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I·CONnect-Clough Center

2018 Global Review of Constitutional Law

Richard Albert, David Landau,
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Editors

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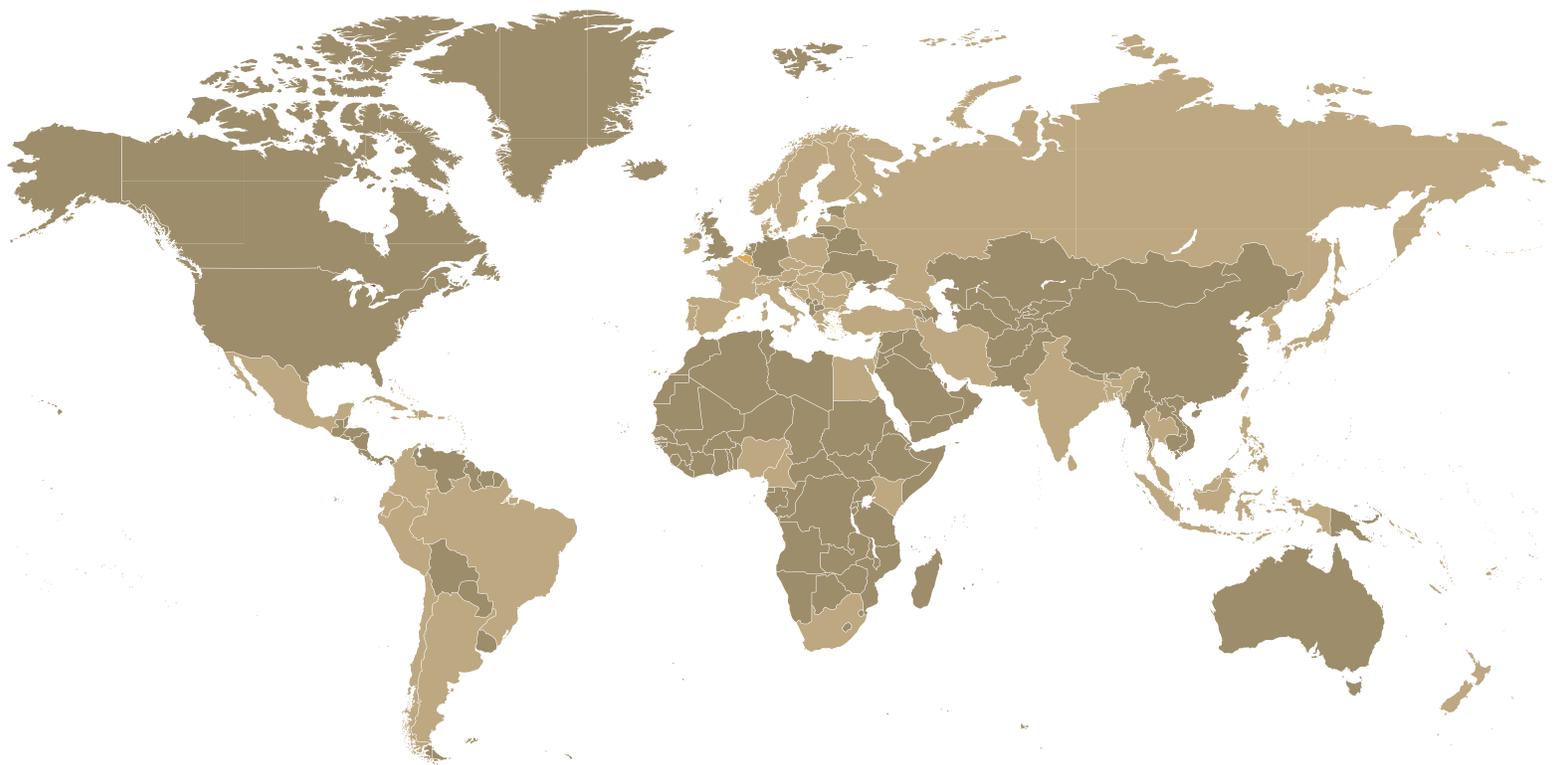
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COUNTRY REPORTS





Singapore

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I. INTRODUCTION

The year 2018 saw courts further grappling with difficult issues concerning constitutional interpretation. Constitutional changes to the elected presidency and the subsequent elections held under the terms of those changes continued to reverberate in a case that challenged the government’s refusal to call for a by-election to replace the parliamentarian who became the current president. Furthermore, there were several important initiatives to change the law with potentially significant implications on constitutional rights as well as the separation and balance of powers in Singapore. Nonetheless, one interesting phenomenon to note is the increasing reliance on public consultation as part of the law-making process. This is evidenced by the public consultation on the amendments to the Films Act as well as the Select Committee on Deliberate Online Falsehoods. This follows a trend in the past years, particularly with the invitation to the public to submit representatives to the Constitutional Commission in 2016.¹ Presumably, such public consultations could serve not only as a ‘crowd-sourcing’ of ideas but also to play a legitimating role in the final legislative product.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

There were three major legislative developments in 2018 impacting constitutional law—amendments to the Films Act, changes to the Criminal Law (Temporary Provisions) Act (CLTPA), and a proposal to introduce legislation regulating ‘fake news’. There were concerns that these changes would broaden executive powers, which could adversely impact freedom of speech and expression as well as restrict access to justice.

The amendments to the Films Act were introduced and passed in Parliament in 2018 following consultation with industry stakeholders and the public. The entire consultation process took more than a year. The Films Act provides a regulatory framework for the distribution, exhibition and possession of films in Singapore. It is a form of prior restraint as, under the Act, distributors and exhibitors of films are required to obtain a licence from the Info-communications Media Development Authority (IMDA) and all films have to be classified by a Board of Film Censors. The use of a licencing framework to regulate speech is not uncommon in Singapore. Such regulation is often justified as seeking to strike a balance between freedom of speech and broader public interests such as the maintenance of racial and reli-

¹ Jaclyn L Neo, Jack T Lee, Ho Jiayun & Makoto Hong, ‘Singapore: The State of Liberal Democracy’ in Richard Albert, Simon Drugda, Pietro Faraguna & David Landau (eds), *I-CONNECT-Clough Center: 2017 Global Review of Constitutional Law* (I-CONNECT 2018).

gious harmony, national security and public morality as well as the protection of the young and vulnerable.²

The current regime has been criticized for restricting speech, particularly political speech. Under the Act, ‘party political films’ are absolutely banned. A party political film is defined fairly broadly to refer to ‘an advertisement made by or on behalf of any political party in Singapore or any body whose objects relate wholly or mainly to politics in Singapore, or any branch of such party or body’ or ‘which is made by any person and directed towards any political end in Singapore’. During a parliamentary debate on the proposed changes to the Films Act, the government defended the continuing ban on the basis that such films ‘seek to sensationalise or distort serious issues to evoke emotional rather than logical debate based on facts’.³

There were important changes and clarifications for free speech protection. For instance, in the revised section 21 of the Films Act, it remains an offence to distribute and publicly exhibit unclassified films, but it is no longer an offence to merely *possess* unclassified films. Furthermore, the IMDA clarified that the section does not cover *private* viewings with family members and friends, though the question of whether a viewing is private or public is subject to a certain degree of judgment. Another important clarification is that, in response to the criticism that the scope of the Films Act may even cover the sharing of ‘home’ videos, the IMDA stated that ‘the online distribution of content over the Internet where there is no

physical copy of the content does not fall within the ambit of the Films Act.’⁴

The second major legislative development is the enactment of the Criminal Law (Temporary Provisions) (Amendment) Act 2018 (No 12 of 2018), which ‘clarified’ the scope of the government’s powers to detain without trial and the scope of judicial review by the courts. The Criminal Law (Temporary Provisions) Act⁵ (CLTPA) empowers the Minister for Home Affairs to issue a detention order of up to 12 months if he is satisfied that the person ‘has been associated with activities of a criminal nature’, and where ‘it is necessary that the person be detained in the interests of public safety, peace and good order’ without a criminal trial having been held. While termed ‘temporary’, the law has been in force since pre-independence days, as it has been legislatively renewed every five years with little change. On 6 February 2018, however, Parliament made two important amendments to the law. First, the Act now spells out in a new Fourth Schedule the activities that are regarded as ‘activities of a criminal nature’. This amendment appears to have been prompted by the Court of Appeal’s judgment in *Tan Seet Eng v Attorney-General*,⁶ which we discussed in last year’s report.⁷ In this case, the Court had struck down detention orders on the basis that they fell outside the scope of the CLTPA. Following the amendment, the CLTPA now sets out that ‘[p]articipating in, or facilitating, any organised crime activity as defined in section 48(1) of the Organised Crime Act 2015 (Act 26 of 2015)’ falls within the scope of the Act.

This includes ‘any activity [...] carried out by a person in Singapore that amounts to a serious offence and—[...] is carried out in furtherance of the illegal purpose of a group which the person knows or has reasonable grounds to believe is an organised criminal group’.⁸ The definition of an ‘organised criminal group’ in section 2(1) of the Organised Crime Act includes a group that seeks to obtain a financial or other material benefit from the commission of any act outside Singapore that, if it occurred in Singapore, would constitute a serious offence as defined under the Act.

Secondly, the CLTPA amendments inserted a finality clause to the Act. A new section 30(2) reads: ‘Every decision of the Minister on a matter in subsection (1) is final’. The Law Minister explained that this provision seeks to clarify that the Court is not to scrutinize the evidential basis for detention under the CLTPA. However, he emphasized that the finality clause is not intended to oust judicial review of detentions on the well-established grounds of illegality, irrationality and procedural impropriety.⁹ This clarification is important as there is an argument that ouster of judicial review would violate the judicial power-vesting clause in the Constitution of the Republic of Singapore (‘the Constitution’).¹⁰ The substantive provisions of the amendment Act came into force on 1 January 2019.

The third major development is the convening of a Select Committee on Deliberate Online Falsehoods, which invited propos-

² Ministry of Communications and Information/Info-communications Media Development Authority, ‘Closing Note to Public Consultation on Proposed Amendments to the Films Act’ (IMDA, 20 February 2018) <www.imda.gov.sg/regulations-licensing-and-consultations/consultations/consultation-papers/2017/public-consultation-on-proposed-amendments-to-the-films-act> accessed 15 February 2019.

^{3,4} Yuen Sin, ‘Ban on party political films should stay: Chee Hong Tat’, *The Straits Times* (Singapore, 22 March 2018) <www.straitstimes.com/politics/ban-on-party-political-films-should-stay-chee-hong-tat> accessed 15 February 2019.

⁵ Cap 67, 2000 Rev Ed (CLTPA).

⁶ [2016] 1 SLR 779.

⁷ See Jaclyn L Neo, Jack T Lee, Ho Jiayun & Makoto Hong, ‘Singapore: Developments in Singaporean Constitutional Law’, in Richard Albert, Simon Drugda, Pietro Faraguna & David Landau (eds), *I-CONNECT-Clough Center: 2016 Global Review of Constitutional Law* (I-CONNECT 2017) 175-180.

⁸ CLTPA, s 48(1)(a)(ii).

⁹ K Shanmugam (Minister for Law), speech during the Second Reading of the Criminal Law (Temporary Provisions) (Amendment) Bill, Singapore Parliamentary Debates, Official Report (6 February 2018), vol 94.

¹⁰ Constitution of the Republic of Singapore, Art. 93. See also the discussion of this point by the Court of Appeal in *Per Ah Seng and another v Housing and Development Board and another* [2016] 1 SLR 1020.

als and conducted public hearings over two weeks in March 2018. The Committee hearings became highly contentious at certain points, particularly in exchanges with Facebook executives¹¹ and a contrarian historian-cum-civil society activist.¹² Besides the fireworks, key issues raised included how to define ‘fake news’ or ‘deliberate online falsehoods’, which is the term preferred by the government, and whether retransmission of such deliberate online falsehoods would constitute an offense. There were also important discussions about who has the final say on defining something as a ‘falsehood’ and whether the government is in the best position to determine truth from falsehood. The role of technology in fostering and accelerating the transmission of fake news was also widely debated. Following the public consultation and hearings, the Committee proposed wide-ranging policy measures,¹³ which will have to be drafted into legislation before being debated in Parliament. What is interesting is that these policy measures took into account representations from the public and adopted a holistic rather than a strictly legalistic approach. The Committee emphasized, for instance, the need to nurture an informed public and to encourage fact-checking as well as to promote social cohesion and trust. It further refined its proposals to state that the laws should be targeted at deliberate falsehoods. Fearful of election meddling, the Committee particularly stressed the need to safeguard the integrity of Singapore’s elections, prevent companies from advertising on platforms deemed to be spreading online falsehoods and for the government to ‘swiftly disrupt the spread and influence’ of false information and impose criminal sanctions on those who spread them. These policy measures, if adopted by the government as

law, are likely to have constitutional implications for freedom of speech and expression, though they may be justifiable in light of recent events around the world.

III. CONSTITUTIONAL CASES

Wong Souk Yee v Attorney-General: Group Representation Constituencies

The case of *Wong Souk Yee v Attorney-General* raises important interpretive issues, particularly in the relationship between the constitutional text and a later statutory text. In particular, it raises the issue of whether it is appropriate to ‘update’ the Constitution to take into account more specific text contained in a more recently enacted statute.¹⁴ When Singapore’s current President, Madam Halimah Yacob, resigned her seat in Parliament to contest the 2017 presidential election, which she won, a question was raised as to whether it was necessary for the government to call a by-election to fill her seat. Madam Halimah was a Member of Parliament representing a Group Representation Constituency (GRC) together with three other candidates. The applicant, who was a voter resident in Madam Halimah’s GRC, applied to the High Court for mandatory orders that the remaining MPs in that GRC vacate their seats and that the Prime Minister advise the President to call a by-election for the whole GRC. This case of *Wong Souk Yee v Attorney-General*¹⁵ turns on the interpretation of Article 49(1) of the Constitution and its application to the GRC system (as opposed to the single-member constituency). Article 49(1) of the Constitution provides that whenever the seat of an elected MP becomes vacant for any reason other than a dissolution of Parliament, the vacancy must be

filled by election ‘in the manner provided by or under any law relating to Parliamentary elections for the time being in force’, namely the Parliamentary Elections Act¹⁶ (PEA). The PEA, on the other hand, states that all elections (including by-elections) in a GRC are to be held on the basis of the number of candidates designated for that GRC by the President. Further, section 24(2A) of the PEA requires all the members of that GRC to have vacated their seats in Parliament before a writ may be issued for an election to fill any vacancy in it. The application of Article 49(1) to GRCs was unclear because the GRC scheme, which was introduced by Article 39A of the Constitution, did not exist when Article 49(1) was enacted.

At first instance, the High Court held that the applicant’s interpretation was unworkable because there is no basis in law to compel the three remaining MPs to resign. The fact that a seat in a GRC has been vacated is neither a ground to disqualify the remaining MPs in the GRC under Article 45 of the Constitution nor a ground to compel the vacation of their seats under Article 46.¹⁷ Instead, the Court accepted the respondent’s interpretation by applying an *updating construction*. This rule of statutory construction posits that the Court may fill a gap in a statute where an amendment to another statute gives rise to any ambiguity or uncertainty in the interpretation of the first statute. The key requirement is that what is missing must be self-evident within the overall spirit of the legislation, and is needed to give effect to the legislative intent. Applied to the facts, the Court held that references to ‘the seat of a Member’ in Article 49(1) should be interpreted to mean ‘the seats of all the members’ in the case of a GRC so that Article 49(1) reflects the changes introduced by Article 39A. Alterna-

¹¹ See e.g., Siau Ming En, ‘Lively exchange between select committee and tech companies’ (Today Online, 23 March 2018) <www.todayonline.com/singapore/live-exchange-between-select-committee-and-tech-companies> accessed 16 February 2019.

¹² See e.g., Tang See Kit, ‘Select Committee concludes hearings on fake news after 8 sessions marked by tense ex-changes’ (Channel News Asia, 29 March 2018) <www.channelnewsasia.com/news/singapore/select-committee-concludes-hearings-fake-news-tense-exchanges-10086868> accessed 16 February 2019.

¹³ Parliament of Singapore, ‘Report of the Select Committee on Deliberate Online Falsehood’ (20 September 2018) <<https://sprs.parl.gov.sg/selectcommittee/search-Page?from=20-9-2018&to=20-9-2018>> accessed 16 February 2019; see also Faris Mokhtar, ‘Select Committee proposes wide-ranging measures to counter online falsehoods, including new laws and criminal sanctions’ (Today Online, 20 September 2018) <www.todayonline.com/singapore/select-committee-proposes-wide-ranging-measures-counter-online-falsehoods-including-new> accessed 14 February 2019.

¹⁴ See e.g., Rosalind Dixon, ‘Updating Constitutional Rules’ [2009] *The Supreme Court Review* 319.

¹⁵ [2018] SGHC 80.

¹⁶ Cap 218, 2011 Rev Ed.

¹⁷ *Wong Souk Yee* [23]-[26].

tively, a rectifying construction may be applied to correct Parliament's inadvertent omission to amend Article 49(1) by adding language similar to section 24(2A) of the PEA.

The application of the updating construction rule raises further important questions about the hierarchy of norms in Singapore. The Constitution is declared to be the supreme law of the land. It is not an ordinary statute. Therefore, an account needs to be provided as to why an amendment to statute (ordinary law) could 'update' the Constitution (higher/supreme law). Nonetheless, the High Court in *Wong Souk Yee* held that this construction of Article 49(1) furthers its purpose with respect to the GRCs. The Court held that as Article 39A requires elections in a GRC to be held on the basis of a group of candidates as designated by the President, it follows that the legislative purpose is for all elections (including by-elections) to be held on the basis of such number of candidates, and that no by-election needs to be held to fill any vacancy in a GRC unless all the MPs in that GRC have vacated their seats.¹⁸

Two alternative arguments by the applicant that the Court examined are worth noting. The first is that voters have an implied right under the Constitution to be represented by an elected MP until the dissolution of Parliament, and the second is that a by-election must be held because the right to vote is part of the basic structure of the Constitution. On the first alternative argument, the Court took the view that voters in Madam Halimah's GRC have not lost their right to be represented in Parliament. This is because voters in the GRC vote not for individual MPs but for a GRC team, which represents the GRC in Parliament. On the facts, Madam Halimah's GRC has continued to be represented in Parliament by the GRC team, albeit with one fewer parliamentarian. On the second

alternative argument, the Court held that it was unnecessary to decide whether the basic structure doctrine is part of Singapore law because the applicant was not challenging the validity of a constitutional amendment.¹⁹ The appeal on this decision was recently heard by the Court of Appeal, which reserved judgment.

Attorney-General v Wham Kwok Han Jolovan: Freedom of Speech

Another constitutional law case that came up in 2018 implicates the proper relationship between freedom of speech and the public interest protected under the offence of contempt of court. Freedom of speech is protected under Article 14 of the Constitution, which also contains express qualifications, one of which is that Parliament may pass laws providing against contempt of court. Prior to 2016, however, contempt of court was defined in common law. In 2016, Parliament passed the Administration of Justice (Protection) Act (AJPA),²⁰ which came into operation on 1 October 2017. The proper application and interpretation of this new Act came up for consideration in the case of *Attorney-General v Wham Kwok Han Jolovan*.²¹ The respondents were charged under the new Act for the offence of contempt by scandalising the court. Under section 3(1)(a), a person commits a contempt of court if the person intentionally publishes any matter or does any act that 'imputes improper motives to or impugns the integrity, propriety or impartiality of any court' and 'poses a risk that public confidence in the administration of justice would be undermined'.

The respondents challenged the constitutional validity of section 3(1)(a) of the AJPA, with the key issue being whether that section is consistent with Article 14(1)(a) of the Constitution. The respondents argued that if

the 'risk' mentioned in section 3(1)(a)(ii) includes a 'remote or fanciful possibility' that public confidence in the administration of justice would be undermined, then this provision would violate a Singapore citizen's right to freedom of speech and expression under Article 14 of the Constitution and is therefore void. This is because the 'real risk' test at common law represented the balance under Article 14 that the constitutional framers carefully struck between the right to freedom of speech and expression and the protection of public confidence in the administration of justice.²² The Court rejected the constitutional challenge. It held that the new law fell within the limitation set out in the Constitution itself. It was therefore within Parliament's legislative power and the purpose of Article 14 for Parliament to decide how the balance should be struck between this constitutional right and the protection of public confidence in the administration of justice.²³

Nagaenthran a/l K Dharmalingam v Attorney-General: Judicial Power

As briefly mentioned above, Article 93 of the Constitution vests the judicial power of Singapore in the judicial branch. However, when, if at all, can legislation oust the Court's power to review discretionary executive action without violating the Constitution and the principle of separation of powers? This was the key issue before the High Court in *Nagaenthran a/l K Dharmalingam v Attorney-General ('Nagaenthran')*.²⁴ Under the Misuse of Drugs Act (MDA),²⁵ drug trafficking is a capital offense. However, a person charged and convicted of drug trafficking could escape the death penalty if he proves that he is a courier and also obtains a certificate from the Public Prosecutor (PP) stating that he had 'substantively assisted' in disrupting drug trafficking activities. Under

¹⁸ Ibid [47]-[48].

¹⁹ Ibid [54]-[57].

²⁰ No. 19 of 2016²

²¹ [2018] SGHC 222.

²² Ibid [22].

²³ Ibid [24].

²⁴ [2018] SGHC 112.

²⁵ Cap 185, 2008 Rev Ed. See s 33B(2)(b).

section 33B(2) of the MDA, the Court would then have the discretion to consider sentencing the applicant to life imprisonment and caning instead of death. The applicant challenged the PP's decision not to grant him a certificate of substantive assistance. The applicant alleged that the PP had reached his decision: (a) in bad faith; (b) unconstitutionally; (c) without taking into account relevant considerations; (d) without establishing facts precedent to his exercise of jurisdiction; and (e) irrationally.

Notably, section 33B(4) of the MDA ousted the Court's power to review decisions by the PP to issue such certificates except on the grounds of bad faith and malice.²⁶ Earlier cases had established that the PP's determination was reviewable on constitutional grounds as well. However, there was no conclusive determination as to whether the PP's decision was open to challenge on further grounds.²⁷ In *Nagaenthran*, the applicant argued that the ouster clause in section 33B(4) was unconstitutional because judicial power to review the executive's exercise of discretion could not be ousted or curtailed under the Constitution, and in accordance with the principles of separation of powers and the rule of law.²⁸ Further, the applicant argued that even if the ouster clause was valid, it would not protect a decision from review if it was a nullity because it was made on the basis of an error of law.²⁹

The High Court ruled that section 33B(4) of the MDA ousted the Court's jurisdiction to review the PP's decision except on the grounds of bad faith, malice or unconstitu-

tionality, but also that such ouster was constitutional. The vesting of judicial power in the judicial branch by Article 93 of the Constitution did not dictate that all legal disputes should be adjudicated by the judicial branch, but that *most* legal disputes should. Certain decisions that were 'intrinsically incapable of submission to an adjudication' could legitimately be vested in the executive branch.³⁰ The Court's position as a co-equal branch of government meant, in this context, that it was obliged to respect the legislature's vesting of certain decisions in the executive branch.

The controlling principle, according to the High Court, was that judicial review could be ousted for *non-justiciable* matters. Justiciability was to be determined by the subject matter of the decision in question, the need for democratic representation and accountability for that decision and the relative competence of the respective branches to take that decision.³¹ In this case, the PP's discretion whether to issue certificates of substantive assistance was adjudged to be a non-justiciable determination. As the Court of Appeal has previously opined,³² this determination is affected by operational considerations relating to the disruption of drug trafficking activities, which the courts are ill-equipped to examine. Far from being a violation of the separation of powers principle, the Court regarded this allocation of power as an exemplar of the separation of powers, noting that the ouster was only partial.³³

One significant qualification, however, was that an ouster clause did not exclude the

Court's power to review decisions for jurisdictional errors of law. Where a jurisdictional error of law is committed in the course of making a determination, that determination would be considered a nullity, with the effect that the Court's jurisdiction to review on the basis of this error is not ousted. This meant that, in addition to bad faith and unconstitutionality, it was open to the applicant to challenge the PP's determination on the ground of a failure to establish a jurisdictional precedent fact.

This revival of the legal concept of jurisdictional error of law is curious, as it is derived from English administrative law, which has long abandoned the distinction between jurisdictional and non-jurisdictional errors of law.³⁴ Nonetheless, the High Court is not wrong insofar as the Singapore courts have yet to renounce this distinction conclusively. The High Court's decision is currently pending an appeal to the Court of Appeal.

Abdul Kahar bin Othman v Public Prosecutor: Judicial Power

Another case that raised the question of the scope of judicial power and the proper boundary between judicial and executive power was *Abdul Kahar bin Othman v Public Prosecutor*.³⁵ In prior proceedings, the applicant had been sentenced to the mandatory death penalty for drug trafficking and was adjudged to not qualify for the discretionary sentencing regime, which would have allowed the Court to sentence him to life imprisonment and caning instead of the death penalty.³⁶ This decision was affirmed

²⁶ Ibid s 33B(4): 'The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.'

²⁷ *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222, [35] (Court of Appeal).

²⁸ *Nagaenthran* (n 23) [31].

²⁹ *Anisminic Ltd v Foreign Compensation Commission and Another* [1969] 2 AC 147 (House of Lords).

³⁰ *Nagaenthran* (n 23) [85].

³¹ Ibid [89], affirming *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 [98].

³² *Muhammad Ridzuan bin Mohd Ali* (n 26) [66]; *Prabakaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 [52] [78] [80] (Court of Appeal).

³³ *Nagaenthran* (n 23) [97]-[98].

³⁴ See e.g., *In re Racial Communications* [1981] AC 374 (House of Lords); *O'Reilly v Mackman* [1983] UKHL 1; *R v Visitor of the University of Hull, ex p Page* [1993] 1 All ER 97 (House of Lords).

³⁵ [2018] 2 SLR 1394.

³⁶ *Public Prosecutor v Abdul Kahar bin Othman* [2013] SGHC 164; *Public Prosecutor v Abdul Kahar bin Othman* [2013] SGHC 222.

on appeal.³⁷ On further appeal, the applicant sought to argue that the regime breached the constitutional principle of the separation of powers as it prescribed the PP's certification of substantive assistance as a precondition to the Court's discretionary sentencing powers. The Court of Appeal reiterated that this did not amount to an unlawful allocation of powers because the power to pronounce the sentence remained with the Court.³⁸ The PP's determination related only to the operational assessment of substantive assistance and was not premised on the PP's view of the appropriate punishment.³⁹ Further, it was not necessarily an intrusion into judicial power for legislation to enable the executive to make administrative decisions that had an impact on an accused person's sentence.⁴⁰

IV. LOOKING AHEAD

The separation of powers and the need for checks and balances will remain significant in the coming year, particularly in determining the proper boundaries of judicial power. This is especially since two court challenges have been filed against Singapore's colonial-era sodomy laws, specifically section 377A of the Penal Code. In the 2015 judgment of *Lim Meng Suang v PP*,⁴¹ the Court of Appeal had upheld the constitutionality of that provision on the basis that the law did not violate the reasonable classification test applicable to determining whether the Constitution's equal protection clause is violated. The Court of Appeal also further determined that the challenges based on the morality or sociological basis of the law are outside the scope of its judicial function, emphasizing that the courts are not to act as 'mini-legislatures'. This view of the judicial function and the boundaries between judicial power and

legislative power serves to limit the scope of judicial review. It will be more than interesting to see how the courts address these two new challenges to the law.

V. FURTHER READING

1. Benjamin Joshua Ong, 'The Doctrine of Severability in Constitutional Review: A Perspective from Singapore' (2018) *Statute Law Review* 1.
2. Victor Leong Hoi Seng, 'Tan Cheng Bock v AG: Is Constitutional Interpretation As Settled As It Seems?' (January 2018) <<https://lawgazette.com.sg/feature/tan-cheng-bock-v-ag-is-constitutional-interpretation-as-settled-as-it-seems/>>
3. Jaelyn Neo, 'Autonomy, Deference and Control: Judicial Doctrine and Facets of Separation of Powers in Singapore' (2018) *5 Journal of International and Comparative Law* 461.
4. Kevin YL Tan & Ang Peng Hwa, 'Amendments to the Films Act: Problems and Concerns', *Singapore Public Law* (30 December 2017) <<https://singaporepubliclaw.com/2017/12/30/films-act/#more-1202>> accessed 16 February 2019.
5. Po Jen Yap & Benjamin Joshua Ong, 'Judicial Rectification of the Constitution: Can Singapore Courts be "Mini-legislatures"?' (2018) 48 *Hong Kong LJ* 389.

³⁷ *Abdul Kahar bin Othman v Public Prosecutor* [2016] SGCA 11.

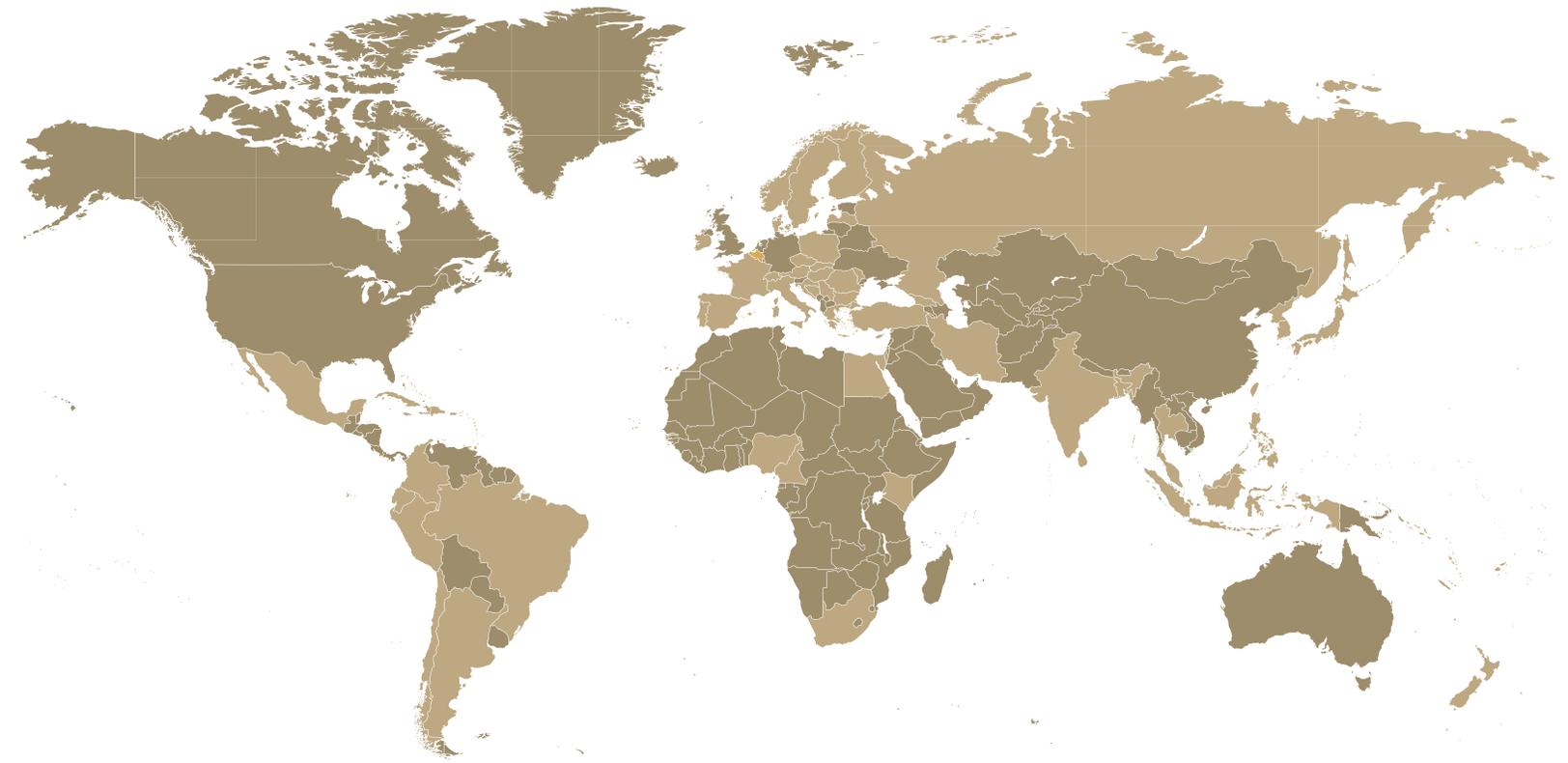
³⁸ *Abdul Kahar* (n 34) [39]; *Prabakaran a/l Srivijayan* (n 31) [65] [72] [76]; see also 'Developments in Singaporean Constitutional Law: 2016 Year-in-Review' (n 7) Section IV(A), IV(B)(2).

³⁹ *Abdul Kahar* (n 34) [40].

⁴⁰ *Ibid* [46]–[47].

⁴¹ [2015] 15LR 26.

SUMMARY



Argentina

In 2017, an ostensibly minor decision by the Supreme Court but with heavy implications regarding the policies of memory and justice concerning human rights violations had invited strong backlash. In 2018, the Court revisited it. Yet the most important constitutional discussion, concerning the legalization of abortion, transpired outside the courts.

Austria

In 2018, the centenary of the Austrian Republic, the new Federal Government launched several constitutional reform projects. The most important of these amends the federal allocation of powers and deregulates further issues. The Constitutional Court's decisions particularly concerned the violation of rights, such as equality or private life.

Bangladesh

Ten years after the last participatory elections, the 11th General Election was held, although its credibility and inclusiveness remain questionable. Two student movements were deplorably suppressed, indicating the poor state of civil rights. The judiciary was largely reticent on civil rights but showed activism against gender-based violence.

Belgium

During the last two months of 2018, Belgian politics were dominated by controversy whether Prime Minister Charles Michel could approve the Global Compact for Safe, Orderly and Regular Migration at the international level. The disagreement resulted first in a minority government and ultimately to the resignation of the government.

Bosnia and Herzegovina

The distribution of mandates after elections in 2018 proved to be a contentious issue in Bosnia and Herzegovina. Despite the deci-

sion of the Constitutional Court of Bosnia and Herzegovina, political stakeholders find that impugnable constitutional and legal provisions are still in effect.

Brazil

In 2018, Brazil celebrated the 30th anniversary of the 1988 Constitution, a symbol of its democracy, but it also elected a far-right president, who may trigger a process of democratic backsliding. How the Supreme Court behaved in 2018 speaks volumes about the challenges that lie ahead in Brazilian democracy.

Bulgaria

In its most debated judgment in 2018, the Bulgarian Constitutional Court declared the “Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence” (the so-called “Istanbul Convention”) unconstitutional. The Court thus obstructed an important step in the fight against gender-based and domestic violence in Bulgaria.

Cabo Verde/Cape Verde

In 2018, the CC conducted a small constitutional revolution in criminal procedure, giving efficacy to the constitutional guarantees that were transposed to the Criminal Procedure Code but often applied rather reluctantly and in a very limited manner by both criminal investigation organs and ordinary courts.

Cameroon

The most important constitutional progress in Cameroon in 2018 was undoubtedly the effective establishment of the Constitutional Council, which, for the first time in its history, started ruling on matters pertaining to its jurisdiction. To that end, it ruled on presidential and senatorial elections held during year.

Caribbean

The most important developments were the decisions of the Caribbean Court of Justice in two cases—*Nervais v The Queen and McEwan et al v Attorney General Guyana*—in which the Court adopted a radically different approach to the interpretation of the region's constitutions from that of the Judicial Committee of the Privy Council.

Chile

Following the trend of recent years, in 2018 the Chilean Constitutional Court continued to use its ex-ante judicial review power to declare the unconstitutionality of parts of some legislative bills, and the number of ex-post cases that reached the Court increased significantly.

Colombia

The Colombian Constitutional Court faced four key issues in 2018. They concerned transitional constitutionalism; effective protection of social rights; solving collisions between participatory, environmental, and indigenous rights and rights and interests linked to mining; and catalyzing deliberative democracy in constitutional justice.

Croatia

In 2018, the main issues dealt with by the Croatian Constitutional Court concerned popular constitutional initiatives. Since the Referendum and Other Forms of Personal Participation in the Exercise of State Power and the Local and Regional Self-government Act does not regulate all issues relevant to the implementation of referenda, the Court had a key role in resolving procedural issues through judicial review.

Cyprus

The most important constitutional development in Cyprus for 2018, which still remains unresolved, concerned the judicial assessment of the absence of the notion of

“non-occupied” parliamentary seats in the constitutional text and the subsequent unsuccessful attempt to establish procedures for replacing seats vacated before the commencement of the parliamentary term.

Czech Republic

The year 2018 in the Czech Republic was marked by growing concerns about a conflict of interest concerning Prime Minister Andrej Babiš. Both Czech and European authorities confirmed its existence. Mr Babiš also remains under criminal investigation for fraudulently obtaining European funding for the so-called Stork Nest Farm.

Denmark

In Denmark, a constitutional rule was bypassed to allow an expansion of voting rights. However, in issues related to immigrants, strict policies were enacted. These included lowering social benefits to a potentially unconstitutional level as well as creating the possibility for “double punishment” for crimes in certain neighbourhoods.

Ecuador

Ecuador expressed a strong consensus about the need to fight corruption. The transitional Council for Public Participation and Social Control was set up to investigate the abuse of power and lack of impartiality in the judiciary. The result was the unveiling of corruption scandals and the dismissal of the Constitutional Court.

Egypt

The year 2018 witnessed a semi-continuous status of emergency, the origin of which goes back decades. Under this status, the Prime Minister issued a decision deferring a wide range of crimes to the State Security Emergency Courts (a type of exceptional court), raising serious challenges to the 2014 Constitution.

Finland

The Government’s plans to introduce new intelligence legislation continued to be a prominent theme in 2018. The constitutional provision on the confidentiality of communications was amended in order to allow the enactment of the intelligence legislation package. Another pressing topic was the reform of the healthcare and social welfare system.

France

The Constitution should have been amended for its 60th anniversary, but that was postponed due to political circumstances. Meanwhile, the Constitutional Council upheld the applicability of the maxim “Liberty, Equality, Fraternity.” Ensuring the protection of personal data, it clarified the relations between domestic and supranational norms.

Gambia

In order to consolidate democracy and align governance architecture with regional and international human rights standards, 2018 witnessed developments in improving human rights and addressing past human rights violations through transitional justice mechanisms (the Truth and Reconciliation and Reparations Commission, Constitutional Review Commission and National Human Rights Commission).

Georgia

This report on 2018 includes a brief introduction to the Georgian constitutional system, constitutional amendments, the last direct presidential election, main challenges of the judiciary, an overview of landmark judgments of the Georgian Constitutional Court, developments expected in 2019 related to Court vacancies, Constitutional Court cases and other related events.

Ghana

The creation of new regions was the single most significant political and constitutional development in 2018. The last time a region was created, it was by a dictator. The tensions that characterized the process, though disturbing, indicate how tangibly different a constitutional government acts from a dictatorial one.

Greece

The initiation of a long-due constitutional revision process marked 2018. It is an open question whether it shall be successfully concluded. Jurisprudence dealt with issues stemming from the continuing impact of the financial and refugee crises that Greece has been facing during recent years.

Guatemala

2018 was marked by a backlash against the International Commission Against Impunity in Guatemala (CICIG) and the Constitutional Court by the President of Guatemala. The President launched domestic and international legal action against the CICIG and Constitutional Court, creating a constitutional crisis months ahead of the general election.

Hong Kong

Hong Kong is a Special Administrative Region of the People’s Republic of China, governed under a Basic Law adopted pursuant to the Chinese Constitution. The boundaries between the two jurisdictions are one of the major issues considered in this report.

Hungary

In 2018, the restructuring of the constitutional system continued. The Seventh Amendment to the Fundamental Law and new laws established further fundamental rights limitations and constraints on independent constitutional institutions, especially the courts. The Constitutional Court’s

relevance within the system of separation of powers continued to decrease.

India

In 2018, the Indian Supreme Court, through a Constitution bench, allowed the Indian state to implement a national biometric identification system known as Aadhar. While striking down certain legal provisions that infringed privacy, the Court held that the law underlying Aadhar withstood judicial scrutiny and, in particular, a newly framed proportionality test.

Indonesia

The most intriguing case in 2018 was the *Presidential Threshold XV* case, in which the Court refused to intervene to resolve a constitutional crisis over a presidential election nomination, which required that a presidential candidate's nomination be based on outdated legislative election results rather than new ones.

Iran

The most important development of 2018 in Iran jurisdiction was the reform of an electoral law of city councils, allowing constitutional religious minorities, Zoroastrians, Jews, and Christians to run for elections even in regions with a Muslim majority, and also represent them.

Ireland

2018 saw the long-anticipated referendum on Article 40. 3. 3., the 1983 amendment that restricted access to abortion. 66% voted to replace the Article with one enabling Parliament to introduce legislation; legislation which, under the influence of the Citizen Assembly, was ultimately more liberal than previously expected.

Israel

In Israel, the most important constitutional development in 2018 was the enactment of a new chapter in the Israeli constitution

concerning national identity: Basic Law: Israel as the Nation State of the Jewish People, anchoring the state's symbols and the Jewish People's right to national self-determination.

Italy

The Italian Constitutional Court's 2018 case law stands out for an apparent judicial engagement on fundamental rights. The Court reasserted its crucial role through many segments of its 2018 case law, particularly in the field of judicial enforcement of rights.

Japan

Prime Minister Shinzo Abe and the Liberal Democratic Party (LDP) wanted to present to the Diet a draft of an amendment to the Constitution in 2018. Following a succession of political scandals, however, the LDP had to abandon the plan, and the movement toward amendment lost momentum.

Kenya

The beginning of apparently serious discussions about amending the Constitution—unfortunately many ill-informed, and some motivated by the concerns of individual politicians—may be the year's biggest development. The biggest change was transitioning to a parliamentary system from a presidential one.

Latvia

The most noteworthy case in 2018 concerned the restriction of the right to be elected to Parliament for former members of the Communist Party. The case contained important findings on the principle of militant democracy and contributed to the judicial dialogue.

Liechtenstein

Liechtenstein's 40-year ECHR membership promoted scholarly engagement. The consequences of political party splits were

debated throughout 2018. The GRECO recommendations to ban anonymous donations to political parties were implemented. The Constitutional Court increased asylum seekers' access to legal aid and demanded that whistle-blowers observe the accuracy of published information.

Malaysia

Malaysia experienced a peaceful, democratic transition of power at the federal level for the first time since independence, following the country's 14th General Election in May 2018. This change of government holds considerable potential for meaningful legal and structural reforms that will strengthen constitutionalism and the rule of law.

Mexico

The most important development in constitutional law concerned the Internal Security Law, published in December 2017 and declared unconstitutional by the Supreme Court in November 2018. This law authorized the Executive branch to use the military as a regular force for public security.

Moldova

A deadlock between the President, Prime Minister and the parliamentary majority that culminated in five temporary suspensions of the President by the Constitutional Court changed constitutional and political life beyond recognition. In the grey zone between East and West, this conflict has entrapped the country in democratic backsliding.

New Zealand

Constitutional developments largely came via the judiciary, with some important decisions handed down by the nation's Supreme Court relating to the two main issues in New Zealand's contemporary constitutional discussions: the relationship of Parliament and the courts, and the rights of Māori under the Treaty of Waitangi.

Nigeria

2018 was challenging for liberal democracy in Nigeria. A transparent electoral process, separation of powers, rule of law, judicial independence, and other mechanisms necessary to secure continuing popular control and public accountability of government suffered reverses. Government actions were not always compliant with procedural safeguards, such as due process.

Norway

While politically turbulent, 2018 was constitutionally more of an ordinary, yet varied year. Central cases concerned freedom of conscience, rights of indigenous peoples, protection of privacy, and constitutional interpretation where fundamental rights are protected both nationally and internationally. Concerning Europe, cases assessing the Norwegian child welfare system dominated.

Palestine

Palestine's accession to a large number of international treaties occurred in the absence of a constitutional provision that clarified their status within the domestic legal system. In 2018, the Supreme Constitutional Court unsuccessfully tried to fill this gap, and further exacerbated the problem it sought to resolve.

Peru

2018 was marked by the fight against corruption in the name of the rule of law. The key constitutional development was the constitutional reform of the judiciary through referendum. Moreover, this referendum raised questions about the relationship between the executive's and the legislative's power.

Philippines

Constitutional democracy eroded in the Philippines. President Duterte, miffed at the Chief Justice's independence, ordered her removal. Without a decent impeachment case, the government secured the removal

through a petition for *quo warranto* instead. The Court surrendered the Chief Justice in a ruling that exposes all government employees to removal.

Poland

The combined effect of changes introduced in 2015-2016, management of the Court's workload by the (irregular) President of the Court, Judge Julia Przyłębska, and continued adjudication by "irregular judges" marginalized the significance of the jurisprudence of the Constitutional Court in the Polish legal order.

Portugal

2018 was a significant year, as the Portuguese Constitutional Court repositioned itself as a faithful guardian of fundamental rights. In Ruling no. 225/2018, the Court declared that the legislative power can change the legal framework of assisted reproductive techniques if protection to the children and the surrogate mother is granted.

Romania

The most important characteristics for the 2018 constitutional year in Romania are the active stance taken by the Constitutional Court in diminishing the powers of the President and the refusal of the population to endorse a conservative revision of the Constitution regarding the definition of marriage.

Russia

The current Russian Constitution was adopted at a time of extreme internal and international weakness. In 2018, there was no talk of major constitutional reforms, but Russia's continued distancing from European constitutional values set a troubling trend given the background of 'sovereignism' and constitutional identity.

Serbia

The Government submitted to the National Assembly the proposition (initiative) for the adoption of constitutional changes. The majority of the Constitutional Court's decisions concerned constitutional complaints regarding issues such as the violation of the right to a trial in a reasonable time.

Singapore

The year 2018 saw courts grappling with constitutional interpretation, particularly in determining the proper balance of powers among the different branches of government. There were several legislative initiatives with implications for constitutional rights. There was also continued reliance on public consultation as part of the government's law-making process.

Slovakia

2018 started on a high note after the resolution of a prolonged inter-branch conflict over the appointment of constitutional judges. The National Council tried to fix the selection and appointment mechanism before nine judges of the Court were to leave office in mid-February 2019, but failed.

South Africa

Pressed by a faction with socialist tendencies within the governing party, a process that may lead to the reduction of the constitutional protection of private property got underway. Parliamentary approval of the process was obtained, but its eventual implementation depended on the May 2019 elections.

South Korea

After inauguration, the Moon administration promoted the "eradication of deep-rooted evils." In 2018, former conservative President Myung-bak Lee was arrested, subsequent to Geun-hye Park in 2017. Under the Moon administration, Japan-Korea relations deteriorated significantly, whereas inter-Korean summits were held three times in 2018.

Spain

Judgment STC 58/2018 addressed the question of whether news stories published in the past could remain accessible on the internet. The CC judged that the passage of time diminished public interest in the information and its continued presence on the internet violated the right to privacy and honour. The CC recognised the right to be digitally forgotten.

Sri Lanka

2018 was very eventful in Sri Lankan constitutional history. Parliament engaged in a constitution-making process, an effort was made to transform the presidential system into a parliamentary one, and there was an attempted constitutional coup by the President of the Republic to illegally dismiss his own government and replace it with another.

Sweden

On September 9, 2018, Sweden elected a new parliament. None of the traditional blocs obtained a majority. As a result, Sweden was left without a government for 115 days—the longest time in its history—after which a left-center government was installed.

Switzerland

Switzerland has a small and open economy reliant on globalization while its Constitution emphasizes democratic self-governance. Constitutional practice in 2018 shed light on the inherent tensions between popular sovereignty and economic globalization, referred to as the “globalization paradox” (Dani Rodrik), in court cases and popular votes alike.

Taiwan

Taiwan’s constitutional development moved in a new direction in 2018 following the 2017 statutory easing of the thresholds for citizens’ initiatives. As the initiatives intended to curtail Interpretation No. 748 on same-

sex marriage illustrate, the TCC arrived at a crossroads amid the rise of popular constitutionalism and referendum politics.

Thailand

The 2019 election was critical to the survival of the junta. The National Council of Peace and Order devised several tricks to win. The Constitution was ill-designed. The Election Commission collaborated by ignoring intimidation and bribery. The public then lost trust in this election and the Constitution.

Turkey

The weakening of the authority of the Turkish Constitutional Court continued in 2018 due to non-execution of its judgments by first-instance courts, the Court’s silence in controversial cases and the new political system, which gives the executive organ nearly absolute power.

Ukraine

2018 was another year of political turbulence marked by the ongoing conflict with Russia, resulting in martial law for 30 days in 10 regions, and further cooperation with the EU. It was proposed to amend Ukraine’s Constitution to proclaim ‘irreversibility of the European and Euro-Atlantic course of Ukraine’.

United Kingdom

As in 2017, Brexit dominated constitutional debates in 2018. Contestation regarding the Government’s exit negotiations with the EU, and new legislative powers for implementing Brexit tested Parliament’s capacities and powers and spurred litigation between the devolved governments and parliaments against the UK’s plans before sub-national, UK, and EU courts.

Vietnam

“Integration” stands for the concurrent holding of the offices of State President and General Secretary of the Communist Party of Vietnam (CPV). This reform aims to consolidate and legitimize the leadership of the CPV, but raises issues about the party’s control over the government and the trouble delineating their relationship.

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