of programs from abroad that are not considered to fall within the scope of the law today to fall within the scope of the law if it has a very strong Swedish connection.

An amendment to the Fundamental Law on Freedom of Expression was made to clarify what type of live feeds fall within the scope of the law. The scope of application of the webcasting rule was therefore limited by an explicit referral to actors who have constitutional protection according to the database rule so that only those actors were enabled to constitutional protection.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Within the Swedish system, the Riksdag is the sovereign. This means that the Riksdag is the highest authority, and this is especially so when it comes to interpreting and amending the Constitution. The court's possibility to review constitutional reform is therefore limited to whether or not the rules on procedure have been adhered to.

The Council on Legislation carries out the main constitutional review. The council is comprised by judges and former judges from the two supreme courts of Sweden. It is an advisory board and although their opinions are adhered to in most cases, they are not binding for the government or the Riksdag. This means that if the Council on Legislation in their opinion advises against an amendment to the Constitution, the Riksdag could still go ahead and approve the amendment.

The scope of review for the Council of Legislation does include the Freedom of the Press Act and the Fundamental Law on Freedom of Expression but not the Instrument of Government. The council did not advise against the amendments to the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.

IV. LOOKING AHEAD

Right now, there is a big discussion on constitutional self-protection in Sweden. This discussion has come to light in the wake of constitutional reforms in Hungary and Poland and the rise of right-wing populism. There is a fear among the legal community that there could be an attack on the rule of law and on the Swedish democracy if populist or illiberal movements were to gain a majority in the Riksdag. If this were to happen, the Swedish Constitution offers little or no protection.

Because of this there are public enquires looking into strengthening the independence of the judiciary and to make it harder to amend the Constitution. There is also a public enquiry looking into the future of public service media.

V. FURTHER READING

Bull, T & Jonsson Cornell, A, *Föreningsfrihet och förbud mot rasistiska organisationer – några rättsliga iakttagelser och en rättspolitisk spaning,* In: Svenskt Juristtidning 2020 p 515.

Cameron, I & Jonsson Cornell, A. *Terroristbrott – en översikt,* In: Svenskt Juristtidning 2017 p 709.

Proposition 2021/22:40, Ett teknikneutralt krav på underskrift av regeringsbeslut

Proposition 2021/22:41, En ny riksbankslag

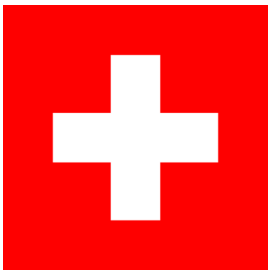
Proposition 2021/22:42, Föreningsfrihet och terroristorganisationer

Proposition 2021/22:55, Utlandsspioneri

Proposition 2021/22:59, Ett ändamålsenligt skydd för tryck- och yttrandefriheten

Proposition 2022/23:73, En särskild straffbestämmelse för deltagande ien terroristorganisation

Switzerland



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I. INTRODUCTION

In 2022, the Swiss constitutional system was exposed to a startling number of international and domestic challenges. There was an undisputed need to debate possible revisions of the country's emergency regulations to implement the lessons learnt from the Covid crisis. Before such a debate could even take place, the looming energy crisis, and the need to develop alternative energy sources as quickly as possible kept the minders preoccupied and questioned the role of the supreme law altogether. Is the Federal Constitution contributing to effective crisis management or, with its complex regulations on responsibilities and procedures, delaying crucial decisions? There was no tranquility in the international sphere either. Ever since the federal government (Federal Council) had unilaterally ended the negotiations about the EU-Swiss Institutional Framework Agreement in 2021, the relations between the country and its most important (trading) partner remained in a paralyzing cul-de-sac. The federal parliament (Federal Assembly), as well as the cantons and their conferences, very actively tried to impact the agendas and actions of the federal executive. They requested, for instance, the relaunch of the negotiations, immediate measures to cushion the negative consequences of the bilateral ice age, especially in the field of research, the conclusion of a number of small framework agreements instead of one comprehensive one, and the inclusion of cities at the negotiation table. Even if these demands have not all been without effect, they have not been able to seriously call into question the constitutional starting position – the conduct of external relations is essentially in the hands of a (divided) Federal Council. Similar constitutional insufficiencies have been detected, experienced, or claimed in the country's reactions to the war in Ukraine. The influx of refugees continued to challenge the relations between the federal and the cantonal tier. More importantly, Switzerland was exposed to harsh international and domestic reactions about the concept of neutrality and its adaptability to current contexts.

The new composition of the Federal Council also sparked a constitutional debate. When the Federal Assembly elected two new members to the collegiate group of seven,[1] it opted for representatives of rural and French-speaking cantons. As a result, the majority of the German-speaking (and urban) population finds itself in a minority in the federal executive.[2] The new composition raised the question of whether the Federal Constitution stipulating that "care must be taken to ensure that the various geographical and language regions of the country are appropriately represented" is complied with.[3] The question can be answered in the affirmative without further ado. The constitutional provision is open and flexible and does not introduce any formal quotas. Also, it aims at the protection of peripheric regions and linguistic minorities and does not prevent the parliament to opt for an over-representation of minority groups.[4]

On a formal level, 2022 did not bring any significant changes to the Federal Constitution. Only one constitutional amendment found its way into the constitutional text – and it was not a very important one from a constitutional perspective. The new constitutional ban on advertising tobacco products to young people, resulting from a popular initiative, obliges the Confederation and the cantons to promote the health of children and adolescents and to prohibit all advertising for tobacco products that may reach them. The initiative was opposed by the Federal Assembly and the Federal Council, which unsuccessfully proposed a more limited approach. As the new constitutional norm is not self-executive, it will now have to be implemented by amendments to relevant laws.

While other popular initiatives to amend the Federal Constitution failed, some cantons partially amended their Constitution and thereby altered the overall constitutional landscape of the country. Further important changes in the legal system also contributed to such alterations. In the past year, such changes have, most importantly, affected non-discrimination in social security. On the one hand, an optional referendum held against a federal act raising women's retirement age to 65 (the regular retirement age of men) was approved narrowly by 50.55 percent.[5] On the other hand, the European Court of Human Rights held that Switzerland's unequal treatment regarding widowers'

1 Federal Council is made up of seven members, each of which heads a government department. The president is elected for a one-year term of office and is regarded as first among equals. The Federal Council is a collegial body and decisions are reached jointly. Cf. Art. 175–177 Cst.

2 Cf. Eva Maria Belser and Simon Mazidi, 'Linguistic Diversity in Switzerland: Going Beyond Territorial Accommodation' (Forum of Federations, Occasional Paper Series 2022) <https://perma.cc/9R3P-77RV> accessed 30 January 2023.

3 Art. 175(4) Cst.

4 Jörg Künzli, 'Commentary of Art. 175' in Bernhard Waldmann, Eva Maria Belser and Astrid Epiney (eds), *Bundesverfassung, Basler Kommentar,* (Helbing Lichtenhahn Verlag 2015), paras 37–38.

5 An optional referendum can be taken against new or revised Federal Acts when within 100 days of the official publication of the act any 50'000 persons eligible to vote or any eight cantons request it. The act is only submitted to a vote of the People and it comes only into force if it is accepted by the majority of People. Cf. Art. 141(1)(a) Cst.

pension allowance amounts to discrimination. The case can be taken as a textbook example of the effects of the (in)famous Art. 190 Cst. This constitutional provision obliges the Federal Supreme Court and other judicial authorities to apply federal acts, even when such acts violate the Federal Constitution. Due to this far-reaching limitation of constitutional review by the courts, the only effective avenue to review federal acts and have them disapplied is to invoke rights under the ECHR.

In the following, we will first present the formal constitutional amendments put to a vote at the federal level in the past year and briefly refer to a few cantonal developments (II.). We will then turn to the case of widower's pensions and recall that Switzerland continues to heavily rely on the European Court of Human Rights to protect human rights and solve counter-majoritarian issues (III.). We will conclude with an outlook on discussions and proposals that could change the constitutional landscape in the years ahead (IV.).

II. SUCCESSFUL AND FAILED CONSTITUTIONAL REFORMS

The Swiss procedure to amend the constitution is flexible at the beginning and rigid at the end. The necessity to collect 100'000 signatures to launch a popular initiative to amend the Federal Constitution constitutes a rather low threshold. When in 1891, the possibility was introduced to initiate a partial revision of the Federal Constitution by means of a popular initiative, the number of signatures required was set at 50'000, which at that time corresponded to about 7 percent of those eligible to vote. In 1977, the number of required signatures was raised to 100'000, mostly as a reaction to the – incredibly late – introduction of female voting rights in 1971. As the population has grown from roughly 3 million in 1891 to 8.7 million, only the signatures of 1.8 percent of the people eligible to vote are nowadays needed to launch an initiative.[6] Despite this, there is no political appetite to adapt direct democratic rights to current demographics and raise the number of signatures.[7] The country rather seems to appreciate the opportunity for even small and marginal groups to effectively raise constitutional concerns. The flexibility of the beginning is contrasted by rigidity at the end of the reform process: All constitutional amendments must be accepted in a mandatory referendum by the majority of the people and the majority of the cantons.[8] As a result of this funnel approach, numerous popular initiatives are successfully launched, but few are successful in the end.

In 2022, three popular initiatives aiming to amend the Federal Constitution were put to a vote at the federal level, and one of them was accepted by the people and the cantons:

- On 13 February 2022, Swiss voters accepted at the ballot box the people's initiative "Yes to the protection of children against tobacco advertising." 56.7 percent of the people voted in favor of the initiative; a majority of the cantons also backed the initiative, allowing it to pass. The initiative called for tighter advertising restrictions by *banning any adverts for tobacco products targeting young people*. The newly introduced constitutional provisions demand from the Confederation and the cantons to promote the health of children and adolescents (Art. 41(1)(g) Cst.) and to prohibit any kind of advertising for tobacco products that may reach them (Art. 118(2)(b) Cst.). Compared to the previous regulation, which only provided for a ban on advertising if it was specifically directed at minors, the new constitutional ban on advertising is much more extensive (and also applies to substitute and alternative products of tobacco products, such as electronic cigarettes). As it bans all advertising reaching young people, it also targets sales promotion and sponsorship. This extension was the main reason why the federal authorities opposed the initiative and made a more moderate counterproposal. The authorities unsuccessfully argued that the initiative constituted a disproportionate restriction on economic freedoms and jeopardized the financing of sporting and cultural events. As a result of the constitutional reform, only advertising aimed at adults that does not reach minors will be permissible in the future (for example, sending advertising e-mails to adults, distributing advertising flyers to adults or advertising spots at cinema screenings or in audiovisual media (films, games, etc.) that are reserved for persons 18 years of age or older).[9] As the new constitutional provisions are not self-executing, it is now up to federal parliament to adapt the relevant laws and implement the new ban.

- On the same day, the people and the cantons were called to the ballot box to determine the fate of a popular initiative aiming at *banning animal testing*. The initiative was rejected by 79.1 percent of the voters and all cantons. The initiative would have provided an unconditional end to all experiments on living beings in Switzerland.[10] As a result, animals would no longer be allowed to be used for scientific research or educational purposes. On top of the animal testing ban, the initiative also proposed to prohibit imports of new products and components developed directly or indirectly through animal experimentation. The ban would have covered experiments on humans too. It remained unclear whether the regulatory scope would have only applied to medicine and biology or to psychology, sociology, and sports science as well.[11] Albeit not as far-reaching as the initiative, the existing Art. 118*b* Cst. already provides protection for research involving human subjects. The constitutional provision was introduced in 2010 and further specified in the Federal Act on Research Involving Human Beings providing for strict procedures and approvals by

6 Cf. Dispatch regarding a new Federal Constitution of 20 November 1996, BBl 1997 I 1 ff., 448; Jacques Dubey, 'Commentary of Art. 139' in Vincent Martenet and Jacques Dubey (eds), *Constitution fédérale, Commentaire Romand* (Helbing Lichtenhahn Verlag 2021), para 21.

7 Dubey (n 6), para 21.

8 Cf. Arend Lijphart, *Patterns of Democracy* (Yale University Press, 2d ed. 2012), 206; Astrid Lorenz, 'How to Measure Constitutional Rigidity: Four Concept and Two Alternatives' (2005) 17 Journal of Theoretical Politics 339, 358–59; Donald S. Lutz, *Principles of Constitutional Design* (Cambridge University Press, 2006), 170.

9 Dispatch regarding the popular initiative 'Yes to the protection of children and adolescents from tobacco advertising (children and adolescents without tobacco advertising)', BBl 2020 7049 ff., 7061.

10 Federal decree regarding the popular initiative 'Yes to the ban on experiments on animals and humans – Yes to research paths with impulses for safety and progress', BBl 2021 1491 f.

11 Dispatch regarding the popular initiative 'Yes to the ban on experiments on animals and humans – Yes to research paths with impulses for safety and progress', BBl 2020 541 ff., 547.

ethics commissions. Based on its constitutional mandate to protect animals in Art. 80 Cst., federal rules on animal testing also already exist. All animal experiments must be approved by cantonal animal experiment commissions. Authorizations are granted if researchers demonstrate that the benefit to society is greater than the suffering of the animals, the expected gain in knowledge exceeds the distress to the animals, no alternatives are available and the distress to the animals is kept to a minimum. With these arguments – the country already applies strict rules and procedures to animal testing and research involving humans – the federal authorities and all political parties opposed the popular initiative aiming at a comprehensive ban of animal testing. Their arguments about the negative impact of the initiative on research, medical and pharmaceutical process, and the economy apparently convinced large parts of the population.

- On 25 September 2022, a popular initiative that aimed at *banning intensive livestock farming* and increasing animal welfare rules was rejected by 62.3 percent of the people and all cantons, with the exception of the (urban) Canton of Basel-City. It is one of the numerous unsuccessful agriculture initiatives aiming at more sustainable, environmentally, and animal-friendly farming.[12] The initiative, dubbed "against factory farming", would have mandated the Confederation to protect the dignity of animals in agricultural livestock farming such as cattle, chickens, or pigs and to take a number of far-reaching measures to this aim. First, the initiative proposed to enshrine the animal's right to not live in industrial livestock or factory farming as this type of farming would systematically violate animal welfare. Second, the Confederation would have been obliged to lay down criteria for animal-friendly housing and care, access to the outdoors, animal-friendly slaughter practices, and maximum group sizes allowed per animal stall. Finally, it would have needed to issue regulations on the importation of animals and animal products for nutritional purposes that would have met the regulatory purpose of the constitutional provision.[13] The federal authorities and most political parties strongly opposed the initiative considering it too extreme and harmful to agriculture and food security. The fear of significant increases in food prices and the predicted difficulties of implementing a blanket ban on factory farming nationally and via trade restrictions were probably the main motives for Swiss citizens to reject the initiative.

Given Switzerland's federal structure, the subnational units (the cantons) are obliged by the Federal Constitution to adopt a democratic constitution which also requires the approval of the people and must be capable of being revised if the majority of those eligible to vote so request.[14] Cantonal constitutional amendments are common and sometimes serve as laboratories to test new constitutional ideas before they are transplanted to other cantons or to the federal level. In 2022, several cantons voted to lower the voting age to 16 (the voting age already applied in the Canton of Glarus) and to involve the youth to a larger extent in democratic decision-making. Promoters of young suffrage have, however, faced setbacks at the polls: In Bern, the proposal to lower the voting age to 16 was rejected by 67.2 percent, and in Zurich, by 64.8 percent. These cantonal results do not bode well for the National Council's commission currently working on a proposal for a constitutional amendment to lower the voting age at the federal level. In contrast, the cantonal trend to entrench climate rights continued in 2022. The Cantons of Basel-City, Bern, Glarus, and Zurich have decided to amend their constitutions to strengthen their commitments to protect the climate and mitigate climate change. It will only be a matter of time before the Federal Constitution is revised in the same way (and some initiatives in this sense are underway).

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The only formal constitutional change occurring in 2022 concerns the banning of any adverts for tobacco products targeting young people. The new provisions mandate the federal authorities to enact legislation to ensure that any type of tobacco product advertising cannot reach children and adolescents. While regulation of tobacco product advertising is undoubtedly a public health concern, one might still question whether it is a matter that should be addressed at the constitutional level. After all, the Constitution lays down the basic principles of a state, the structures and processes of government, and the fundamental rights of citizens.[15] The reason for legislative concerns, such as tobacco advertisements, but also matters of civil, criminal, environmental, or migration law, to seize the crown of the Federal Constitution lies within the Constitution itself: On the one hand, it permits any popular initiative to amend the Constitution that does not violate mandatory provisions of international law. It, therefore, does not provide for a requirement of constitutionality for constitutional amendments themselves. On the other hand, it does not permit legislative initiatives that would be aimed at amending federal legislative acts. All popular concerns, constitutional or not, are hence channeled into constitutional amendment processes. The Federal Constitution consequently includes several provisions which would be more appropriately included in a federal legislative act.

Once a constitutional amendment has been accepted, it is applied directly if it enjoys direct effect or, more frequently, must be implemented by enacting new legislation or amending existing legislation. For instance, the wording of the new ban on advertising tobacco products to young people calls for the Confederation to take legislative action in this area. Before the constitutional amendment – and until its legislative implementation by the Federal Assembly – Switzerland has rightly been considered a tobacco paradise. It has taken the least decisive action against smoking and tobacco consumption in Europe and has not ratified the World Health Organization's Framework Convention

12 Samuel Jaberg, 'Swiss agriculture remains under pressure despite success at ballot box' (*swissinfo*, 25 September 2022) <https://perma.cc/62WC-WKKT> accessed 1 April 2023.

13 Federal decree regarding the popular initiative 'No factory farming in Switzerland (factory farming initiative)', BBl 2022 700 f.

14 Art. 51(1) Cst.

15 Elliot Bulmer, 'What is a Constitution? Principles and Concepts' (*International IDEA Constitution-Building Primer 1*, 2017) <https://perma.cc/Q88F-SDH4> accessed 1 April 2023, 5.

on Tobacco Control.[16] The reasons are manifold and are linked to a generally liberal approach to economic freedoms and the fact that the largest cigarette producers in the world have a branch in Switzerland and generously support sportive and cultural events. While some cantons had already issued stricter regulations before, the Confederation is now obliged to bring the new national Tobacco Products Act, which will not take effect until 2024, in conformity with the new constitutional norms. As the Tobacco Products Act will be a federal act, it will not be submitted to constitutional review. The judiciary will therefore have no means to intervene should the federal parliament delay the implementation of the new constitutional norm or opt for a limited ban that does not comply with the will of the constitution-maker to enforce strict rules.

The country also still awaits the implementation of the constitutional ban on face covering accepted in 2021 (Art. 10*b* Cst.).[17] The federal authorities initially took the position that the face covering ban concerned the public space, which is why the cantons were responsible for implementing it. However, the cantons pushed for a federal solution. Adherence to federal responsibilities would have resulted in 27 so-called "burqa bans" in Switzerland (and thus probably more bans than burqa wearers). After some hesitation, the Federal Council agreed to a federal solution. However, its initial proposal to insert the ban on face coverings into the Criminal Code code met with considerable criticism during the consultation process.[18] Currently, a draft is before the federal parliament that provides for a special federal act on face coverings.[19] If parliament approves the draft, the new federal act – like any federal act – will be subject to an optional referendum.[20] A limited judicial review could only take place in the context of a subsequent case if, for example, a person were to be fined on the basis of the federal act. Moreover, due to the restriction of constitutional jurisdiction at the federal level, it would not be based on the Federal Constitution but on the ECHR (which allows bans on the burqa according to the case law of the ECtHR).[21]

The limited role of courts in exercising constitutional control with regard to federal acts is also illustrated by the ECtHR judgement regarding widowers' pensions. Widows and widowers insured under the Swiss social securities regulations are entitled to a widow's or widower's pension in accordance with the Old Age and Survivors Insurance Act. According to Art. 24(2) of the Act, the entitlement to a widower's pension expires when the widower's youngest child reaches the age of 18. The widow's pension is not subject to such expiry. In the case decided in 2022, Max Beeler was entitled to a widower's pension after the death of his wife in 1994. When his youngest daughter turned 18, the cantonal authority decided to discontinue his widower's pension. Max Beeler appealed against the decision, claiming that the unequal treatment of widows and widowers amounted to discrimination on the grounds of gender, prohibited by Art. 8(2) and (3) of the Federal Constitution. The Appenzell-Ausserrhoden High Court, as well as the Federal Supreme Court, dismissed the case. The Federal Supreme Court considered its hands to be tied by Art. 190 Cst. obliging it to apply federal acts even if unconstitutional. In its judgement, the Court pointed out that the parliament, when introducing different prerequisites for widows' and widowers' pensions, was well aware of the fact that it was creating an inadmissible gender-specific distinction and recalled that reforms attempting to do away with the violation of the right to equal treatment of women and men had failed.[22] As surprising as it may sound but in the Swiss system, democracy trumps the rule of law in such a situation, and the primacy of the Constitution is not implemented against the (explicit) will of the majority in parliament. The only way the Federal Supreme Court can hold the national law-maker responsible is to refuse the application of the discriminatory federal act based on the violation of the ECRH, which – according to the Court's case law – takes priority over federal acts. The Court, however, did not see any space for such "constitutional review through the backdoor of the ECHR". It argued that the prohibition of gender discrimination under Art. 14 ECHR was accessory and not self-standing and, therefore, only required that the rights and freedoms guaranteed by the ECHR were protected and applied without discrimination. Switzerland has not ratified the Additional Protocol No. 1 to the ECHR covering non-discrimination and unequal treatment in the context of social security. The Court also held that Art. 8 ECHR protecting privacy and family life did not include social benefits and could hence not be used to open up a judicial review based on accessory non-discrimination duties.[23]

The ECtHR, however, took a different stance on the issue.[24] It attached importance to the fact that Max Beeler had taken over childcare after the death of his wife and that the granting or discontinuation of the pension thus had a direct and crucial impact on the organization of family life.[25] There was, therefore, sufficient connection between the widower's pension and his right to family life to oblige the member state to protect and apply such pension without discrimination. The Court also rejected Switzerland's main (and discriminatory) argument that the legislative difference was not based on gender stereotypes but on social reality. The country claimed that it was appropriate to have different regulations protecting women in place as long as equality between men and women had not yet been entirely achieved in practice with regard to paid employment and the distribution of roles within couples. Simply put, Switzerland's reasoning was founded on the premise that a widower typically loses the person who cares for the children and the household, whereas a widow loses the sole breadwinner.[26] The Strasbourg Court rejected this conventional understanding based on the male breadwinner model (which is based on gender stereotypes) in powerful words by reaffirming "[...] that references to traditions,

16 Cf. Imogen Foulkes, 'Swiss approve tobacco ad ban long after neighbours' (*BBC*, 13 February 2022) <https://perma.cc/NB43-LF5U> accessed 29 April 2023.
17 Cf. Eva Maria Belser and Simon Mazidi, 'When direct democracy trumps human rights: Unveiling the Swiss "Burqa Ban"' (*ConstitutionNet: Voices from the Field*, 28 March 2021) <https://perma.cc/3R3L-HTSB> accessed 15 June 2022.
18 Cf. Dispatch regarding the Federal Act on the Ban on Face Coverings of 12 October 2022, BBl 2022 2668, 15–19.
19 Draft of the Federal Act on the Ban on Face Coverings, BBl 2022 2669.
20 Art. 141(1)(a) Cst.
21 Cf. *S.A.S. v France* App no 43835/11 (ECHR, 1 July 2014). This was confirmed in the case *Dakir v Belgium* App no 4619/12 (ECHR, 11 July 2017).
22 Federal Supreme Court Decision, BGer 9C_617/2011 (4 May 2012), consid. 3.5.
23 Federal Supreme Court Decision, BGer 9C_617/2011 (4 Mai 2012), consid. 3.1 and 3.3.
24 Cf. Maija Dahlberg, 'More human rights at the cost of the state sovereignty? Clarifying the scope of applicability of Article 8 ECHR to social welfare benefits in Beeler v Switzerland' (*Strasbourg Observers*, 21 February 2023) <https://perma.cc/E9H8-65QB> accessed 29 April 2023.
25 *Beeler v. Switzerland* App no 78630/12 (ECHR, 11 October 2022), para 79.
26 Cf. Alice Margaria, 'Freeing fatherhood from breadwinning – Are we ready for (formal) equality? Beeler v. Switzerland' (*Strasbourg Observers*, 24 January 2023) <https://perma.cc/ZKW5-D39C> accessed 29 April 2023.

general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex, whether in favor of women or men [...]"[27] and that "[...] the relevant legislation contributes rather to perpetuating prejudices and stereotypes regarding the nature or role of women in society and is disadvantageous both to women's careers and to men's family life [...]."[28] Once again, hence, Switzerland had to rely on an international body to solve a counter-majoritarian concern – and to implement and indirectly enforce its own constitution. To remedy this situation and implement the ruling, the Federal Council recently presented the outlines of a revision and proposed that widows' and widowers' pensions be granted until the child's 25th birthday at the latest, regardless of marital status.

The case provides a striking illustration of the extent to which constitutional review by the courts in Switzerland is limited when it comes to primary legislation at the federal level. It is, therefore, hardly surprising that in 2021 a new political proposal was submitted calling on the Federal Council to submit a draft decree to the Federal Assembly that would allow for the introduction of a constitutional review of federal acts.[29] The new proposal – just like the numerous earlier proposals aiming at strengthening the judiciary – did not receive sufficient support in parliament and has been rejected by the Council of States. For the time to come, Switzerland will therefore continue to depend on the Strasbourg Court and the ECHR to effectively protect international and national human rights against the will of the majority in parliament (and the people).

IV. LOOKING AHEAD

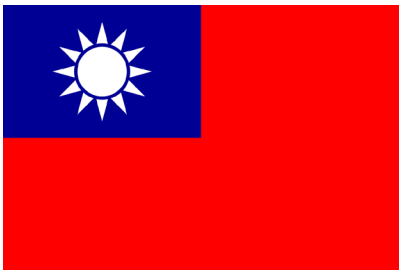
Currently, committees collect signatures for more than twenty popular initiatives at the federal level, ten have successfully been launched and are currently being examined by federal authorities. In addition, a group of individuals has announced to prepare for the launch of a popular initiative requesting the total revision of the Federal Constitution.

Amongst the popular initiatives for which currently signatures are being collected is one aiming at "preserving Switzerland's neutrality". The initiative expresses unease about Switzerland's reaction to Russia's illegal war against Ukraine and the hasty reconsideration of its previously firm positions. When the Federal Council decided to adopt the EU's sanctions against Russia, questions were raised about Switzerland's neutrality. These questions became internationally salient when Switzerland refused to allow the re-export to Ukraine of weapons produced in Switzerland but owned by other countries. Is Switzerland's neutrality an international or constitutional obligation, and what exactly does it imply and forbid? It is undisputed that very limited obligations arise from the law of neutrality codified in the Hague Conventions of 18 October 1907. It is also interesting to note that, unlike the safeguard of Switzerland's independence and welfare, the alleviation of need and poverty in the world, the promotion of human rights and democracy, and the conservation of natural resources, neutrality is neither mentioned as an aim of the Federal Constitution nor as a foreign policy goal.[30] From a constitutional point of view, Switzerland's neutrality has always been considered an instrument and not an end in itself. The Federal Constitution only explicitly refers to neutrality in Art. 173(1)(a) and Art. 185(1) Cst. when mandating the Federal Assembly and the Federal Council to take measures to safeguard Switzerland's neutrality.[31] The reason for inflexible reactions, therefore, stems less from the constitution than from the Federal Act on War Materiel, which came into being as a reaction to a popular initiative requesting increased arms control and the banning of arms exports and was tightened in 1996 and in 2008, both times again in the run-up to popular initiatives, and relaxed later. In general, however, the current constitutional framework gives the federal authorities a lot of leeway in how to use neutrality as an instrument of security, foreign and economic policy. To limit this flexibility, right-wing campaigners are currently collecting signatures for an initiative seeking to enshrine perpetual and armed neutrality in the Federal Constitution. The initiative also demands that Switzerland may not join any military or defense alliance (except in the case of a direct military attack on Switzerland) and that it refrains from all non-military coercive measures, i.e., that it no longer participates in sanctions (unless decided by the UN).[32]

Finally, in 2023, the Grand Chamber of the ECtHR will render its eagerly awaited decision in the case of the *KlimaSeniorinnen*. It is the first case the ECtHR is hearing in the area of climate change and is likely to clarify a series of crucial legal questions relevant to all parties to the Convention.[33] The *KlimaSeniorinnen*, a group of elderly women, allege that Switzerland's failure to take adequate action to combat climate change and reduce domestic emissions exposes them to adverse health effects, possibly even death.[34] The Federal Supreme Court held that such matter should not be pursued through the courts but through political means, for which the Swiss system offered sufficient possibilities.[35] It will be interesting to see how the ECtHR will assess the standing of the association which has brought forward the case,[36] the normative nexus between the right to life and the right to respect for private and family life, and its role in holding Switzerland (and other member states) accountable to implement positive obligations under the Paris Agreement.[37]

27 *Beeler v. Switzerland* App no 78630/12 (ECHR, 11 October 2022), para 110.
28 *Beeler v. Switzerland* App no 78630/12 (ECHR, 11 October 2022), para 113.
29 Motion 21.3690 (Zopfi), 'Strengthening fundamental rights and federalism and reinforcing the rule of law. A new attempt to introduce constitutional jurisdiction' (10. June 2021) <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20213690> accessed 1 April 2023.
30 Cf. for foregin policy goals Art. 54(2) Cst. and for the Federal Constitution's objectives Art. 2 Cst.
31 Cf. Federal Council, 'Clarity and guidance on neutrality policy, Federal Council report in response to Postulate 22.3385 put forward by the Council of States Foreign Affairs Committee (FAC-S), 11.04.2022' (26 October 2022) <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/neutrality.html> accessed 1 April 2023, 7.
32 Federal popular initiative regarding the 'Preservation of Swiss neutrality (neutrality initiative)', Preliminary examination, BBl 2022 2694.
33 Cf. Eva Maria Belser and Simon Mazidi, 'Switzerland' in Luís Roberto Barroso and Richard Albert (eds), *The International Review of Constitutional Reform 2021*, 220.
34 Cf. Helen Keller and Corina Heri, 'The Future is Now: Climate Cases Before the ECtHR' (2022) 40 Nordic Journal of Human Rights 153, 155 f.
35 Federal Supreme Court Decision, BGer 1C_37/2019 (5 May 2020), consid. 5.3 and 5.5.
36 Cf. Evelyne Schmid, 'Victim Status before the ECtHR in Cases of Alleged Omissions: The Swiss Climate Case' (*EJIL:Talk!*, 30 April 2022) <https://perma.cc/54MR-TXAW> accessed 1 April 2022; Keller and Heri (n 34) 155 ff.
37 Véronique Boillet, 'Direct Democracy or Climate Litigation?' (*Verfassungsblog*, 17 Mai 2022) <https://perma.cc/3XL2-YFQ6> accessed 1 April 2022; Johannes Reich, Flora Hausammann and Nina Victoria Boss, 'Climate Change Litigation Before the ECtHR' (*Verfassungsblog*, 16 Mai 2022) <https://perma.cc/KJ6R-8RRR> accessed 1 April 2022.

Taiwan



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I. INTRODUCTION

Taiwan held its first-ever constitutional referendum in November 2022. On the ballot, there was a proposal to amend Article 130 of the Republic of China (ROC) Constitution, which prescribes that "[a]ny citizen of the Republic of China who has attained the age of 20 years shall have the right of election in accordance with the law. Except as otherwise provided by this Constitution or by law, any citizen who has attained the age of 23 years shall have the right of being elected in accordance with law." Because of this outdated constitutional provision that was enacted in 1947, Taiwan has been and continues to be an outlier among liberal democracies by denying the right to vote to 18 and 19-year-olds.

The proposed constitutional amendment, i.e., the proposed Additional Article 1-1 of the ROC Constitution, was a straightforward one: "Any citizen of the Republic of China who has attained the age of 18 years shall have the right of election, recall, initiative, and referendum in accordance with the law. Except as otherwise provided by this Constitution or by law, any citizen who has attained the age of 18 years shall have the right of being elected in accordance with the law. The provisions of Article 130 of the Constitution shall cease to apply." In other words, the proposed amendment would lower the voting age from 20 to 18, and the age of candidacy from 23 to 18 (except as otherwise provided by law). If the proposed amendment were ratified, the Elections and Recalls Act and the Presidential Elections and Recalls Act would have to be revised accordingly, but the age of candidacy for certain offices could still be set at a higher age as provided by the Constitution (specifically requiring that candidates for President and Vice President be at least 40 years or older) or by law (such as requiring a higher age of candidacy for municipality/county mayors).

Under the existing constitutional amendment rules established by Additional Article 12 of the Constitution, a constitutional amendment bill can only be initiated by one-fourth of the members of the Legislative Yuan (LY), Taiwan's unicameral parliament. To become a part of the Constitution, an amendment bill must first pass the LY by a three-fourths vote with a quorum of three-fourths of LY members. After this vote, the amendment bill must then be ratified by an absolute majority of eligible voters in a constitutional referendum held six months later. Since popular voting in Taiwan is not compulsory and the highest voter turnout rate in recent years has never gone beyond 75%, it can be argued that the constitutional amendment in Taiwan requires not only a legislative supermajority but a referendum supermajority as well.

Ultimately, the constitutional referendum failed to meet the ratification threshold. With the voter turnout rate being around 58.97%, about 84.79% of the turned-out voters would have to vote "yes" for the proposed constitutional amendment to be ratified. Yet, only 49.77% of the turned-out voters did so, while 44.21% of them simply voted "no." The referendum result showed that the proposed constitutional reform of the voting age and age of candidacy was far more controversial among ordinary voters than their political representatives and the six-month referendum campaign did little to change the hearts and minds of the voters in Taiwan.

The remainder of this report is organized as follows. Section II lays out the history and process leading to the 2022 constitutional referendum. Section III explores why the constitutional referendum failed. Section IV looks ahead to the constitutional future of Taiwan in the aftermath of the failed reform.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Voting age reform has been an issue in Taiwan for over two decades. The first constitutional amendment bill for lowering the voting age was introduced in the LY in 2002. Since 2006, voting age reform has gained some more traction thanks to the advocacy in Taiwan's civil society. In 2015, the two major parties in Taiwan—the Kuomintang (KMT) and the Democratic Progressive Party (DPP)—had pledged to support this specific cause as part of the constitutional reform rekindled in the wake of the Sunflower movement of 2014. The constitutional amendment process was soon abandoned, however, because the KMT and the DPP could not agree on anything else.

The constitutional reform process was restarted after President Tsai Ing-wen won her re-election in 2020. By March 2022, 87 bills of the constitutional amendment had been introduced to the LY. In order to hold a constitutional referendum concurrently with the nationwide local elections scheduled in November 2022, the LY leadership had long planned to clear the constitutional amendment bills no sooner and no later than late March 2022. The LY Select Committee on Constitutional Amendments, however, did not begin its review process until January 2022. With little time left and no hope to negotiate a package deal that both the DPP and the KMT lawmakers would agree

upon, the DPP-dominated select committee reported to the LY nothing but the bill on lowering the voting age and the age of candidacy—a proposal that all parties had proclaimed to support. This bold move forced the opposition KMT lawmakers to publicly declare their stance on the roll-call record, and the KMT caucus decided to support the long-overdue voting age reform rather than obstructing it, just minutes before the floor vote. On March 25, 2022, the LY cleared the proposed amendment by a vote of 109-0 with only four abstained votes.

The second stage of the constitutional amendment process began with a slightly bumpy start, as the KMT raised but quickly dropped its objection to the plan of holding the constitutional referendum and the 2022 local elections on the same day. The KMT's objection was short-lived, because the plan was well within the discretion of the Central Election Commission (CEC). The special referendum day as provided by the Referendum Act, after all, applies only to citizen-initiated ordinary referendums. Moreover, it was widely believed that the constitutional referendum would be doomed to fail if it were not held concurrently with the November elections due to insufficient voter turnout. The CEC scheduled the constitutional referendum as planned, but the episode may have foreshadowed the lack of bipartisanship in the referendum campaign.

During the eight months from March to November, the campaign which supported the ratification of the proposed amendment had sought hard to persuade voters that lowering the voting age and age of candidacy is the right thing to do. After all, under the Civil and Criminal Codes, Taiwanese are already regarded as adults when they reach 18 years of age. Male citizens who are 18 or older are also obligated to serve compulsory military service. The supporters further emphasized that lowering the voting age to 18 has long been a global trend, and expanding the electorate would make Taiwan a more democratic country. Notwithstanding the strong arguments for the "yes" campaign, it appeared that many voters in Taiwan still harbored the view that the 18–19-year-olds are too young to vote or run for office. Some opponents of the proposed amendment specifically criticized the simultaneous lowering of the age of candidacy, arguing that it has not been discussed enough. In addition, many people believed that the proposed constitutional amendment was an unnecessary waste of political energy as the voting age could simply be lowered through legislation. It was rather difficult for the reform proponents to knock down all the bad arguments against the proposed amendment, especially since most of the public discussion on this issue took place on social media and instant communication platforms that were replete with misinformation. All political parties having seats in the LY endorsed the "yes" campaign by issuing press releases, running advertisements, and/or organizing campaign rallies. The question of whether they had done everything they could do to mobilize their supporters to vote for ratification is debatable. The strongest supporters for the constitutional referendum arguably came from NGOs like the Taiwan Youth Association for Democracy. This organization had partnered with many college student unions in creating a grassroots, non-partisan, and student-based campaign for the ratification vote, both physically and virtually. The referendum campaign, indeed, had turned many college and high school students into activists.

The CEC launched an awareness campaign featuring a Taiwanese baseball star to encourage voters to get out and vote on the constitutional referendum. To foster public deliberation, the CEC also held five rounds of broadcast public presentations in mid-November. However, since not one person came forward and registered as a representative of the "no" campaign, only the representatives of the proponents took part in the CEC-held presentations.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

To many people's dismay, the long-overdue constitutional reform of voting age and age of candidacy failed to pass the ratification threshold, even though it had managed to garner the support of the majority of Taiwan's voters. The failure can be understood and appraised from three different perspectives. Let's start off by discussing the arduous amendment rules that matter. As mentioned above, the current constitutional amendment rules in Taiwan require a supermajority agreement at both the legislative and ratification stages. This institutional design was to "democratize the process of anticipated further alteration of the Constitution." The linking of referendums to constitutional amendments "was hailed as a momentous step towards bringing Taiwan's Chinese Constitution closer to the Taiwanese people." But most countries require supermajority agreement only at the legislative phase, and the dual-supermajority rule has rendered Taiwan's ROC Constitution one of the most entrenched constitutions in the world. Given the de facto supermajority referendum threshold, it would take a political miracle for the proposed voting age and age of candidacy amendment to be ratified. Notably, some scholars have suggested that it is the amendment culture as measured by the past rate of amendment, rather than the stringency of amendment thresholds, that determines the level of constitutional rigidity. However, this argument strengthens our contention that the amendment rules matter significantly in the context of Taiwan. The fact that the ROC Constitution had been amended seven times from 1991 to 2005 suggests that the Taiwanese people were not hesitant to change their supreme law of the land. The people of Taiwan are willing to modify their constitution in response to a changing society. However, constitutional amendments have completely disappeared since the installation of the new amendment rules in 2005. It is therefore clear to us that the 2022 failure resulted in part from the stringency of the constitutional amendment rules.

Secondly, the referendum outcome might be attributed in part to the limited scope of the proposed constitutional reform. In the previous seven rounds of constitutional revision in Taiwan, all amendments were brought together and put to a vote as a package. Perhaps because package deals are more likely to create win-win scenarios for the participating parties, studies have maintained that "the bundle of compromises approach was the one most likely to secure the passage of the constitutional revision." By contrast, the failed 2022 reform featured a single-subject amendment proposal. Ostensibly, few politicians objected to the proposal publicly, fearing that they might alienate future voters. Nonetheless, the proposal failed because, as with any single-subject proposal, bipartisanship greatly lowered the incentive for any political party to campaign for a proposal also endorsed by their political nemesis. There is no wonder that political parties cared much more about the local elections held on the same day than about the constitutional referendum itself.

Finally, political partisanship played a role in determining the outcome of the referendum vote. Specifically, a 2021 public opinion survey found that 56.5% of the DPP supporters were already in favor of the voting age reform, but 67.3% of the KMT supporters were against it. This apparent partisan divide is arguably shaped by a prevailing view that young voters lean more toward the pro-independence DPP than the pro-unification KMT. That is, many KMT voters might tend to oppose the enfranchisement of 18–19-year-olds for fear of empowering their rivals. The outcome of the referendum vote seemed to highlight this partisan divide. As pointed out by a post-referendum electoral analysis, Taiwan's voters still voted along party lines in this constitutional referendum. Frankly speaking, the DPP supporters voted heavily in favor of the proposed amendment while many of the KMT supporters voted "no" to the reform as if the amendment proposal were a partisan initiative rather than a bipartisan one. It appears that the constitutional referendum had turned into a different kind of referendum—that is, a vote of confidence in the incumbent DPP government. Given that the DPP performed poorly in the 2022 local elections, which were often viewed as some sort of mid-term elections in Taiwan, the failed ratification vote might be collateral damage to the electoral politics of the day as well.

IV. LOOKING AHEAD

In the past, all constitutional amendments in Taiwan were passed either by a single representative entity known as the National Assembly (1947-2000), or by the LY and a National Assembly (2005) that functioned as an ad hoc constitutional assembly. The 2022 constitutional referendum marked the first time that Taiwanese voters directly took part in the constitutional amendment process as the authority with the final say. Therefore, the failure suggests that collaboration among political elites, though still a necessary condition, is no longer sufficient for a constitutional amendment in Taiwan. Lowering the voting age and age of candidacy has long been a tough sell among ordinary voters throughout history and around the world. What sets Taiwan apart is not only that ordinary voters in Taiwan get the final say, but that they would have to approve such reform measures by a resounding supermajority vote. We would be able to report a success story of civic participation in the constitutional amendment, had the constitutional amendment rules in Taiwan required only that the constitutional referendum meet a 50% turnout threshold.

Given the electoral calendar and political dynamics in Taiwan, it seems unlikely that the LY will re-propose the defeated amendment any time soon. Nevertheless, the LY might still take the initiative to lower the voting age by simply writing it into the current election laws, as argued by some constitutional law scholars. Considering that the total number of "yes" votes exceeded the number of "no" votes in the 2022 referendum, the LY could regard this outcome as a political mandate that favors such change. On the other hand, the LY may view the referendum result as a final verdict of the people and choose to remain inactive on this issue. In this case, the voting age and age of candidacy in Taiwan would likely remain at least 20 and 23, respectively, for quite a while.

In a broader sense, the referendum failure might indicate that the channel of formal constitutional change has been blocked. Unless the DPP and the KMT could reach a wider consensus and propose a package proposal for large-scale constitutional reform, it seems that constitutional unamendability has become a reality in Taiwan. This suggests that informal constitutional change, such as judicial review or the development of unwritten constitutional norms through power politics, may play an even more important role in Taiwan's constitutional future. Given the rigidity of the ROC Constitution, it also follows that the gap between the capital-C Constitution and the small-c constitution might be wider and wider over time. Alternatively, constitutional reformers may simply give up amending the Constitution through the arduous formal procedure and go extra-constitutional—write a new Taiwan Constitution through a more majoritarian constitution-making process. But peaceful constitution-making seems at best a distant hope in Taiwan in view of the curse of geopolitics and political polarization from within.

V. FURTHER READING

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Thailand

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I. INTRODUCTION

The year 2022 was another turbulent year for Thailand. For the eighth consecutive year, General Prayuth Chan-Ocha, a military strongman who seized power through a royalist-backed coup in May 2014, had served as the country's prime minister (PM). The junta-initiated 2017 Constitution was still enforced to repress left-wing and pro-democracy movements that were perceived as threats to the political dominance of the monarchy. Repelled by aristocratic privileges and the oligarch system it anchors, pro-democracy groups continued advocating for amendments to the Constitution. Furthermore, the Constitutional Court (CC) once again became an integral player in deciding on the seething controversy regarding Prayuth's term of office as Prime Minister (PM). This landmark case was entangled and linked to the status of the 2014 coup.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In this section, three main points will be addressed: (a) a constitutional amendment proposal aimed towards spearheading more extended decentralization initiated by an activist group, the Progressive Movement (PG), led by Thanathorn Juangroongruangkit; (b) the CC's controversial decision on Prayuth's eight-year limit as PM which later sparked disagreements over whether the limitation as such should still be constitutionally retained; and (c) the changes to election laws according to the successful constitutional amendment in 2021.

1. LOCAL ADMINISTRATION

We will begin by focusing on a proposed amendment to constitutional provisions on local administration, which was proposed by the PG, led by Thanathorn Juangroongruangkit. Thanathorn was one of the founders and the former leader of the Future Forward Party (FF). Banned by the CC following the dissolution of the FF in 2020, Thanathorn established a political pressure group, the PG, campaigning for constitutional reforms to various aspects of Thai society. In the aftermath of the 2014 coup, the local administration in Thailand has been significantly reduced to accommodate to the junta's recentralization scheme.[1] Regarding such a policy as a vital mechanism for anchoring the military's long-term political dominance, the PG proposed the highly disputed bill to repeal Chapter 14 of the 2017 Constitution. This proposal was directed towards disentangling the local administration from political bondage caused by the complexity of the current administrative laws and its bureaucracy. Its proposed changes included:

1. The local government can provide public services on the local level. This means the central government and the deconcentrated bodies (such as *Changwat* (provincial authorities)) may provide services only in the case that such services are beyond the capacities of local authorities.
2. To reduce overlapping responsibilities between the local government and other authorities, there must be a clear delegation of power and organized plans for local administration to follow.
3. There must be a law on local elections.
4. There must be a law promoting public participation in local governance.
5. The law must guarantee local financial autonomy.[2]

While many pro-democracy advocates demand changes to the institutional structure of local authorities, the proposal heightened apprehension among vast segments of conservative civil society and business cronies, believing that the decentralized scheme would eventually lead to the sudden loss of their firm grip on power.[3] Due to these concerns, the majority of Parliament voted against the proposal.[4]

2. THE CONSTITUTIONAL COURT'S DECISION ON PRAYUT'S TIME IN OFFICE AS PM

As we briefly noted earlier, the current PM, Prayuth, had been in power since the 2014 coup. Despite various attempts being made to topple his

1 See Andrew Harding and Rawin Leelapatana, 'Possibilities for Decentralization in Thailand: A View from Chiang Mai' (2021) 1 Thai Legal Studies 76.

2 'ร่างรัฐธรรมนูญแห่งราชอาณาจักรไทย แก้ไขเพิ่มเติม (ฉบับที่ ..) พุทธศักราช .... นายธนาธร จึงรุ่งเรืองกิจ กับผู้มีสิทธิเลือกตั้ง จำนวน 76,591 คน เป็นผู้เสนอ'[Thai Constitutional Amendment Bill proposed by Thanathorn Juangroongruangkit and 76,591 electorates] (Thai Parliament, 23 November 2022)< https://web.parliament.go.th/assets/portals/1/files/ file_20220819111041_1_251.pdf> accessed 1 March 2023.

3 Aekarach Sattaburuth, 'Progressive Movement's charter amendment too radical, says senator' (Bangkok Post, 22 November 2022) <https://www.bangkokpost.com/thailand/politics/2449065/progressive-movements-charter-amendment-too-radical-says-senator> accessed 1 March 2023.

4 245 votes were cast for the proposal and 254 votes were against it. 129 of the members of the National Assembly abstained. See 'รัฐสภาโหวตคว่ำร่างแก้ «รธน.ปลดล็อกท้องถิ่น» ฉบับ ธนาธร-ปชช.'[Parliament rejected the constitutional amendment bill "Unlock Local Administration" proposed by Thanathorn and the people] (Thai PBS, 7 December 2022) < https://www.thaipbs.or.th/news/content/322315> accessed 1 March 2023.

premiership, all of them were cleared by the CC.[5] Initiated by the opposition bloc led by the Pheu Thai Party, the most recent one in 2022 centered on Prayuth's eligibility as the PM due to the time limit clause articulated in the 2017 Constitution. Section 158 of the 2017 Constitution states that "The Prime Minister shall not hold office for more than eight years in total, whether or not holding consecutive term…"[6] The ambiguous wording here led to the rise of three different interpretations. The first interpretation was advocated by fifty-one law professors in an open letter to the President of the CC.[7] According to this interpretation, Prayuth's term of office began on the date he was appointed to the position of PM following the 2014 coup, thus ending on August 23, 2022.[8] Meanwhile, the second interpretation asserted that his term of office commenced on April 6, 2017, the date that the 2017 Constitution came into force, thus allowing Prayuth to stay in power until April 5, 2025.[9] Finally, the third interpretation used the date Parliament selected Prayuth as the PM on June 9, 2019, as a starting date for the eight-year calculation; his premiership would consequently terminate on June 8, 2027. [10]

The CC declared the above petition admissible and suspended Prayuth as PM for five weeks. Its final verdict corresponded with the second interpretation, allowing Prayuth to stay in power until April 5, 2025. The ruling also prompted the junta-appointed senators to propose an abolition of Section 158 of the 2017 Constitution to prolong the stay in power of the 'good PM'.[11] At the time of writing this report, this proposal is subject to a lot of ongoing debates.

3. THE CONUNDRUM OF CHANGES TO ELECTION LAWS

Following the successful amendment of the 2017 Constitution on the election system in 2021, it became necessary to create organic laws significant to the election process to facilitate the much-expected upcoming election in Thailand. The two most important organic laws include the Organic Law on the Election and the Organic Law on Political Parties. In this regard, Parliament had to determine whether the party-list MP calculation would be divided by 500 (the total number of the members of the House of Representatives) or 100 (the total number of the party-list members of the House of Representatives). The first option would provide more advantages to smaller parties, with the latter would otherwise favor larger ones. Despite the disagreement as such, both organic laws finally gained parliamentary approval, with the latter option selected.[12]

Also, despite the controversy over whether these bills had been properly passed, the CC later ruled that both pieces of legislation were lawfully issued, and therefore, are considered effective.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Now, we will move on to analyze the amendment attempts and the CC's decision mentioned in Part II. Two main questions will be addressed: (a) whether the 2022 amendment proposals should be classified as legitimate constitutional amendments, or if they entailed what Richard Albert labels as constitutional dismemberments, and (b) how the CC's decision on Prayuth's term of office can be theoretically described.

To answer the first question, we have to delve into the details of the diametrically opposed conceptions of 'constituent power' or the power to create and amend constitutional norms – the *liberal-democratic* (LDCP) and the *royal* constituent power (RCP).[13] Both compete in a constitutional amendment process to "[define] the essential form of the political bond between the people (the citizens of the state) and its governing authorities."[14] Embraced by the opposition bloc and pro-democracy supporters, the LDCP perceives the concrete, flesh-and-blood people as an "active citizenry" who must be empowered to actually exercise "[their] right to define and redefine themselves and their state as they deem best' in the process of constitutional change without fear of state repression."[15] Put briefly, they are "the amenders of [their] constitution." [16] The people's power can be manifested through a variety of means, whether it is a constituent assembly or a public referendum.[17] The RCP, on the contrary, is advocated by the royalist-conservative elites and the military, with a presumption being that most Thais are ignorant, uneducated, and poor people who are not ready for a fully-fledged democracy.[18] This assumption justifies placing the exercise of constituent power under the embrace of the elites.[19] Meanwhile, any constitutional amendment proposals that defy the political pre-eminence of the monarchy are deemed unconstitutional.[20]

5 '8 ปี ประยุทธ์ : ที่มาคำวินิจฉัยศาลรัฐธรรมนูญ 30 ก.ย. หลังนายกฯ ได้ไปต่อ'[8 years of Prayut: The background of the Constitutional Court's decision on 30 September which allow the PM to continue working] (BBC News Thai, 29 November 2022) <https://www.bbc.com/thai/thailand-63071260> accessed 1 March 2023.

6 Section 158 of the Constitution of the Kingdom of Thailand 2017.

7 'Law lecturers advise Constitutional Court judges PM's term expires by Aug 24' (Thai PBS World, 16 August 2022) < https://www.thaipbsworld.com/law-lecturers-advise-constitutional-court-judges-pms-term-expires-by-aug-24> accessed 1 March 2023.

8 Rungrit Petchrat, '3 แนวทางวาระนายกฯ 8 ปี กฎหมายจะเป็นกฎหมาย หรือกฎหมายจะกลายเป็นอภินิหาร' [3 methods to calculate the PM's 8-year tenure. Is this law 'the law' or is this law 'the miracle'?] (Thairath, 9 August 2022) <https://plus.thairath.co.th/topic/spark/101928> accessed 4 March 2023.

9 Petchrat (n 6).

10 Ibid.

11 Taddao Tong-im, 'หัวหน้าพรรคไทยศรีวิไลย์ ชี้ ส.ว.เสนอแก้ รธน. ตัดมาตราที่ห้ามเป็นนายกฯ เกิน 8 ปี เปิดช่อง พล.อ.ประยุทธ์ ดำรงตำแหน่งต่อ' [Leader of the Thai Civilised Party pointed that the Senators proposed for the removal of the section which prohibits the PM from staying in power over 8 years for Prayut to continue his work] (TP Channel, 23 November 2022) <https://www.tpchannel.org/news/837> accessed 6 March 2023.

12 'Parliament votes for party-list MP calculation method to be divided by 500' (The Nation, 7 July 2022) < https://www.nationthailand.com/in-focus/40017444> accessed 6 March 2023.

13 The analysis here is based on Rawin Leelapatana's works. See Rawin Leelapatana, 'Thailand's Competing Notions of Constituent Power: The Making of the 2017 Constitution in the Binary-Star Scenario' in Son Ngoc Bui and Mara Malagodi (eds), *Asian Comparative Constitutional Law, Volume I* (Hart 2023); Rawin Leelapatana, 'Thailand's 2017 Constitution: Constitutional Amendment in the Binary-Star Scenario' in Son Ngoc Bui and Mara Malagodi (eds), *Asian Comparative Constitutional Law, Volume II* (Hart 2024) [forthcoming]; Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press 2017) 120-122.

14 Martin Loughlin and Neil Walker, 'Introduction' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press, 2007) 3.

15 Joel Colon-Rios, 'The Legitimacy of the Juridical: Constituent Power, Democracy, and the Limits of Constitutional Reform' (2010) 48 Osgoode Hall Law Journal 199, 209–13; Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press 2020) 254-257; Richard Albert, 'Constitutional Handcuffs' (2010) 42 Arizona State Law Journal 663, 676.

16 Xenophon Contiades and Alkmene Fotiadou, 'Constitutional Resilience and Unamendability: Amendment Powers as Mechanisms of Constitutional Resilience' (2019) 21 European Journal of Law Reform 243, 255.

17 Gary Jeffrey Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (Yale University Press 2020) 253-254; Joel Colon-Rios, *Constituent Power and the Law* (Oxford University Press 2020) 13.

18 David Streckfuss, *Truth on Trial in Thailand* (Routledge 2011) 28; Michael K. Connors, 'Article of faith: The failure of royal liberalism in Thailand' (2008) 38 Journal of Contemporary Asia 143, 144.

19 Eugénie Mérieau, 'The 1932 Compromise Constitution: Matrix of Thailand's Permanent Constitutional Instability' in Kevin Tan and Bui Ngoc Son (eds), *Constitutional Foundings in Southeast Asia* (Hart Publishing, 2019) 312, 318; Kasian Tejapira, 'The Irony of Democratization and the Decline of Royal Hegemony in Thailand' (2016) 5 Southeast Asian Studies 219, 228.

20 Tom Ginsburg, 'Constitutional afterlife: The continuing impact of Thailand's postpolitical constitution' (2009) 7 International Journal of Constitutional Law 83, 88-89.

The 2022 attempted constitutional amendments reflected the struggle between the two competing conceptions of constituent power, with no absolute winner. Supporters of each apparently conceived the political standpoint held by their opposition as defective. The opposition bloc and pro-democracy advocates obviously saw the 2017 Constitution, especially its provisions on the centralized administrative system, as obstacles to the LDCP. Therefore, their amendment was considered essential for 'fixing a design flaw.' [21] Undoubtedly, the royalist-conservative elites and the military viewed these amendment proposals as threats to, and thereby attempts to 'dismember', their hegemonic position under the RCP. Such efforts were considered unconstitutional, given that they would pave the way for what Albert calls "constitutional dismemberment" or "[constitutional] changes that do not cohere with the [core ideal of] the existing constitution." [22] The battle over constitutional amendment in 2022 ultimately accentuated the absence of "the bright-line rule for distinguishing between legitimate constitutional amendments and constitutional dismemberment."[23]

Next, we apply Luís Roberto Barroso's theoretical perspectives toward the CC's roles in constitutional politics to answer the second question. According to Barroso, the CC generally performs three main roles in constitutional politics: *counter-majoritarian* (i.e., the role in monitoring constitutional compliance of parliamentary and executive acts to prevent a democratic backsliding), *representative* (i.e., the role in actualizing 'social demands not satisfied by the elected branches'), and *enlightened* (i.e., the role in facilitating democratization and liberalization).[24] The Prayuth ruling blatantly contradicted all of these roles. However, this result was not surprising to many people, as the majority of the CC comprised of judges selected either by the junta-established National Assembly under the 2014 Interim Constitution or by the appointed Senate, which included top military officials under the 2017 Constitution. Instead of helping to bring down the authoritarian rule, the CC tacitly justified the seizure of power in 2014 and the junta leader's absolute power to govern the country as PM during the transition period. This precedent consequently imprinted special military prerogatives and the space of impunity within the Thai constitutional system. Not only did the decision severely undermine highly vocal demands for political reforms from civil society, but it also exacerbated political polarization between the pro-democracy and the royalist-conservative factions.

IV. LOOKING AHEAD

In the year 2022, many attempts at constitutional reform failed. The most controversial one was the unsuccessful effort to "unlock the local administration" by Thanathorn Juangroongruangkit. Despite the rocky road ahead for the decentralization reform, Thanathorn believed that his political ally, the Move Forward Party, will continue pushing forward the scheme.[25] Interestingly, the PG's attempt did not completely end in vain. To some extent, the group succeeded in stirring attention toward the current highly centralized administration among broader segments of Thai society. The unwieldy bureaucratic system, existing patronage networks in many provinces, and the lack of effective mechanisms to detect corruption further escalated public concerns over the issue.[26] The fact that, in 2022, Chadchart Sittipunt won the Bangkok governor election in a landslide,[27] also galvanized and propelled the "public participation sentiment" to the local level in many parts of the country.

Additionally, attention should be drawn to the attempt to amend the 2017 constitution following the CC's interpretation of Section 158. These ongoing debates in Parliament focus on whether the limit to the PM's tenure should be revoked.[28] Finally, the successful constitutional amendment to the election system in 2021 was proven to be more apparent than real. Divided opinions among big and small parties could even cost the upcoming election, seeing that there were attempts to halt votes in Parliament. Nevertheless, the CC's decisions on the two organic laws provided life support to the amendment process. Moving forward, the public will need to look out for other tactics used by any party that could interrupt Thailand's long-awaited election in 2023.

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21 Richard Albert, 'Constitutional Amendment and Dismemberment (2018) 43 The Yale Journal of International Law 1, 3-4.

22 Ibid, 6.

23 Rawin Leelapatana, Kornkanok Buawichien, and Suprawee Asanasak, 'Thailand' in Luís Roberto Barroso and Richard Albert (eds), *The 2021 International Review of Constitutional Reform* (The University of Texas at Austin 2022) 227.

24 Luís Roberto Barroso, 'Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies' (2019) 67 The American Journal of Comparative Law 109, 110, 125-142.

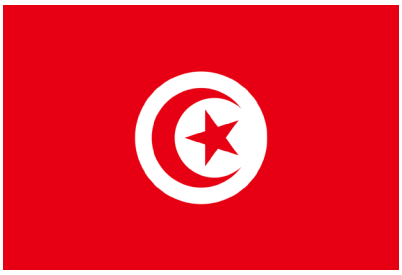
25 "'ก้าวหน้า-ก้าวไกล" เสียดายอนาคตประเทศ หลังสภาคว่ำร่าง "ปลดล็อกท้องถิ่น"' ["Progressive Movement – Move Forward" Disappointed because of the loss of the country's future after the Parliament failed to pass the "Unlock the local administration" bill] (Bangkok Biz News, 7 December 2022) < https://www.bangkokbiznews.com/politics/1041812> accessed 5 March 2023.

26 Sutthikeat Aungkaburana, 'The Past, Present, and Directions for the Future: The Relationship between Local Political Officials and Officials of Local Administrative Organizations in Thailand' [2021] 18(1) Thai Khadi Journal 155, 170.

27 'ชัชชาติ สิทธิพันธุ์ : ผู้ว่าฯ กทม. ผู้คว้าคะแนนเลือกตั้งสูงสุดในประวัติศาสตร์' [Chadchart Sittipunt: The Governor of Bangkok who received the most votes of Bangkok's history] (BBC News Thai, 29 May 2022) < https://www.bbc.com/thai/61545581> accessed 6 March 2023.

28 'ยันแก้วาระ8ปีแค่ศึกษา จี้เลิกอำนาจส.ว.ดีกว่า' [Amending the 8-year-term section is part of a research. Better remove the Senators' power] (Thaipost, 17 January 2023) < https://www.thaipost.net/one-newspaper/304089> accessed 9 March 2023.

Tunisia



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I. INTRODUCTION

If 2021 was characterized as the year of "deconstitutionalization" in Tunisia,[1] 2022 must be described as the "re-constitutionalization" of the country around an authoritarian presidential figure. The global pandemic exacerbated the dysfunction of the institutions established by the 2014 Constitution, leading President Kais Saied to take advantage of populist anger to legitimize his decision to freeze the Parliament and dismiss the government. Following Saied's coup d'état on July 25th, 2021, he set in motion his plan to establish a new Constitution, more in line with his populist and conservative views. The year began with a nationwide digital consultation to gather Tunisians' opinions on constitutional reform. Despite the government's efforts to boost participation, the consultation was not a resounding success. The formation of a Consultative Commission for a New Republic followed, which was tasked with examining proposals from the consultation as well as drafting a constitutional project for the President. Once the commission had delivered the draft, a constitutional referendum was scheduled for July 25th, 2022.[2] Political parties were largely divided about the referendum, with some calling for a boycott and a few others rejecting the new Constitution. However, Saied's popularity has secured him an approval rating of over 90%, even though the referendum gathered only a 30% participation rate. Tunisia now has a completely new Constitution, and this report describes how the constitutional reform created a presidentialist regime and a new separation of powers, favoring the executive branch. This report highlights the tension with the former Constitution and demonstrates the radical shift in the constitutional paradigm, moving from a democratic to an authoritarian rule.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

To begin, it is important to recall the turmoil happening during the publication of the constitutional draft. On June 30th, President Kais Saied presented his project for a new Constitution. Days later, Sadok Belaid, the head of the Consultative Commission for a New Republic, published their version of the proposed Constitution in a Tunisian newspaper. Even though the President was not legally bound by their version, the published text bore no resemblance to the one developed by the Commission. Belaid even warned that the presidential project was dangerous and could lead to a dictatorship. While not exactly a failed constitutional reform, this episode shows the President's disdain towards the consultative commission. He certainly published his single-handedly written text with no regard for public participation.[3] Another incident distorted the fairness of the debates. On July 8th, the President published a Decree on the correction of errors in the draft Constitution, supposedly to rectify spelling mistakes and syntactical errors. In reality, the new project makes substantial changes to the first version without the President considering a rescheduling of the referendum or a public debate about the new constitutional text. Tunisians found themselves with three different constitutions, and ultimately, the July 25th referendum about the President's version turned out to be a half-hearted plebiscite. By embodying Saied's political and ideological stances, this Constitutional reform brought a reinstatement of the separation of power principle while weakening the protection of fundamental rights.

The new political regime is characterized by a strong presidency. At the core of the constitutional reform lies the determination to make the president the cornerstone of the new institutions.[4] Thus, the President combines the power of a head of government in a parliamentary regime with the power of a president in a presidential regime. Because he determines the general policy of the State, he has a dominant position over the government and over the Parliament. As Article 87 clarifies, the President is in control of the executive branch, only to be assisted by the government. He appoints the Head of Government with no regard to the results of the legislative elections or the compositions of the two chambers of the legislative branch. But in reality, Ministers are accountable to the President (Article 112).

The President also has ascendancy over the Parliament, which is now divided between the Assembly of People's Representatives and the National Council of Regions and Districts. The President detains the legislative initiative, and his bills always have priority (Article 68). More

1 Aymen Briki and Wissal Ben Mahfoudh, 'Tunisia' [2022] 2021 Global Review of Constitutional Law.
2 Nate Grubman, 'Yea or Stay Away: Kaïs Saïed's Autocratic Referendum' July 2022 Project on Middle East Democracy (POMED).
3 Haifa Mzalouat, 'Constitution et référendum : délais intenables, tensions et dysfonctionnements' (*Inkyfada*) <https://inkyfada.com/fr/2022/06/29/constitution-referendum-25-juillet-kais-saied-dysfonctionnements-tunisie/>
4 Salsebil Klibi, 'Brèves Observations Sur La Constitution Tunisienne Du 25 Juillet 2022' [2022] JusPoliticum Blog.

importantly, the President can circumvent the Parliament by directly submitting his bill to a referendum. Strikingly, he can initiate a constitutional reform by calling for a referendum without needing the approbation of the Parliament beforehand (Article 136). This feature of the new Constitution is unique in the world and demonstrates the populist trait of the regime: the President's need to create a direct link between himself and the People. The President enjoys an incredible amount of power, and it is not counterbalanced by any kind of accountability. He is not politically nor criminally liable. The President can no longer be held accountable by the Parliament, and the Constitutional court cannot review whether the President committed serious violations of the Constitution.

As a result, the Parliament seems to be quite vulnerable. It is fragmented in two different chambers, with its scope of competence limitatively listed in Article 75 of the Constitution. Whatever does not fall within this scope falls under the President's general regulatory authority. Furthermore, the Parliament appears to be domesticated, as it consistently lives with two looming threats. The first threat comes from the President, as he retains the ability to dissolve one or both Chambers. The second threat comes from citizens, as the new Constitution introduces a recall procedure to revoke the mandate of a member of Parliament. In an autocratic context, this measure is an incentive for deputies to follow the path of the President.

The new constitutional court retains the ability to review legislation both before the law is promulgated (*a priori* review) and during an ongoing case (*a posteriori* review). Yet, the constitutional court is no longer involved in regulating the competencies between the Head of Government and the President. As mentioned before, the Court can no longer rule on violations of the Constitution by the President, as was the jurisdiction of the former constitutional court (that was never implemented). On the other hand, the composition of the Constitutional court does not meet international constitutional standards. Article 125 clarifies that the President appoints all nine members of the Court by Decree. One third among them must come from the oldest magistrates of the Cour de cassation, another third from the oldest magistrates of the High Administrative Court, and the last third from the oldest members of the Court of Auditors. This peculiar composition is harmful to constitutional justices, because they would only serve until they reach the age of retirement, which is set at 62. This very short amount of time will not allow them to develop a coherent and cohesive body of jurisprudence.[5] Moreover, those magistrates lack essential knowledge in constitutional law and are not adequately trained to protect human rights.[6] Without its fundamental attributes of impartiality and independence, it is hardly expected that this constitutional court will play a counter majoritarian role or protect fundamental rights against the will of the President and his majority, especially since the constitutional text itself lacks clarity when affirming those rights.

Contrary to the 2014 Constitution, the new Constitution provides a more fragile protection of fundamental rights. Chapter II retrieves the rights and liberties declared in the former Constitution, such as civil, political, and social rights. However, they are granted a diminished protection because of the ambiguous phrasing of Article 55 that allows the legislature to restrict them. Strong concerns against the first version of this article forced the President to add in his project that those restrictions to liberties must be equated to 'necessity due to a democratic regime' and proportionate to their causes. Yet, these additions seem weak considering other provisions of the Constitution, such as the promotion of Islam as the religion of the State.

Furthermore, another blow to fundamental rights comes from Article 5 of the Constitution affirming the belonging of Tunisia to the Islamic nation (*'Umma*). It suggests that the State must implement the Islamic aims (*maqasid*), such as preservation of self, honor, heritage, religion, and freedom. By asserting the importance of the religion and subjecting the State to its purposes, this article breaks a long-lasting Tunisian tradition of separation of state and religion. Both Constitutions of 1959 and 2014 declared Islam part of the Tunisian identity without making it the religion of the State. This damaging innovation introduces Islam into the constitutional order, whereas the civil nature of the State was formally erased. This article is threatening to fundamental rights, as it conveys a traditional conception of Islam and legitimizes the use of Islamic law (*Sharia*) to overturn progressive features of the Tunisian legislation. Gender equality, freedom of consciousness, and LGBTQI+ rights are among the core freedoms that this article endangers.

For President Kais Saied, this entire reform provided a constitutional legitimation to establish an illiberal and authoritarian regime.[7]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The 2014 Constitution described a clear process to reform the Constitution and provided a wide range of unamendable rules.[8] The initiative to amend the Constitution was shared between the President and the Parliament. According to Article 144, the Assembly of the Peoples' Representatives had to approve the idea of a revision. The second step is to vote on the constitutional amendment by the Assembly, with a required approval of a strengthened majority of two-thirds of deputies. Then, the President can submit the amendment to a referendum. This can allow him to associate with the constituents in deciding on an important revision. But this tool can also be used when the President does not agree with the amendment, leading him to invite the People to settle the dispute between him and the Parliament. Multiple articles disseminated in the Constitution supplied unamendable rules. The first series concerns the first two articles of the Constitution, which declare the principles and values of Tunisian society. All the articles that protect rights and liberties also do not suffer any kind of amendments (Article 49). Lastly, the Constitution prohibits increasing the number and length of presidential terms (Article 75 paragraph 6).

Those unamendable rules express the core principles the Tunisian Constitution aims to protect, occurring mainly by giving a great role to the Constitutional Court to review constitutional amendments.

5 Yasmine Akrimi and Abdessalam Jaldi, 'Tunisie : De La Révolution de 2011 à La Chute de La IIème République' [2022] Brussels international centrer and Policy Center for the Global South <https://www.policycenter.ma/sites/default/files/2022-08/PP_11-22_Jaldi%20%26%20Akrimi%20%281%29.pdf>.

6 Rihab Boukhayatia, 'Magistrats En Tunisie : Pourquoi Si Conservateurs, Si Autoritaristes ?' (*Nawaat*) <https://nawaat.org/2021/03/05/magistrats-en-tunisie-pourquoi-si-conservateurs-si-autoritaristes/>.

7 Xavier Philippe, 'La légitimation constitutionnelle des démocratures' (2019) N°169 Pouvoirs 33.

8 André Roux, 'La révision de la Constitution' (2016) The Constitution of Tunisia, United National Program for Development.

However, the judicial body was never implemented.[9] The two consecutive legislatures (from 2014-2019 and 2019-2021), failed to elect the four members of the constitutional court they had to appoint. Organic law 2015-50 required a two thirds majority in the Assembly to nominate a judge. Unfortunately, the consensus needed for this law could never be reached in a highly fragmented Parliament. Deputies tried to amend the law in 2021 to facilitate the nomination of constitutional judges, but they faced strong opposition from Kais Saied. In his refusal to promulgate the new organic law, the President claimed that the Assembly exceeded the constitutional deadline to implement the constitutional court.[10] In this way, the President also immunized himself from a probable impeachment, which would have involved the constitutional court. After a blockade in the Parliament, the opposition from the President definitively stopped the establishment of the power of judicial review. The absence of a Constitutional court prevented the establishment of a true constitutional democracy.

The constitutional reform thrust a complete dismemberment of the 2014 Constitution and deconstructed most of the Jasmine Revolution's heritage. During his presidential campaign in 2019, Saied announced his project to reform the Constitution, claiming that it alienated the will of the people and stole the 'true democracy'. Several crises arose between him and the Head of Government over the first two years of his presidency. However, it was only during the Covid-19 outbreak in the summer of 2021 that the President decided to take action to transform the Constitution. The first breach in the constitutional continuity occurred on July 25th, 2021, the national day to celebrate the Tunisian Republic. The President decided to trigger Article 80 of the 2014 Constitution, declaring a State of Exception. With large popular support, President Kais Saied dismissed the Government and froze Parliament's activities. The President even sent military forces to block access to the House in Bardo. The President considered it his duty to ensure the continuity of the State in the face of Parliament's behavior of corruption and mismanagement. However, these measures did not respect the prohibition provided by Article 80 on the State of Exception. Indeed, the Constitution insists that the Assembly is deemed in permanent session and no censorship motion can be made against the Government. This presidential *tour de force* plunged Tunisia into a new legitimization dilemma.[11] Defying constitutional legality, the President relied on a strong legitimacy fermented by strong and durable popular support. He argued that the will of the People and the continuity of the State are supra-constitutional principles.[12] This extra-legal approach freed his hands from the constitutional canvas, allowing him eventually to initiate a constitutional reform without regard to the 2014 Constitution.

After freezing the Parliament in July 2021, the second breach in constitutional continuity happened on September 22nd, 2021, when the President issued the infamous Decree 117. Although it was titled "Concerning Exceptional Measures", the content of the act looked more like a compact constitution, providing a temporary separation of powers. It suspended the Constitution and allocated the legislative powers to the President. Legislation took the form of Decree-Laws, immunized against judicial review (Article 7 of the Decree).

As a result, the deprivation of the judicial body allowed the President to carry his constitutional project without any kind of counter-power. The new Constitution is the complete negation of the previous one. After the parliamentary regime, flawed but consensual, the 2022 constitution opts for a presidentialist system. In that sense, the doctrine qualified it as the revenge of the 1959 authoritarian Constitution.[13] The shift in the constitutional paradigm is best illustrated by the preamble, which does not look anything like the preamble of the former constitutions. It dismisses all references to universal principles of constitutional law, like the rule of law, democracy, or human rights. Instead, the preamble repeated the emphatic formula of "We the People". This reference to the United-States Constitution reflects the populist agenda of Saied. He put forward his personal vision of the Tunisian history, changing the date of the Revolution from January 14th (the day the dictator fled) to December 17th (the day the martyr Mohamed Bouazizi set himself on fire). Finally, no domestic Court was able to control the process of constitutional reform. The control of the presidential measures eventually came from a supranational court, one month after the promulgation of the new Constitution.

On September 22nd, 2022, the African Court on Human and Peoples' Rights issued an extremely important decision, reviewing the Presidential decrees that dismissed the government and froze the Parliament in July 2021.[14] A Tunisian lawyer filed an application against Tunisia, claiming that the presidential measures are a violation of several human rights protected by the African Charter. More specifically, he alleges that the measures violated the right of the people to self-determination, as defined in Article 20 (1) of the Charter, and the right to participate in the conduct of public affairs as guaranteed by Article 13 (1). It is worth mentioning Tunisia's line of defense, which claimed its sovereignty before the international body. This position echoes the President's discourses, especially with his Western counterparts. The Court noted nonetheless the absence of the Constitutional court in Tunisia, and therefore, no judicial remedy was available to the applicant. As the applicant cannot challenge the presidential decrees, he is deemed to have met the requirement of exhaustion of local remedies. The application being admissible, the Court held that Tunisia had violated the right of the people to participate in the conduct of public affairs. The Court conducted a legality review, considering that the Presidential exceptional measures were unconstitutional. It also evaluated that those acts were not proportional to the purpose for which they were adopted.[15] The Court ordered Tunisia to repeal the presidential decrees and to implement the Constitutional Court. Although the judgment did not prevent the constitutional reform from being completed, it is a significant contribution to international human rights law.

9 Yacine Ben Chaabane Mousli, 'L'émergence menacée des Cours constitutionnelles au Maghreb' [2021] Mediterranean Journal of Legal Research <http://mj-lr.com/lemergence-menacee-des-cours-constitutionnelles-au-maghreb/>.

10 Rafaâ Ben Achour, 'La Cour constitutionnelle tunisienne : promesses et blocages': (2021) N° 127 Revue française de droit constitutionnel 235.

11 Aymen Briki, 'Saied Grab of Power Between Popular Sovereignty and Constitutional Legitimacy: A Déjà-vu Tunisian Legitimization Dilemma – Journal of Middle Eastern Politics and Policy' (5 September 2021) <https://jmepp.hks-publications.org/2021/09/05/saied-grab-of-power-between-popular-sovereignty-and-constitutional-legitimacy-a-deja-vu-tunisian-legitimization-dilemma/>

12 Dhifallah Hassan, 'L'acte Du Chef d'Etat Tunisien Entre Légitimité et Légalité' [2021] L'acte du chef d'Etat tunisien entre légitimité et légalité' <https://www.academia.edu/50304301/L_acte_du_chef_d_Etat_tunisien_entre_l%C3%A9gitimit%C3%A9_et_l%C3%A9galit%C3%A9>

13 'Salsabil Klibi: Le projet de constitution proposé au référendum du 25 juillet 2022 : la revanche de la constitution de 1959 ?' (*Leaders*) <https://www.leaders.com.tn/article/33563-salsabil-klibi-le-projet-de-constitution-propose-au-referendum-du-25-juillet-2022-la-revanche-de-la-constitution-de-1959>

14 *Mohamed Ben Brahim Belgeith v Republic of Tunisia* (African Court for Human and Peoples' Rights)[September 22nd 2022].

15 ibid. [119].

Chapter X of the new Constitution organizes the process to amend the Constitution. What is most striking is the possibility for the President to bypass the Parliament in order to submit the amendment directly to a referendum. This procedure is coherent with President Saied's populist discourses, where the legitimacy of the people is considered far greater than the legitimacy of its representatives, even if it might allow liberticidal reforms. The new Constitution mentions some unamendable rules, but the composition of the Constitutional Court to review the amendments can inform that it will not play any kind of counter-majoritarian role. As constitutional judges are chosen from the oldest magistrates, they cannot endorse a representative role. Their training and experience as magistrates can make them play an enlightened role,[16] but it is more likely that they would not dare to oppose a presidential reform because they do not enjoy a sufficiently protective statute. Being appointed solely by the president for such a short term shows their lack of independence and their deficiency of impartiality.

After Tunisia carried for a decade the democratic flame in the region, this constitutional reform aligned it with the autocracies of North Africa and the Middle East.

IV. LOOKING AHEAD

The establishment of the new Tunisian Constitution contrasts greatly with the more democratic process of the 2014 Constitution. It is also at odds with the more inclusive process happening around the same time in Chile. The first conclusion to draw is that the Constitution lacks legal and rational legitimacy, and it might, in the long run, prejudice it. Sustaining power with this constitution will be a difficult task because it is a constitution that was poorly born. Only 30% of the Tunisians took part in the referendum, and the hypertrophy of the President is not coherent with the Tunisian population increasing need for more democratic institutions.

Looking forward, the first challenge of the Constitution is to implement the new institutions. It created a second House in the Parliament and the Constitutional Court would be the first one to be put in place after the Revolution. First, elections of the lower House took place on December 17th, 2022. Despite the symbolic aura, elections suffered an only 11% turnout. The same results occurred in the second round of the legislative elections. The low turnout in the legislative elections underlines the paradox of the Tunisian people, who refute the political path the country is taking yet continue to support its leader. Second, and more worrisome, is that the first day of the parliamentary session, on March 13th, 2022, was closed to journalists, and only national television was allowed inside the Bardo's institution. This decision of the President to not publicly display the parliamentary debates foreshadows how power will be practiced in the next years: closed, unilateral, and ultimately autocratic. Some can defend that the President is the faithful representative of the Tunisian people. By upholding the will of the people as a supra-constitutional norm and his opposition to judicial review of legislation, he can be related to popular constitutionalism. But measure after measure, President Kais Saied stripped down all principles of the rule of law and put aside democratic accountability. In that sense, autocratic legalism is a more appropriate notion to characterize his tenure.

Also, having exclusively legal answers to face Tunisia's endemic problems shows an economic blind spot.[17] All the constitutional efforts Saied initiated are not putting Tunisia on the right path to offer its population social justice and economic welfare. Saied's strictly moralistic approach to the economy is not addressing the rise of social inequalities and the spread of unemployment, especially amongst the youngest part of the population.

Lastly, members of civil society are aware of human rights abuses and an increase in repression from the police. Several political arrests are targeting opposition figures and reminisce the bleakest memories of the former dictatorship. Besides, the President endorsed the racist rhetoric of the 'great replacement' triggering violence against migrants and black Tunisians. Today, Tunisia's budget is suspended from loans the International Monetary Fund or the World Bank might grant it.

The recent constitutional reform provoked a complete dismemberment of the Tunisian constitution and the revolutionary ideals martyrs died for. Every revolution goes through some periods of recession. President Kais Saied will be remembered as the authoritarian who confiscated democracy. It is now up to the Tunisian people to take it back.

V. FURTHER READING

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16 Luís Roberto Barroso, 'Counter-Majoritarian, Representative and Enlightened: The Roles of Constitutional Courts in Democracies' [2017] American Journal for Comparative Law.

17 Yasmine Akrimi and Abdessalam Jaldi, 'Tunisie : De La Révolution de 2011 à La Chute de La IIème République' [2022] Brussels international centrer and Policy Center for the New South <https://www.policycenter.ma/sites/default/files/2022-08/PP_11-22_Jaldi%20%26%20Akrimi%20%281%29.pdf>.

Turkey

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I. INTRODUCTION

Turkey has been part of the Western World since the beginning of the 19th century and joined the League of Nations by invitation. Turkey is a founding member of the United Nations as well as a member of NATO, the Council of Europe, the Organization on Security and Cooperation in Europe, the OECD, an associate member of the Western European Union, and a candidate for EU membership since 1999.

However, in recent years the government of Turkey has increasingly distanced itself from Western and EU values and standards. As a result, Turkey has been backsliding in areas of democracy, the rule of law, and respect for fundamental rights.

Turkey has long-lasting constitutional reform problems and unfortunately has not been able to fully consolidate its democratic regime. The immediate blame for this failure may be laid at the feet of the current Constitution of 1982, the product of the National Security Council military regime of 1980-83. The military rulers of this period blamed what they saw as the excessive liberalism of the 1961 Constitution for the breakdown of law and order in the late 1970s. Thus, the primary goal of the 1982 Constitution was to protect the state against the actions of its citizens, rather than protecting the citizens against the encroachments of the state, something a democratic constitution must do.

In 1982, the long period of military rule came to an end which resulted in the enactment of the 1982 Constitution through a public referendum approval process. Since the original enactment, the 1982 Constitution has been amended 20 times. However, this process was undemocratic and lacked a broad, open, and inclusive approach because it excluded the involvement and opinion of opposition leaders, civil society, and the public.

On July 20th, 2016, following the coup attempt on July 15th, 2016, a three-month state of emergency was declared in Turkey. This state of emergency had been extended several times after the original declaration. Under this state of emergency, Law number 6771 on Constitutional Amendment was signed by the President on February 10th, 2017, and later approved by a national referendum on April 16th, 2017. The amendment's fundamental feature, which bears a scant semblance to Western democratic principles, is its emphasis on the "fusion of powers" in the executive branch. This entails the rejection of the parliamentary system of government based on a soft separation of powers, which has been the preferred arrangement throughout Ottoman-Turkish constitutional history. An exception to this separation of powers principle is evidenced in the Constitution of 1921, which called for a national assembly government in which the legislative and executive branches would be combined. In essence, the constitutional amendments have introduced a change in the political regime of Turkey, adopting a "Turkish-style" presidential regime.

After the lifting of the post-coup state of emergency in July 2018, several legal provisions that restricted fundamental rights and granted extraordinary powers to the executive branch were integrated into law, leading to the further deterioration of the rule of law. The implementation of the amended constitution and the propagation of a "presidential style" system has largely undermined fundamental principles necessary in a democratic system.

Since 2022, constitutional reforms have been very high on the Turkish government's agenda. The main area of current constitutional issues are "regressive institutional reforms", "continued hyper-centralization of power in the presidency", "authoritarian interpretation of the presidential system", "lack of independence of the judiciary", "unsubstantiated charges against human rights defenders, journalists, lawyers, academics and others who are critical of government policies", "sustained legal and administrative pressure on civil society and human rights defenders, lawyers and journalists", "disrespecting its own international commitments" and "lack of willingness by the current administration to make any kind of real reforms in the field of fundamental rights and rule of law".

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

Discussions on changes to Turkey's constitution began six months before the 2023 presidential and parliamentary elections in Turkey. The ruling parties, AKP, MHP, and their allies do not have the three-fifths majority in parliament to pass constitutional amendments. Having said that, in October of 2022, the existing Turkish President outlined his goals for Turkey in the twenty-first century, pledging to draft a new constitution that would protect citizens' rights and freedoms.

The presidential proposal is aimed at safeguarding the rights of women desiring to wear Islamic-style headscarves. The proposed amendment states that no woman, under any circumstances, can be deprived of exercising her basic rights and freedoms, such as the right

to an education, the right to work, the right to elect and be elected the right to participate in political activities and civil service, or the right to access property and utilize services offered by public and private institutions due to wearing the headscarf for religious reasons or as part of daily attire. No woman can be condemned, accused, or subjected to any form of discrimination for wearing the headscarf, and when it comes to uniforms necessitated by service, the state will take necessary measures to ensure that a woman is never prevented from wearing the headscarf and attire for religious reasons.

The proposed amendment is not only related to women's attire but also encompasses changes to the meaning and definition of the institution of family and marriage. A draft clause describes the family as exclusively "*the union of a man and a woman*." Such an amendment aims at preventing same-sex relationships in the country. Currently, though homosexuality is not a crime in Turkey, same-sex marriages are not legally allowed and hostility towards them is a widespread phenomenon.

The "Table of Six", the unofficial combined coalition of the main opposition parties challenging the current President in the 2023 presidential and parliamentary elections, has stated that if they win the election and assume power, they will enact a constitutional reform package focusing on re-establishing and restoring democracy, the rule of law, and a parliamentary system with strong checks and balances.

After a nine-month effort, the "Table of Six" drafted a constitutional reform package, which was put in motion after February of 2022 when they publicly signed a joint manifesto for Turkey's transition into the "*Strengthened Parliamentary System*". The draft constitutional amendment proposal was announced on 28, November 2022. This collaboration is noteworthy, as it marked the first time in Turkish political history that a group of opposition parties came together to present a shared vision of a new Turkey, through sharing a draft constitutional amendment with the public at large. This reform package is an incredibly comprehensive roadmap on how the Table of Six plans to restore the rule of law, should it come to power.

It is important to underline that this package does not propose a brand-new constitution, but rather lays out a set of amendments to the existing constitution, making some critical changes to certain constitutional provisions. The constitutional package comprises 167 articles on nine main topics, primarily aiming to return the country to a parliamentary system of democracy from its current executive presidential system, created in 2017 through a controversial referendum. Opposition parties state that "the most problematic part of the current constitution, which infects the entire system, is the one-man regime." This package would reinstate the powers of the parliament with robust checks and balances on the executive branch and restore the presidency to its former symbolic function. Additionally, the existing 7% election threshold would decrease to 3%.

An important part of the draft is replacing the word "*duties*" found within the titles of the articles of the Constitution with the word "*liberty*". The essential approach of the draft is the focus on "*people and human dignity*". Thus, the fundamental role of the state is defined as providing a service to the citizen, rather than the citizen carrying the duties and responsibilities that come with being a citizen of the state.

The Table of Six promises not only to abolish the "hyper-presidential system", or what is commonly labeled the "*one-man rule*", but to also establish a brand-new parliamentary model. The package proposes amendments that anticipate not only the adoption of the new parliamentary model, but also the reinstatement of an independent and impartial judiciary, the reform of public institutions, and the systematic prevention of human rights violations.

The first set of suggested changes relates to constitutional protections for fundamental freedoms and rights. For instance, the package offers using the principle of "*human dignity*" as the foundation for constitutional law in the constitution. The package also emphasizes the importance of rights and freedoms and contains modifications to the constitution that will increase the boundaries of the freedom of expression, press, and association, and will include the incorporation of animal rights. The main cause of the systematic violation of fundamental rights and freedoms over the past ten years has not been the constitutional provisions themselves, but rather how they have been interpreted. Even though the proposed constitutional provisions are fundamental to furthering democracy, it should be noted that the interpretation of these provisions is equally essential and should not be ignored. Therefore, an independent and impartial judiciary is equally essential to stop this systematic violation of human rights.

The relationships between the legislative and executive branches of government are the subject of the second series of suggested modifications. The hyper-presidential system, which was enacted by public vote in 2017, empowered the president to rule autonomously from the parliament and deinstitutionalized several significant powers of the Turkish Parliament. The proposal strengthens the system of checks and balances against the government by calling for the restoration of these legislative and budgetary powers of parliament. To prevent the accumulation of power in the hands of a politically autocratic president, the package also reinstates the institutions of a non-partisan presidency as head of state and the premiership as the executive arm of government.

The reintroduction of an impartial and independent judiciary is now the subject of the third set of suggested reforms. The package includes new provisions that would help de-politicize the Constitutional Court as well as the Council of Judges and Prosecutors (HSK). Furthermore, the proposed amendments aim to improve the constitutional guarantee for judicial tenure, and the recognition of the Supreme Electoral Board (YSK) and the Court of Accounts, as high courts will help strengthen the system of checks and balances against the danger of executive intervention in judicial independence.

Finally, the fourth group of proposed amendments concerns the reorganization of certain public institutions such as the Radio and Television Supreme Council (RTÜK) and the Council of Higher Education (YÖK). The package proposes to grant these institutions significant autonomy to prevent them from becoming instrumentalized by the government. The package also abolishes the authority of the Ministry of Interior to dismiss elected mayors and appoint trustees in lieu of them.

In a nutshell, the package embodies a comprehensive proposal to restore the rule of law in Turkey. However, it is also important to underline that this is just an initial consensus by the six opposition parties, rather than a final text that would be directly adopted should they win the elections.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Turkey has a rigid constitution; as a result, any constitutional amendments must follow a specific procedure. As explained in section II, since there were no successful Constitutional reforms during the reference period, the report turns its attention to the significant decisions of Turkish Constitutional Court (hereafter the TCC).

One may ask whether the TCC is empowered to review the constitutionality of the constitutional amendments. Article 148(1) explicitly empowers the TCC to review the constitutionality of constitutional amendments. However, this competence is limited to only their form. Judicial review of constitutional amendments to the constitution is restricted to consideration of whether the requisite majorities were obtained for the proposal and in the ballot, and whether the prohibition on debates under urgent procedure was complied with. Thus, in accordance with the 1982 Constitution, amendments may be reviewed only regarding their form, namely, the procedural aspects of their adoption. Accordingly, Parliament has the final word in the interpretation of the Constitution's "spirit" and "principles." Meaning, a substantive review of constitutional amendments by the TCC is excluded from judicial review. Having said this, the TCC does not always act within these limitations.

The jurisdiction of the TCC is regulated by the Constitution itself and by the Code, numbered 6216, on Establishment and Rules of Procedures of the Constitutional Court. The TCC is a single state body that has the right to give an official interpretation of the provisions of the Constitution. The Plenary of the TCC examines the constitutionality, in respect of both form and substance, codes, statutes, Presidential decrees, and the Rules of Procedure of the Grand National Assembly of Turkey. However, Presidential decrees issued during a state of emergency or in time of war may not be brought before the TCC, alleging their unconstitutionality as form or substance. In addition, no appeal to the TCC may be made regarding international agreements, on the grounds that they are unconstitutional.

Turkey became a party to the European Convention on Human Rights in 1954, and recognized the right to the individual application and compulsory jurisdiction to the European Court of Human Rights in 1987 and 1990 respectively. Individual application to the TCC has been accepted in Turkey since September 23rd, 2012. Accordingly, people may apply to the TCC alleging that the government has violated their fundamental rights and freedoms secured under the Constitution and falling within the scope of the European Convention on Human Rights.

The Plenary of the TCC in its functional role as the "*Supreme Criminal Tribunal*" may try offenses committed in the official capacity by the President of the Republic, the Speaker of the Grand National Assembly of Turkey, Deputies of the President of the Republic, Ministers. Presidents and Justices of the Constitutional Court, High Court of Appeals, Council of State, High Council of Judges and Prosecutors, Court of Accounts, Chief Public Prosecutors, and Deputy Public Prosecutors. Other public officials such as the Chief of General Staff or the commanders of military forces may also be tried in the TCC for offenses committed in the performance of their official duties.

The final dissolution of political parties may be decided by the TCC after a charge is submitted by the Office of the Chief Public Prosecutor of the High Court of Appeals (Yargıtay). Instead of dissolving political parties permanently, the TCC may rule to deprive the concerned party of state aid, wholly or in part, depending on the intensity of the actions brought before the TCC. Current efforts to dissolve the second-largest opposition party in Turkey's parliament ahead of parliamentary and presidential elections are the latest in a deeply problematic practice of forcing the closure of political parties in Turkey. In 2022, the TCC was asked to order the closure of the Peoples' Democratic Party (HDP), a party with 56 deputies in Turkey's parliament. Since 1982, the TCC has ordered the dissolution of 19 political parties out of the 40 cases it has reviewed. The European Court of Human Rights (ECtHR) has found that in six out of seven Turkish cases it reviewed, the party closure decisions violated the European Convention on Human Rights.

Rules regulating suspension of the pronouncement of the criminal conviction and their implementation were invalidated on September 23rd, 2022, by the TCC (E.2021/121, K.2022/88, July 20, 2022) on the grounds of violating the right to a fair trial. Suspension of the pronouncement of the judgment (SPJ) is a noncustodial criminal sanction that can be imposed by a court at the sentencing stage. The SPJ was introduced by amendments made in the Criminal Procedure Code (CPC) in December 2006.

Article 153 of the Turkish Constitution clearly stipulates that the decisions and judgments of the TCC are binding on the legislative, executive, and judicial organs, as well as all-natural persons and legal entities. There is no doubt that the most important aspect of the binding nature of the judgments is the proper execution of them. The effectiveness of the constitutional review and individual constitutional complaint is dependent upon the due respect and execution of the judgments delivered by the TCC. In a couple of cases, some inferior court judges were reluctant to abide by the judgments of the TCC. It must be made clear that the non-execution of court judgments by the authorities constitutes a breach of the right to a fair trial as defined in Article 6 of the European Convention on Human Rights.

When controls fail to deter, there's always the threat of imprisonment on flimsy and vague charges of defamation or insulting the president, government officials, the memory of deceased persons, or their family members.

The wording of the Turkish Constitution (Art 36, inter alia) guarantees that all lawyers should be able to carry out their professional duties without fear of reprisal, hindrance, intimidation, or harassment to preserve the independence and integrity of the administration of justice and the rule of law. Having said that, the author of these pages has become the target of a campaign of judicial harassment, being charged with "insulting the memory of a deceased person." The lawyer then presented the accused client's defense that the deceased (the accused's study supervisor), abused the accused. Any such "defamation" was therefore on his client's instructions a necessary element of the accused's defense of the murder charge. So, the lawyer had a professional duty to present the "defamation " to the court. It goes without saying that the indictment is inconsistent with respect for human rights, with respect to fundamental freedoms, and the rule of law.

In addition to the author of these pages being subjected to public criticism for accepting the role of defense counsel in this case, he was dismissed from his public duty as an academic member in Turkish Police Academy without any due process. With the endorsement of the Minister of Interior Affairs, the author of these pages was expelled from duty without regard to due process envisaged in domestic legislation and international law. He was not granted his right to defend himself.

IV. LOOKING AHEAD

Constitutional changes in 2017 concentrated power in the hands of the president, removing key checks and balances. The switch to a "Turkish Style" presidential system - justified as a way to stabilize the political system - caused more harm than good. The separation of powers has been weakened, civil and political rights have been violated, the judiciary and media are under strict supervision, and the opposition has been targeted for repression. In particular, the absence of the rule of law increased corruption and the violation of international sanctions undermined Turkey's image in the international arena.

Turkey's next presidential and parliamentary elections are scheduled for May 14th, 2023. These elections constitute a critical juncture in Turkey's future. According to the constitutional amendments of 2017 (Article 101/3), political parties that either individually or as a coalition gain at least 5% of the total votes in the last parliamentary election can nominate a presidential candidate. In addition, independents can run as presidential candidates if they collect at least 100,000 signatures, for which notarization is not required since the 2018 elections.

All Turkish nationals over the age of 18 can exercise the right to vote (Constitution, Article 67). The Supreme Election Board (SEB) is the sole authority in the administration of Turkish elections (Law 298, Article 10). The General Directorate of the Electoral Registry, a part of the SBE, prepares, maintains, and renews the nationwide electoral registry.

In the absence of checks and balances, elections are the only way to hold the executive to account. However, the fairness and competitiveness of elections are increasingly questioned. The amendments introduced in the election law in April 2022 as well as the disinformation bill that passed in October 2022 create further allow the government to increase its control over the electoral process.Despite these negative developments, it is hoped that the forthcoming presidential and parliamentary election in Turkey is conducted in a peaceful and tranquil atmosphere with a high voter turnout. The stability and prosperity of Turkey are of great importance to its people. The international community should support Turkey's fair election process in a more active way.

We hope that the present authoritarian administration will not continue to remain in power after the upcoming election in 2023 and that the current powers are not solely replaced by another undemocratic and authoritarian regime.

Once the current autocratic president is ousted and forced to leave the presidency through an electoral defeat, several political scenarios are imaginable. Either the new political majority will be strong enough to immediately amend the Constitution and even start a new constitution-making process, or, and much more likely, it will not have a comfortable two-thirds majority and will have to manage the necessary transition in a more piecemeal and pragmatic manner. The establishment of a long-lasting democratic system based on the rule of law inevitably needs time. The proper training of the staff in charge of this process is another crucial democratic component.

A law on an amendment to the constitution is published in the Official Gazette and submitted to a referendum, if it is adopted by a vote of between three-fifths and two-thirds of the total number of members of the Grand National Assembly, and is not sent back to the Assembly for reconsideration by the president. A law on a constitutional amendment adopted by a two-thirds majority in the Assembly may be submitted to a referendum either directly by the president or if the president has vetoed it.

The Grand National Assembly of Turkey consists of six hundred members of parliament. If three-fifths of MPs, (at least 360 lawmakers) do not vote in favor of it, the constitutional amendment is rejected. However, if more than 360 MPs but fewer than 400 MPs vote in favor of the amendment, it will pass and be forwarded to the president who either holds a referendum or sends it back to the lawmakers for more assessments. In cases where the amendment secures more than 400 "yes" votes, it passes automatically and the president either opens it up for public opinion or directly puts it into effect.

Since the adoption of a constitutional amendment is a long and hard process, the Table for Six needs to receive more than three-fifths of the votes in Parliament to send it to a referendum. That requires a miraculous performance from them in the upcoming elections in June of 2023, wherein which they need to attain a minimum of 360 seats. Therefore, it looks like the constitution-making or amending debate in Turkey will be still on the agenda for a while. Having said that the proposed amendments have already served as a starting point for a conversation among the public, politicians, and academics in determining the future constitutional landscape in a post-election era.

Taking into consideration that the backsliding of Turkish democracy during the last ten to fifteen years happened in a piecemeal and erratic way while only partially based on constitutional amendments, the reverse process should also be possible through gradual legal and eventually constitutional changes. Political pragmatism, based on a clear commitment to basic democratic values and societal reconciliation might be more important for the sustainable recovery of Turkish democracy than a radical constitutional restart. In the new era, Turkey should increasingly be attached to the international community supporting the reformation processes in a more active way.

V. FURTHER READING

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Uganda

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I. INTRODUCTION

Uganda has an interesting constitutional history, defined by its colonialism, independence, and its present situation. Since its independence in 1962, Uganda has had four different constitutions due to the country's evolving political situation. Because Uganda had different government regimes throughout time, the country also had four different constitutional developments depending on who was in power. For instance, Idi Amin was a dictator who implemented authoritarian policies in Uganda from 1971 to 1979. The present constitution of Uganda was promulgated in 1995 and was the key point of action for the National Resistance Movement (NRM), the Ruling Party which came into power in 1986, and was aimed at fighting the country's social injustices. The Constitution-making process lasted over seven years following nationwide reviews, consultations, and public debates. This process was considered unprecedented in its participatory character, and it was anticipated to foster democracy and the rule of Law in Uganda.[1]

However, since its enactment to the present, the public and general sentiment toward the Constitution has declined. The Constitution has been amended four times by the Parliament of Uganda with the first amendment being successfully challenged in the Constitutional Court of Uganda.[2] Some of the amendments were extremely controversial and have contributed to a loss in public confidence in the Constitution as the Supreme Law. The first controversial amendment was regarding the removal of the presidential term limits in 2005 that allowed the incumbents to run for re-election indefinitely. Additionally, another controversial amendment took place in 2017 when Uganda's Parliament removed the presidential age limit from the Constitution that required presidential candidates to be less than 75 years old. This amendment which removed the presidential age limit allowed President Yoweri Kaguta Museveni, aged 76, to claim his sixth consecutive term in the 2021 elections.

Critics have proposed that since the adoption of the 1995 constitution, Uganda has experienced many setbacks and has been "moving backward" in history regarding civil, political, and human rights.[3] For example, Uganda's government has restricted various civil liberties, attempted to ram through undemocratic legislation in Parliament without a quorum, and disregarded democratic principles by placing power in the hands of the elite. Despite the government violating individual rights, there were not any constitutional reforms in Uganda during 2022. However, the controversial amendments discussed above are areas that were and are still subject to discussion with the public anticipating future amendments to the Constitution to grant the Ruling Party more authority. This report discusses the speculated areas of reform, proposed reforms, and the constitutional amendments that were matters of debate in Uganda in 2022.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

In Uganda, the Constitution establishes three modes of amendment: amendment by Parliament, amendment by referendum, and amendment requiring approval of District Councils.[4] The majority of these amendments to the Constitution have been through the nation's Parliament. In 2022, Parliament proposed one constitutional reform through the Constitution (Amendment) Bill of 2022. The purpose of the bill was to amend the Third Schedule of the Constitution which lists the indigenous communities in Uganda since February 1st, 1962. The bill sought to add more communities to the schedule including Bakingwe, Bagabu, Maragoli, Mosopisyek, and Saboat. Amending the schedule is crucial as the indigenous communities are recognized under Article 10(a) of the Constitution to be citizens by birth. The inclusion of these communities would be greatly advantageous in recognizing these groups as Ugandan citizens.

However, this reform did not materialize, because the bill was postponed providing room for a holistic amendment of the Constitution in the future. The implication seems to be that the amendment will be handled once a Constitutional Review Commission is constituted. For more than a decade, the government has maintained its commitment to establish a Constitutional Review Commission, an organization established to consider various constitutional reform proposals in Uganda.[5]

1 Benjamin J. Odoki, 'The Challenges of Constitution-making and Implementation in Uganda'. https://constitutionnet.org/sites/default/files/Odoki,%20B.%20challenges%20of%Constitution-making%20in%20Uganda.pdf
2 Ssemogerere and Others v Attorney General Constitutional Appeal No. 01 of 2002.
3 Ali Mari Tripp, 'The Politics of Constitution Making in Uganda'. Accessed at: https://www.usip.org/sites/default/files/Framing%20the%20State/Chapter6_Framing.pdf
4 Articles 258, 259, 260 and 261 of the Constitution
5 Stephen Kafeero and Shabibah Nakirigya, 'How political reforms have eluded Uganda under NRM rule'. Accessed on: https://www.monitor.co.ug/uganda/magazines/people-power/how-political-reforms-have-eluded-uganda-under-nrm-rule--3994904

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The year 2022 witnessed the aftermath of the COVID-19 pandemic. The government was focused on assuaging the impact of the pandemic on the economy and its citizens. Additionally, Uganda had just finished the 2021 elections which resulted in President Yoweri Kaguta Museveni and NRM emerging as the victors. This victory was largely propagated by the amendment to Article 102 of the 1995 Constitution (as affected by the Constitution (Amendment) Act of 2018) that resulted in the removal of age limits as a qualification for candidates in presidential elections as stated earlier. This amendment to the Constitution was equally affirmed by the Supreme Court.[6] Without this amendment, President Museveni would have been ineligible to vie for the position of President of the Republic of Uganda. These political and socioeconomic circumstances may have contributed to the limited constitutional reform discussions in Uganda.

IV. LOOKING AHEAD

One of the key and continuous points of contention from various members of the public is the need to reinstate term and age limits in elections. There is a consensus from most of Uganda's residents who argue that these limitations are crucial to preserving democracy, the rule of law, and good governance. However, with the NRM still in power, the discussion around the reinstatement of term and age limits is shelved. The opposition in the Parliament of Uganda has expressed that they want to prioritize constitutional reform during the 2023/2024 session.[7] The Leader of the opposition, Mathias Mpuuga, has stated that the current Constitution needs to be amended as it is not representative of the needs and aspirations of the citizenry.[8]

There has also been discourse championed by the pro-ruling party to further amend the Constitution and adopt a parliamentary system in which the Parliament forms the Electoral College that elects the President.[9] Introducing this change would be a departure from the practice by other member states of the East African Community that have a presidential system in which the president is elected through universal suffrage. The proposal to extend the term of the Parliament of Uganda from five to seven years while adopting a parliamentary system is perceived as another method by the National Resistance Method (NRM) to consolidate its power and rule in Uganda. Because the NRM has been the ruling power since 1986, other reforms such as the removal of age and term limits, show the party's strong desire to remain in power.

6 Male Mabirizi and Others v Attorney General, Constitutional Appeal No. 2 of 2018 [2019] UGSC 6

7 'Opposition to prioritize constitutional reforms in new House session'. Accessed at: https://www.parliament.go.ug/news/6359/oppositioj-prioritise-constitutional-reforms-new-house-session

8 'Leader of Opposition courts church on constitutional reforms'. https://www.parliament.go.ug/news/6367/leader-opposition-courts-church-constitutional-reforms

9 Julius Barigaba, 'Uganda plans to amend law, system of government'. Accessed at: https://www.theeastafrican.co.ke/tea/news/east-africa/uganda-plans-to-amend-law-system-of-government-3683272?view=htmlamp

V. FURTHER READING

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Ukraine

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I. INTRODUCTION

Ukraine was invaded by the Russian Federation on February 24, 2022. Since that moment martial law was introduced in the country, meaning that some constitutional rights and freedoms have been restricted, and it has become impossible to change the Constitution.

Still, due to the continuation of the Constitutional Court's work, there were some elements of the constitutional process in Ukraine in 2022. Despite the ongoing war, Ukraine has received EU candidate status, providing an opportunity for a new wave of reforms. One of these reforms addressed the Constitutional Court judges' selection.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The constitutional process in Ukraine was halted due to the Russian invasion of Ukraine. The same day as the start of the aggression, the President of Ukraine issued a decree introducing martial law.[1] According to the legal procedure, this decree was approved by the Verkhovna Rada of Ukraine (VRU), the nation's parliament.[2] According to these decisions, the constitutional norm that allows certain temporary restrictions of rights and freedoms under the conditions of martial law was enacted (Articles 64, 157). Among these restrictions, there is a law that prohibits amending the Constitution "in the conditions of martial law or a state of emergency" (Article 157).

Despite martial law being enacted, and a pause on constitutional amendments, there was one decision of the Constitutional Court of Ukraine (CCU) that allowed the constitutional process to remain alive. Yet in 2019, when President Zelensky's team started a new wave of constitutional reforms in Ukraine, the newly elected parliament decreased the immunity of members of parliament by amending the Constitution's Article 80. In January 2020, the group of oppositional MPs addressed the CCU to check if the amending process complied with the Constitution. On November 1, 2022, the CCU ruled that the process was constitutional.[3] Thus the three-year-long dispute over the members of parliamentary immunity was finished.

However, this was not the end of the year's long affair. The court's decision was mildly criticized by the Venice Commission, which suspected it was inconsistent with previous interpretations of Ukraine's Constitution and advised that inconsistency can "undermine legal certainty and constitutional stability" (p. 10-11)".[4]

Other steps in the constitutional reform were delayed until the post-war period.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Under martial law conditions, Ukraine is governed by the President as the Commander in Chief with the support of the General Headquarters and the National Security and Defense Council. Other branches of power and governmental institutions function in a manner previsied by the Constitution for the war situation.

The all-out war waged by Russia against Ukraine has shaken both the legal and political systems of the nation, as well as the overall foundations of European security. The war's impact on European constitutional systems has led to some countries abandoning their neutral status, as they began seeking membership in security alliances.[5]

The Western-led coalition in support of Ukraine has increased the nations chances of joining the EU, thus opening new prospects for constitutional reform. On June 23rd, 2022, the European Council granted Ukraine candidate status and invited the European Commission to monitor Ukraine's implementation of reforms required as part of the fulfillment of the conditions necessary for the membership application to proceed.[6]

1 Presidential decree 'On the introduction of martial law in Ukraine' [No. 64/2022 as of 24 February 2022].

2 Law of Ukraine 'On Approval of the Presidential Decree "On the Introduction of Martial Law in Ukraine"' [24 February 2022; No. 2102-IX]. After that, the martial law was continued several times during 2022 and after (see: Presidential Decree 'On the introduction of martial law in Ukraine' [amended by decrees No. 133/2022 as of 14 March 2022; No. 259/2022 as of 18 April 2022; No. 341/2022 as of 17 May 2022; No. 573/2022 as of 12 August 2022; and No. 757/2022 as of 07 November 2022].

3 Constitutional Court of Ukraine, *Decision in the case on the constitutional petition of 50 people's deputies of Ukraine on the compliance with the Constitution of Ukraine (constitutionality) of the Law of Ukraine 'On Amendments to Article 80 of the Constitution of Ukraine (regarding immunity of people's deputies of Ukraine)'* [No. 2-Ð/2022 as of 1 November 2022].

4 European Commission for Democracy through Law (Venice Commission), *Ukraine amicus curiae brief on the limits of subsequent (a posteriori) review of constitutional amendments by the Constitutional Court* [No. 1070/2021 as of 17-18 June 2022).

5 Sharon Pia Hickey, 'In the World of Constitution Building in 2022', (2022) *Constitution.Net*, 22 December 2022, <https://constitutionnet.org/news/world-constitution-building-2022> accessed 12 March 2023.

6 European Council, *Conclusions EUCO 24/22, CO EUR 21, CONCL 5* [as of 23-24 June 2022].

Among the seven major issues for Ukraine to address in the accession process, as identified by the European Commission, is further reform of the Constitutional Court. The EC stated:

"The only body that may interpret the Constitution and determine whether legislation conforms to it is the Constitutional Court of Ukraine (CCU), which is still in urgent need of reform in line with the recommendations of the Venice Commission. Central to such reform is the introduction of a credible and transparent selection procedure for appointments of judges to the CCU, including an integrity check. The relevant legislation is pending in the Parliament."[7]

Indeed, as the Ukrainian political system adapted to wartime conditions the debates around reforming the Constitutional Court, inspired by the European membership perspective, came back to life. As a result, after much discussion by Ukrainian politicians, legal experts, and members of the Venice Commission, the government updated the selection mechanism of the CCU judges.[8] But this law created some tensions between the Ukrainian government and the European Venice Commissions.

The law, adopted by the Verkhovna Rada on December 13th, 2022 and signed by President Zelensky on December 20th, 2022, stipulates that the appointment of candidates to the Constitutional Court is to be done with the participation of an Advisory Group consisting of six members, three of whom are to be appointed by the president, the Verkhovna Rada, and the Congress of Judges (one each). Three other members are to be chosen by the National Academy of Legal Sciences, the Congress of Representatives of law schools and research institutions, and representatives of public associations who are active in the field of constitutional reform, the rule of law, and human rights protection within the past five years.[9] This version of the legal action was supported by the Venice Commission in an urgent opinion (CDL-PI(2022)046-e) in November 2022.[10]

According to an analysis by legal experts, the Venice Commission issued its final opinion before the last vote on the law was taken in the Verkhovna Rada in December of 2022. But, the Venice Commission was dissatisfied with the selection procedure described in the draft law and made two new recommendations. The first recommendation was that the Advisory Group add a seventh member, appointed by the international legal community, to reduce political influence on judge selection (points 60, 72-8). The second recommendation was that parliament add a provision to the law stating that those persons whom the Advisory Group denied could not be accepted as candidates for a Constitutional Court judgeship (points 60, 72-6).[11] However, the law as approved by the Verkhovna Rada did not follow these recommendations, leading to Ana Pisonero, the European Commission spokesperson, issuing a statement on December 23rd expressing the hope that the Ukrainian authorities would fully take into account the Venice Commission's recommendations to make adjustments to the law on the Constitutional Court.[12] Unfortunately, this hope was not realized before the start of the war, and the tensions that emerged between Kyiv and Brussels remained to be resolved in 2023.

In 2022, the Constitutional Court continued to function with less and less efficiency. While the court's subpar functioning in 2020-2021 was connected to conflict with the president and his administration,[13] in 2022 the court had to work under the constant threat of Russian attacks, in the absence of a chairperson, and with a minimal number of judges. However in terms of progress, the institutional conflict between the CCU and the presidency has died down.

Oleksandr Tupytsky's term as chairperson and a member of the court expired in May 2022, and more importantly he had left Ukraine at the start of the war.[14] Several more CCU judges resigned during the year, leaving the court with only thirteen of its original, eighteen, members. With its reduced ranks and the political environment created by the war, the court became much more open to cooperating with the presidential team. Unfortunately, the number of judges now barely suffices for tasks like carrying out normal court duties and electing the court's chairperson. For most of the year, the acting chairperson of the court was Judge Serhiy Holovaty.

Even though the conflict between the presidency and the Constitutional Court has finally petered out, the Court is only able to provide constitutional control in a limited fashion.

IV. LOOKING AHEAD

At the end of the war, Ukraine will face several pressing tasks, including repatriating millions of refugees and IDPs as well as reconstructing its economy. Equally as important, the nation must also reconstruct its political, constitutional, and legal systems in response to postwar issues. As President Zelensky pointed out in the address to the parliament in December 2022, the future post-war reconstruction will embrace all sectors and will be done within the framework of its impending EU membership.[15] Furthermore, in December, Oleksandr Kornienko, parliamentary vice-chairperson, and the president's close ally, held a meeting with representatives of civil society organizations, during which he stated that the presidential team envisaged significant constitutional reform after the war.[16]

7 European Commission, *Opinion on Ukraine's application for membership of the European Union* [COM(2022) 407 final as of 17 June 2022], p. 5.

8 Law 'On Amendments to Certain Legislative Acts of Ukraine on Improving the Procedure for Selecting Candidates for the Position of a Judge of the Constitutional Court of Ukraine on a Competitive Basis' [2846-IX as of 13 December 2022].

9 Ibid., Article 10-2.

10 European Commission for Democracy through Law (Venice Commission), *Urgent Opinion on the draft law "On Amendments to Certain Legislative Acts of Ukraine on improving the procedure for the selection of candidates for the position of judge of the Constitutional Court of Ukraine on a Competitive Basis"* [CDL-PI(2022)046-e as of 23 November 2022].

11 European Commission for Democracy through Law (Venice Commission), Opinion on the draft Law "On amending some legislative acts of Ukraine regarding improving the procedure for selecting candidate judges of the Constitutional Court of Ukraine on a competitive basis" [CDL-AD(2022)054-e as of 17-18 December 2022].

12 'European Commission expects Ukraine to follow Venice Commission recommendations on Constitutional Court bill' (*The Kyiv Independent*, 23 December 2022) <https://kyivindependent.com/news-feed/suspilne-european-commission-expects-ukraine-to-take-into-account-venice-commission-recommendations-on-constitutional-court-bill> accessed 12 March 2023.

13 See our previous reports on the constitutional process in Ukraine as of years 2020 and 2021.

14 On that see information of the Ukrainian State Bureau of Investigations (SBI) at <https://dbr.gov.ua/news/dbr-rozslidue-nezakonnu-vtechu-za-kordon-eksgolovi-konstitucijnogo-sudu-ukraini-oleksandra-tupickogo> accessed 12 March 2023. Also, the Podil Court of Kyiv imposed a pre-trial restraint on Tupytsky in the form of detention, which allows it to request his extradition from Austria; on that see the SBI statement as of 29 September 2002 at <https://dbr.gov.ua/news/sud-obrav-dlya-eksgolovi-ksu-zapobizhnij-zahid-u-viglyadi-trimannya-pid-vartoyu-jogo-mozhna-ekstraduvati-z-avstrii> accessed 12 March 2023.

15 See President Zelensky's statement at <https://www.president.gov.ua/en/news/prezident-ukrayini-vistupiv-zi-shorichnim-poslannyam-do-verh-80121> accessed 12 March 2023.

16 See the report about that meeting at <https://sud.ua/uk/news/publication/256521-konstitutsiya-ukrainy-budet-izmenena-posle-voyny-kornienko> accessed 12 March 2023.

How and when Russia's assault on Ukraine will end is unknown. There is, however, more clarity about the steps the government needs to take in 2023. The EU membership perspective requires that Ukraine make the Constitutional Court a stronger and more independent institution. It is expected that all court judges will be appointed, and in the process, the new selection procedure will be tested. It is also expected that the law on the selection of judges will be amended to align with the Venice Commission's recommendations and that the new selection process will enhance the court's ability to guarantee proper constitutional control.

V. FURTHER READING

Constitution of Ukraine, official English translation [1996-2016] UNESCO <http://www.unesco.org/education/edurights/media/docs/a15b327cf78c- 02c2f45db48fd9d8247de77ad591.pdf> accessed 12 March 2023

Andrii Nekoliak, 'Shaming the Court: Ukraine's Constitutional Court and the Politics of Constitutional Law in the Post-Euromaidan Era' [2022] RCEEL 47 298-321

Halyna Chyzhyk and Mykhailo Zhernakov, 'Ukraine's constitutional court reform on brink of catastrophe — and Venice Commission is to blame' (2022) EURACTIV, December 15, 2022, <https://www.euractiv.com/section/europe-s-east/opinion/ukraines-constitutional-court-reform-on-brink-of-catastrophe-and-the-venice-commission-is-to-blame/> accessed 12 March 2023

Mykhailo Minakov and William E. Pomeranz, 'Constitutional Crisis in Ukraine: Looking for Solutions' [2021] Kennan Cable 65 1-10

United Kingdom of Great Britain and Northern Ireland

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I. INTRODUCTION

In 2022, both the government and the official opposition in the United Kingdom presented key reform proposals. This report examines the significant impact these two proposals will have should they become law. The first of the proposals is the Conservative government's long-standing wish to repeal the Human Rights Act 1998 and replace it with a Bill of Rights. This is not about the United Kingdom withdrawing from the European Convention on Human Rights, rather it is about how these Convention rights are applied and interpreted by British judges in the domestic courts. Given the landmark significance of the Human Rights Act of 1998 and the aim to bring rights home, the proposed Bill of Rights Bill, which is currently being considered by Parliament, potentially offers a more restrictive approach to human rights protection in the United Kingdom. The second proposal is a report by the Commission on the United Kingdom's Future that was established by the Labour Party, the United Kingdom's official opposition. Given the likelihood that the Labour Party may win the next general election, these proposals are a clear sign of what could be significant constitutional reform, which will match the reforms under Tony Blair's previous Labour government.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

The United Kingdom is one of the few countries that does not have a written constitution. Instead, the UK Constitution is derived from several written and unwritten sources. The two reforms that are explored below can be implemented by an ordinary Act of Parliament, as there are no constitutional requirements that entail significant changes to the constitutional status quo to be approved by a referendum or by a super-majority in Parliament.

1. BILL OF RIGHTS BILL

In terms of major constitutional law developments, 2022 has seen the introduction of the Bill of Rights Bill into the House of Commons. The much-anticipated Bill of Rights Bill has been promised by successive Conservative leaders, both during their time in opposition and as Prime Minister. The 2010 General Election led to the first peacetime coalition government for a significant time in British history, when David Cameron MP (Conservative) and Nick Clegg MP (Liberal Democrat) brought their respective parties together to form a government. Peacetime coalition governments have been rare in the United Kingdom. One infamous example is the coalition government established between Lord North and Charles James Fox in 1783. The Conservative-Liberal Democrat coalition government had competing agendas regarding constitutional reform and in 2011, the coalition agreed to establish a Commission on a Bill of Rights to explore whether the Human Rights Act 1998 should be replaced with a British Bill of Rights. The Human Rights Act was a product of Tony Blair's first Labour government and was an integral part of his party's 1997 general election manifesto. The Act was needed due to the dualist nature of the United Kingdom's legal system, which meant that despite the United Kingdom being a Contracting state to the European Convention on Human Rights, the Convention could not be enforced or relied upon in domestic British courts.

1.1. BACKGROUND TO THE REFORM

To examine the possibility of a British Bill of Rights, the Commission on a Bill of Rights delivered its report in December 2012, which was described by Professor Mark Elliot as a "damp squid" (M Elliot, "A damp squid in the long grass: the report of the Commission on a Bill of Rights" [2013] EHRLR 137). One of the reasons for this criticism was that the members of the Commission could not agree on a proposed outcome, which led to a dissenting opinion by Baroness Helena Kennedy KC and Philippe Sands KC, leading human rights lawyers. The Commission's report did say that "[n]one of us considers that the idea of a UK Bill of Rights in principle should be finally rejected at this stage" ([12.2]). It also was clear that "[a] majority of the members of the Commission, including the Chair, believe that, on balance, there is a strong argument in favor of a UK Bill of Rights" ([12.7]).

While there have been talks about substantive reforms to the Human Rights Act 1998 and the withdrawal from the Council of Europe, these major constitutional reforms have not been prioritized after the Conservative Party formed a single-party government in 2015. Additionally, the outcome of the 2016 referendum regarding the United Kingdom's membership in the European Union created a constitutional crisis that therefore became the country's main priority.

Since the 2016 referendum resulted in a majority of the public voting in favor of the United Kingdom leaving the European Union, the Brexit crisis led to two landmark Supreme Court decisions that caused criticism of the court from within the government. Ultimately, this criticism influenced the promise in the 2019 general election manifesto by the Conservative Party to conduct a major constitutional review. In its manifesto, the Conservative Party promised to "update the Human Rights Act and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security, and effective government. The Conservative Party also said, "In our first year we will set up a Constitution, Democracy & Rights Commission that will examine these issues in depth and come up with proposals to restore trust in our institutions and in how our democracy operates."

The new Conservative government launched an Independent Human Rights Act Review, which was chaired by Sir Peter Gross, a former Lord Justice of Appeal. In terms of its reference, the Panel was instructed that "[t]he Review will focus on two overarching themes regarding the framework of the HRA and will be UK-wide. In reflecting on those themes, the panel should consider how the framework is operating currently, how the HRA could best be amended (if the amendment is called for) to address any issues identified and the benefits and risks of such amendments."

In its report delivered in October 2021, it was clear from the Panel's recommendations there was no basis for repealing the Human Rights Act 1998. The Panel's view was that this amendment, rather than repeal, could be used to remedy any perceived deficiencies with certain sections of the Act. In its Executive Summary, the Panel reflected that, "[t]he vast majority of submissions in response to the [call for evidence] spoke strongly in support of the HRA, emphasizing that it was not to be viewed through the prism of a few high-profile cases; what happened outside the courtroom was every bit as important, a telling example regarding the impact of the development of a human rights culture on the provision of care in care homes." In the face of long-running criticisms and public attitudes, this support for the Human Rights Act 1998 demonstrates the lack of support for repeal. The Panel's recommendations included that, "serious consideration should be given by the Government to developing an effective program of civic and constitutional education in schools, universities, and adult education." In terms of reforms, the Panel also recommended that section two of the Human Rights Act 1998 be amended to clarify the view that domestic civil liberties be applied first before looking at the Convention. This was an approach put forward by Lord Reed in *R (on the application of Osborn) v Parole Board* [2013] UKSC 61. The Panel also recommended that section three of the Human Rights Act 1998 be amended to clarify the methods of interpretation and the question over the extra-territorial scope of the Convention needed to be addressed as the Act's "extra-territorial application is unsatisfactory." This reflected the use of the Human Rights Act 1998 to bring claims from those who alleged death or mistreatment from British military personnel overseas, as well as claims from the families of British military personnel who had been killed due to alleged inadequate equipment.

In response to the review's report, in December 2021, Dominic Raab, the new Lord Chancellor, was clear that, "[t]he UK's contribution to the development of human rights law is immense. It is founded in the common law tradition, dating back hundreds of years, and in Parliament's development of positive rights. It is something of which the UK can be proud." The government took the view that the Human Rights Act 1998 should be repealed and replaced with a British Bill of Rights. This proposed wholesale reform, which differed from the Panel's recommendations, could be considered as lacking the support of the Independent Panel's expertise. Arguably, this proposed reform was influenced by ideological beliefs rather than a genuine assessment of the effectiveness and suitability of the existing statutory framework.

1.2. THE PROPOSED BILL OF RIGHTS BILL

In June 2022, the Lord Chancellor and Deputy Prime Minister Dominic Raab introduced the Bill of Rights proposal to the House of Commons. To date, the Bill has not yet had its second reading in the House of Commons. The aim of the Bill of Rights Bill is to repeal the Human Rights Act 1998, and the government believes that the Bill "would clarify and rebalance the relationship between the courts in the United Kingdom, the European Court of Human Rights, and Parliament." The Bill would be able to do this by repealing section three of the Human Rights Act 1998, which has been controversial given the interpretative power granted to judges. Additionally, the legislation would also address the need for the courts to "give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about the balance between different policy aims, different Convention rights and Convention rights of different persons are properly made by Parliament." Furthermore, the Bill of Rights would establish the Supreme Court, rather than the European Court of Human Rights, as the institution which has the final say over the interpretation of the European Convention on Human Rights within the United Kingdom. Finally, the Bill ensures that judgments of the European Court of Human Rights are not part of domestic law. The Bill of Rights Bill was not intended to withdraw the United Kingdom from membership of the Council of Europe or as a signatory to the European Convention on Human Rights. Ultimately, it remains uncertain whether the Bill of Rights Bill will be enacted to repeal the Human Rights Act of 1998.

It is important to consider the key proposals in the Bill of Rights Bill. The Bill will not become law until it has been approved by the House of Commons and the House of Lords, which is subject to the Parliament Act 1911 and Parliament Act 1949. After receiving approval from both the House of Commons and the House of Lords, the Bill needs to receive royal assent, which is a mere formality as it is a constitutional expectation that assent will be given. The Bill of Rights Bill has yet to receive its second reading in the House of Commons.

Clause 1 (1) states that the proposed Act "reforms the law relating to human rights by repealing and replacing the Human Rights Act 1998." Clause 1 (2) highlights that the Act "clarifies and re-balances the relationship between courts in the United Kingdom, the European Court of Human Rights, and Parliament." It states that the Supreme Court rather than the European Court of Human Rights determines the meaning and effect of Convention rights for the purposes of domestic law. Furthermore, Clause 1 (2) also states that courts are no longer required to read and give effect to legislation, so far as possible, in a way that is compatible with the Convention rights. These courts must give the greatest possible

weight to the principle that, in a Parliamentary democracy, decisions about the balance between different policy aims, different Convention rights, and Convention rights of different individuals are properly made by Parliament. In terms of the jurisprudence of the European Court of Human Rights, Clause 1(3) clarifies that this is "not part of domestic law and does not affect the right of Parliament to legislate."

Clause 2 outlines which parts of the Convention are given effect by the Bill. Given the long-running concern over the perceived subordinate nature of the relationship between the European Court of Human Rights and the Supreme Court, Clause 3(1) states that "[t]he Supreme Court is the ultimate judicial authority on questions arising under domestic law in connection with the Convention rights." Clause 3 is designed to replace Section 3 of the Human Rights Act 1998 with provisions that seek to control the interpretation of the Convention by the courts. An example of this is outlined in Clause 3 (3) which states, "A court determining a question which has arisen in connection with a Convention right may not adopt an interpretation of the right that expands the protection conferred by the right. The only exception is that the court has no reasonable doubt that the European Court of Human Rights would adopt that interpretation if the case were before it."

The Bill proceeds to deal with perceived deficiencies in how the Human Rights Act 1998 impacted upon an individual's freedom of speech. The bill aims to give "great weight to the importance of protecting the right." Additionally, the bill also intends to limit positive obligations, the rights of offenders and public protection, and parliamentary decision-making, the need to "give the greatest possible weight to the principle that, in a Parliamentary democracy, decisions about how such a balance should be struck are properly made by Parliament" regarding declarations of incompatibility. Finally, the Bill seeks to restrict the use of Article 8 of the European Convention on Human Rights to prevent deportations.

The so-called right to trial by jury is protected in Clause 9, but the Bill is clear that the right can be overlooked where it is "prescribed by law that the person should be tried without a jury." In 2001, as part of his Criminal Courts Review, Lord Justice Auld was clear that "[I] n England and Wales, there is no constitutional or indeed any form of the general right to trial by judge and jury, only a general obligation to submit to it in indictable cases. It is often claimed that the Magna Carta, traditionally regarded as the foundation of our liberties, established such a right. However, this claim is incorrect." Clause 10 maintains the existing ability of domestic courts to issue a declaration of incompatibility and such a declaration which "does not affect the validity, continuing operation or enforcement of the provision in respect of which it is made." Clause 12 expands on this by making it "unlawful for a public authority to act in a way which is incompatible with a Convention right." Crucially, Clause 14 prevents being brought under the Bill of Rights because of overseas military operations. The clause defines overseas military operations to mean "any operations outside the British Islands, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of Her Majesty's forces come under attack or face the threat of attack or violent resistance, thus giving it a wide definition and limiting possible claim under the Bill of Rights."

1.3. RESPONSE TO THE PROPOSED BILL OF RIGHTS

Many legal commentators, including Dominic Grieve KC, the former Attorney-General in the Conservative-Liberal Democrat coalition, have been critical of the proposed Bill of Rights. Grieve, who was dismissed for opposing the Prime Minister's wish to repeal the Human Rights Act 1998, argues that the 2019 Manifesto and the Government's attitude towards the two *Miller* decisions seem to mark the development of a novel constitutional principle. According to this constitutional principle, "governments enjoying the confidence of a parliamentary majority have essentially a popular mandate to do whatever they like and that any obstruction of this is unacceptable." Furthermore, Grieve was clear in his remarks in which he said, "I remain mystified by what in practice Dominic Raab, is trying to achieve; unless it is a Machiavellian plot to create such variance between the interpretation of the Convention rights by our domestic courts and that of the ECtHR that the Government is able to throw its metaphorical hands up in horror at the frequency of appeals to and adverse judgments from Strasbourg and claim popular support to withdraw entirely from the Convention." By calling some of the proposed reforms "unnecessary window dressing," Grieve questions the impact these reforms will truly have regarding the protection of human rights. Furthermore, Grieve's statement that "most of the proposals for reform are about fettering the ability of our domestic courts to interpret the Convention in accordance with its jurisprudence" also shows how critical he is about the effect these reforms will have.

In a lecture delivered in November 2022, Sir Peter Gross, Chair of the Review, was critical that the Panel's recommendations were ignored, noting that, "There *is* an evidence-based way ahead through the implementation of IHRAR's Recommendations for a coherent package of practical reforms, straightforward to implement and achieving incremental change." Gross viewed the report as being underpinned by evidence, whereas the Bill was not, as the "[Panel's] conclusions were evidence-based—and other than doctrinaire, unsupported assertions, no basis, still less any reasoned basis, has been advanced for rejecting them. Moreover, there has been no discussion engagement with the thesis that the evidence supports incremental change, involving specific and targeted reforms to the Human Rights Act, not its repeal." While targeted reform is seen as a possible option, the repeal of the Human Rights Act is not supported. In short, "the [Bill] misses its mark on the matters where it parts company with [Panel's] Recommendations."

2. COMMISSION ON THE UNITED KINGDOM'S FUTURE

The last substantive period of constitutional reform was under the previous Labour government (1997-2010). In 2022, the Labour Party, now in opposition, published the report of its Commission on the Future of the United Kingdom. The Commission was chaired by former Prime Minister Gordon Brown and presented a view of the reformist agenda proposed by the Labour Party if it wins the next general election.

In 2022, the Labour Party's report "A New Britain: Renewing our Democracy and Rebuilding our Economy" is essentially a political

manifesto that critiques the performance of the Conservative government. Nonetheless, it is important to examine the proposed reforms from a constitutional perspective and understand how they would impact the country's legal framework. The report is clearly concerned about the lack of public confidence in the state as it is "troubling that most voters feel that Britain does not care about their future. Sentiments [like this] don't just threaten Britain's economic prospects; they threaten the very existence of the United Kingdom." The reforms proposed by the Commission are intended to decentralize the British State, which is "the most centralized country in Europe." The centralization of power and decision-making have a real impact on accountability and ministerial compliance with the accepted constitutional norms. The Commission is critical of the UK government by arguing how concerning the over-centralization in the nation is. In its critique, the Commission says, "Our over-centralized system can result in abuses of power, disregard for the conventions of our unwritten constitution, conflicts of interest allowed to fester, the intensified use of patronage, and the ignoring of ethical standards and advisers on ethics by a conservative political class that has tried to act without constraint." This could sound like political rhetoric, but it is true that ministers have been accused of ignoring constitutional norms and the party-gate saga. A noteworthy example of this is when Boris Johnson arguably misled the House of Commons. This is a point addressed by Peter Hennessy and Andrew Blick in *The Bonfire of the Decencies: Repairing and Restoring the British Constitution* (Haus Publishing 2022) and Chris Monaghan in *Accountability, Impeachment, and the Constitution: The Case for a Modernized Process in the United Kingdom* (Routledge 2022). In an interview conducted in May 2022, Peter Hennessy voiced concerns by stating the following: "[W]e haven't got time to muck about in this country anymore. There are so many deep-set problems. They need the best attention and effort of the best of the political and administrative classes all the time, and we're not getting it." ('"A Bonfire of the Decencies": Peter Hennessy on Boris Johnson's government', *Financial Times*, 23 May 2022, available at: https://www.ft.com/content/37a5b18a-77d0-4f17-ae0a-99802396ff36).

The Commission reflects the real risk that the United Kingdom will break up and that Scotland will hold a second referendum regarding its independence (see the Supreme Court's decision in *REFERENCE by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 of the Scotland Act 1998* [2022] UKSC 31). In terms of the key proposed reforms, the Commission is adamant that, "[t]he political, social, and economic purposes of the UK as a Union of Nations, which the overwhelming majority of people in the country already accept, should be laid out in a new constitutional statute guiding how political power should be shared within it." Compared to the Bill of Rights Bill which can be seen as taking a step back in terms of the domestic protection of human rights, the Commission's proposals are far more progressive in terms of developing new categories of constitutionally protected rights: "There should be new, constitutionally protected social rights—like the right to health care for all based on need, not ability to pay—that reflect the current shared understanding of the minimum standards and public services that a British citizen should be guaranteed."

The Commission proposes that the UK Constitution should focus on entrenching the devolution settlement to make a case for the United Kingdom surviving intact and gain the support of those who would seek independence in Scotland and Wales: "[I]n the past, governments have answered the desire for change in Scotland and Wales by announcing a shopping list of powers, but then practicing a policy of 'devolve and forget,' which has led to division and resentment." The devolution legislation which led to the establishment of the Scottish Parliament and the Senedd (the Welsh Parliament) could theoretically be amended by the United Kingdom Parliament because of parliamentary sovereignty, which does not place any restrictions on the types of law that Parliament may create or repeal. A proposed solution to address the issue of legislative authority regarding devolved matters was the Sewel Convention, whereby the United Kingdom Parliament would promise not to legislate for Scotland on devolved matters without its permission. However, it is important to note that the Sewel Convention was a constitutional convention that had no legal weight. Essentially, the Sewel Convention was a promise that the UK Parliament would abide by its moral or political obligation not to breach its commitment to devolution. The Commission's proposal is to "entrench the constitutional status of self-government across the nations of the UK and offer constitutional protection for devolution in Scotland and Wales by strengthening the Sewel Convention and protecting it from amendment through the new second chamber." Furthermore, the proposed reform would extend parliamentary privilege, which is currently enjoyed by parliamentarians at Westminster by virtue of the Bill of Rights 1689, to the Scottish Parliament and the Senedd.

Crucially, the proposed reform also includes changes regarding the House of Lords. The Commission is proposing to complete the reform started by the Labour government under Tony Blair, which left the House of Lords partly reformed and entirely unelected, with occasional elections for hereditary peers. The Commission is clear that "[t]he unelected House of Lords is completely indefensible today. Our country requires a new, democratically legitimate second chamber." It builds upon proposals from the Labour Party back in 2015, as it argues that an Assembly of the Nations and Regions would replace the House of Lords. One of the issues with creating a second elected chamber was that it could undermine the primacy of the House of Commons as guaranteed by the Parliament Act 1911 and Parliament Act 1949. The proposal states that "[t]he new second chamber should complement the House of Commons with a new role of safeguarding the UK Constitution, subject to an agreed procedure that sustains the primacy of the House of Commons." The Assembly of the Nations and Regions would represent the entire country and members could safeguard devolution and local self-government.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

1. REFLECTIONS ON THE PROPOSED BILL OF RIGHTS BILL

The proposed Bill of Rights Bill has not progressed beyond a first reading in the House of Commons. The real test will come when it eventually proceeds to the House of Lords, where it is unlikely to receive a favorable reception, and the strong group of crossbenches (i.e.,

independent) Lords will likely see support for any number of proposed amendments. The fact remains that the Bill can hardly be a good example of constitutional reform. It fixates on several headline problems such as deportations, judicial power, trial by jury, and freedom of expression, without offering broader constitutional reform regarding these issues. A cynic might say that it is a bill of grievances, rather than an evidence-based reform of the domestic human rights legislation. Baroness Hale of Richmond, a crossbencher in the House of Lords and former President of the Supreme Court, offers a sound assessment of the Bill and its lack of progress to date: "We should note that although the Bill had its first reading in the House of Commons in June 2022, it has so far gone no further. This is partly because its sponsor, Dominic Raab, was not in office while Liz Truss was Prime Minister and partly because, although he is now back in office, his political future is not certain. But if he survives the current inquiry into his conduct, we may expect Bill to make further progress. It has been noted that this Bill is but one example of the government's willingness to act in ways that *may* be incompatible with the UK's international obligations in politically charged situations. All of this is, to say the least, surprising in a country which has always prided itself on upholding the international legal order."

Of particular concern is the restriction on rights that the Bill envisages, which contradicts the rhetoric of bringing rights home. In its observations, the Joint Committee Parliamentary on Human Rights said, "Human rights are, by their nature, universal. They apply to everyone equally… The Bill of Rights risks carving out groups of people who will have less ability to enforce their rights than others. It also risks making enforcing rights both inside and outside of court more difficult for all." The Joint Committee Parliamentary on Human Rights was critical that "[t]he Bill does not include the requirement which exists under Section 19 HRA for a Minister to make a statement on the compatibility of all government Bills with Convention Rights. The Government argues that the Section 19 statements constrain innovative policy making. We see no evidence of this." What does the absence of an equivalent to Section 19 mean? The absence of Section 19 encourages ministers to push forward with questionable legislation. We can see this with the recent Illegal Migration Bill, where the Home Secretary made a statement under Section 19 in which she said, "I am unable to make a statement that, in my view, the provisions of the Illegal Migration Bill are compatible with the Convention rights, but the Government nevertheless wishes the House to proceed with the Bill." Therefore, there is justification for asking what will happen in the absence of this statutory requirement?

2. REFLECTIONS ON THE COMMISSION ON THE UNITED KINGDOM'S FUTURE

It is unsurprising that the Commission believes that citizens should be consulted and allowed to be involved in the conversation about the eventual constitutional settlement. This clear commitment to consultation and public engagement is important, given the perception of constitutional reform often being top-down within the United Kingdom, despite consultations and the use of referendums such as Proposed Voting Reform (2011), Devolution for Scotland and Wales (1997), and the proposed introduction of a North-East Regional Assembly (2004). Given the past constitutional reform agenda of the Blair and Brown Labour governments (1997-2010), any new Labour government will likely have its own reform agenda. While the Commission's recommendations are not the final answer as to what these reforms will look like should Labour win the next general election (which is likely to be held in 2024 or 2025), they are strong indicators of what Labour considers to be constitutional problems: namely, the fragile nature of the Union, centralization and lack of devolution across England, and the composition of the House of Lords.

IV. LOOKING AHEAD

Two significant questions are currently looming. The first is regarding the investigation led by Adam Tolley KC into allegations that Raab bullied civil servants. The outcome of the investigation will determine whether Rabb will be cleared of the allegations. If he is cleared, it is more likely that with Raab remaining in office, there will be greater momentum for proceeding with the Bill of Rights and getting past the challenges it will face in the House of Lords (in 2023 Raab resigned as a result of several of the allegations being upheld). The second question pertains to who will win the next general election in the United Kingdom. If the Labour Party wins the general election, then the proposed constitutional reforms may be implemented, leaving a lasting impact on the United Kingdom's Constitution.

V. FURTHER READING

Peter Hennessy and Andrew Blick in *The Bonfire of the Decencies: Repairing and Restoring the British Constitution* (Haus Publishing 2022)

Sir Peter Gross, 'The Independent Human Rights Act Review ("IHRAR") and beyond', ALBA Keynote Lecture, November 2022. This is available through Joshua Rozenberg KC (Hon)'s Substack, available at: https://rozenberg.substack.com/p/raabs-bill-wont-work

Dominic Grieve KC, 'Blaming the Judges: What is our problem with politicians when it comes to the Law', Talk to the Judicial Institute, University College London, 6 December 2022, available at: https://www.ucl.ac.uk/judicial-institute/sites/judicial_institute/files/blaming_judges_final_53092.pdf

The Labour Party, 'A New Britain: Renewing our Democracy and Rebuilding our Economy: Report of the Commission on the UK's Future', December 2022, available at: https://labour.org.uk/wp-content/uploads/2022/12/Commission-on-the-UKs-Future.pdf

Chris Monaghan, *Accountability, Impeachment and the Constitution: The Case for a Modernised Process in the United Kingdom* (Routledge 2022)

United States of America

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I. INTRODUCTION

The Constitution of the United States of America is extremely difficult to amend in modern times.[1] In the nation's 246-year history, only twenty-seven amendments have been ratified. Development of constitutional law in the United States, particularly noteworthy in the area of constitutionally protected individual rights, primarily occurs through judicial interpretation of the Constitution in resolution of cases and controversies before the Supreme Court of the United States (the "Supreme Court").[2] As a result, the composition and credibility of the Supreme Court are highly relevant in determining constitutional rights and empowering public confidence in its rulings.

The year 2022 began with the nomination, and eventual Senate confirmation, of Supreme Court Justice Ketanji Brown Jackson. A respected jurist, Justice Jackson filled a vacancy on the nine-member Supreme Court following the retirement of Justice Stephen Breyer. Justice Jackson's confirmation was a historic milestone for representation on the Supreme Court, as she became the first Black woman to hold the office of a Supreme Court Justice.

In June 2022, the Supreme Court issued *Dobbs v. Jackson Women's Health Organization*, an opinion holding that "the Constitution does not confer a right to an abortion."[3] This decision marked a significant change in constitutional law in the United States as the *Dobbs* decision explicitly overturned the 1973 opinion, *Roe v. Wade*, which noted that the Supreme Court had "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution" and first held that "the right of personal privacy includes the abortion decision[.]"[4]

Prior to the issuance of *Dobbs*, 2022 was a noteworthy year due to a leak of a draft version of that opinion–an unprecedented violation of the culture and expectations of privacy associated with Supreme Court deliberations on a pending case. In an issued statement, the Supreme Court described the leak as "a grave assault on the judicial process."[5] To date, the identity of the person who provided a copy of the draft opinion to media is unknown.

The leak of the draft opinion and subsequent issuance of the final *Dobbs* opinion overturning *Roe v. Wade* stirred significant public discussion, including on reform of the Supreme Court. President Biden had already established a Presidential Commission on the Supreme Court of the United States, which issued a 288 page "Final Report" on December 8, 2021, discussing the history of Supreme Court reform proposals and exploring potential reforms for the future.

While the United States of America rarely has meaningful constitutional reform efforts directed at the text of the Constitution,[6] the year 2022 was influential in the nation's constitutional development as: 1) a new Supreme Court Justice was sworn in and her confirmation expanded representation on the Supreme Court; 2) a once-recognized constitutional right was overturned; 3) a long-standing practice of respect for privacy in Supreme Court deliberations was violated; and 4) legislative and public interest in Supreme Court reform heightened.

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. CONFIRMATION OF JUSTICE JACKSON

On January 27, 2022, Supreme Court Justice Stephen Breyer provided a notice of his intent to retire from the Court at the summer recess of the Court.[7] Justice Breyer served as an Associate Justice of the Supreme Court from August 3, 1994 through June 30, 2022.[8]

1 *See* Richard Albert, *The World's Most Difficult Constitution to Amend?*,110 California Law Review 2005 (2022).

2 *See e.g.*, Luis Roberto Barroso, *Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies*, 124, American Society of Comparative Law (2019) ("It is fitting to remark that in the United States, 'judicial review' identifies the possibility that a judicial court, particularly the Supreme Court, may declare the unconstitutionality of acts from other branches of government – either a law or an executive action – as well as review, on appeal, the interpretation to the Constitution rendered by lower courts.").

3 *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op., at 69 (U.S. June 24, 2022).

4 *Roe v. Wade*, 93 S. Ct. 705, 727 (1973).

5 Statement of the Court Concerning the Leak Investigation, Jan. 19, 2023, SUPREME COURT OF THE UNITED STATES, Dobbs_Public_Report_January_19_2023.pdf (supremecourt.gov).

6 There are constitutional amendment proposals introduced in Congress frequently that do not achieve sufficient support to begin the amendment process, as set forth under Article V to the U.S. Constitution. *See Measures Proposed to Amend the Constitution,* U.S. Senate, www.senate.gov/legislative/measuresproposedtoamendtheconstitution.htm (last visited April 20, 2022); *see also* H.R.J. Res. 48, 117th Cong. (2021) (proposing an amendment to the Constitution of the United States providing that the rights extended by the Constitution are the rights of natural persons only).

7 Letter from Justice Stephen Breyer to President Joseph Biden (Jan. 27, 2022), Letter_to_President_January-27-2022.pdf (supremecourt.gov).

8 Supreme Court of the United States, Biographies, Current Members (supremecourt.gov) (last visited April 18, 2022).

While the swearing in of a new Supreme Court Justice is not in itself a constitutional reform, it always brings the potential for significant impact on American constitutional law.[9] Justice Jackson was nominated by President Biden on February 28, 2022 and was confirmed by the Senate on April 7, 2022.[10] Justice Jackson was a judge on the U.S. District Court for the District of Columbia from 2013 to 2021 and then on the United States Court of Appeals for the District of Columbia Circuit from 2021 until joining the Supreme Court on June 30, 2022.[11] Justice Jackson formerly clerked for Justice Breyer and brings to the Supreme Court experience in criminal law and as an attorney at the U.S. Sentencing Commission.[12]

Justice Jackson's confirmation is also noteworthy due to expanding representation on the Supreme Court. Justice Jackson is the first Black woman to hold the office of Supreme Court Justice. President Biden acknowledged the failure of the American government and courts to adequately reflect the nation's people in his statements on Justice Jackson's nomination, saying: "For too long, our government, our courts haven't looked like America. And I believe it's time that we have a court that reflects the full talents and greatness of our nation with a nominee of extraordinary qualifications and that we inspire all young people to believe that they can one day serve their country at the highest level."[13]

2. SUPREME COURT LEAK

On May 2, 2022, Politico published a leaked draft of the Supreme Court's opinion in *Dobbs v. Jackson Women's Health Organization*, the case asking the Court to overturn *Roe v. Wade*, the precedent which established a constitutional right to obtain an abortion in the United States.[14] Typically, deliberations of the Supreme Court justices, including draft versions of an opinion, are kept in strict confidence.[15] The day following the Politico report and release of the alleged draft opinion, the Supreme Court issued a press release stating "Although the document described in yesterday's reports is authentic, it does not represent a decision by the Court or the final position of any member on the issues in the case."[16] The release of the draft opinion overturning *Roe*, and removing constitutional protections for obtaining an abortion, set off a firestorm of discussion across the nation, including the calls for court reform discussed in more depth below. The unprecedented nature of the leak also heightened perceptions that the historical reverence for the Supreme Court was fading.[17]

The Supreme Court initiated an investigation into the leak of the draft opinion and issued a Statement on the investigation months later. That Statement described the leak as "one of the worst breaches of trust in its history" and "a grave assault on the judicial process."[18] The Marshal of the Supreme Court and other staffers, who conducted the investigation, were "unable to identify a person responsible by a preponderance of the evidence."[19]

3. DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION

The Supreme Court's reversal of *Roe v. Wade* in *Dobbs v. Jackson Women's Health Organization* was a significant change in the United States's constitutional law. For the nearly 50 years since the Supreme Court's decision in *Roe v. Wade,* the ability to access an abortion was one of the constitutional rights recognized by American courts. Members of the current Supreme Court describe that history very differently. The *Dobbs* majority described the history of the right to an abortion with a focus on the pre-*Roe* legal landscape:

"For the first 185 years after the adoption of the Constitution, each State was permitted to address this issue in accordance with the views of its citizens. Then, in 1972, this Court decided *Roe v. Wade*, 410 U.S. 113. Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (*e.g.,* its discussion of abortion in antiquity) to the plainly incorrect (*e.g.,* its assertion that abortion was probably never a crime under the common law.) After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature."[20]

In contrast, the dissenters of the decision paint a different picture with its history of the right to obtain an abortion, focusing on the impact of *Roe*, saying:

"For half a century, *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a women's right to decide for herself whether to bear a child. *Roe* held, and *Casey* reaffirmed, that in the first stages of pregnancy, the government could not make that choice for women. The government could not control a women's body or the course of a woman's life. It could not determine what the woman's future would be. See *Casey*, 505 U.S., at 853; *Gonzales v. Carhart*, 550 U.S. 124, 171-172 (2007) (Ginsburg., J., dissenting). Respecting a

9 As described in the 2020 International Review of Constitutional Reform, the timing and process of nominating and confirming Supreme Court justices in cases of a vacancy includes significant political involvement, due in part to the impact of each Justice on constitutional law development in the United States of America. Franciska Coleman, USA, *The 2020 International Review of Constitutional Reform*, p. 305, Program on Constitutional Studies at the University of Texas at Austin, in collaboration with International Forum on the Future of Constitutionalism, (2021) (Luis Roberto Barroso & Richard Albert, Eds.).

10 United States Congress, PN1783 - Nomination of Ketanji Brown Jackson for Supreme Court of the United States, 117th Congress (2021-2022) | Congress.gov | Library of Congress.

11 Supreme Court of the United States, Biographies, Current Members (supremecourt.gov) (last visited April 18, 2022).

12 *Id.*

13 Remarks by President Biden on his Nomination of Judge Ketanji Brown Jackson to Serve as Associate Justice of the U.S. Supreme Court, Feb. 25, 2022, https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/25/remarks-by-president-biden-on-his-nomination-of-judge-ketanji-brown-jackson-to-serve-as-associate-justice-of-the-u-s-supreme-court/.

14 Josh Gerstein & Alexander Ward, Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows, Politico, https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473.

15 Statement of the Court Concerning the Leak Investigation, Supreme Court of the United States, Jan. 19, 2023.

16 Supreme Court Press release, May 3, 2022, https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_05-03-22.

17 *See* Jeff Neal, *Why Has the Supreme Court Come Under Increased Scrutiny*, HARVARD LAW TODAY (Nov. 16, 2022), https://hls.harvard.edu/today/why-has-the-supreme-court-come-under-increased-scrutiny/.

18 Statement of the Court Concerning the Leak Investigation, Supreme Court of the United States, Jan. 19, 2023.

19 *Id.*

20 *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op., at 1 (U.S. June 24, 2022).

woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and consequential of all life decisions."[21]

The issue of abortion as a constitutional right has divided the American public from the time *Roe* was decided to date. A desire to appoint Supreme Court justices who may overthrow *Roe* was a crucial part of the support leading to Donald Trump's election as President in 2016, and he quickly took credit for the *Dobbs* decision.[22] While conservative groups celebrated the demise of *Roe v. Wade*, progressive groups decried the outcome as political and dangerous to women's rights.

4. COURT REFORM PROPOSALS

The leak of the draft *Dobbs* decision, followed by the subsequent publication of the final version eliminating the federal constitutional protection to abortion, immediately heightened calls for Supreme Court reforms from many Americans.[23] Court reform had already been a frequent and contentious topic in the wake of election year Supreme Court nominations, as described in more detail in the 2020 Edition of the International Review of Constitutional Reform.[24]

President Biden issued Executive Order 14203 on April 14, 2021, establishing the Presidential Commission on the Supreme Court of the United States (the "Commission").[25] The Executive Order instructed the Commission to produce a report describing current commentary and debate on the status of the Supreme Court, historical background on critical assessment and reform proposals for the Supreme Court, and an analysis of the merits and legality of various Supreme Court reform proposals.[26]

The Commission published its Final Report on December 8, 2021.[27] The Final Report noted the importance of the Supreme Court when it comes to the development of American constitutional law, saying: "at various moments throughout history, conservatives and progressives alike have turned to the Court to protect the rights they most value and to define the authority of the elected branches of the federal government and of the states in accord with their understandings of the Constitution."[28] Just months prior to the *Dobbs* leak, the Final Report observed the passionate opinions on the question of court reform and impact on the country's constitutional law:

"The Court reform debate is not merely a byproduct of recent partisan conflict. Rather, it is a high-stakes debate because of the unique role and structure of the Supreme Court. The Court's decisions have extraordinary impact on the lives of Americans generally. The Court also exercises enormous power within the U.S. system of government, as do the individual Justices themselves, who serve for life. The sharp polarization in contemporary American politics only exacerbates the conflict over the Court."[29]

The Commission's Final Report does not contain a recommendation for reform but assesses the history, legal authority, and potential advantages and disadvantages for reform proposals, including the establishment of term limits for Supreme Court justices and modifying the number of justices on the Supreme Court.[30]

Before the Final Report was published, a bill was introduced in the United States House of Representatives to establish term limits for Supreme Court justices.[31] On November 1, 2022, the bill was referred to the Subcommittee on Courts, Intellectual Property, and the Internet, yet no further action was taken.[32] There are differences of opinion on whether the efforts in this bill or other similar proposals are constitutionally permissible as a legislative action.[33]

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

The full extent of the impact of the outcome of *Dobbs* is not known yet. However, the reasoning of the majority and concurring opinions provides a potential path for litigants to challenge many other rights recognized to have constitutional protection under existing Supreme Court jurisprudence. The most sobering statement from a *Dobbs* decision relating to other constitutional protections was from Justice Clarence Thomas. Justice Thomas authored a separate concurrence explicitly stating his belief that the Supreme Court "should reconsider all of this Court's substantive due process precedents, including *Griswold, Lawrence*, and *Obergefell*."[34] Having a sitting Supreme Court Justice openly call for reconsideration of cases providing a constitutional right to birth control (*Griswold*[35]), private conduct such as sexual activity (*Lawrence*[36]), and same-sex marriage (*Obergefell*[37]) indicates the potential for significant reform of existing constitutional law in the coming years if others on the Court become willing. The majority opinion, in contrast, does seek to distance itself from an inevitable questioning of other cases involving constitutional rights explaining that those cases "were critically different for a reason that we have explained: None of those cases involved the destruction of what *Roe* called 'potential life.'"[38] Further into the majority opinion, the Court addressed the issue

21 *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op., Breyer, J.; Sotomayor, J; Kagan, J. (dissenting) at 1 (U.S. June 24, 2022).
22 *See* Lawrence Hurley, *Analysis: Trump's Justices Decisive in Long Campaign to Overturn Roe v. Wade*, Reuters (June 24, 2022, 1:48 PM), Analysis: Trump's justices decisive in long campaign to overturn Roe v. Wade | Reuters.
23 *See* Jeff Neal, *Why Has the Supreme Court Come Under Increased Scrutiny*, HARVARD LAW TODAY (Nov. 16, 2022), https://hls.harvard.edu/today/why-has-the-supreme-court-come-under-increased-scrutiny/.
24 Franciska Coleman, USA, *The 2020 International Review of Constitutional Reform*, p. 305, Program on Constitutional Studies at the University of Texas at Austin, in collaboration with International Forum on the Future of Constitutionalism, (2021) (Luis Roberto Barroso & Richard Albert, Eds.).
25 Exec. Order 14203, 86 FR 19569 (2021).
26 *Id.*
27 Final Report, Presidential Commission on the Supreme Court of the United States (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf.
28 *Id.* at 18.
29 *Id.*at 17-18.
30 *Id.* at 67-143.
31 H.R.J. Res. 5140, 117th Cong. (2021) (Supreme Court Term Limits and Regular Appointments Act of 2021).
32 Actions Overview, H.R.J. Res. 5140, 117th Cong. (2021) (Supreme Court Term Limits and Regular Appointments Act of 2021), www.congress.gov/bill/117th-congress/house-bill/5140/actions (last visited April 20, 2023).
33 *See* Final Report, Presidential Commission on the Supreme Court of the United States (2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf ("Members of the Commission are divided about whether Congress has the power under the Constitution to create the equivalent of term limits by statute."), at 130.
34 *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op., Thomas, J (concurring) at 3 (U.S. June 24, 2022).
35 *Griswold v. Connecticut*, 381 U.S. 479 (1965).
36 *Lawrence v. Texas*, 539 U.S. 558 (2003).
37 *Obergefell v. Hodges*, 576 U.S. 644 (2015).
38 *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op., at 37 (U.S. June 24, 2022).

even more clearly, stating: "And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion."[39]

The three dissenting members of the Court responded directly to this claim with the critique that "[e]ither the majority does not really believe in its own reasoning. Or if it does, all rights that have no history stretching back to the mid-19th century are insecure. Either the mass of the majority's opinion is hypocrisy, or additional constitutional rights are under threat. It is one or the other."[40] Regardless of the Court's internal disagreements of the effect of *Dobbs* will have on other rights, members of the public who disagree with the constitutional protections afforded under other Supreme Court precedents will surely attempt to bring cases before the Court to test the limit of the Court's willingness to reconsider those rights. Thus, the scope of *Dobbs* reform to America's current constitutional framework is unknown as the Court will surely continue to grapple with other challenges related to individual rights precedents.

IV. LOOKING AHEAD

The Presidential Commission on the Supreme Court of the United States provided an assessment of various reform proposals for the high court. Any of the potential reforms could have significant effects on American constitutional law, if pursued.

Individual rights that the Supreme Court has previously recognized as constitutionally protected under the substantive due process doctrine, or other extra-textual analyses, may be challenged by litigants desirous of testing if Justice Thomas' call in his *Dobbs* concurrence to overturn that precedent is shared by other justices. Additionally, lower courts throughout the country will be considering new legal challenges to abortion restrictions that were enacted after, or came into effect at the time of, the *Dobbs* decision removing constitutional protections for those laws.

V. FURTHER READING

Dobbs v. Jackson Women's Health Org., No. 19-1392, slip op. (U.S. June 24, 2022).

Richard Albert, 'The World's Most Difficult Constitution to Amend?' (2022) 110 California Law Review 2005.

39 *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op., at 66 (U.S. June 24, 2022).

40 *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. Breyer, J; Sotomayor, J; Kagan, J. (dissenting), at 5 (U.S. June 24, 2022).

Uruguay

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I. INTRODUCTION

As it is the first report on Uruguay, I will briefly review the constitutional history[1].

The first formal and codified Constitution of Uruguay as an independent State was that of 1830, which was subject to changes in its reform procedures in 1912.

In 1917, a total change of the Constitution was favorably voted by the citizens, which instituted the so-called Second Republic, with a two-headed Executive Branch, distinguishing the Presidency of the Republic and the National Administration Council (collegiate of nine members), with separation of the Catholic Church from the State and strong territorial decentralization in the Departmental Governments. It was partially amended in 1932 (direct election of the Senators) and was in force until March 31, 1933, when the *coup d'état* by the constitutional President of the Republic, Dr. Gabriel Terra, took place.

It was followed by the new 1934 Constitution, which was ratified by plebiscite and partially modified in 1936 and 1938, which was in force until February 21, 1942, when the constitutional President of the Republic, Gral. Alfredo Baldomir coup d'état took place, which concluded with the 1942 Constitution, also approved by a majority by the citizens, which was completely replaced by the Constitution of 1952 that instituted the integral collegiate of nine members in the Executive Branch.

The Uruguayan Constitution currently in force was ratified by plebiscite by the body of citizens in November 1966, and entered into force in its entirety on March 1, 1967, replacing the 1952 Constitution.

Once the *de facto* military civic government was installed, the Constitution did not fully apply between June 27, 1973, and March 1, 1985.

The Constitution does not include unchangeable clauses, and its Article 331 establishes four procedures for its reform, which can be total or partial; for projects of a) popular initiative, which can be presented by 10% of the registered citizens; b) presented by two-fifths of the members of the General Assembly or meeting of Senators and Representatives; c) presented by the Senators, Representatives or the Executive Branch, which need to be approved by an absolute majority of the total components of the General Assembly of the Legislative Branch and d) constitutional laws that will require two-thirds of the total components for their sanction in each of the Chambers within the same legislature.

In any of the four procedures, the constitutional reform project needs to be approved finally in a ratification plebiscite, which must reach the majorities established in Article 331, according to each case.

After the 1967 Constitution was restored in 1985, it was subject to four partial reforms in 1989 (indexation of retirements and pensions), 1994 (declaration of unconstitutionality with general and absolute effects of the provisions on retirements and pensions in budget laws), and 2004 (fundamental rights to potable water and sanitation) through the procedure of popular initiative (Article 331-A) and one in 1997, for constitutional law (ballotage electoral system; environmental protection, etc.) (Article 331-D).

During the year 2022, no formal project of constitutional reform was perfected (Article 331).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

We found in 2022 three journalistic references to eventual constitutional reforms.

The first, which was mentioned by the Ministry of the Interior in April, was to enable night raids, which Article 11 of the Constitution forbids[2], in an unusual formula in Comparative Constitutional Law. On this topic, he was referring to the last constitutional reform project passed by referendum in Uruguay on October 27, 2019[3], initiated by 10% of registered citizens, rejected having obtained 46.8% of the votes, requiring an absolute majority of the who attended the elections (50.01%), which must represent at least thirty-five percent of the total registered in the National Civic Registry.

The second, also in April, related to modifying Article 152 of the Constitution that prohibits the re-election of the President of the Republic in the immediate or consecutive period by requiring that five years have elapsed from the date of his removal.

The possibility of immediate re-election[4] was raised on several occasions since the 1967 Constitution came into force. On November 28, 1971, the formal reform project (Article 331) was rejected in the plebiscite (yes votes: 26,2%); it was later outlined during the Presidencies

1 See: E. Esteva Gallicchio y H. Gros Espiell, "Uruguay", in *Constituciones Iberoamericanas* (UNAM 2005).

2 "The home ("*el hogar*") is an inviolable sacred. At night no one may enter it without the consent of their boss, and during the day, only by express order of a competent Judge, presented in writing and in the cases determined by law".

3 The proposal said: «Article 1 - Add to article 11 of the Constitution the following paragraph: "However, the law may regulate night raids, for cases in which the acting Judge has well-founded suspicions that crimes are being committed"».

4 See: E. Esteva Gallicchio, "Reelección presidencial en Uruguay", *Derecho Constitucional Latinoamericano y Boliviano / Jornadas de Derecho de América del Sur*, (Kipus, 2015), 583.

of Lacalle Herrera; of Tabaré Vázquez and in 2022, of Lacalle Pou, but in none of the latter cases was a formal reform project drawn up. The presidents of the Republic disagreed on consecutive re-election, except for Lacalle Pou who expressed that he would share it for a single consecutive time, but not applicable at the end of his presidency so that the discussion "does not have a name and surname."

The third, in November, regarding the possibility of incorporating into the Constitution a provision related to the protection of debtors, which would be promoted by the Cabildo Abierto Party (a member of the government coalition) in the event that is not approved ordinary law that it proposes on debt restructuring of physical persons.

None of these references came to formally as a constitutional reform project (article 331 of the Constitution).

Although continued during the year, it is an ordinary bill, consideration of the one presented in September 2021 by the National Representative for the National Party, Francisco Capandeguy Sánchez, and by four other national representatives elected by the Colorado, Cabildo Abierto, Independiente, and De la Gente Parties for which they represent the governmental Republican Coalition[5].

Also, the project was entered in December 2021 by the National Representative Álvaro Lima, together with nine other representatives of the opposition coalition, Broad Front Party[6].

These projects enter into aspects related to Uruguayan nationality and citizenship, therefore, if approved without the application of one of the four procedures prescribed by Article 331 of the Constitution to reform it, some authors consider that, if perfected as an ordinary law, it would be unconstitutional and others will probably conclude that we would be facing a constitutional mutation, through tolerance of the Supreme Court of Justice in the control of constitutionality or application of an evolutive constitutional interpretation.

During the year 2022, the judgment of the Supreme Court of Justice nº 286/2022, of May 10, 2022[7], was highlighted, which by majority vote (3 vs. 2) admitted the constitutionality of Law 18831 of October 27, 2011, which refers to crimes against humanity, by restoring the punitive power of the State affected by Law 15848.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Being mere draft proposals, no jurisdictional review was applied in the cases mentioned in Part II.

1. The constitutional change proposals could be better described as amendments in the cases of admission under certain conditions precisely indicated for night raids and dismemberment[8] in the cases of admission for immediate presidential re-election.

In the event of innovations in the distinction made by the Constitution between citizenship and nationality (articles 73 to 81 of the fundamental law), it is proposed as an ordinary law or as an interpretative law of the Constitution, therefore, not even considering the need to apply one of the procedures to reform the Constitution (article 331), betting towards a possible constitutional mutation.

In the case of the possible incorporation into the Constitution of provisions for the protection of debtors, since the content of the possible formal constitutional change at the initiative of 10% of the registered citizens (article 331-a) has not been published, it is not possible to classify it as amendment or dismemberment.

2. The rigid and codified Constitution of Uruguay does not determine unchangeable clauses.

The Uruguayan Constitution does not provide for legal regularity controls that reach the constitutional provisions perfected in accordance with article 331.

3. The constitutionality review competence of the Supreme Court of Justice reaches the laws (Article 256 and concordant) and the interpretative laws of the Constitution (Article 85-20º). The constitutional reform projects must comply with the formal requirements stipulated in Article 331, and the competent body to control them is the Electoral Court (Article 322-c and concordant: as judge of the acts of plebiscite). I reiterate that Article 331 foresees the total reform of the Constitution, no court can review the content.

Notwithstanding the possible control of conventionality[9] that the Inter-American Court of Human Rights can exercise, according to the doctrine developed by it within the framework of the American Convention on Human Rights.

4. By the text of the Constitution, when assigning its competence, the role of the Supreme Court of Justice of Uruguay has traditionally been considered counter-majoritarian, and in practice, it has been characterized by prudence. Probably the most important sentence that shows the Supreme Court of Justice assuming a combination with the representative role[10] continues to be nº 365/2009[11] on the so-called law of expiration of the punitive claim of the State nº 15.848[12], December 22, 1986 (expression of a block of rights; new role of Article 72 of the Constitution, legal value of the pronouncements of the majority, etc.).

IV. LOOKING AHEAD

In Uruguay, no major formal constitutional changes are planned for the year 2023. It is not improbable that, late in the year 2023, some formal constitutional reform can be promoted (article 331 of the Constitution), to be put to plebiscite, in conjunction with the next national elections, on the last Sunday of October 2024.

V. FURTHER READING

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5 Cámara de Representantes. Comisión de Constitución, Códigos, Legislación General y Administración. Carpeta nº 1858 de 2021. Repartido nº 527 setiembre de 2021. Libertad de circulación de los ciudadanos legales uruguayos.

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7 Available in: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/busquedaSimple.seam (access: March 30, 2023).

8 See: R. Albert, *Constitutional Amendments / Making, Breaking and Changing Constitutions* (Oxford University Press, 2019), 76 y ss.

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10 L. R. Barroso, "Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies", *The American Journal of Comparative Law*, Volume 67, Issue 1, March 2019, 109–143.

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Vietnam

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I. INTRODUCTION

Constitutionalism is the belief that a government should be based on a constitution.[1] Or, in a broader sense, it is the doctrine that a body of laws determines a government's authority and refers to efforts to prevent arbitrary government.[2] The idea of the rule of law (or the rule-of-law state in Vietnam) emerged in ancient Greece,[3] that is, in the modern time, defined as "the mechanism, process, institution, practice, or norm that supports the equality of all citizens before the law secures a nonarbitrary form of government, and more generally prevents the arbitrary use of power."[4]

The terms constitutionalism and rule of law are closely related, and sometimes equated, since both are about how the powers of government and state officials are to be limited.[5] The difference is that constitutionalism refers to various constitutional devices and procedures, such as the separation of powers between the legislature, the executive, and the judiciary; the independence of the judiciary; and respect for individual rights. The rule of law, on the other hand, embodies specific standards that define the characteristic virtues of a legal system as such.[6]

The idea of the rule of law had a significant impact on the first Vietnamese Constitution of 1946 and recontinued its influence on the constitutional-making process of the country after being ignored during the Cold War. In 2022, the Central Committee under the Communist Party of Vietnam (CPV) adopted Resolution No.27 on "Continue building and perfecting the socialist rule-of-law state of Vietnam in the new period," the latest political development of the rule of law in the country. This paper offers a brief overview of Resolution No.27. Then, it analyzes its impact on the journey to constitutionalism and the possibility of constitutional reform in Vietnam in the coming years.

1 The Britannica Dictionary, *Constitutionalism, at:* https://www.britannica.com/dictionary/constitutionalism (February 25, 2023).
2 Richard Bellamy, *Constitutionalism*, in the Encyclopedia Britannica , at: https://www.britannica.com/topic/constitutionalism (February 25, 2023).
3 *Rule of Law*, National Geographic, at: https://education.nationalgeographic.org/resource/rule-law/ (February 25, 2023).
4 Naomi Choi, *Rule of Law*, in the Encyclopedia Britannica, at: https://www.britannica.com/topic/rule-of-law (February 25, 2023).
5 Ten, C. l (2017), "Constitutionalism and the Rule of Law", A Companion to Contemporary Political Philosophy, John Wiley & Sons, Ltd, pp. 493–502;
6 See Reynolds, Noel B. (1986). "Constitutionalism and the Rule of Law". All Faculty Publications (BYU ScholarsArchive) , at: https://scholarsarchive.byu.edu/facpub/1469/ (February 30, 2023).

II. PROPOSED, FAILED, AND SUCCESSFUL CONSTITUTIONAL REFORMS

1. A STEP FORWARD TO CONSTITUTIONALISM: AN OVERVIEW OF THE CPV RESOLUTION NO.27

Historically, Ho Chi Minh was the first Vietnamese who advocated for the rule of law. In the "Claim of the People of Annam" sent to the Versailles Conference in 1919, Ho Chi Minh (then known as Nguyen Ai Quoc) requested to build a rule of law regime in Indochina.[7] After Vietnam gained independence (1945), its first Constitution of 1946 reflected the principles of the rule of law when affirming people's sovereignty, the supremacy of the Constitution, citizens' rights, and a mechanism of controlling state power.[8] Unfortunately, during the Cold War, the model of a "dictatorship of the proletariat state" undermined the principles of the rule of law in the country.

Shocked by the collapse of the socialist system in the former Soviet Union and Eastern Europe in the late 1980s, the CPV launched the Doi Moi (innovation) policy and allowed local academia to study Western theories on state and law. Based on the German concept of *Rechtsstaat,* Vietnamese scholars proposed the idea of *nhà nước pháp quyền (the rule-of-law state*), which is known as the Vietnamese version of *Rechtsstaat*. Since *Rechtsstaat* is the "German modified version" of *the rule of law*, there is a view that *nhà nước pháp quyền* of Vietnam is not identical to *the rule of law.*[9] Specifically, when *nhà nước pháp quyền* emphasizes common principles of "supremacy of law" and "respect of human rights," it also underlies the requirement of "the state and the society monopoly led by the CPV"[10] (so it is called *the socialist rule-of-law state of Vietnam).*

7 See the English version sent to the Secretary of State of the United States, Delegate to the Peace Conference (Mr Robert Lansing) at http://www.soc.ucsb.edu/projects/casemethod/beamish.html (February 30, 2023).
8 See Pham Diem, *The 1946 Constitution of Vietnam*, at https://vietnamlawmagazine.vn/the-1946-constitution-of-vietnam-4443.html. See also Nguyễn Sĩ Dũng, *the 1946 Constitution and the rule-of-law thought (Hiến pháp 1946 với tư tưởng pháp quyền),* at the Website of the National Assembly of Vietnam, https://quochoi.vn/tulieuquochoi/anpham/Pages/anpham.aspx?AnPhamItemID=271 (February 30, 2023).
9 See Vũ, C. G., Nguyễn, M. T. (2018). *Discussing the concept of the rule-of-law state and the construction of a socialist rule-of-law state according to the 2013 Constitution,* at: https://repository.vnu.edu.vn/handle/VNU_123/94737 (February 30, 2023)
10 See Dao T. U. (2019). *The rule of law in Vietnam: Core values and new approach aspects.* In the International Conference of Laws in a Changing World, Hanoi, August 20 2019. https://repository.vnu.edu.vn/handle/VNU_123/94848 (February 30, 2023).

The CPV first announced its idea of building a socialist rule-of-law state of Vietnam in its 7th National Midterm Congress (1994). This was then reaffirmed in the resolutions adopted in subsequent events, including the Platform for National Construction (supplemented and developed in 2011) and the latest 13th Party Congress (2021).

Based on the CPV's idea, in 2001, the National Assembly of Vietnam legally added "building socialist rule-of-law state" into the amendment of the 1992 Constitution. As a result, the current 2013 Constitution of Vietnam inherits this provision: "The State of the Socialist Republic of Vietnam is a socialist rule-of-law state of the People, by the People, for the People" (Article 2).

However, until 2022, there is still no document either of the CPV or the State that clearly defines the constitutive elements of the socialist rule-of-law state of Vietnam. Therefore, the new progress occurred on November 9, 2022, when the 13th Central Committee of the CPV adopted Resolution 27-NQ/TW on "Continuing to build and perfect the socialist rule-of-law state in Vietnam in the new period."[11] It is the first Resolution of the CPV to precisely and comprehensively address the issue of building a socialist rule-of-law state in the country. First, the Resolution identifies the constitutive elements (characteristics). Then, it determines general goals as well as five specific goals (to be achieved by 2030), three core contents, and ten tasks attached with solutions to build and perfect the socialist rule-of-law state in Vietnam in the coming years.

Among eight constitutive elements identified in Resolution 27-NQ/TW, six reflect the common democratic characteristics of constitutionalism, which are: (1) The State of the People, by the People, for the People; (2) Human rights and citizens' rights are recognized, respected, guaranteed and protected; (3) The State is organized and operated according to the Constitution and laws; (4) The legal system is democratic, fair, humane, complete, synchronous, unified, timely, feasible, public, transparent, stable, accessible, strictly implemented and consistency; (5) Independence among the courts, and independence of judges and jurors in a trial; and (6) Respect and ensure the implementation of international treaties to which Vietnam is a party.[12] However, there are also two particular reflected characteristics of the socialist regime, which are: (1) The State led by the Communist Party of Vietnam; and (2) State power is unified, with clear assignment, close coordination, and effective control among state agencies in the exercise of legislative, executive and judicial powers.[13]

Resolution 27-NQ/TW also emphasizes particular characteristics of the socialist regime as the first viewpoint, which reads[14]: *"Be consistent, apply and creatively develop Marxism-Leninism and Ho Chi Minh's thought; be consistent to national independence and socialism; be consistent in guidelines of renewal and ensure the leadership and ruling of the Communist Party,"* and, *"Continue to build and perfect the rule-of-law State of the Socialist Republic of Vietnam of the people, by the people and for the people under the leadership of the Communist Party...."* In addition, the Resolution also identifies specific tasks and solutions to strengthen the Communist Party's leadership in building and perfecting the socialist rule-of-law state in Vietnam.[15]

Above, it is shown that the CPV views the socialist rule-of-law state not as a "type of state system,"[16] but rather as *a model of state governance* based on some principles, including those that reflect both the universal nature of constitutionalism (the rule of law, guarantee of human rights, control of state power) and particular characteristics of the socialist regime (the monopoly leadership of the communist party on state and society; a semi Western-style power separation mechanism). In other words, the CPV's policy is to *apply some values of the rule of law to build a socialist state* (a socialist rule-of-law state), *not to build a socialist-oriented rule-of-law state*. This approach differs from building a socialist-oriented market economy, which was initiated by the CPV in 1986. Specifically, in the former one, the CPV replaced the centralized and planned economy from the previous period in Vietnam with a socialist-oriented market economy, in which the state only plays a directional role in achieving the long-term goal of building socialism. However, in the latter, the CPV retains the fundamental elements of the socialist political regime, and it only renews its governance approach according to selected rule-of-law principles to strengthen, rather than replace the socialist political system with another.

III. THE SCOPE OF REFORMS AND CONSTITUTIONAL CONTROL

Overall, Resolution No.27 created an excellent opportunity for promoting constitutionalism in Vietnam. By strongly affirming the policy of building a socialist rule-of-law state, this Resolution dispels remaining conservative arguments in the CPV who want to return to the previous model of the dictatorship of the proletariat.

More specifically, Resolution No.27 affirms the constitutional devices and procedures containing constitutionalism in Vietnam, including:

First, the Resolution certifies that the nature of the socialist rule-of-law state of Vietnam is of the People, by the People, and for the People.[17] This statement leads to a principle underlying the relationship between the People and the State, in which the People are the masters of state power.[18] The State does not have inherent power, only that which is entrusted to it by the People.[19] Therefore, the Resolution defines controlling state power as one of the critical objectives,[20] solutions, and tasks[21] in building and perfecting the socialist rule-of-law State of Vietnam.

Second, the Resolution declares "People as the centre, goals, subjects and driving force for the country's development,"[22] and, "the State respects, guarantees, and protects human and citizens' rights."[23] In accordance with this statement, the Resolution identifies tasks and solutions to respect, guarantee, and protect human rights and citizens' rights.[24]

11 Resolution No.27- NQ/TW adopted 09/11/2022 at the 6th session of the XIII Central Committee of the CPV on "Continue to Build and Perfect the Socialist Rule-of-law State of Vietnam in the New Period" (Nghị quyết số 27-NQ/TW ngày 09/11/2022 Hội nghị lần thứ sáu Ban Chấp hành Trung ương Đảng khóa XIII về tiếp tục xây dựng và hoàn thiện Nhà nước pháp quyền xã hội chủ nghĩa Việt Nam trong giai đoạn mới), at: https://tulieuvankien.dangcongsan (February 30, 2023)
12 Resolution No.27- NQ/TW, Section IV (1).
13 Resolution No.27- NQ/TW, Section IV (1).
14 Resolution No.27- NQ/TW, Section II, paragraph 1.
15 Resolution No.27- NQ/TW, Section IV (10).
16 Regarding the "type of state system", see Christopher Pierson (2004), *The Modern State*, Second edition, Routledge.
17 Resolution No.27- NQ/TW, Section II (1)
18 Resolution No.27- NQ/TW, Section II (2)
19 Resolution No.27- NQ/TW, Section II (2)
20 Resolution No.27- NQ/TW, Section III (2)
21 Resolution No.27- NQ/TW, Section IV (8)
22 Resolution No.27- NQ/TW, Section II (3).
23 Resolution No.27- NQ/TW, Section II (3).
24 Resolution No.27- NQ/TW, Section IV (2).

Third, the Resolution confirms the supremacy of law and the Constitution.[25] It insists that the organization and operation of the rule-of-law State of Vietnam follow the Constitution and the law.[26] In line with this confirmation, the Resolution identifies the objective and task of improving Vietnam's legal system and law enforcement mechanism.[27]

Fourth, the Resolution emphasizes the importance of modern and effective governance.[28] In connection with this, the Resolution promises a lean, clean, efficient, and effective state apparatus,[29] considering it a core requirement[30] with specific tasks and resolutions for election reform,[31] administration reform,[32] judicial reform,[33] and renovating the National Assembly,[34] the Government, local governments,[35] the President,[36] the Court, and other judicial bodies.[37]

Fifth, the Resolution asserts that one of the core requirements in building and perfecting the socialist rule-of-law state of Vietnam is "stepping up judicial reform" to ensure the independence between the courts as well as the independence of judges and jurors in a trial.[38] Along with that requirement is the goal and task of "building a professional, modern, fair, strict, integrity judiciary, which serves the Fatherland and People, and protecting justice and human rights…."[39]

In comparison, the 2013 Constitution of Vietnam generally mentioned the issues stated above. However, unlike Resolution No.27, the 2013 Constitution textually raised the issues without detailing them. Further, some issues are missing in the 2023 Constitution. For example, the modern and effective governance,[40] the lean, clean, efficient, and effective state apparatus,[41] election reform,[42] administration reform,[43] and judicial reform.[44] Therefore, in 2022, Resolution No.27 actually created a constitutional change without a constitutional amendment[45] or political constitutional amendment[46] in Vietnam.

From another angle, Resolution No.27 satisfies the features of "constitutional mutation,"[47] since it promotes a new constitutional practice that will replace or amend some existing constitutional rules in Vietnam in the coming years. Specifically, Resolution No.27 consolidates relevant provisions of the Vietnamese 2023 Constitution in the short term, and it serves as the basis for amending the Constitution in the long term.

The 2023 Constitution of Vietnam has yet to officially provide any unamendable rules. ĐNonetheless, several constitutionalized provisions unofficially forbid discussion in the country (often called "taboo"), which include the monopoly leadership of the CPV[48] and the Western-style separation of state power.[49] Regardless, none of the reforms raised in Resolution No.27 conflict with the above-mentioned taboo.

However, the reforms envisaged in Resolution No.27 are political control rather than constitutional control. Since Resolution No. 27 is a political document, its content, including the reforms it envisages, will be implemented by the Communist Party, specifically the CPV Politburo.[50] Political control of constitutional reform is not justified in most countries. Nonetheless, it is still official in socialist countries such as Vietnam, China, Laos PDR, Cuba, and North Korea. Under the political control system, the National Assembly is the key player in implementing all constitutional reforms provided in Resolution No.27, but under the direction of the CPV.[51] Meanwhile, according to Resolution No.27, the Government and the Court of Vietnam, respectively, take on administration reform and judicial reform tasks,[52] which are much less important than the National Assembly.

Vietnam has not yet established a constitutional court, and the Court has traditionally played a feeble role in constitutional reform, which is not among the three Weberian ideal types of judicial roles indicated by Luís Roberto Barroso.[53]

IV. LOOKING AHEAD

Resolution 27-NQ/TW on "Continuing to build and perfect the socialist rule-of-law state in Vietnam in the new period," is a vital document passed by the CPV in 2022. There are criticisms in the Vietnamese academic community that this Resolution has no new contents, but is merely a synthesis and repetition of reforms previously indicated in the 2013 Constitution and other documents adopted by the CPV, especially the CPV Politburo's 2005 Resolutions No.48[54] and No.49[55] on building the legal system and judicial reform respectively. However, when taking into account its unique nature (Resolution No.27 is the document adopted by the highest body of the CPV, which is the Central Executive Committee, and is the first specialized document on the building a socialist rule-of-law state of Vietnam so far issued by the CPV) as well as

25 Resolution No.27- NQ/TW, Section II (3)
26 Resolution No.27- NQ/TW, Section II (3) and III (2)
27 Resolution No.27- NQ/TW, Section III (2) and IV (3).
28 Resolution No.27- NQ/TW, Section I (1.1)
29 Resolution No.27- NQ/TW, Section I (1.1)
30 Resolution No.27- NQ/TW, Section III (2)
31 Resolution No.27- NQ/TW, Section IV (3)
32 Resolution No.27- NQ/TW, Section IV (6)
33 Resolution No.27- NQ/TW, Section IV (7)
34 Resolution No.27- NQ/TW, Section IV (4)
35 Resolution No.27- NQ/TW, Section IV (6)
36 Resolution No.27- NQ/TW, Section IV (5)
37 Resolution No.27- NQ/TW, Section IV (7)
38 Resolution No.27- NQ/TW, Section III (2)
39 Resolution No.27- NQ/TW, Section IV (7)
40 Resolution No.27- NQ/TW, Section I (1.1)
41 Resolution No.27- NQ/TW, Section I (1.1)
42 Resolution No.27- NQ/TW, Section IV (3)
43 Resolution No.27- NQ/TW, Section IV (6)
44 Resolution No.27- NQ/TW, Section IV (7)
45 See Albert, Richard, Constitutional Change without Constitutional Amendment (March 24, 2022). 59 Alberta Law Review 777 (2022), U of Texas Law, Legal Studies Research Paper, Available at SSRN: https://ssrn.com/abstract=4065935 (February 30, 2023).
46 Relating to the issue of constitutional amendments, see Albert, Richard, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (New York, 2019; online edition, Oxford Academic, October 24 2019), https://doi.org/10.1093/oso/9780190640484.001.0001 (February 30, 2023).
47 Regarding constitutional mutation, see Bruno De Witte, *Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation*, 11 EuConst 434 (2015).
48 This taboo refers to Article 4 of the 2023 Constitution of Vietnam.
49 This taboo refers to Article 2 of the 2023 Constitution of Vietnam.
50 Resolution No.27- NQ/TW, Section V (1)
51 Resolution No.27- NQ/TW, Section V (3)
52 Resolution No.27- NQ/TW, Section V (3)
53 See Luís Roberto Barroso, Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies. *The American Journal of Comparative Law*, Volume 67, Issue 1, March 2019, Pages 109–143, https://doi.org/10.1093/ajcl/avz009 (February 30, 2023).
54 Resolution No. 48-NQ/TW dated 24/5/2005 of the Politburo on the strategy of building and perfecting the legal system of Vietnam by 2010, orientation to 2020 (Nghị quyết số 48-NQ/TW ngày 24/5/2005 của Bộ Chính trị về chiến lược xây dựng và hoàn thiện hệ thống pháp luật Việt Nam đến năm 2010, định hướng đến năm 2020), https://tulieuvankien.dangcongsan.vn/he-thong-van-ban/van-ban-cua-dang/nghi-quyet-so-48-nqtw-ngay-2452005-cua-bo-chinh-tri-ve-chien-luoc-xay-dung-va-hoan-thien-he-thong-phap-luat-viet-nam-den-273 (Feb. 30, 2023).
55 Resolution No. 49-NQ/TW dated June 2, 2005 of the Politburo on the judicial reform strategy up to 2020 (Nghị quyết số 49-NQ/TW ngày 02 tháng 06 năm 2005 của Bộ Chính trị về chiến lược cải cách tư pháp đến năm 2020), http://hoiluatgiavn.org.vn/nghi-quyet-so-49-nqtw-ngay-02-thang-06-nam-2005-cua-bo-chinh-tri-ve-chien-luoc-cai-cach-tu-phap-den-nam-2020-d563.html (Feb. 30, 2023).

its specific and comprehensive content (Resolution No.27 for the first time officially defines the characteristics, objectives, essential requirements, and a system of tasks and comprehensive solutions to build socialist rule-of-law state of Vietnam), it is without a doubt that Resolution No.27 is a significant step forward in consolidating and promoting constitutionalism in Vietnam. Moreover, the Resolution also sets the stage for broader constitutional reforms that have begun in Vietnam since Doi Moi (1986) and have significantly accelerated over the past decade, mainly through the amendment of the 1992 Constitution in 2001 and the adoption of the current Constitution in 2013.

Nevertheless, various challenges exist when implementing the ambitious constitutional reforms required in Resolution No.27, which may lead to this Resolution only achieving half-hearted results when compared to the previous Resolutions No.48 and No.49.[56] Among the challenges to the constitutional reforms, the two most significant are the internal opposition to the Vietnamese political system and the weak participation of local people.

As a one-party regime, the Vietnamese political system (including the CPV, the State, and influential socio-political organizations, led by the CPV) is formally a unified block and has maintained that unity for decades. However, in recent years, this system has become looser and looser, mainly due to the corruption of its constituents. Each element of the political system of Vietnam (meaning the CPV's departments, state agencies, and socio-political organizations) is essentially an interest group (*nhóm lợi ích)* which has its own group interests (*lợi ích nhóm*). Therefore, they tend to protect and expand their group interests no matter if they're contradictory to the common interests of the system. This situation is getting more and more serious, despite the constant warnings of the CPV's General Secretary Nguyen Phu Trong.[57]

The situation has recently made institutional reforms in Vietnam increasingly less feasible due to the emergence of this new challenge. In the past, the traditional obstacles were mainly from dogmatists and conservatives in the political system. However, in addition to traditional ones, new obstacles recently emerged from these "interest groups." A specific example demonstrating this challenge is that many reforms that were required in the CPV Politburo's Resolutions No.49, which altered some functions of the local Court, Procuracy, and Investigation, failed to implement due to a lack of cooperation from these agencies.

The constitutional reforms envisaged in Resolution No.27 require significant alternating of the organization and operation of almost all state agencies and influential political-social organizations by tightening the control of their power and forcing them to give up unjustified group interests. Consequently, the reforms will inevitably encounter implicit, solid, and resilient obstacles from those institutional interest groups. As such, whether the CPV can successfully implement the ambitious reforms they set out in Resolution No.27 is still a big question, and this is because the Party still needs to provide practical strategies or solutions to crush the implicit opposition of interest groups in the reform process.

Another obstacle to implementing constitutional reforms envisaged in Resolution No.27 is the need for more local people's attention, monitoring, and supervision. This obstacle is an experience gained from failing to completely implement some essential, previous resolutions of the CPV, especially Resolutions No.48 and No.49.

The above bad practice can be repeated with Resolution No.27. Even if constitutional reforms promise to improve people's lives, few local people will pay attention to, monitor, and supervise the implementation of Resolution No.27 due to a few reasons. First, these reforms are politically and legally complicated, which is beyond the understanding of the majority of the local people. Second, most Vietnamese people still prioritize improving living standards after decades of difficult economic conditions, and only a small percentage are interested in the political-legal issues of the country. Third, the ideologically monistic political system and the state's strict control of society make monitoring, especially voicing criticism of weaknesses in the implementation of Resolution No.27, risky, and discourage even local people dedicated to its reforms.

V. FURTHER READING

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56 Regarding the failure in the implementation of Resolution No.49, see Vo Khanh Vinh, *The current state of judicial reform in our country in the past time and the issues raised* (Thực trạng cải cách tư pháp ở nước ta thời gian qua và những vấn đề đặt ra), Vietnam Lawyer's Journal (Tạp chí Luật sư Việt Nam), 25/09/2021, https://lsvn.vn/thuc-trang-cai-cach-tu-phap-o-nuoc-ta-thoi-gian-qua-va-nhung-van-de-dat-ra1632586508.html (February 30, 2023).

57 See *General Secretary: Strongly fighting against individualism, group interests (*Tổng Bí thư: Đấu tranh mạnh mẽ chống chủ nghĩa cá nhân, lợi ích nhóm), VOV, 14/10/2016, https://vov.vn/chinh-tri/dang/tong-bi-thu-dau-tranh-manh-me-chong-chu-nghia-ca-nhan-loi-ich-nhom-559860.vov. See also: *General Secretary: Fighting corruption is difficult because the group interests are intertwined* (Tổng bí thư: Chống tham nhũng khó vì lợi ích nhóm chằng chịt, lắt léo), Thanhnien, 22/01/2019, https://thanhnien.vn/tong-bi-thu-chong-tham-nhung-kho-vi-loi-ich-nhom-chang-chit-lat-leo-185822077.htm; *Identifying "group interests", "interest groups" and measures to prevent and combat (*Nhận diện "lợi ích nhóm", "nhóm lợi ích" và biện pháp phòng, chống), the People Army Newspaper (Báo Quân Đội Nhân dân),02/7/2020, https://www.qdnd.vn/phong-chong-tu-dien-bien-tu-chuyen-hoa/nhan-dien-loi-ich-nhom-nhom-loi-ich-va-bien-phap-phong-chong-624853; *Resolutely fight against group interests* (Kiên quyết đấu tranh chống lợi ích nhóm), Propaganda Journal (Tạp chí Tuyên giáo), 3/2/2023, https://tuyengiao.vn/nghien-cuu/ly-luan/kien-quyet-dau-tranh-chong-loi-ich-nhom-143144 (February 30, 2023)

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Summaries

The Most Important Developments in Constitutional Reform by Jurisdiction

Afghanistan

In 2022, most of the previous government's bureaucracy and ministries were incorporated into the Taliban Regime. Moreover, the Islamic law and justice system under the Taliban saw a massive expansion, with the Supreme Court assuming a central (and illiberally transformative) role. However, the situation of human rights (particularly women's rights) remains bleak.

Albania

In 2022, there was a formal change of the constitution of Albania which did not bring any significant developments. Nevertheless, the tendency of constitutional jurisprudence to informally modify the Constitution through interpretation regarding the separation and balancing of powers could be observed.

Angola

Law 18/21 (Angolan Constitutional Reform), issued 11 years after the promulgation of the 2010 Constitution of the Republic of Angola, aims to strengthen Local Government and the process of building the Angola Democratic State of Rights, institutionalizing Local Authorities, and decentralizing the political power.

Argentina

In 2022, the ruling of the Supreme Court of Justice of the Nation declared the unconstitutionality of the law that regulated the Judicial Council, bringing a new interpretation of section 114 of the Constitution and creating intense political controversy.

Australia

The most important development in constitutional reform in Australia in 2022 was the announcement by a newly elected Australian government that it would take steps to amend the nation's Constitution to establish an Aboriginal and Torres Strait Islander Voice. The government will put the proposal to a referendum in 2023.

Austria

The most significant constitutional amendment of 2022 concerned the transparency of party financing and brought an extension of the Austrian Court of Audit's competencies as well as the strengthening of its independence. Meanwhile, other major proposed amendments like the Freedom of Information Act are still waiting to be realized.

Bangladesh

The promulgation of the Chief Election Commissioner and the Other Election Commissioners Appointment Act of 2022 remains the most important development in constitutional reform within the country, as it ushered in a new era in the election commission's functions for the first time after 50 years of the enactment of the Constitution.

Barbados

The most important development in constitutional reform within Barbados in 2021 was its transition to a republic. The country removed the Queen of Britain as the non-executive head of state, who was represented locally by a Barbadian as Governor-General, and now has a native Barbadian as head of state. This change swapped the non-executive Governor-General to a non-executive President.

Belgium

In 2022, the federal government communicated a *provisional* list of revisable constitutional provisions to Parliament. The proposed constitutional amendments relate to the recurrent issue of long government formation, the condemnation of Belgium by the ECtHR regarding the settlement of disputes on the credentials of parliamentary representatives, and the constitutional amendment procedure itself.

Bosnia and Herzegovina

In 2022, The BiH Parliamentary Assembly rejected six amendments, while on the eve of the 2022 general elections, The Office of the High Representative imposed 21 amendments to The Constitution of the Federation of BiH (one of the two federal units) to improve the functionality and prevent institutional crises. The second federal unit, Republika Srpska, continued with a secret drafting process of a new Constitution.

Botswana

The completion of public consultations and the presentation of the Commission's report marks a milestone in this maiden comprehensive constitutional review exercise in Botswana. Similarly, the determination of LGBT rights by the Court of Appeal is a milestone in Botswana's constitutional history.

Brazil

In 2022, Brazil went through a frenetic pace of constitutional change. Fourteen constitutional amendments passed in Congress. Brazil faced the most challenging presidential elections ever for its democracy, as President Bolsonaro threw the electoral process off balance through constitutional change. But he ended up losing. What this means for Brazil's constitutionalism is yet to be seen.

Burundi

Burundians are looking forward to witnessing significant changes, including a rethought model ofdecentralization, transfer of competencies to the new provinces and municipalities, and how thiswill impact the electoral code as well as the access to public services and resources as a consequence of the administrative restructuring underway.

Canada

While in Canada constitutional change generally occurs in informal, indirect, and incremental ways, 2022 was a constitutionally effervescent year with five formal amendments to the Constitution, including an unprecedented number of province-initiated unilateral amendments. Some of these amendments have constitutional scholars divided on their validity.

Cape Verde

In 2022, the formal procedure of constitutional reform was not used in Cabo Verde, the Constitutional Court did not recognize any constitutional convention or the incorporation of previously non-included rights in the Bill of Rights; and no clear informal changes to the constitutional norms were identified.

Chile

The most crucial development in constitutional reform in the Chilean jurisdiction in 2022 was lowering the super majoritarian threshold that officially started the interregnum stage of the current constitutional text and the passing of the constitutional amendments that enabled the second constitution-making process in three years.

China

The year 2022 marks the 40th anniversary of China's 1982 Constitution. In 2022 China completed the institutional system for the new fourth governmental branch. An efficient court system plus a stronger NPCSC have manifested the institutional preparedness for Chinese constitutionalism in the 2020s and after.

Colombia

Although sixty-six constitutional reforms were proposed in 2022, none were adopted. Only six are still pending in Congress and will be deliberated in 2023. Among these are projects regarding political reform, the creation of an Agrarian and Rural Jurisdiction, and the adult use of cannabis.

Croatia

The constitutional amendments tabled in 2022 aim at reforming preconditions for a valid referendum and the role of the Constitutional Court in reviewing the constitutionality of referendums. There has also been deliberation about the introduction of the right to abortion into the constitutional text.

Cuba

Cuba encountered multiple crises in 2022. Rather than safeguarding fundamental rights, the government emphasized laws that supported repression. The legislative sanctioned both the Penal Code, expanding limitations on human rights, as well as the Family Code, which acknowledged same-sex marriage under a selective implementation of laws pertaining to fundamental rights.

Cyprus

The House of Representatives amended the Constitution on two separate occasions. First, it approved the amendment to the Constitution to allow the use of the English language in the newly established Admiralty Court, and second, it implemented the restructuring of the judicial system.

Czech Republic

No successful constitutional reforms were passed in the Czech Republic in 2022, with a few proposals pending or rejected. A government proposal on military operations abroad is likely to pass in 2023, while bills not supported by the government will likely fail.

Democratic Republic of the Congo

No formal constitutional reform occurred in 2022, but there were several informal changes to the Constitution by court's decisions. The most important constitutional reform is the proposal of a draft law to amend conditions to run for presidential elections, modifying the scope of Article 72(1) of the Constitution.

Dominican Republic

The Dominican Republic is immersed in constitutional reform, with the purpose of continuing to strengthen the institutions of the democratic and justice system, specifically the High Courts, the Judiciary, and the Public ministry by using the Economic and Social Council (CES) as the center of dialogue for the reform.

Ecuador

During 2022 the Ecuadorian constitution was free of reforms. Nonetheless, the president introduced an extensive reform package that failed to pass the popular vote through a referendum. Other reforms that received a favorable opinion from the Constitutional Court are scheduled to be debated by the legislature in 2023.

Egypt

The most important development in constitutional reform in Egypt in 2022 is that legislative competence cannot be delegated according to the Constitution to anyone other than Parliament, even if the delegate is Parliament itself. Also, none of the private law persons can issue executive regulations for laws.

Eswatini

In 2022, Eswatini's socio-political crisis continued with escalating government crackdowns. Despite acknowledging the need for a national dialogue on democratic reforms, no progress was made. The judiciary, however, offered transformative interpretations of freedom of expression and press but undermined freedom of association and the rule of law, evidenced by court rulings.

Finland

No formal constitutional amendments were either adopted or pending in 2022. However, both the Covid-19 pandemic and Russia's aggression against Ukraine brought about a discussion on the need to improve domestic legislation for the purpose of better handling new and unprecedented threats. Furthermore, the era of Finnish military non-alignment ended as Finland decided to seek membership in NATO.

France

2022 was a presidential election year, and since Emmanuel Macron did not get the parliamentary majority he hoped for, constitutional reforms were halted. However, a new constitutional bill was introduced following SCOTUS' *Dobbs* decision in order to protect the right to abortion in the Constitution.

Gambia

President Barrow's 2022 re-election promised a new Gambian constitution. However, there are concerns about the government's ability to deliver given the challenging political climate, economic struggles, security risks, and slow pace of reforms. The country's democratic fragility underscores the importance of ongoing efforts to achieve effective reforms, constitutional and otherwise.

Georgia

In 2022 in Georgia, there was no new substantial amendment to the Constitution. However, the bill initiated in the Parliament repeated word for word some parts of the 2021 amendment bill. The reader will learn the main reasons for that and the current status of both bills in this report.

Germany

In light of Russia's attack on Ukraine, the Federal Government decided to invest in the Armed Forces. To this end, Article 87a of the Basic Law (*Grundgesetz*) was amended. Its Section 1a gives the Federation the power to set up a special trust with its credit authorization for a single amount of up to 100 billion euros.

Greece

The discussion over the secrecy of communications as guaranteed in Article 19 of the Constitution was the main concern of the Greek public sphere in 2022. The National Intelligence Service was accused of intercepting communications of politicians and other public figures in Greece, and as a result, the law implementing the aforementioned constitutional provision has changed.

Guatemala

No formal constitutional amendments were ratified within Guatemala in 2022. However, it is noteworthy that two advisory opinions, issued by the Constitutional Court in January 2022, might have resulted in some modifications to the oversight functions of Congress.

Honduras

The first development in constitutional reform in 2022 in Honduras is the derogation of the Special Zones for Employment and Economic Development. This reform is yet to be enforceable as it must be ratified. The other development that remains a proposal in Congress is the creation of the Anti-Corruption International Commission in the Constitution.

Hong Kong

On December 30th, of 2022, for the first time, and upon request from the Chief Executive of Hong Kong, the Standing Committee of the National People's Congress issued an interpretation regarding Articles 14 and 17 of the Hong Kong National Security Law.

Hungary

In 2022, the Hungarian government continued to function under the state of danger, the special legal order extended by an amendment to the Fundamental Law. Furthermore, another amendment changed the election calendar by requiring local and EP elections to be organized on the same date.

India–1

The Supreme Court reaffirmed its power to review legislative processes in cases of both substantive and procedural illegality. It extended this power to include processes that potentially challenge the democratic framework enshrined in the Constitution, which may possibly be considered in tension with Articles 122 and 212 of the Constitution.

India–2

These included the conferment of a constitutional right to reproductive autonomy, a split decision on an order banning headscarves from state-run educational institutions, and a declaration that an extension of affirmative action to economically weaker sections of the society does not violate the basic structure doctrine.

Indonesia

The year 2022 is a continuation of efforts to amend the Constitution. At least two main agendas signify the following echoed suggestions. First is the reinstatement of the General Guidelines for State Policy. Second is the addition of the presidential term of office.

Ireland

Major changes arose in Ireland's electoral system in 2022 when the nation's parliament granted constitutional control over the process to a new commission (*Coimisiún Toghcháin*), which took on the responsibility for the nation's referendum process amid a pending question posed to the people about housing.

Israel

An amendment to Basic Law: The Government which changed the conditions for being appointed to a ministerial position so that only a person who served an actual prison sentence could not serve as a minister. This change was meant to allow MK Aryeh Deri to be appointed as a minister in the government that was established in 2022.

Italy

In 2022, two constitutional reforms were passed. One establishes the principle of protection of the environment, biodiversity, and ecosystems, also in the interest of future generations, and makes animal protection a state responsibility. The second recognizes the principle of insularity and requires the state to promote measures to address disadvantages.

Jamaica

In January 2022, the Ministry of Legal and Constitutional Affairs was established and given responsibility for constitutional reform. The Ministry formed a Constitutional Reform Committee, and that committee has started to meet to provide oversight and guidance on the process of reform and help build national consensus.

Japan

On July 8th, 2022, former Prime Minister Shinzo Abe, celebrated for vigorously promoting constitutional revision, was shot to death. Without the biggest facilitator, the path to formal constitutional revision seemed far off. Constitutional *revision* has not been achieved again this year. But there are important developments in de facto constitutional *reforms*.

Jordan

Jordan's Parliament bolstered the King's power with constitutional amendments, enabling judicial appointments, dissolving Parliament, and assuming military control. Critics say this threatens democracy, while supporters believe it promotes stability. The new National Defense Council advises on security and economic growth amid Jordan's challenges.

Kenya

The first important development in constitutional reform in Kenya in 2022 is the Supreme Court's interpretation of the word "sex" under Article 27(4) of the Constitution to mean sexual orientation of any gender, whether heterosexual, lesbian, gay, intersex, or otherwise. The second development is that the President petitioned Parliament with proposals to amend the Constitution.

Lesotho

In August of 2022, a period before the National elections process, His Majesty the King declared a state of emergency and recalled the then-dissolved Parliament of Lesotho to pass the *11th Amendment to the Constitution Bill 2022* and the *National Assembly Electoral (Amendment) Bill 2022*.

Lithuania

In 2022, three constitutional amendments were introduced directly to the text. First, the age of a parliamentary candidate was lowered from 25 to 21. Second, direct mayoral elections were allowed implementing the previous constitutional ruling. Third, the ban on impeached people running for office that requires an oath was lifted.

Luxembourg

In December 2022, the Luxembourgish parliament adopted numerous constitutional amendments, many of which comprehensively and fundamentally overhauled the Constitution to rebalance legislative, executive, and judiciary powers. This reform enhanced democracy, the rule of law, and human rights. The "amended" Constitution will enter into force on July 1st of 2023.

Malawi

All of Malawi's 2022 proposed constitutional reforms relate to elections. Although all the reforms are relatively minor, the proposed reform relating to the reconstruction of the composition of the Electoral Commission is, arguably, the most significant.

Malta

In 2022 the Maltese Parliament passed a single minor constitutional amendment on the reorganization of the Civil Protection Department. The Government presented further reform bills on the freedom of expression, freedom of the media, and fundamental rights related to procreation. Many other issues of constitutional concern remain to be addressed.

Mexico

The year 2022 was characterized by an amendment that marked a crucial milestone in the long-standing constitutional dismemberment of the civic-military relationship, and two failed constitutional amendments endorsed by President Lopez Obrador, which aimed to guarantee the State's predominance in electricity production and transform the structure of the electoral authority.

Mozambique

In 2022, without any reform to the constitutional text, the most important constitutional development was the controversial decision of the Constitutional Council (Ac. 03/CC/22), refusing to declare the unconstitutionality of the law regarding the time limits for preventive detention, which, according to complaints by lawyers and civil organizations, allows for the unjustified extension of preventive detention.

Myanmar

Myanmar's constitutional discourse is fractured, with the February 2021 military coup d'état resulting in a nationwide conflict between the military junta and opposing pro-democracy forces. The conflict instigated a constitutional divide, with the military committed to a 2008 Constitution that enshrines its dominance and the pro-democracy resistance working to draft a new constitution.

Namibia

This report unravels the constitutional reforms that unfolded in Namibia in 2022 amidst pressing social-political challenges. Those reforms include the Repeal of Obsolete Laws Act, the Access to Information Act, and amended gender rights laws. The report outlines issues arising from the Supreme Court judgments and laws enacted by Parliament.

Netherlands

The Netherlands introduced a General Provision at the start of its Constitution, reading "The Constitution guarantees fundamental rights and democracy based on the rule of law." This General Provision is unlikely to have significant practical consequences but holds an important symbolic function.

New Zealand

The most important development of 2022 in New Zealand was an aborted attempt by the Government to legislatively entrench public ownership requirements of water infrastructure and service providers. The attempted entrenchment proceeded by way of a last-minute amendment in the legislative process seeking to lock in a politically partisan policy preference.

Nigeria

Though neither the Constitution nor judicial interpretation has assigned any role to State Governors, the lack of autonomy of State Assemblies from executive control ensures the Governors' informal hegemony over the legislature. The Governor's influence and the President's gatekeeping role have greatly reduced the number of proposed reforms.

Pakistan

In a significant constitutional crisis, a no-confidence motion against the Prime Minister, Imran Khan, was initiated in 2022. It was averted by the timely intervention of the Supreme Court restoring the National Assembly and declaring the government's decision to dissolve the assembly against the Constitution, yet removing the Prime Minister subsequently.

Palestine

The situation in Palestine has been declining since 2007, mainly due to the continuous imposition of a state of emergency since the parliament's suspension in 2007 and its dissolution by the Supreme Constitutional Court in December 2018. President Abbas has been exploiting the state of emergency to maintain his power. This exploitation was made evident by two recent significant events: the assassination of activist Nizar Banat and the delay of parliamentary and presidential elections.

Portugal

In 2021, the pandemic crisis, along with the declaration of a state of emergency and the dissolution of the Assembly of the Republic, blocked any chance of constitutional revision. It was only in October 2022 that a new procedure was initiated, with eight projects currently under discussion.

Republic of the Congo

The Republic of Congo (or 'Congo-Brazzaville') implemented several constitutional reforms in 2022 in the areas of anti-corruption laws, the procedure for amending the Constitution, the COVID-19-related state of emergency, gender-based violence, and the Freedom of Communication Council. Looking forward, the report also pays particular attention to the State Reform Plan.

Romania

One Constitution revision proposal is pending, aiming to amend the right to be elected. A citizen initiative concerning the candidate's appointment for the office of Prime Minister was negatively endorsed by the Legislative Council. 2023 announces a year of constitutional debates against the background of the 100th anniversary of adopting the Constitution of unified Romania.

San Marino

In 2022, despite a consensus reached in 2020 on the necessity for the Sammarinese legal system to undergo a significant constitutional reform, amendments to the Declaration of Citizens' Rights and Founding Principles of the Sammarinese Legal System or constitutional laws have neither been proposed nor passed.

Sierra Leone

Constitutional reform in Sierra Leone mainly entailed revisiting the 2017 constitution reform recommendation that had been proposed by Justice Cowan Committee. A White Paper was unveiled by President Julius Maada Bio, accepting some of the recommendations while rejecting others.

Slovak Republic

2022 was another uneventful year in terms of formal constitutional change. Yet, Slovakia experienced constitutional progress through litigation that dealt with the constitutionality of certain aspects of a referendum, fiscal responsibility, and the protection of the material core of the Constitution. The year culminated in the no-confidence vote against the Government, indicating turbulent constitutional developments in 2023.

Slovenia

In 2022, the governing coalition submitted a formal proposal to the Parliament to initiate the procedure for amending the Constitution, with the objective of diminishing the influence the legislature currently wields over the composition of the judiciary and therefore rearranging the balance of powers between the three branches of government.

South Africa

The most important developments in Constitutional reform within South Africa included both amending Section 6 of the Constitution of the Republic of South Africa to elevate South African sign language to an official language and amending Chapter 9 of the Constitution to include a Cyber Commission as an institution strengthening constitutional democracy.

Sri Lanka

In 2022, the 21st Amendment to the Sri Lankan Constitution reintroduced the Constitutional Council. The Council, consisting of seven Parliamentarians and three independent members, recommends or approves appointments to key public offices. While this amendment restricts presidential powers, it falls short of the people's demands for radical reform of the executive presidency.

Sweden

During 2022, there were several constitutional amendments with two standing out as the most controversial. The first is the possibility to limit the freedom of association in regards to terrorist organizations. The second is the criminalization of foreign espionage in regards to the media.

Switzerland

Switzerland adopted one amendment to the Federal Constitution. It mandates that the Confederation and the cantons promote the health of children and adolescents and prohibit all advertising for tobacco products that may reach them. Furthermore, the ECtHR ruling on widowers' pension has shown how Switzerland relies on an international body and on the Convention to resolve a counter-majoritarian concern and to indirectly enforce its own constitution.

Taiwan

In November 2022, Taiwan held its first-ever constitutional referendum, which aimed to lower the voting age from 20 to 18. Despite bipartisan and public support, the long-overdue constitutional reform of the voting age failed to pass the ratification threshold.

Thailand

In 2022, many attempts at constitutional reform failed. The most controversial attempt was the unsuccessful effort to 'unlock the local administration' by Thanathorn Juangroongruangkit. However, the attempt at least succeeded in stirring attention toward the current highly centralized administration among broader segments of Thai society.

Tunisia

In 2022, a new Constitution was promulgated in Tunisia. Undoing the revolution's achievements, the constitutional reform implemented a presidential regime and weakened human rights protection.

Turkey

Current efforts to dissolve the second-largest opposition party in Turkey's parliament ahead of parliamentary and presidential elections are the latest in a deeply problematic practice in Turkey of forcing the closure of political parties. The author of this section has recently become the target of a campaign of judicial harassment.

Uganda

The year 2022 did not see many major constitutional developments since the country was recovering from the COVID-19 pandemic and the elections that had just returned President Yoweri Kaguta Museveni and NRM political party into power. This was after the amendment of Article 102 of the 1995 Constitution regarding presidential age limits.

Ukraine

Due to the Russian invasion in 2022, the Ukrainian government introduced martial law, which has inevitably restricted the constitutional process. Still, due to the continuation of the Constitutional Court's work, there were some elements of the constitutional process in 2022 within Ukraine. Also, as Ukraine received EU candidate status, new reforms started, one of which addressed the Constitutional Court members' selection.

United Kingdom

2022 saw two key reform proposals. The first from the government is to repeal the Human Rights Act 1998 and replace it with a Bill of Rights. The second proposal is the report by the Labour Party's Commission on the United Kingdom's Future. Should Labour win the next general election, this highlights the prospect of significant constitutional reform.

United States of America

In June 2022, the United States Supreme Court held in *Dobbs v. Jackson Women's Health Organization* that, "the Constitution does not confer a right to an abortion." This holding reversed a nearly fifty-year precedent and opens the door to potential additional reform of constitutionally protected individual rights jurisprudence.

Uruguay

The most important advance of the constitutional reform in Uruguay was the consideration of bills related to nationality. This would informally modify the Constitution, by not using the procedures of Article 331, but the procedures for the elaboration of the ordinary law and of the interpretative law of the Constitution.

Vietnam

Resolution 27-NQ/TW on the socialist rule-of-law state adopted by the CPV in 2022 is a significant step forward to constitutionalism, promising broader constitutional reforms in Vietnam. Nevertheless, various challenges exist to these constitutional reforms relating to the internal opposition in the Vietnamese political system and the participation of local people.