10

Courts as Constitutional Rule-Makers for Elections and Parties

Some Comparative Evidence

Aziz Z. Huq

10.1 INTRODUCTION

After declaring independence in 1960, the people of Côte d'Ivoire have faced the legacy of a long and difficult struggle to achieve democratic self-rule. Impeding their path was thirty-plus years of single-party rule by President Félix Houphouët-Boigny, successful and failed coup attempts, and a bloody civil war that ripped the country apart along a north-south line. Against this fractious backdrop, the presidential election of 2010 pitted incumbent Laurent Gbagbo against his former minister Alassane Ouattara and other candidates. When a runoff between Gbagbo and Ouattara was called in the challenger's favor (54.1 percent to 45.9 percent), Gbagbo appealed to the national Conseil constitutionnel, alleging fraud. The Conseil, a judicial body patterned on the French model, threw out 600,000 votes and declared Gbagbo the winner. This decision struck many impartial observers as fraudulent and counter democratic.[1]

A year later, the Awami League government of Bangladesh repealed the Thirteenth Amendment of that nation's Constitution. This provision had created a system of non-party "caretaker" regimes prior to national elections, headed by a former chief justice, charged with the impartial management of polls. Under these caretaker regimes, Bangladesh experienced three elections (in 1996, 2001, and 2008) "widely lauded as free and fair."[2] The later polls in 2014 and 2018, without a caretaker regime, were marked not just by declining competitiveness and captured legislative bodies but also sharp increases in "legal and extralegal measures to silence critics,

[1] O'Brien Kaaba, "The Challenges of Adjudicating Presidential Election Disputes in Africa: Exploring the Viability of Establishing an African Supranational Elections Tribunal," Doctor of Laws (LLD) thesis University of South Africa, 2015.

[2] M. Ehteshamul Bari, "The Incorporation of the System of Non-party Caretaker Government in the Constitution of Bangladesh in 1996 as a Means of Strengthening Democracy, Its Deletion in 2011 and the Lapse of Bangladesh into Tyranny following the Non-participatory General Election of 2014: A Critical Appraisal," *Transnational Law & Contemporary Problems* 28(1): 52 (2018).

weaken the opposition, and create a culture of fear."[3] In effect, the involvement of a judicial actor – albeit in a nontraditional, and arguably non-judicial role – allowed democracy to thrive.

In both Côte d'Ivoire and Bangladesh, an actor identified with the higher judiciary – either an apex court or its former chief – exercised a constitutionally defined power over the administration of national elections and parties. In the first case, judicial involvement arguably derailed fair democratic choice. In the second, a judicial actor's involvement enabled a fairer measuring of popular judgment. At minimum, therefore, these cases caution against a rush to judgment for or against a robust judicial presence in the constitutional law of parties and elections. A global answer to this question quickly meets powerful counterexamples.

More modestly, this chapter explores theoretical and analytic foundations of these questions. It first aims to clarify some theoretical premises of this significant constitutional design choice. It then develops an analytic taxonomy of potential judicial tasks in managing elections with an eye toward democratic stability. This is complemented with an enumeration of potential risks. I make no claim that this theoretical and analytic ground-clearing yields sharp prescriptions about the role of courts in protecting democracies, although it does clarify the stakes of that functionality. This chapter offers, in the end, a crisper, less obstructed vantage upon the choices at play, rather than a decisive prescription.

Four other limits to the chapter's scope need emphasis. First, I focus on the role of *apex* courts (broadly defined) in setting out basic ground rules for democratic choice. I do not address the interaction between ordinary litigation and election management. Almost any kind of jurisdiction *can* yield litigation that somehow "affects" an election. When a visiting session of the Lefortovo court sentenced the late Alexei Navalny to nine years' imprisonment in March 2022 on fraud charges,[4] for example, it was clearly influencing the possibility of democratic competition in Russia – perhaps in deep ways that were not evident at the moment of judgment. But it was not defining or applying the ground rules for elections or parties as such.

Second, and relatedly, there are many other aspects of intergovernmental relations and legislative process that might be thought essential to a functioning democracy beyond elections and parties. Gardbaum, for example, rightly singles out the legislative failure to hold an executive accountable as a political-process

[3] Ali Riaz, "The Pathway to Democratic Backsliding in Bangladesh," *Democratization* 28(1): 190 (2021).

[4] Council of Europe, "Russia: Declaration by the High Representative on behalf of the EU on the ruling to extend Alexei Navalny's politically motivated imprisonment by an additional 9 years," Press Release 305/22 (March 22, 2022), www.consilium.europa.eu/en/press/press-releases/2022/03/22/russia-declaration-by-the-high-representative-on-behalf-of-the-eu-on-the-ruling-to-extend-alexei-navalny-s-politically-motivated-imprisonment-by-an-additional-9-years/pdf.

failure.[5] Keeping with the more limited focus of this volume. I will home in more narrowly on the immediate accoutrements of democratic choice.

Third, I am concerned with courts' function in democratic contexts, broadly defined to include some instances of competitive authoritarianism but not purely authoritarian ones. (The latter do run elections of a sort. And when de facto independent courts in non-democratic contexts are allowed, these do seem to mitigate the risk of illegal manipulation.)[6]

Finally, I focus on constitutional, not statutory, rules and institutions. The last distinction is a touch artificial. Constitutions can be entrenched to greater or lesser extents than statutes. Entrenchment can vary within a single document, for instance, via targeted eternity clauses. Whole constitutions can be self-consciously styled as "temporary,"[7] just as institutions – think of Bangladesh's caretaker governments – can be "intermittent."[8] To assume a stable variation in the entrenchment of statutes and constitutions, therefore, is unjustified. My use of the term "constitutional," therefore, should be understood to connote a relatively high degree of entrenchment compared to other state institutions in a given polity.

10.2 THEORETICAL COORDINATES

What role should apex courts play in the constitutional law of elections and parties? Is theirs a function other bodies can serve equally well? And if there's choice between courts and alternative constitutional institutions, what considerations should guide designers? In the first instance, these questions sound in constitutional theory, oriented to offer guidance on the different functions necessitated by a commitment to democracy. Often, constitutional theory implicitly adopts the position of an imaginary constitutional designer. It implicitly assumes that theoretical and empirical work can, in tandem, at least narrow the range of plausible design choices. What is "optimal" may depend heavily on political and economic context, so specific prescription can be infeasible. A minimal "Hippocratic" insight into the range of feasible options that "do no harm" may be the best normative constitutional theory can do.[9]

It is a mistake to think that a democratic constitution must be composed solely of democratic parts. To the contrary, institutions insulated from partisan politics play

[5] Stephen Gardbaum, "Comparative Political Process Theory," *International Journal of Constitutional Law* 18(4): 1435–1457 (2020).

[6] See Cole J. Harvey, "Can Courts in Nondemocracies Deter Election Fraud? De Jure Judicial Independence, Political Competition, and Election Integrity," *American Political Science Review* 116(4): 1325–1339 (2022).

[7] Ozan Varol, "Temporary Constitutions," *California Law Review* 102(2): 409–464 (2014).

[8] Adrian Vermeule, "Intermittent Institutions," *Politics, Philosophy, and Economics* 10(4): 420–444 (2011).

[9] Aziz Z. Huq, "Hippocratic Constitutional Design," in *Assessing Constitutional Performance* ed. Tom Ginsburg and Aziz Z. Huq. Cambridge University Press, 2016, 39–70.

necessary roles in fostering the persistence over time of democratic choice.[10] A polity in which police and election officials responded to every whim of elected actors would not be democratic very long. Recent work by Gardbaum and Khaitan builds on this basic premise. Both start from the Madisonian intuition that constitutions invest individuals with legal and political authority, which can be used to advance or undermine the structural presuppositions of future popular choice under a stable constitutional frame. Even if some policy choices inevitably commit future actors,[11] a democratic constitution at least requires that electors retain the ability to change their minds at least about *who* is in power – although perhaps this is not alone enough[12] – so as to yield a tolerable measure of uncertainty and hence rotation of political office. To the extent it is conceptualized as intertemporally durable, democracy demands constraints at odds with elected actors' incentives.

Gardbaum's theory of "comparative political process theory" identifies the defense of "institutional structures and political processes within which democratic politics operates" from "erosion, corruption, and capture" as a distinctive design problem.[13] Echoing Hans Kelsen's celebration of the judiciary as the "guardian" of constitutional norms,[14] Gardbaum isolates "judicial review" as the institutional vessel for that defense.[15] Khaitan echoes Gardbaum's concern about the instability of non-self-executing constitutional norms. In contrast to Gardbaum's focus upon courts, though, he posits a need for "guarantor institutions" (or "fourth branch" bodies) with legislative and executive functions. He criticizes the "lawyerly blinkers" that lead scholars to "ignore" actors other than judges. The latter have both expressive and also material capacity (which courts are said to lack). They act either before or after a constitutional norm is violated.[16] Khaitan's point has empirical resonance: by 2019, some 64 percent of states had some kind of independently managed electoral system.[17]

Written constitutions have in the last fifty years taken up both Gardbaum's judicial path and Khaitan's fourth-branch proposal. Figures 10.1 and 10.2 plot the percentage of constitutions in force at any given time that contain respectively, a court explicitly tasked to resolve election disputes, or some form of election

[10] Aziz Z. Huq and Tom Ginsburg, "Democracy without Democrats," *Constitutional Studies* 6 (1): 165–188 (2020).
[11] Paul Pierson, "When Effect Becomes Cause: Policy Feedback and Political Change," *World Politics* 45(4): 595–628 (1993).
[12] Compare Norberto Bobbio, *The Future of Democracy: A Defence of the Rules of the Game*. University of Minnesota Press, 1987.
[13] See Gardbaum, "Comparative Political Process Theory," 1453.
[14] Hans Kelson and Carl Schmidt, *The Guardian of the Constitution*. Cambridge University Press, 2015.
[15] See Gardbaum, "Comparative Political Process Theory," 1411.
[16] Tarunabh Khaitan, "Guarantor Institutions," *Asian Journal of Comparative Law*, 16: S43 (2021).
[17] Malcolm Langford, Rebecca Schiel, and Bruce M. Wilson. "The Rise of Electoral Management Bodies: Diffusion and Effects," *Asian Journal of Comparative Law* 16: S62 (2021).

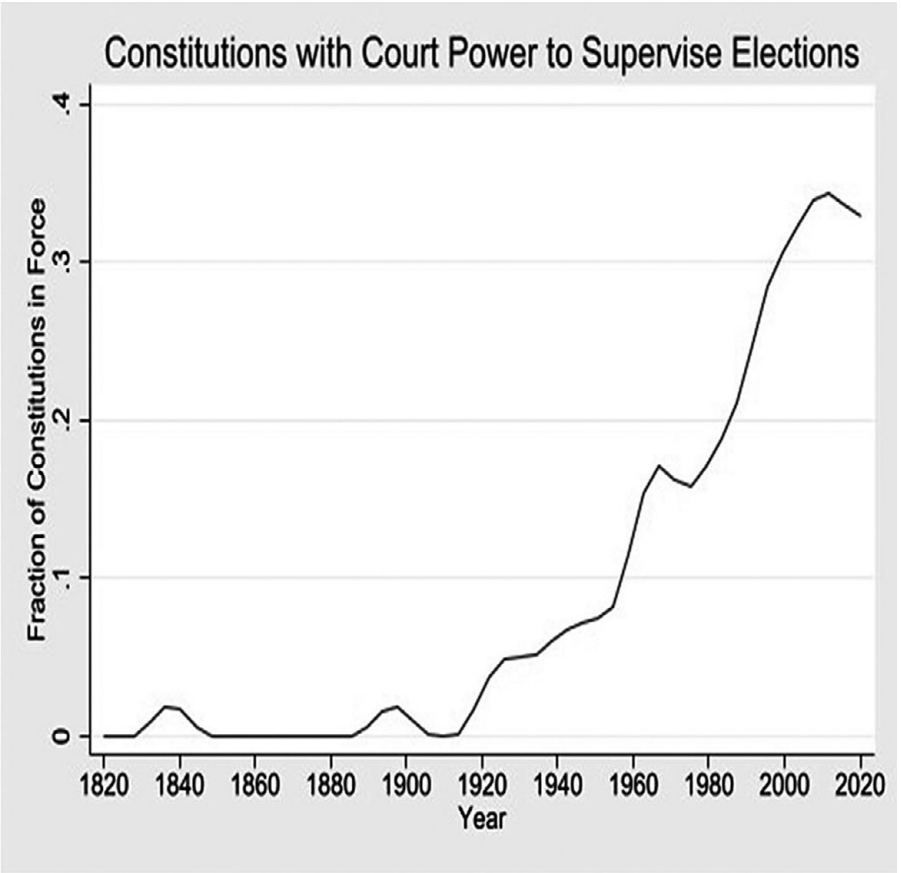

FIGURE 10.1 Percentage of extant constitutions with courts engaged in electoral supervision.

management body.* They show how the adoption of courts preceded that of election commissions globally by about twenty years and, further, how neither model is obviously numerically dominant. The choice between courts and fourth-branch institutions (if imagined as a matter of substitutes and not as possible complements) hence remains a live one.

Both accounts leave questions open. Gardbaum, for example, does not address the possibility, illustrated in the Côte d'Ivoire case, that courts can be instruments of entrenchment. It thus does not explain how to stymie judicial capture. Khaitan also invites inquiry into how to create institutions insulated from ordinary politics, how to maintain such insulation, and to how to respond in the event of capture. He further

* Thanks to Morgen Miller for help with the charts in this chapter.

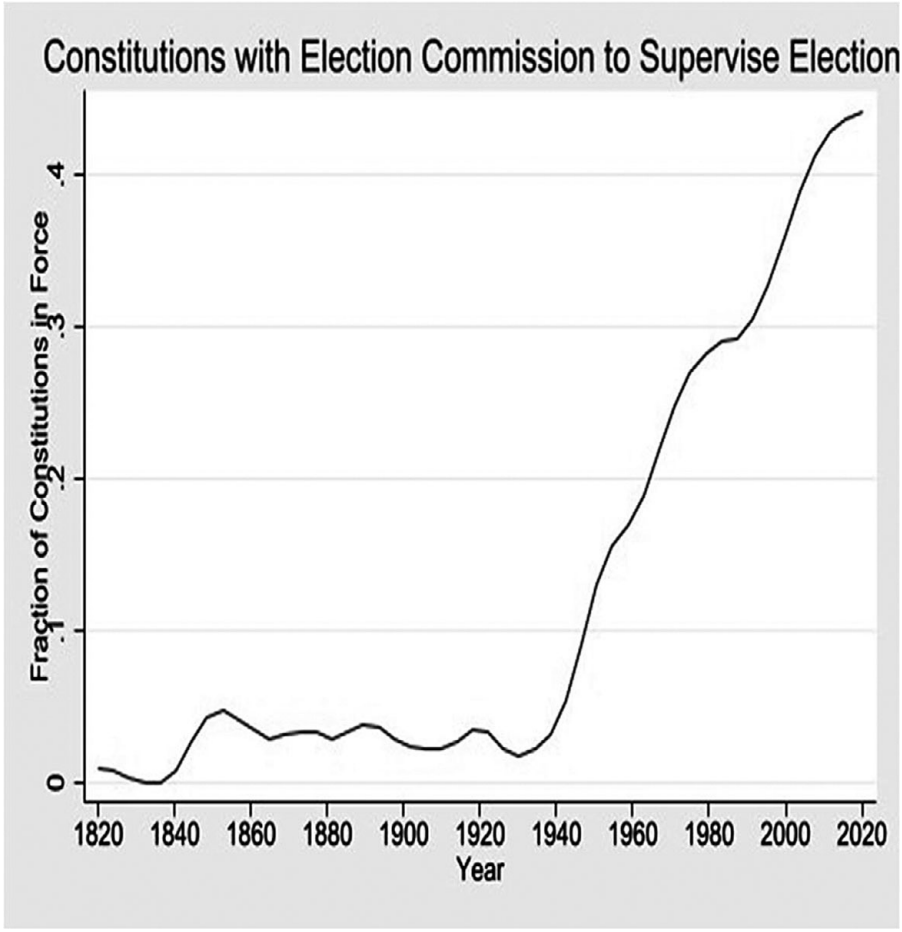

FIGURE 10.2 Percentage of extant constitutions with commissions engaged in electoral supervision.

leaves open the question of whether (or which) guarantor institutions are "normatively desirable" at all.[18] If the Côte d'Ivoire case invites the thought that courts, acting alone, cannot alone be assumed to be faithful guardians in a Kelsenian mold, a different study of election commissions in four Central American countries paints a rather dismaying picture of slow decay and partisan capture.[19] More generally, a designer may be uncertain about the nature of future threats to democracy (which might bare differently on courts as opposed to commissions), the risk that political

[18] Khaitan, "Guarantor Institutions," S59.

[19] Antonio Ugues, "Electoral Management Bodies in Central America," in *Advancing Electoral Integrity* ed. Pippa Norris et. al. Cambridge University Press, 2014, 118–134.

leaders will find ways to capture or subvert "guarantor" bodies, and her own ability to memorialize norms in ways that have consistent effect over time. Even as tremendous work has gone toward elucidating the forms of democratic failure writ large, in short, there is relatively little systematic work on how or why institutional guardians of democracy founder.

Current theoretical work further leaves open how to taxonomize the distinctive tasks involved in electoral guarantorship and the related puzzle of how to parcel out those tasks among different bodies. In part, this gap abides because there is no clear sense of what, quite specifically, "democratic maintenance" work on parties and elections involves. With a more fine-grained taxonomy of such tasks in hand, it may well be possible to discern whether and when institutional parallelism overlap, or even monopoly control by one body is desirable, or at least not a serious error.

10.3 A TAXONOMY OF JUDICIAL RESPONSIBILITIES RELATED TO ELECTIONS AND PARTIES

Keeping a system of competitive political parties and electoral choice in good working order is no simple matter. It requires attention to many different legal and constitutional mechanisms. There are many sharp corners during any representative process at which a hazardous and destabilizing political judgment can throw the democratic project off track. Election-related activity often begins when popular discontent with an incumbent regime bubbles over into oppositional associational action by the public. Parties are formed; old ones dissolve, merge, or reboot. Platforms are drafted, voters courted. Coalitions must be formed. Candidates or parties demand a line on a ballot. Voting happens, without or without irregularities. Counting follows, and an outcome is reached – or not. And so on and – one hopes – on, again and again: The promise of democracy resides in its endless capacity for iterative revision, of messing up, and starting again. From the ex ante perspective of the constitutional designer, a choice must be made about which of these diverse moments falls under constitutional regulation.

This section organized the heterogeneous range of such possible platforms for election regulation in a constitution into four broad categories. Setting these out, I avoid the assumption that each one must be subject to judicial supervision. Rather, there is a wide range of possible forms of choices about what to regulate and also how. Hence, a specific problem might be under a court's supervision, regulated by a constitutional (or statutory) fourth-branch body, left without any regulation at all, or even insulated from state regulation via negative constitutional rights against the state. I bracket this choice of regulatory instruments and instead offer a taxonomy of moments in the democratic process in which judicial intervention can be imagined. A four-prong taxonomy, in my view, captures the range of potential issues in a tractable way. To the extent feasible, I illustrate this taxonomy with examples from

outside the American context: The latter is relatively familiar and well-studied, and in many ways "exceptional."[20]

a. Entry rules for voters, candidates and parties. Constitutional regimes for voters, candidates, and parties tend to point in different directions. Respecting voters, constitutions tend to be inclusive. Article 42 of the Ghanaian Constitution, for example, declares that "every citizen of Ghana of eighteen years of age or above and of sound mind has the right to vote and is entitled to be registered as a voter for the purposes of public elections and referenda."[21] Until a 2012 Supreme Court decision, however, adult prisoners in Ghana were not permitted to vote. As in South Africa and Kenya, a constitutional judgment redrew the electorate's boundaries to draw in the incarcerated.[22] By way of counterpoint, the Indian high court has invalidated a statutory prohibition that negated felon disenfranchisement *only* for legislators.[23] The right to vote might also be implicated by practical hurdles, such as registration deadline, residency rules, and identification demands.

Voters are numerous and candidates, to some extent, replaceable. In contrast, parties tend to be fewer and far less fungible. As Schattschneider famously said, "political parties created democracy, and modern democracy is unthinkable without them."[24] So constitutional regulation of parties has higher stakes for democratic stability. The risks of both their regulation and their freedom are acute. One implication is the allocation of constitutional rights to associate to parties, which appear to have generally positive effects.[25] Another is the possible prohibition of parties that would otherwise command meaningful public support. I focus on the latter here.

Starting with the German Basic Law, constitutions have included "militant democratic" party bans as prophylactics against anti-democratic political formations (as discussed at more length in the Introduction to this volume). Article 21(2) of Germany's Basic Law, their locus classicus, flatly bans political parties that "seek to impair or abolish the free democratic basic order or endanger the existence of the Federal Republic of Germany."[26] A recent survey of legislative and constitutional party-ban provisions in Europe found around thirty-six examples, excluding prohibitions on parties on ideological grounds (65 percent), for violent activity (56 percent),

[20] Nicholas O. Stephanopoulos, "Our Electoral Exceptionalism," *University of Chicago Law Review* 80(2): 769–858 (2013).

[21] Constitution of Ghana, art. 42. (1992 [rev.1996]).

[22] Adem Kassie Abebe, "In Pursuit of Universal Suffrage: The Right of Prisoners in Africa to Vote," *Comparative and International Law Journal of Southern Africa* 46(3): 410–446 (2013).

[23] Surya Deva, "Democracy and Elections in India," in *Judicial Review of Elections in Asia* ed. Po Jen Yap. Routledge, 2016, 49.

[24] Elmer Eric Schattschneider, *Party Government: American Government in Action*. Routledge, 1942, 1.

[25] Adam S. Chilton and Mila Versteeg, "Do Constitutional Rights Make a Difference?," *American Journal of Political Science* 60(3): 575–589 (2016).

[26] Grundgesetz [GG] [Basic Law] art. 21(2), translation at www.gesetze-im-internet.de/englisch_gg/index.html.

as a means to protect the political order (44 percent), or for undemocratic internal party functioning (5 percent).[27] These provisions are largely enforced by courts, which rely for evidence on parties' platforms, leaders' statements, and members' activities.[28] Administrative agencies play a larger role within individualized lustration regimes, addressed below.[29] It is worth considering whether this forum choice influences the way in which democratic threats are evaluated. An administrative process, for example, might focus less on ostensible policy ambitions (courts' core concern) and more on empirical evidence of, say, party linkages to foreign, anti-democratic forces (e.g., the Russian government) or paramilitary formations.

A variant on "militant democracy" bans is the use of rules setting a threshold, or floor, of votes before a party obtains any legislative representation. Thresholds of 3 to 5 percent are common in party-list proportional representation systems.[30] In 1952, the German Bundesverfassungsgericht invalidated a Schleswig-Holstein law that imposed a 7 percent threshold, citing grounds of political equality and the need for a compelling justification for thresholds greater than 5 percent. It subsequently invalidated vote threshold rules that disfavored smaller parties from the former East Germany in the wake of reunification. The Bundestag responded by amending the election law to ameliorate the constitutionally flawed threshold rule.[31] The net result of these cases is that changes to Germany's election framework that seem likely to fence out smaller parties receive close judicial scrutiny, at the same time as the basic law raises the specter of judicial exclusion. This implies a judgment that courts, and not legislatures alone, should manage party disqualification. Germany is not alone in this practice. In 1998, the apex court of Italy invalidated a threshold that disfavored the representation of linguistic minorities in the Trentino-Alto Adigo region.[32]

One reason to favor judicial settlement of individual and party bans is that such prohibitions implicate considerations of due process that are familiar to judges and well-suited to resolution by courts. The law is singling out a person or association for a handicap not imposed on similarly situated actors. Courts may be able to draw on deeper jurisprudential resources to elaborate fitting procedural safeguards and

[27] Angela K. Bourne and Fernando Casal Bértoa, "Mapping 'Militant Democracy': Variation in Party Ban Practices in European Democracies (1945–2015)," *European Constitutional Law Review* 13(2): 221–247 (2017).

[28] Yigal Mersel, "The Dissolution of Political Parties: The Problem of Internal Democracy," *International Journal of Constitutional Law* 4(1): 86 (2006).

[29] Tom Ginsburg, David Landau, and Aziz Z. Huq, "Democracy's Other Boundary Problem: The Law of Disqualification," *California Law Review* 111, forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3938600.

[30] Arend Lijphart, *Electoral Systems and Party Systems. A Study of Twenty-seven Democracies, 1945–1900*. Oxford University Press, 1994, 20–35.

[31] Donald P. Kommers and Russell A. Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany*. Duke University Press, 2012, 186–191.

[32] Kieran Williams, "Judicial Review of Electoral Thresholds in Germany, Russia, and the Czech Republic," *Election Law Journal* 4(3): 193 (2005).

evidentiary thresholds. The existence of a familiar template for judicial involvement lowers the expected adoption and error costs associated with courts' intervention. The same, however, may well not be true for challenges to vote thresholds – which instead implicate questions of judicial competence in respect to more synoptic judgments about election systems in the round.

b. Electoral system review. The cases concerning the validity of vote thresholds in proportional representation systems are a reminder that constitutional courts can exercise jurisdiction over abstract (otherwise known as "facial") challenges to different elements of electoral systems. These cases present the question of conformity between a constitutional norm and the verbal contents of election law, bracketing any inquiry into how that law is applied on the ground. Generally, such challenges are adjudicated before an election. They seem less common than more specific charges of fraud or malfeasance in a particular election, a class of jurisprudence that I take up below. But the two categories obviously overlap.

A common question for review involves the carving up of a polity into geographic districts for representational purposes. In 1961, Ireland's High Court struck down a districting plan characterized by "grave inequalities."[33] Between 1986 and 2010, France's Conseil Constitutionnel invalidated several electoral districting statutes with large deviations from an equal population baseline. It twice instructed the French legislature to redraw all the nation's districts.[34] Other electoral system features can also be subject to judicial review. In 2008, for example, Indonesia's Constitutional Court upheld a mandatory gender quota for party lists but invalidated a vote threshold for party-list candidates.[35] In 2013, Italy's Constitutional Court struck down a 2005 election law because it used closed party lists and assigned a majority party a "bonus" in seats. These features, reasoned the Court, violated Article I of Italy's Constitution (popular sovereignty), Article 3 (equality before the law), Article 67 (representation as national, not local); and Article 48 (freedom of the vote). In an unusual further step, the Italian court issued a remedy in the form of a new, purely proportional, electoral system using a preference voting system. This system served the interest of neither party coalition. Their leaders Matteo Renzi and Silvio Berlusconi quickly negotiated an alternative scheme.[36]

Systemic challenges can also be lodged in international judicial bodies. Since 1986, the European Court of Human Rights has also permitted challenges to European law concerning elections to the European parliament.[37] And in 2016,

[33] O'Donovan v. Attorney General, High Court of Ireland (January 1, 1962), https://ie.vlex.com/vid/donovan-v-attorney-general-806302841.

[34] Stephanopoulos, "Our Electoral Exceptionalism," 781–782.

[35] Stefanus Henrianto, "The Curious Case of Quasi-weak-form Review," in *Judicial Review of Elections in Asia* ed. Po Jen Yap. Routledge, 2016, 101–102.

[36] Gianfranco Baldini and Alan Renwick, "Italy toward (Yet Another) Electoral Reform," *Italian Politics* 30(1): 164–166 (2015).

[37] Francis G. Jacobs, "Constitutional Control of European Elections: The Scope of Judicial Review," *Fordham International Law Journal* 28: 1034–1036 (2005).

the African Court of Human and People's Rights ordered Côte d'Ivoire to amend its electoral commission law to bring it into compliance with an impartiality principle in the African Charter on Democracy, Elections and Governance. The international court, though, stepped in only after a substantial challenge had been filed and rejected by the nation's high court.[38]

A final relevant class of cases involves the legal environment in which elections are run. Constitutions might extend a positive constitutional protection to speech, spending, and conduct constituting a campaign. Alternatively, they can impose negative restraints on how and when campaigns are conducted. Litigation of such rights that yields judgments of general scope will shape the electoral environment. They may indirectly change outcomes, but the frequency and identity of outcome-dispositive voting rules is hard to evaluate.

c. Election integrity claims. Specific complaints about election integrity seem more common than abstract challenges. A "surprisingly large" number of elections are closely fought.[39] Emotions are likely to run higher during such heated contests, with accusations of impropriety (or perhaps even its appearance) being more common. Across Anglophone democracies, moreover, partisan identification – both negative and also positive – appears to play an increasingly large role in national politics.[40]

The judicial reversal of a national election result on grounds of specific illegality or malfeasance seems rare. (The invalidation of *subnational* elections, by contrast, is more common, as Camby illustrates).[41] The example of Côte d'Ivoire's 2010 poll seems exceptional, not illustrative. Hence, when presidential polls in Taiwan in March 2004 led to an incumbent victory by 0.22 percent, the loser sought and obtained a court-ordered recount that reduced, but did not flip, the margin of victory.[42] In 2013, the Kenyan Supreme Court declined to set aside Uhuru Kenyatta's first-round victory in a presidential race against Raila Odinga.[43] Four years later, in 2017, after yet another closely fought election between Kenyatta and Odinga, the same Court accepted the latter's complaints of election irregularities, nullified the poll, and ordered fresh voting within sixty days. Because Odinga refused to participate in this second round – citing concerns about the election commission's integrity – judicial intervention did not ultimately change the

[38] Ben Kioko, "The African Charter on Democracy, Elections and Governance as a Justiciable Instrument," *Journal of African Law* 63(S1): 53 (2019).

[39] Laurence Whitehead, "The Challenge of Closely Fought Elections," *Journal of Democracy* 18 (2): 14 (2007).

[40] Mike Medeiros and Alain Noël, "The Forgotten Side of Partisanship: Negative Party Identification in Four Anglo-American Democracies," *Comparative Political Studies* 47(7): 1022–1046 (2014).

[41] Jean-Pierre Camby, *Le Conseil constitutionnel, juge électoral*. Dalloz, 2013.

[42] Tun-jen Cheng and Da-chi Liao, "Testing the Immune System of a Newly Born Democracy: The 2004 Presidential Election in Taiwan," *Taiwan Journal of Democracy* 2(1): 81–101 (2006).

[43] Kaaba, "The Challenges of Adjudicating Presidential Election Disputes in Africa," 93–94.

election's outcome.[44] In a variant on this dynamic, international courts in Africa, rather than their domestic counterparts, have been reviewing election disputes in Burkina Faso, Nigeria, Kenya, and Tanzania.[45]

The logical limit-case of these possibilities is Bangladesh's caretaker government regime. Recall that this looked to a former chief justice to administer government during the run-up to an election.[46] In effect, it assumed that the risk of illegal self-dealing by the incumbent government would be unacceptably large. Rather than adjudicate challenges after the fact, it imposed a blanket prophylactic remedy of control by judicial personnel. The judicial character of the caretaker regime, indeed, seems to have been important to its success.

Such widespread practice aside, there is also good reason to doubt that judges generally do a good job catching or preventing irregularities. A threshold reason is their lack of relevant expertise in recondite and technical matters of election administration. A second problem is impuissance. The path of the 2017 Kenyan election suggests that even when a court perceives irregularities, it may lack the political capital to force a change in election outcomes. The latter also illustrates the possibility of tension, even conflict, between a judiciary and a fourth branch institution with different views of a vote's legality – a point to which I return below.

On the other hand, the power to consider specific allegations of fraud or malfeasance in respect to a particular election is distinct from the power to consider whether, in the abstract, a legal framework contained in statutes and regulations comports with constitutional norms. The two genres of litigation usually turn on different evidentiary grounds and demand different kinds of judicial competencies. The distinction between specific and abstract review, though, should not obscure a more profound connection between these two genres of litigation: A well-designed and well-functioning legal structure for parties and elections minimizes the opportunity for strategic action by powerful state actors intended to derail an anticipated electoral defeat. Post hoc judicial review of specific objections might usefully identify vulnerabilities in the electoral framework, providing the legislature with the information necessary to "patch" the system. Alternatively, such review might have a corrosive "moral hazard" effect: Elected officials know that they can appeal, after the fact, to the bench in cases where something goes awry. Ex ante, therefore, they have less urgent reasons to anticipate and fix vulnerabilities in an electoral system. The exercise of judicial review, which is often assumed to be the sine qua non of legality, hence creates a dynamic unravelling of the rule of law around

[44] Richard Stacey and Victoria Miyandazi, "Constituting and Regulating Democracy: Kenya's Electoral Commission and the Courts in the 2010s," *Asian Journal of Comparative Law* 16: 1–18 (2021).

[45] James Thuo Gathii and Olabisi D. Akinkugbe, "Judicialization of Election Disputes in Africa's International Courts," *Law and Contemporary Problems* 84(1): 181–218 (2022).

[46] See Bari, "The Incorporation of the System of Non-party Caretaker Government in the Constitution of Bangladesh."

elections. A possible way to mitigate the force of such incentive effects is the judicial use of a "penalty default" remedy. This is a judicial solution disfavored by all – perhaps akin to the Italian constitutional court's ruling in 2013 – that forces hegemonic partisan actors to revise the election law rather than compete under an intolerable disposition.

Ginsburg and Elkins offer a more minimalist justification of the judicial role in settling close elections.[47] Likening a closely contested election to the game-theory model of "chicken," they posit that a judicial resolution can operate as a "self-enforcing focal point" that mitigates the risk of overt conflict even if it is not a particularly accurate factfinder. This role, they note, need not be played by a court; the latter is just a "convenient third-party [that] draws on the imagery of a neutral dispute resolver."[48] This logic, though, assumes a relatively narrow temporal focus on the moment after a close election. It does not account for the risk of strategic false claims by a likely loser that an election is closer than it really is: Again, the problem can be characterized in terms of moral hazard, with the risk of upstream strategic action rising as the expected accuracy of the third-party adjudicator decreases.

d. "Exit" rules for candidates and parties. Just as law can impose front-end hurdles to entering the political process so too can law create chutes for expelling individuals or groups that pose a threat to the democratic process. Democratic exclusion varies not only by whether it operates at a granular, individual level or a coarser group level but also whether it hinges on past "bad" conduct or a prediction of future harm. I have addressed party bans above because they can be thought of as ex ante barriers to participation. I hence focus on individual disqualification here because they commonly hinge on a finding of "bad" past action.

At one end of this spectrum is the familiar impeachment remedy. Almost all (90 percent) of constitutions with a presidency speak to impeachment. Crimes and constitutional violations are the most common bases for removal. A lower legislative chamber usually begins an impeachment by a supermajority vote, and ex post judicial review is often, albeit not always, available. Between 1990 and 2018, impeachment was proposed at least 210 times in 61 countries, against 128 different heads of state. But only ten removals were ultimately carried out, some of which involved judicial review of a legislative removal decision.[49] Impeachment is not the only pathway for exclusion. Israeli courts have adopted an aggressive program of removing officials and blocking appointments based on a judge-made concept of "good character," deeming officials ineligible from remaining in or holding office if

[47] Tom Ginsburg and Zachary Elkins, "Ancillary Powers of Constitutional Courts," *Texas Law Review* 87(7): 1456–1457 (2008).

[48] Ibid. at 1457.

[49] Tom Ginsburg, Aziz Z. Huq, and David Landau, "The Comparative Constitutional Law of Presidential Impeachment," *University of Chicago Law Review* 88(1): 81–164 (2021).

currently under indictment.[50] On the other side of the ledger, lustration rules might be subject to constitutional challenge rather than simply being enforced. In 2003, for instance, Indonesia's Constitutional Court invalidated a prohibition on the election of Communist Party members.[51]

Given their stakes, disqualification disputes unsurprisingly can spill into larger questions of institutional power. India provides an example. After the Allahabad High Court invalidated the election of Indira Gandhi on corruption-related grounds, the Indian parliament enacted a constitutional provision making election disputes involving the prime minister and speaker non-justiciable. In 1975, the Indian Supreme Court invalidated that amendment, citing its "basic structure" doctrine.[52] Hence, a discrete dispute about one politician become the basis for a more sweeping ruling about judicial power.

e. Summary. Apex courts are in practice involved in a wide range of election and party-related disputes. In some instances, they perform tasks assigned by a constitution (e.g., enforcing rights, resolving factual claims of irregularity, and disqualifying parties or candidates). At other times, they clarify the meaning of the organic law (e.g., in abstract challenges to the constitutionality of election-related provisions). A minimal conclusion from this survey is negative: Given the heterogeneity and numerosity of potential disputes, there is unlikely to be a single "right answer" to the question of when courts should be involved, or not, in the constitutional regulation of parties and polling. The world is too complex for a single, simple solution of that kind.

10.4 INSTITUTIONAL CHOICE IN THE CONSTITUTIONAL SUPERVISION OF ELECTIONS AND PARTIES

If there is no "one size fits all" institutional choice covering all of these examples, the question arises whether there are reasons to assign some tasks to courts and some to fourth-branch bodies. The choice is nonbinary: Courts might be either substitutes or complements for fourth-branch bodies, such as election commissions. Indeed, as Figure 10.3 shows, a nontrivial number of constitutions contain both election-specific judicial powers and also an election commission. This overlap creates the possibility of both cooperation and conflict.

The case studies discussed above push in different directions as to this choice. The Côte d'Ivoire example points toward skepticism about courts and hence an emphasis on nonjudicial bodies. In South Africa, the Constitutional Court and the Public Protector have worked in tandem in respect to high-level corruption relevant

[50] Yoav Dotan, "Impeachment by Judicial Review: Israel's Odd System of Checks and Balances," *Theoretical Inquiries in Law* 19(2): 705–744 (2018).
[51] See Henrianto, "The Curious Case of Quasi-weak-form Review," 98.
[52] See Deva, "Democracy and Elections in India."

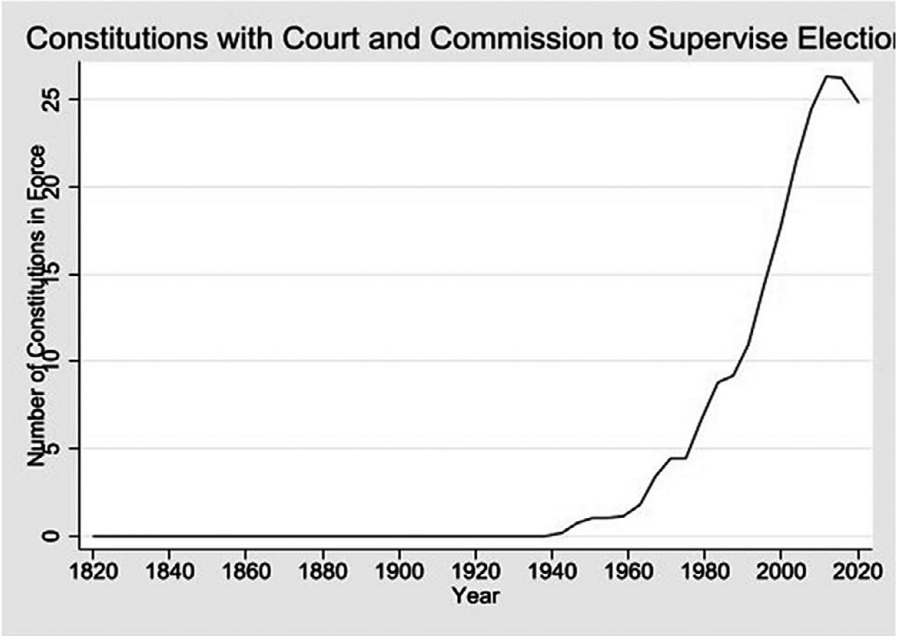

FIGURE 10.3 Proportion of extant constitutions with both judicial and fourth-branch electoral bodies.

to the potential disqualification of the prime minister.[53] Or an election commission might be subject to judicial oversight, as was the case in Kenya in 2017. That oversight can be intense or mild. In Taiwan, for example, courts "respect[] the regulatory authority" of the Election Commission by deferring to its judgment.[54] The Bangladesh example further hints that judicial actors can be embedded within an election management infrastructure to sustain constitutional norms. There is, in short, a quite wide array of potential relationships between courts and other bodies: cooperative, adversarial, entangled, or dominating.

There is good reason for resisting a strong presumption in favor of courts or fourth-branch bodies. To see this, consider three obstacles confronted by any constitutional body charged with maintaining democratic hygiene in and around elections: All three afflict both courts and non-judicial bodies in roughly equal measure. First, an institution with sufficient insulation from contemporaneous partisan pressures must get off the ground. Not only must that institution be designed with robust insulation from the very beginning, but that design feature must prove enduringly effective.

[53] Aziz Z. Huq, "A Tactical Separation of Powers Doctrine," *Constitutional Court Review* 9(1): 19–44 (2019).

[54] Wen-Chen Chang and Yi-Li Lee, "Judicial Strategies in Resolving Presidential Election Disputes," in *Judicial Review of Elections in Asia* ed. Po Jen Yap. Routledge, 2016, 147–172.

The initial constitutional design of either a judicial or a fourth-branch body can be flawed. In a study of election management bodies, Michael Pal identifies gaps in their organic documents that facilitate capture.[55] Similarly, the American federal judiciary was designed with two assumptions in mind: that the nation's Senate would be a nonpartisan body and that the supply of potential judges would be limited enough that selection could not be used to partisan ends. Both assumptions faltered within a decade of ratification. As a result, the American system for appointing federal judges is directly partisan, and partisan projects infuse the operation of the national judiciary.[56] One sort of democratic success, that is, engendered a different kind of democracy-related failure in another element of the Constitution.

Good design requires constitutional founders who eschew a partisan cast of mind and who are capable of anticipating evolving and as-yet unanticipated strains on the democratic process. Obviously, these won't always be to hand. Perhaps the most obvious circumstances in which good design will come to the fore arise after a widely maligned (e.g., a fascist or apartheid) regime has collapsed, and there is intense public and geopolitical pressure for a fresh start.

Second, even a well-designed court or fourth-branch body institution can be subject to overweening informal (or illegal) pressures that compromises their good operation. For the past three decades, the Indian judiciary has exercised almost complete control over the formal processes for appointments to the higher bench. This insulates it from direct partisan pressure. The Supreme Court, indeed, invalidated a 2014 statute creating a National Judicial Appointments Commission. Yet the judiciary has recently turned a "blind eye" to controversial steps by the Bharatiya Janata Party (BNP) of Prime Minister Narenda Modi, such as a controversial campaign finance law, extrajudicial detentions in Jammu and Kashmir, and the construction of a Hindu temple on the site of the Babri Masjid. Judicial quiescence appears to be the result of "subtle" administrative measures, such as slow-walking promotions and background checks and resisting calls for better funding.[57] More troubling allegations of corruption on the part of a new chief justice and blackmail by the BNP suggest that even most robust legal defenses of institutional independence might be vulnerable to circumvention by sufficiently unscrupulous political operatives.[58] Similarly, Zambian Chief Justice Mathew Ngulube was forced to resign in 2002 after it was found out that he had received bribes from incumbent President Fredrick Chiluba while deliberating on an election-related petition.[59]

[55] Michael Pal, "Electoral Management Bodies as a Fourth Branch of Government," *Review of Constitutional Studies* 21(1): 85–113 (2016).

[56] Aziz Z Huq, "Why Judicial Independence Fails," *Northwestern University Law Review* 115 (4):1055–1122 (2020).

[57] Madhav Khosla and Milan Vaishnav, "The Three Faces of the Indian State," *Journal of Democracy* 32(1), 117 (2021).

[58] Atul Dev, "India's Supreme Court Is Teetering on the Edge," *The Atlantic* (April 29, 2019), www.theatlantic.com/international/archive/2019/04/india-supreme-court-corruption/587152/.

[59] Kaaba, "The Challenges of Adjudicating Presidential Election Disputes in Africa," 115.

Where an incumbent resorts to extralegal measures to undermine democratic choice, the institutional choice between guardianship bodies will have limited salvific effect. What is more important is the strength of the larger supervisory regime of criminal law pertaining to political corruption.

It is not clear whether courts or fourth-branch bodies can best resist this pressure. Tushnet[60] has suggested that the modal adjudicative tasks of an apex court often force it to take positions that have inescapable partisan connotations. Tasking judges with election-related dispute resolution may amplify the risk they will be tarred as "party-political".[61] And Tushnet's concern clearly extends, as he recognizes, to fourth branch institutions. And it may be that apex courts are more vulnerable because their ordinary docket has high political stakes. Or it might be that an apex court has a sufficiently large load of non-partisan-coded cases that it has a *greater* capacity to absorb or deflect "party-political" criticism. It is hard to know which way this consideration cuts in advance.

Third, it is well known that a verbal specification of a norm may be an imperfect proxy for an underlying constitutional value. Over time, a specific formulation may do an increasingly bad job of tracking that value. A more general verbal formulation, in contrast, may require new judgments over time as to how best to apply it across new and different circumstances over time. The negative right to speak free of governmental coercion, for example, is plausibly thought to be necessary to a well-functioning democracy. But that negative right may become increasingly irrelevant if it is possible for government to crowd or drown out critical, adversarial speech.[62] As a result, a court or guarantor institution tasked with maintaining a healthy democratic public sphere must revise radically how "democratic debate" is realized to avoid obsolescence at the hands of new digital media technologies. Again, a potentially paradoxical dynamic can be traced: A court that has successfully defended a negative-rights account of the democratic sphere may be so beholden to that history, intellectually or as a matter of institutional pride, that it is unable to recognize a decisive evolution in the sociopolitical environment. Blinded by success, it is driven to failure.[63]

There is, in short, a complex blend of countervailing pressures at play across a range of constitutional design decisions. It is, in particular, difficult to see an overwhelming case for either courts or fourth-branch bodies. Both courts and non-judicial bodies are vulnerable to threshold design flaws and illegal influence.

[60] Mark V. Tushnet, *The New Fourth Branch: Institutions for Protecting Constitutional Democracy*. Cambridge University Press, 2021, 32–33.

[61] Ibid.; compare Olabisi D. Akinkugbe and James Thuo Gathii, "Judicial Nullification of Presidential Elections in Africa: *Peter Mutharika v Lazarus Chakera and Saulos Chilima* in Context" (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3642709.

[62] Zeynep Tufekci, *Twitter and Tear Gas*. Yale University Press, 2017.

[63] Stephen Holmes, "Saved by Danger/Destroyed by Success. The Argument of Tocqueville's Souvenirs," *European Journal of Sociology* 50(2):171–199 (2009).

Perhaps the longer historical pedigree of judicial independence offers a more secure psychological and social foundation for resisting drift and corruption; or perhaps the *bien-pensant* myth of judges who stand above the fray makes their partisan allegiance more difficult to discern and critique. In respect to the third concern raised above, it is easy (but probably wrong) to assume that courts are worse than legislative or executive bodies at updating principles' legal entailments under new circumstances. The Canadian Charter of Rights and Freedom has famously been viewed as a "living tree," capable of fruitful adaption to new environments.[64] Max Weber's idea that bureaucracy can be hindered by an "iron cage" of rigid doxa and habit has grown into cliché – but holds more than a grain of truth. The dominance of either "living tree" or "originalist" metaphors in the high-level legal culture of a polity may have a greater impact than the abstract choice between judge and bureaucrat.

To the extent that even a rough cut at the question of institutional choice is appropriate, Tushnet's suggestion that overlapping guarantor institutions may well be ex ante desirable seems a good starting point.[65] Rather than trying to read the tea leaves to discern the political future, a designer might write in multiple, seemingly redundant bodies so that at least one does not fail when confronted by an unexpected challenge.[66] Yet even this guidance requires caveats: Where particularized election disputes are concerned, a plurality of forums for contesting an outcome may induce forum-shopping, inconsistent judgments, and even outright conflict because of the lack of a focal-point resolution.[67] Where an election-related dispute requires a quick answer therefore – usually because operative power hangs in the balance – it is likely better to avoid overlap and second-guessing. Perhaps this will lead to a higher rate of erroneous decision-making, but that may be better than a higher-rate of election-related conflicts.

10.5 CONCLUSION

Apex judiciaries have played a significant part in administering elections in many jurisdictions. Success stories as well as cautionary tales abound. To an extent, the courts are likely capable of being replaced by fourth-branch bodies. But the design of the latter raises many of the same questions about "independence" as a judiciary's design. Reinventing the wheel might do little to improve the quality of democracy. For this reason, there may be some small reason to prefer courts in a jurisdiction where de facto judicial independence has been achieved, and more reason to look to fourth-branch institutions where that public good remains an elusive and unrealized goal.

[64] Wilfred J. Waluchow, "The Living Tree, Very Much Alive and Still Bearing Fruit: A Reply to the Honourable Bradley W Miller," *Queen's Law Journal* 46: 281 (2020).
[65] Tushnet, *The New Fourth Branch*, 22.
[66] Aziz Z. Huq, "Forum Choice for Terrorism Suspects," *Duke Law Journal* 61: 1415–1519 (2011).
[67] Compare Ginsburg and Elkins, "Ancillary Powers of Constitutional Courts."