ABSTRACTS

Specialized Constitutional Review in Latin America

By *Miguel Gonzalez Marcos,* Minnesota, USA

The Panamanian people have to choose between a Constitutional Chamber within the Supreme Court and a Constitutional Court, if a specialized institution substitutes the Supreme Court of Justice in exercising constitutional review. This study aims to identify policy issues for deciding between these alternatives drawing on comparable experiences with specialized constitutional review from Costa Rica and Colombia. The decisive factor in arranging a specialized institution for constitutional review in these countries was the mistrust in the Judiciary. Also, for the Panamanian predicament, these experiences caution that it is essential to balance the specialized institution for constitutional review with the democratic participation in shaping the Constitution.

The second part of this study tells on the Panamanian constitutional debate about specialized constitutional review. After describing the basics of the Panamanian constitutional review, it presents the state of the debate, justifies the use of Costa Rica and Colombia as relevant comparable models, and suggests questions to guide the analysis. The third and fourth part focus on Costa Rica and Colombian constitutional review models respectively. These parts show that in choosing a Constitutional Chamber in Costa Rica, the prestige of its Supreme Court was paramount, while in choosing a Constitutional Court in Colombia the mistrust in its Supreme Court just as paramount was.

It shows the choice between a Constitutional Chamber and a Constitutional Court implies a decision on how much trust there is in the Judiciary. It also shows that with further specialized constitutional review in Costa Rica and Colombia a shift in understanding the Constitution took place, bringing more activism to constitutional decision-making. In addition, the study suggests that a Constitutional Court differentiated from the Judiciary would be the best choice strictly, but not necessarily the most convenient politically. At any rate, the study argues that is key to devise a more participative constitutional review that would put the Constitutional Court as a principal, but not as the only institution deciding constitutional issues.

Recent Constitutional Reforms in Indonesia

By *Andreas Ufen,* Hamburg

The consolidation of democracy in Indonesia after the fall of Suharto in May 1998 has proven to be much more difficult than expected. One of the main challenges for the governments following the New Order regime was and still is to transform the revered Constitution of 1945 (UUD 45) into a strong basis for upcoming political reforms.
This article gives a short description of political and constitutional developments after 1945, but concentrates on the events since 1998. The People's Congress (MPR) so far has amended the constitution step by step during annual sessions. But it took a few years time until August 2002 to establish a presidential system. The current constitution is incomplete and some passages are nebulously formulated pending clarification. Although it is still unclear whether the recent amendments support democratization it seems to be a good start for further reforms.

The Lawful Judge – A comparative survey on the allocation of cases to judges in South Africa and Germany

By *Hilke Thiedemann*, Hamburg

Since 1994 South Africa has been a constitutional state governed in terms of the rule of law. The shift from parliamentary sovereignty to supremacy of the constitution significantly increased the power of South Africa's judiciary, and South African courts are now empowered to review and set aside legislation. Section 165 of the South African Constitution guarantees an independent and impartial judiciary.
The German Constitution (which served, to a considerable extent, as a model for the South African Constitution) guarantees that no one may be deprived of his "lawful judge". This principle requires that objective criteria are used to determine which judge or judges should hear a specific case. Such a determination aims to prevent interference with the judicial function from whatever source – be it from the executive or legislative organs, the judiciary itself or other entities. For this purpose statutory rules have been established, which, supplemented by internal court rules, regulate the allocation of matters within a court, down to the level of determining the specific judges.
The South African legal system does not recognize such a principle. Statutory rules of jurisdiction only determine which court is competent to decide a particular case. The internal allocation of court cases is not done in accordance with prescribed rules, but is rather – for practical reasons and in an attempt to ensure an efficient administration of justice – left to the discretion of the judge president of a court.

The article provides an overview of the principle of the "lawful judge" in German law and compares this principle with the practice of allocation of court cases in South Africa. It then outlines recent developments in South Africa in the area of judicial independence and court organization. An argument is made in favour of an adoption of the principle of the "lawful judge" into South African law, and the article concludes with some proposals for legislative reform to achieve this goal.

The Direct Effect of the WTO-Conventions in European Union Law

By *Gerald G. Sander,* Stuttgart

The article deals with the different considerations facing the European Court of Justice (ECJ) in deciding whether to grant direct effect to WTO law, especially the GATT provisions.
In its judgment the Court decided that individuals could not enforce GATT law because the provisions lacked direct effect. The Court held that, because the agreement is based on principles of negotiations undertaken on the basis of reciprocal and mutually advantageous arrangements, and is characterized by the great flexibility of its provisions, in particular those conferring the possibility of derogation, the safeguards procedures, and the settlement of conflicts. Following the same line of argument, the ECJ decided that EC Member States could also not enforce the GATT provisions in Article 173 actions before the Court.
One the other hand granting direct effect to the world trade law would force the European Community to adopt a rule-based liberal economic foreign trade policy which would maximize the economic welfare of the EC. Besides, the situation has changed significantly since the enactment of the new WTO law and the establishment of the WTO in 1995 as an international organization. Innovations in the WTO agreements include in particular the alterations in the dispute settlement mechanism, the abolition of the "grandfather clause", the prohibition of self limitation arrangements in the Agreement of Safeguards and the increased precision of a number of the GATT rules. Nevertheless, the ECJ in more recent decisions stayed with its opinion and denied the direct effect of the WTO/GATT law and that neither individuals nor Member States can invoke a violation before the Court.
However,the Member States of the EC have a special status in Article 173 actions. A Member State files a complaint also with an eye on the interests of the Community as a whole, pursuing not only its own case but the legality of the Community act in question. EC Member States are also GATT contracting parties as well and liable for breach of any of the obligations laid down in this international agreement. They must protect themselves from being held liable for the conduct of the Community. Therefore it is consistent that the states should invoke a violation of WTO/GATT law before the ECJ.