

Recht, Sicherheit und Verwaltung
in internationaler Perspektive

Law, Security and Public Administration
in an International Perspective

6

Oesten Baller (ed.)

Violent Conflicts, Crisis, State of Emergency, Peacebuilding

Constitutional Problems, Amendments
and Interpretation



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Foreword

Constitutional law can appear differently in political crises, states of emergency or national and international conflicts. Negative implications are likely to occur, where constitutional law is abused in states of emergency situations or exploited by the political elite to enforce its own positions and to escalate crises and conflicts. However, constitutional law can also be a valid yardstick for maintaining a sense of proportion in crises and exceptional situations, as well as for respecting the constitutionality of the political system. Most importantly, constitutional law provides a recognised framework for finding solutions to conflicts, crises or states of emergency situations – and for making peace.

This volume is based on lectures given by constitutional lawyers from Africa, Asia, Europe and South America at the 10th World Congress of Constitutional Law (IACL-AIDC), held from 18–22 June 2018 at SungKyunKwan University in Seoul, Korea, on Violent Conflicts, Peace-Building, and Constitutional Law. The English and French contributions originate from three Congress workshops: No. 3 (State of Emergency), No. 14 (Constitutional Amendments), and No. 19 (Violent Conflicts, Peacebuilding and Constitutional Law).

The first thematic block describes violent conflicts. *Abiodun Odusote* explores the perennial and violent clashes between herdsmen, farmers and indigenous ethnic communities across West Africa, which result from scarce rural resources and heterogeneous, partly traditional, forms of living and economic activities. From this point of view, he looks at both the constitutional embedding of these forms of living, and the attempted solutions on domestic and supranational levels. Based on an, as objective as possible, factual assessment of the Russian-Ukrainian conflict, *Oesten Baller* examines the constitutional development and the constitutional interpretation as well as the main political decisions with constitutional law relevance, both in Ukraine and Russia. Even though the main responsibility for the conflict clearly lies with Putin's Russia, the analysis shows that deficiencies in the rule of law are characteristic in both countries.

Crises of constitutional relevance and such of a constitutional nature are in the focus of the second, the largest, at the same time, thematic block. *Sacha Sydoryk* asks whether, and if so, to what extent, a constitution may be amended at all in times of severe crises. To this end, he examines the constitutions of many member states of the European Union and concludes with the presentation of model solutions. Two contributions deal with the constitutional problems associated with national meas-

ures to combat terrorism. *Audrey de Montis* and *Priscilla Jensel-Monge* ask about the institutional and functional balance between the executive and legislative branches in the French anti-terrorist struggle, and as a result, favour a strong controlling function of parliament, even in times of terrorism. *Xavier Miny* and *Quentin Pironnet* analyse the Belgian legal anti-terror system, and conclude that, even in a state of emergency, the rule of law does not allow the end to justify the means.

Rubens Beçak and *Jairo Lima* deal with judicial review of constitutional amendments in the light of the political constitutionalism critiques. Since the power to amend a constitution has greater democratic potentials than ordinary legislation, constitutional amendments require a judicial scrutiny compatible with this nature. Supermajority rules in Constitutional Courts are the way they develop their argument. In his article on the evaluation of Taiwan's Act of Ill-gotten Political Party Assets in Taiwan, dated 2016, *David KC Huang* asks whether a Bill of Attainder should be regarded as transitional justice or transitional injustice. Obviously, the author tends towards the latter – with a comparative law view to Germany's two historical attempts to cope with its past – when he states that revenge can never create justice.

Oyelowo Oyewo covers a wide geographical span when he looks at the challenges of constitutional reforms in democratising states in Sub-Saharan Africa, and asks about Nigeria's chances of playing an active role in this process. In any case, he concludes, there will be no stable democracy without far-reaching constitutional changes. *Paul Zibi's* contribution deals with the chances to overcome the crisis in Cameroon, which has been known as Anglophone Crisis since 2016. As a result, he proposes a constitutional reform that takes account of the country's specifics and strengthens the use of the English language accordingly, making Cameroon a bilingual decentralised state. This is the only way to avoid separatism and unwanted federalisation. *Anne-Laure Youhnovski Sagon* examines the jurisprudence of the European Court of Human Rights on the right to life in connection with deadly governmental violence in times of crisis. In concluding, she states that, even in extreme crises, the Court fails to perform the necessary comprehensive proportionality analysis.

Three articles in the third thematic block deal with constitutional exception regimes, martial law and state of emergency. *Olivier Le Bot* asks whether, in France, there is a right to judicial review during a state of emergency, and whether this right can be restricted or denied. He notes that it was a decision by the French Constitutional Council that, in the interests of the executive, severely infringes upon the right to judicial review in a state of emergency. *Maciej Pisz* examines extra lege legislative powers for the executive during martial law in contemporary Polish constitutional law. In conclusion, the author considers these exceptions to Parliament's primacy in leg-

isolation to be permissible at least within the framework of Polish constitutional law, in particular with regard to the principle of separation of powers. *Eva Schulev-Steindl* deals with the question of resilience of law in times of crisis in Austria, with a comparative view to other European countries. In the end, she proposes elements of a regulatory model to optimise Austrian law, and emphasises the importance of a system of checks and balances even in exceptional situations and crises. Last, but not least, *Manon Bonnet's* contribution focusses on the peacebuilding function of constitutions, emphasizing the dualism of peace and democracy. This would require a new understanding of the old concept of democratic peace. It should not be forgotten, however, that constitutions in post-conflict settings play just a limited role among other factors.

The diversity of aspects presented in these contributions, and the interesting perspectives chosen by the authors characterise this volume, as well as the often comparative approach. The global communication and the excellent cooperation within this book project have been very gratifying for the editor and give hope for a follow-up volume after the next World Congress of Constitutional Law in Johannesburg/South Africa in December 2022.

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Oesten Baller

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Perennial Conflicts between Farmers, Herdsmen and Communities in West Africa: Perspectives on Clashes of Rights to Livelihoods

Abiodun Odusote

Abstract

Perennial and violent clashes between herdsmen, farmers and indigenous ethnic communities across West Africa are widespread. Various arguments have been advanced to find the root causes of and factors that exacerbate these conflicts. There have been accusations and counter accusations among the warring factions. The change on ecosystems that limit the amount of land for grazing purposes characterized by retreating natural resources and population bloat have and are occasioning continued migration of herdsmen and their cattle from the North to the South hemisphere in search of greener pastures for their herds. Balancing the rights of the herdsmen and farmers to livelihoods amidst competing and diverse claims to land, road access, water, grass and other limited resources makes the conflicts more difficult to manage by government authorities and relevant stakeholders. The herdsmen are desirous of grazing land and cattle passages whilst the farmers seek to protect their farmlands, plantations and farm products from the scavenging cattle. It is not unusual for cows to stray into children's parks, schools, offices, residential homes, care homes, hospitals, airport runways and farmlands; thereby destroying farm produce, farmlands and generally occasioning great nuisance. There are also ethno-religious undertones exacerbating the conflicts. This often results in very violent clashes and confrontation leading to severe loss of lives and properties on both sides. This research employs doctrinal perspective to make enquiries on the root causes of the violent conflicts, interrogates how to address the competing rights and claims on land, forests, water and agricultural resources to avoid conflicts and review governmental mechanism of fostering inclusivity and harmonious cohabitation between the herdsmen and farmers. In conclusion, credible legal and institutional frameworks that promote peaceful co-existence of the farmers, communities and herdsmen are recommended.

I. Introduction

1. Problem Statement

On the 1st of January, 2018 Nigerians were greeted with the tragic killings of about 73 people by herdsmen in a violent and despicable attack on Logo and Guma in Benue State, Nigeria. Some commentators attributed the violent attack to the enactment of Grazing Prohibition Law by the Benue State Government¹. This argument can-

1 *Umar Tanko Al-Makura*, the Nasarawa State Governor has disclosed that the implementation of the anti-grazing law in Benue State is responsible for herdsmen attacks. Available at <<https://www.eagleee.com/detail?newsId=602490>>, accessed on 20 March, 2018; *Mansur Dan-Ali*, Minister of

not hold water in view of the fact that there has been many reckless killings of farmers and inhabitants of host communities across the country before the enactment of the Grazing Prohibition Law in Benue State. Subsequent to the New Year killings in Logo and Guma, there have been numerous other killings in other states of the federation by herdsmen. Many of the other states of the federation that have and are still experiencing herdsmen killings have no anti-grazing laws. However, in his reaction to the killings masterminded by the herdsmen in Logo and Guma, the Emir of Kano, and seemingly justifying the killings as retaliation, *Alhaji Sanusi*² claimed that over 800 Fulani herdsmen and people were killed on the Mambilla Plateau in Taraba State in one weekend³. The Taraba State Government acknowledged there was a conflict between the farmers and the herdsmen on the Mambilla Plateau but contend that both parties suffered casualties and the figure of deaths from both sides put together is nowhere close to 800. A Judicial Commission of Enquiry was set up to investigate the conflicts and make appropriate recommendations. The Judicial Commission had since submitted its report but the state is yet to take any action or make the content of the report known to the public. The death recorded on the New Year's Day is not in isolation. Study has shown that recently "deaths from Fulani extremists resulted in more than 3000 deaths across four countries, with 92 % fatalities taking place in Nigeria."⁴ Based on the above, this study investigates the factors responsible and exacerbating these conflicts. This paper is divided into four parts. Part one is the introductory. Part two interrogates the clashes of rights to livelihoods by reason of the competing and divergent interests of the parties, using the constitution and other statutory remedies as panacea to the seemingly irretraceable conflicts. Part three offers insights to the nature and experiences of other West African countries in managing and sometimes resolving these conflicts. Part four concludes by way of summing up the expositions in the paper and proposing credible solutions that have the potential of ushering in lasting and enduring peace between the herdsmen, farmers and the indigenous communities across West African states.

Defence of the Federal Republic of Nigeria also blamed anti-open grazing law for killings by herdsmen. Available at <<https://www.premiumtimesng.com/news/headlines/256685-nigerian-govt-blames-anti-open-grazing-law-killings-herdsmen.html>>, accessed on 20 March, 2018.

- 2 *Alhaji Sanusi* is also a patron of the Miyeti-Allah, an umbrella body of the herdsmen trade/pressure union.
- 3 This claim has been disputed by the Taraba State Government and the Christian Association of Nigeria chapter in Taraba State. Cf. Nigerian Punch Newspaper, Sanusi's claim that 800 Fulani were killed, a lie – Taraba govt, CAN, available at <<http://punchng.com/sanusi-claim-that-800-fulani-were-killed-a-lie-taraba-govt-can/>>, accessed on 18 April, 2018.
- 4 Global Terrorism Index (GTI) 2017.