# Fourth-Branch Institutions and Political Oppositions

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**Abstract** Fourth-branch accountability can be characterized as a constitutional trust-type mandate to provide intrastate nonpartisan accountability with a broad repertoire of institutional capacities. Fourth-branch institutions play a significant role in protecting constitutional democracies, and their role in the system of political accountability becomes especially apparent when political oppositions are unwilling or unable to perform a partisan check. These institutions partly emerge from distrust in the political branches' ability to ensure accountability in a partisan world. Thus, they are designed to be insulated from partisan pressures and anchored to the core principles of legality and impartiality. However, fourth-branch institutions do not exist in a supra-partisan realm. We argue that fourth-branch accountability remains intertwined with partisan dynamics and, as a result, these institutions interact with political oppositions in symbiotic or antagonistic ways. We examine these types of interactions in the light of four cases from Latin America. Given these interactions, we address two questions. First, how to understand impartiality. Second, whether the strategic behavior deployed in their interactions with political oppositions is compatible with the impartiality principle. To the first question, we suggest that impartiality is an ideal of institutional design but a blunt instrument to analyze the fourth-branch behavior because it is challenging to employ for a serious assessment. To the second question, we propose distinguishing between different types of strategic stances; responding to partisan alignments is not necessarily problematic if they look at the institution's self-interest within certain margins of excessive aggrandizement and near-cowardice.

**Keywords:** Fourth-Branch Institutions; Political Oppositions; Political Accountability

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## A. Introduction

Every democratic regime requires a robust system to hold public officials accountable. Broadly defined, *political accountability* encompasses the mechanisms of control of pub-

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lic officials, including oversight, answerability, and responsibility.[1] This system operates through a network of formal and informal relationships that enable oversight and potential sanctions. Attending to their structure, these mechanisms can be classified into two main categories: *intrastate* accountability, which involves relationships between public institutions, and *nonstate* accountability, which connects public officials with civil society actors.[2]

Another way to classify accountability is by examining the logic underpinning these controls, distinguishing between *partisan* and *nonpartisan* accountability. Partisan accountability is driven by partisan motivations, such as advancing an agenda, opposing rival factions, or fostering political loyalties. In contrast, nonpartisan accountability refers to oversight and controls that are supposed to come from "outside" party politics, that is, not motivated by partisan goals or systematically aligning with a particular faction in the partisan competition.

This article focuses on the interaction between two key actors in the accountability system: political oppositions and fourth-branch institutions. Political oppositions can be broadly understood as organized actors that express their disagreement with the government or its policies in the public sphere.[3] While political parties are the most prominent and visible form of opposition, they are by no means the only type; other actors, such as social movements, advocacy groups, and civil society organizations, also play critical roles in opposing and holding governments accountable.

Hence, political opposition plays a pivotal role in partisan accountability, leveraging their position to exercise both state and nonstate forms of control. When oppositions are represented in the political branches, they can utilize constitutional tools to hold the government accountable, thereby contributing to intrastate accountability. Even in the absence of electoral representation, oppositions can take the form of organized civil society groups, present alternative narratives to the public, or mobilize the citizenry, thereby engaging in nonstate accountability.

The fourth branch comprises a series of functions allocated to constitutionally entrenched institutions independent of the three traditional branches based on considerations of distrust, meaning that in a given constitutional system, the executive, legislative and the ordinary judiciary are considered to lack the necessary expertise, capacity, or incentives

1 For an overview of the disagreements regarding the concept and a typology of accountability, see *Scott Mainwaring*, Introduction: Democratic Accountability in Latin America, in: Scott Mainwaring / Christopher Welna (eds.), Democratic Accountability in Latin America, Oxford 2003.

2 Mainwaring formulates a distinction between intrastate and electoral accountability. We take his concept of intrastate accountability but use it in broader terms; for example, we do not require a formalized legal relationship between two public authorities has he does, Ibid., p. 20.

3 Nathalia Brack and Sharon Weinblum define political opposition as "[..] a disagreement with the government or its policies, the political elite, or the political regime as a whole, expressed in public sphere, by an organized actor through different modes of action", see *Nathalie Brack / Sharon Weinblum*, 'Political Opposition': Towards a Renewed Research Agenda, Interdisciplinary Political Studies 69 (2011), p. 74.

to provide a credible commitment to perform a given function adequately.[4] Accountability is one of these functions, although not the only one. Thus understood, the fourth branch includes constitutional courts upholding the constitutional framework, electoral bodies guaranteeing the peaceful and democratic transfer of powers, ombuds offices investigating human rights violations, independent general attorneys prosecuting crime and representing the state's interest, and comptrollers auditing the use of public resources, among others.

Fourth-branch institutions exercise intrastate nonpartisan accountability. In this regard, fourth-branch accountability is not unique; the ordinary judiciary and independent agencies tasked with accountability functions may also participate in the accountability system in that manner. Institutions in this quadrant have in common that they all operate under the principles of *legality*—their power comes from a constitutional or legal delegation—and *impartiality*—they must exercise their powers without partisan biases, regardless of partisan pressure. However, the fourth branch is unique because it is constitutionally entrenched, tends to have trust-type delegated powers,[5] with a broad repertoire of capacities, often can act *ex officio*, and is designed to intervene in high politics. Consequently, fourth-branch accountability can be characterized as a constitutional trust-type mandate to provide intrastate nonpartisan accountability with a broad repertoire of institutional capacities.

Despite the clear distinctions outlined in this introduction, evaluating the adherence of fourth-branch institutions to their core principles of legality and impartiality presents significant challenges due to their intervention in partisan politics. The fourth branch and political oppositions operate in the same political landscape and often respond to the same political junctures. As a result, even though the fourth branch is theoretically independent of party politics, it remains deeply intertwined with the dynamics of the partisan world.

This article can be read as an elaboration on Mark Tushnet's skepticism regarding the *above party politics* status of the fourth branch.[6] We argue that, regardless of legality and impartiality, fourth-branch accountability is deeply intertwined with partisan alignments,

4 Tarunabh Khaitan offers a similar general definition of guarantor institutions: "constitutionally entrenched bodies that exist and function outside of the traditional tripartite structure of government [the executive, legislative, and judicial branches] in order to guarantee constitutional commitments.", see *Tarunabh Khaitan*, Making Constitutional Promises Credible: The Preventive Potential of Guarantor Institutions, The Preventive Potential Project, (2024), p. 1. However, in other pieces, he suggests a more demanding and detailed account of what guarantor institutions are: a "tailor-made constitutional institution, vested with material as well as expressive capacities, whose function is to provide a credible and enduring guarantee to a specific non-self-enforcing constitutional norm [or any aspect thereof]", see *Tarunabh Khaitan*, Guarantor Institutions, Asian Journal of Comparative Law 16 (2021), p. 40.

5 The characterization of the fourth branch—guarantors—as trustees is developed by *Tarunabh Khaitan*, Guarantor (or the So-Called "Fourth Branch") Institutions, in: Jeff King / Richard Bellamy (eds.), The Cambridge Handbook of Constitutional Theory, Cambridge 2025, p. 603.

6 See *Mark Tushnet*, Institutions for Protecting Constitutional Democracy: An Analytic Framework, with Special Reference to Electoral Management Bodies, Asian Journal of Comparative Law 16 (2021). Tushnet doubts the Kelsenian aspiration of a guardian of the constitution from above party politics and instead embraces the possibility of "institutions implicated in party politics but each

building symbiotic or antagonistic relations with political oppositions. This means that political oppositions' behavior heavily influences the fourth branch's effectiveness in holding public officials accountable. At the same time, the fourth branch's actions—or inactions—carry significant partisan implications, impacting the strategies and capacities of political oppositions.

This article is structured into three sections. Section B characterizes fourth-branch accountability as a constitutional trust-type mandate to provide intrastate nonpartisan accountability with a broad repertoire of institutional capacities. It does so by distinguishing this type of accountability from the partisan controls exercised by the political branches and other state nonpartisan institutions. First, presenting how the fourth branch can be conceived as a reaction to the limitations of the political branches; second, outlining the main differences between fourth-branch institutions and other nonpartisan public bodies, such as independent agencies and ordinary judiciaries.

Section C analyses four cases to illuminate the interaction between the fourth branch and political oppositions. There is no supra-partisan world from which the fourth branch can operate; as a result, what the fourth branch does is influenced by partisan alignments, and, at the same time, the fourth branch's actions—or inactions—impact the partisan world. We analyze four cases from Latin America to point out how the fourth branch interacts with political oppositions, generating relations of symbiosis or antagonism. With these cases, we do not aim to show a representative image of the region; however, we think they help clarify our case that fourth-branch accountability cannot escape partisan dynamics.

Finally, section D deals with two questions that follow from recognizing the intertwining between the fourth branch and political oppositions. First, how we should understand impartiality in a world where these interactions occur. Second, whether the strategic behavior deployed in their interactions with political oppositions is compatible with the impartiality principle. To the former, we suggest that impartiality can be understood as an ideal at the level of institutional design, and it is – at best – a blunt instrument to evaluate fourth-branch behavior. To the latter, we propose distinguishing between different types of interactions, and that fourth-branch strategies responding to partisan alignments are not necessarily problematic if they look at the institution's self-interest, within certain margins.

## B. Characterizing Fourth-Branch Accountability

One way to conceptualize the fourth branch is through a negative approach, focusing on the functions that constitutional framers believe the traditional three branches of government cannot be trusted to perform. From this perspective, constitution-makers may assign certain functions to fourth-branch institutions when they determine that the executive, legislative,

in a slightly different way", see *Mark Tushnet*, The New Fourth Branch: Institutions for Protecting Constitutional Democracy 21 (2021).

and ordinary judicial branches lack the necessary expertise, capacity, or incentives to provide credible commitments to discharge them adequately.

According to Mark Tushnet, the story of the fourth branch is partly the story of distrust in the capacity of the political branches to take care of the constitution, mainly due to the logic of partisan politics.[7] Similarly, when Bruce Ackerman defends the need for an integrity branch, he suggests that elected politicians cannot be trusted to tackle corruption due to partisan incentives.[8] These approaches have in common the idea that electoral incentives and partisan politics can undermine the capacity and willingness of oppositions represented in the political branches to maintain core aspects of constitutional democracy. Accountability is one of these functions.

That distrust, however, does not fully justify the necessity of fourth-branch accountability. Modern constitutional systems already include unelected bodies, such as independent administrative agencies and the ordinary judiciary, designed to function free from partisan bias. Nevertheless, the fourth branch differs from independent agencies in its higher degree of constitutional entrenchment. Fourth-branch institutions are also different from an ordinary judiciary in their distinctive engagement with the principle of legality, a trust-type independence, a broad repertoire of institutional capacities often involving acting *ex officio*, and their potential intervention in high politics.

## *I. From Partisan Accountability to Nonpartisan Accountability*

The primary structural classification of political accountability appears delineated in the roots of American constitutionalism, distinguishing between what we have called nonstate and intrastate accountability. As The Federalist No. 51 suggested, controlling the government is primarily the citizens' responsibility, but also requires some auxiliary precautions:

> *"A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.*
> *This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual*

7 *Tushnet,* note 6, pp. 8-41.

8 "Bureaucracy cannot work if bureaucratic decisions are up for sale to the highest bidder. Nor can elected politicians be trusted to get serious about corruption. Even when they themselves do not share directly in the loot, a slush fund can often serve to grease the wheels of their electoral coalitions", see *Bruce Ackerman,* The New Separation of Powers, Harvard Law Review 113 (2000), pp. 633, 694.

> *may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State."*[9]

What Madison refers to as auxiliary precautions represents the foundational form of intrastate control mechanisms in modern constitutions. The system of separation of powers and checks and balances operates by distributing authority among distinct branches of government, each equipped with its own motives and powers to resist encroachments by the others, ensuring that ambition counteracts ambition.[10] This structured competition among self-interested branches was designed to curb abuses of power and prevent its concentration in any single entity.

However, that structure was inadequate to deal with the world of party politics. Political parties[11] subvert the logic of self-interested branches – if it ever existed in reality – by introducing the party's interest. According to Levinson and Pildes,[12] political parties, as organizations aligned around policy and ideology, became the most significant predictor of interbranch behavior: cooperation during unified government and competition during periods of divided government. Consequently, a substantial part of the system of auxiliary precautions – the mutual checks between the political branches – turned into an instrument of party collaboration or competition.[13]

Both scenarios are potentially problematic for every constitutional system adopting a model of separation of powers with political parties.[14] During periods of unified government, we can expect a decline in interbranch checks, allowing the party in control to implement its agenda without intrastate partisan constraints from oppositions, opening the door for self-entrenchment in power, precisely the situation of concentration of power that the framers feared. Meanwhile, during periods of divided government, party competition may lead to pathological dynamics such as gridlock, with both political branches blocking each other while claiming democratic legitimacy to represent citizens' interests,[15] or breaking the stalemate situation through unilateral action, what Ackerman calls the *Linzian nightmare*,

9 *Alexander Hamilton* / *James Madison* / *John Jay*, The Federalist Papers (2009), p. 264.

10 Ibid.

11 Regarding how the party system unfolded against the framers' expectations in the U.S., see *Bruce Ackerman*, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy, Cambridge 2005.

12 *Daryl J. Levinson* / *Richard H. Pildes*, Separation of Parties, Not Powers, Harvard Law Review 119 (2006), p. 2311.

13 Ibid., p. 2329.

14 The presidential model of separation of powers was highly influential in Latin America, making it significant for the cases we analyze, see *Gabriel L. Negretto*, Diseño Constitucional y Separación de Poderes en América Latina (Constitutional Design and Separation of Powers in Latin America), Revista Mexicana de Sociología 65 (2003), p. 41.

15 That is, the *dual democratic legitimacy* problem pointed out by Linz, see *Juan J. Linz*, Presidential or Parliamentary Democracy: Does It Make a Difference?, in: Juan J. Linz / Arturo Valenzuela (eds.), The Failure of Presidential Democracy, Baltimore 1994, pp. 1, 6–8.

in which "one or another power assaults the constitutional system and installs itself as the single lawmaker."[16]

The possibility of these scenarios makes intrastate partisan controls not always reliable. Depending on the political cleavage, alliances, and relative power of political parties, political oppositions may not be able or willing to perform their primary function of controlling the government. As Giovanni Sartori observed, such doubts lead "pessimists" to seek "alternative avenues and devices of control" outside the partisan framework, while "optimists" maintain faith in opposition-led accountability as a sufficient mechanism.[17]

Mark Tushnet can be understood as embracing a doubly pessimistic perspective; first, with political branches providing partisan control; second, with the plausibility of nonpartisan fourth-branch checks. His justification for the fourth branch reflects the search for these alternative control mechanisms rooted in a distrust of intrastate partisan accountability. Tushnet questions the efficacy of Madisonian checks and balances in a system where partisan dynamics dominate, emphasizing the need for institutions capable of intervening in party politics in a different way.[18] In making his case, he follows Hans Kelsen's proposal of a constitutional court as the archetypical fourth-branch institution.

Tushnet argues that Kelsen envisioned constitutional courts as impartial guardians of the constitution, essential in systems dominated by party politics. These courts must operate outside the party system to ensure their independence and impartiality. Their primary role is to interpret and enforce the constitution's allocation of powers among branches of government. While their work involves interpreting laws, Kelsen recognized their role as intrinsically political because constitutional law reflects deep political judgments about fundamental goals of governance, social values, and visions of the common good.[19]

According to Tushnet, the aspiration that defines a constitutional court is to perform a political role from above partisan politics. The Kelsenian guardian of the constitution is tasked with engaging in constitutional governance while remaining detached from the direct influences of party competition. However, Tushnet is skeptical about the feasibility of designing institutions that can genuinely rise above partisan logic.[20] Despite this skepticism, he acknowledges the potential efficacy of a network of institutions – not just one court –

16 *Ackerman*, note 8, p. 645.

17 Giovanni Sartori asserts: "Our view of the problem of the control over government depends very much on how we stand with regard to the problem of opposition. The pessimists, so to speak, are likely to develop an interest in exploring alternative avenues and devices of control, whatever these may be. The optimists, on the other hand, may prefer to dwell on the controlling function which is provided by the very existence of an opposition," see *Giovanni Sartori*, Opposition and Control: Problems and Prospects, Government and Opposition 1 (1966), pp. 149, 154.

18 *Tushnet,* note 6, pp. 8–41.

19 Ibid., p. 15.

20 Tushnet argues: "We can design such mechanisms that will indeed insulate the constitutional court from those threats, but the mechanisms will do so effectively only under conditions that make it unnecessary to have a constitutional court as a guardian of the constitution.", see Ibid., p. 21.

that, while involved in political processes, are not directly partisan and could collectively contribute to maintaining regime stability; these institutions would be implicated in party politics but "each in a slightly different way."[21]

We elaborate on Tushnet's skepticism by exploring what that slightly different implication in partisan politics means. We assume that constitution-makers have designed fourth-branch institutions intending to insulate them from partisan dynamics, reflecting a deep mistrust in the sufficiency of intrastate partisan controls to ensure accountability. However, this raises another question: why establish new, entrenched institutions when modern constitutional systems already include nonpartisan authorities, such as independent agencies and courts, capable of fulfilling similar roles? Addressing this question requires exploring the perceived limitations of existing institutions and the unique characteristics attributed to the fourth branch that justify its distinct constitutional entrenchment.

### *II. Fourth-Branch Accountability as Intrastate Nonpartisan Accountability*

Fourth-branch institutions are not the only public body that engages in intrastate nonpartisan accountability. Independent agencies can be legally empowered to take actions of oversight and/or sanction over other public officials, and an ordinary judiciary can adjudicate cases involving public officials in the performing of their functions. As part of their removal from partisan politics, these institutions are usually not democratically elected – at least not in the same manner as political branches – and thus need to rely on different principles of legitimation.[22] Like the fourth branch, the judiciary and independent agencies rest on legality and impartiality.

Despite that similarity, significant differences make fourth-branch accountability unique and worthy of a separate analysis. First, fourth-branch institutions are constitutionally entrenched to a greater degree than independent legal agencies, protecting them against the majoritarian dynamics of partisan politics. Second, while the judiciary is materially constrained by legality and performs an eminently adjudicatory function, the fourth branch enjoys what has been called a trust-type delegation, and it is charged with roles and institutional capacities that go beyond adjudication, often acting *ex officio* and potentially intervening directly in high politics.

21 Ibid., pp. 21–22.

22 Mark Thatcher and Alec Stone Sweet define non-majoritarian institutions as "governmental entities that [a] possess and exercise some grant of specialised public authority, separate from that of other institutions, but [b] are neither directly elected by the people, nor directly managed by elected officials", see *Mark Thatcher* / *Alec Stone Sweet*, Theory and Practice of Delegation to Non-Majoritarian Institutions, West European Politics 25 (2002), pp. 1, 2.

## 1. Similarities: The Legality and Impartiality Principles

All institutions engaged in intrastate nonpartisan accountability rely on two core principles: legality and impartiality. Legality requires that their actions are grounded in constitutional or legal mandates. Impartiality requires that they carry out their role without partisan bias or favoritism. These principles are essential for maintaining public trust and legitimacy within the accountability system. From a functional perspective, political players need to believe these institutions will stick to these principles in order to delegate accountability functions; in other words, being anchored to these principles is what grounds a significant part[23] of the credibility of their commitment to accountability.[24]

Legality points out that these institutions exercise delegated power; consequently, whatever they do or omit should be grounded on their mandate. The scope of this delegation may be broader or narrower, and it will be determined by a prior, less legally constrained decision made by constitution makers or legislators.[25] That previous decision will require a broad agreement between the existing political forces. Sometimes, agreements may be reached by employing open-ended language; that language grants the institution greater flexibility to operate, provided its actions remain within the legal boundaries set by its mandate.[26]

Impartiality points out an attempt to remove these institutions from partisan politics; whatever they do or omit should not be driven by partisan motivations, aiming to benefit or harm one side of the political cleavage. From a rational choice perspective, interested parties only agree to empower these institutions if they believe the creation will not

23 Other aspects have to do with technical expertise, see *Frank Vibert*, The Rise of the Unelected: Democracy and the New Separation of Powers, Cambridge 2007.

24 For an analysis of criteria that may justify delegation to independent unelected authorities, see *Paul Tucker*, Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State, Princeton 2018, pp. 92–108.

25 Hans Kelsen stipulates that: "While the constitution, statute, and the decree represent the general norms of the law, which are progressively more saturated with content, the judicial decision or administrative act are to be regarded as individual legal norms. A legislator, who stands only under a constitution that determines his procedure of legislation, is bound by law only to a relatively limited extent," see *Hans Kelsen*, Kelsen on the Nature and Development of Constitutional Adjudication, in: Lars Vinx (ed.), The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law, Cambridge 2015, pp. 22, 24.

26 Alec Stone Sweet argues that constitutions can be understood as relational contracts: "Modern European constitutions–complex instruments of governance designed to last indefinitely, if not forever–are paradigmatic examples of relational contracts. Much is left general, even ill-defined and vague, as in the case of rights. Generalities and vagueness may facilitate agreement at the ex-ante, constitutional moment. But vagueness, by definition, is normative uncertainty, and normative uncertainty threatens to undermine rationales for contracting in the first place," see *Alec Stone Sweet*, Constitutional Courts and Parliamentary Democracy, West European Politics 25 (2002), pp. 77, 86.

systematically work against their interests.[27] Under conditions of electoral uncertainty, constitution makers – and, to a lesser extent – legislators may consider it in their interest to empower an independent institution to perform accountability functions insulated from partisan pressures.[28]

As a matter of institutional design, impartiality influences several aspects: the degree of constitutional entrenchment, the composition and selection of the institution's leadership, the procedures of appointment, mechanisms of ex-post review and oversight of its decisions, and the protections afforded to its members, among others. These features collectively aim to ensure the institution's credible commitment to maintaining nonpartisan accountability by helping reduce partisan pressure over fourth-branch officials.

## 2. Differences: Why is Fourth-Branch Accountability Special?

The principles of legality and impartiality are a common feature of all institutions in the system of intrastate nonpartisan accountability. However, there are significant differences between independent agencies or an ordinary judiciary, on the one hand, and the fourth branch, on the other. First, fourth-branch institutions are constitutionally entrenched to a greater degree than independent legal agencies, protecting them against the majoritarian dynamics of partisan politics. Second, while the judiciary is materially constrained by legality and performs an eminently adjudicatory function, the fourth branch enjoys what has been called a trust-type delegation, and it is charged with roles that go beyond adjudication, often acting *ex officio* and potentially intervening directly in high politics.

The main difference between fourth-branch institutions and independent agencies is that the former are constitutionally protected from the dynamics of partisan politics and contingent majorities. In principle, independent agencies with merely legal status can perform the same functions as fourth-branch institutions. For example, when Guillermo O'Donnell proposed the concept of horizontal accountability, he only referred to agencies that were "legally enabled and empowered" without reference to constitutional entrenchment.[29] However, there is something distinctive about constitutional entrenchment.

27 This, of course, always depends on what are the alternatives. For example, a political force may agree to empower an independent institution to perform accountability functions just because they foresee they would be worse off leaving accountability to the partisan game, that is, relying on intrastate partisan accountability. See *Neil K. Komesar*, Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy (1997) (regarding institutional choice as a matter of alternatives); *Rosalind Dixon* / *Tom Ginsburg*, The Forms and Limits of Constitutions as Political Insurance, International Journal of Constitutional Law 15 (2017), p. 988 (regarding the insurance theory of constitutional review).

28 Tushnet states "statutory design choices occur without any veil of ignorance, even a somewhat opaque one", see *Tushnet*, note 6, p. 44.

29 Guillermo O'Donnell defines horizontal accountability as "state agencies that are legally enabled and empowered, and factually willing and able, to take actions that span from routine oversight to criminal sanctions or impeachment in relation to actions or omissions by other agents or

Tarunabh Khaitan argues that constitutional entrenchment is essential for ensuring a credible and lasting commitment.[30] While independent agencies may be carefully designed to shield them from partisan pressures – through measures such as appointment procedures and operational safeguards – they remain inherently vulnerable to the very conditions that made their existence necessary. When interbranch collaboration arises due to partisan alignments, diminishing intrastate partisan accountability, the independence of agencies can be easily undermined. Partisan coalitions, wielding a simple majority in the political branches, can modify or abolish these agencies entirely, highlighting their fragility compared to constitutionally entrenched fourth-branch institutions. That fragility is an issue due to the involvement of fourth-branch accountability in high politics; if we did not rely on the capacity of political opposition to control the government in the first place, it seems reasonable not to trust the same partisan alignments to protect – or at least not dismantle –nonpartisan accountability agencies.

Fourth-branch institutions are also different from the ordinary judiciary. We acknowledge that the role and institutional capacities of courts vary depending on the particularities of each constitutional culture.[31] Still, some basic features will help us highlight these differences, particularly when focusing on civil law countries.

Although some aspects of the judiciary will be entrenched in the constitution, the daily activities of ordinary courts are substantively determined by the will of the legislature and executive branches because courts are materially constrained by legality,[32] meaning that judicial decisions are legitimate because they can be interpreted as concrete applications of the existing law.[33] Consequently, and despite problems of under-determinacy of the law, the political branches maintain control over the normative instrument that ordinary courts are mandated to apply.[34]

agencies of the state that may be qualified as unlawful," see *Guillermo O'Donnell*, Horizontal Accountability and New Polyarchies & The Self-Restraining State, in: Andreas Schedler / Larry Jay Diamond / Marc F. Plattner (eds.), Power and Accountability in New Democracies (1999), pp. 29, 38.

30 Khaitan claims that guarantor institutions require double constitutional entrenchment: the institution has to be entrenched but also the norms they enforce, see *Khaitan*, note 4, p. 51.

31 *Mirjan R. Damaška*, The Faces of Justice and State Authority: A Comparative Approach to the Legal Process, New Haven 1986; *Robert A. Kagan*, Adversarial Legalism: The American Way of Law, Cambridge MA 2019.

32 *Fernando Atria*, La Forma del Derecho, Madrid 2016, pp. 198–212.

33 In the traditional scheme of separation of powers, what separates the judicial function from the other branches is that adjudication does not represent other social interests than the letter of the law; in the classic wording of Montesquieu, the judge is *la bouche qui prononce les paroles de la loi*, see *M. J. C. Vile*, Constitutionalism and the Separation of Powers, Carmel 1998, pp. 97–98; *Charles de Montesquieu*, The Spirit of the Laws, in: Anne M. Cohler / Basia Carolyn Miller / Harold Samuel Stone (eds.), Cambridge 1989, p. 163.

34 Stone Sweet refers to ordinary courts as agents of the political branches: "If ministers or parliamentarians notice that a judge has applied a statutory provision in a way that they did not intend and do not like, the law can be changed. Thus, to the extent that an agency problem

Fourth-branch institutions, on the other hand, enjoy what has been labeled a trust-type delegation.[35] What characterizes trust-type institutions is a high degree of independence in carrying out a given task, regardless of variations in the principal's preferences after the moment of the delegation, helping to enhance the credibility of the commitment to protect a given interest.[36] The fourth branch carries out a trust-type of mandate, entrenched in the constitution, that simple majorities in the political branches cannot modify without garnering enough support to satisfy the thresholds required for a constitutional amendment.

In a trust-type delegation, decisions made by fourth-branch institutions within the scope of their delegated powers are removed from the direct influence of the political branches, ensuring autonomy from partisan influence; meanwhile, the political branches retain control over the broader legal framework, including the laws applied by ordinary courts. This distinction relies on two assumptions: first, that the constitution provides sufficient entrenchment from ordinary politics; second, that simple statutes and decrees cannot override or alter core aspects of fourth-branch operations, frustrating its goals.[37]

A second difference has to do with their primary function. The judiciary's primary function is to adjudicate matters presented to it by interested parties;[38] in contrast, the tasks allocated to the fourth branch are heterogeneous, even within accountability functions.[39] Fourth-branch institutions can adjudicate issues (as constitutional and electoral courts), carry out investigations (public prosecutors and anti-corruption agencies), audit public resource spending (as audit bodies), and collect, manage, and publish information that does not necessarily favor the government (as statistics and census offices and human rights commissions), among other things. That variety of functions requires that the fourth

can be identified, it can be corrected: the principals overturn judicial decisions by reworking the normative instrument that they themselves directly control, thus precluding the offending judicial interpretation.", see *Stone Sweet,* note 26, p. 89.

35 *Khaitan*, note 5, pp. 605–608 (regarding guarantor institutions as trustees); see also *Giandomenico Majone*, Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance, European Union Politics 2 (2001), p. 103 (explaining how fiduciary principles inspire delegations oriented to enhance the credibility of long-term commitments).

36 *Thatcher / Sweet*, note 22, p. 7.

37 For this reason, constitutional deferral becomes a significant problem in fourth-branch institutions' design. Regarding constitutional deferral, see *Rosalind Dixon / Tom Ginsburg*, Deciding Not to Decide: Deferral in Constitutional Design, International Journal of Constitutional Law 9 (2011), p. 636; *Michael Pal*, Electoral Management Bodies as a Fourth Branch of Government, Review of Constitutional Studies 21 (2016), pp. 85, 90 (referring to the weakness of fourth branch institutions—electoral management bodies in particular—under a statutory model).

38 *Lon L. Fuller / Kenneth I. Winston*, The Forms and Limits of Adjudication, Harvard Law Review 92 (1978), pp. 353, 364.

39 O'Donnell argues that agencies mandated with horizontal accountability—and we can extend this to fourth-branch institutions—provide significant advantages over horizontal balance accountability (checks and balances between the three traditional branches), such as proactivity, prevention and deterrence, professionalism, and development of technical capabilities to deal with the complexities of their functions. See *O'Donnell*, note 29, pp. 45–46.

branch be granted powers not typically found in ordinary courts, such as acting *ex officio*, intervening to prevent illegal actions before they occur, or executing concrete material actions instead of merely communicative ones.[40]

Finally, one of the most critical features of the fourth branch is that it is designed to intervene in high politics when necessary and endure partisan pressure.[41] In systems lacking fourth-branch institutions, many delicate functions, such as nonpartisan accountability, will be assumed by other institutions at a cost; courts and independent agencies may end up caught by the partisan fire, damaging their legitimacy and undermining their capacity to discharge other functions. Consequently, when constitution makers design fourth-branch institutions are also releasing political pressure from alternative allocations; in doing so, they seem to be assuming that the fourth branch will be better able to withstand the partisan blows.

As an example, take this parallel between two seemingly close institutions: ordinary courts and constitutional courts. First, while ordinary courts apply legal norms that are the direct result of contingent partisan alignments within the political branches, constitutional courts are tasked with upholding the constitutional framework itself; in this sense, they act as trustees of the constitutional order, rather than as mere agents of the legislature and the executive.[42] Second, although both institutions can adjudicate controversies, constitutional courts typically play a more prominent role in policy-making and exercise ancillary functions that may be considered characteristically fourth-branch in nature.[43] Finally, constitutional courts are deliberately designed to operate in a highly politicized environment, a fact often reflected in the procedures for appointing justices; in contrast, ordinary judiciaries, especially in civil law traditions, are more closely aligned with bureaucratic models.[44]

Putting all these pieces together, we can characterize fourth-branch accountability as a constitutional trust-type mandate to provide intrastate nonpartisan accountability with a broad repertoire of institutional capacities. There is a natural tension between nonpartisan accountability of partisan officials. Making political officials accountable will always have

40 Khaitan, for example, talks about material and expressive capacities, see *Khaitan*, note 4, p. 42; see also *Tarunabh Khaitan*, Guarantor (or the so-Called 'Fourth Branch') Institutions, in: Jeff King / Richard Bellamy (eds.), Cambridge Handbook of Constitutional Theory, Cambridge 2024.

41 *Tushnet*, note 6, pp. 14–15.

42 *Stone Sweet* argues: "Depending upon the relevant constitutional rules in place, the political parties may be able to overturn constitutional decisions, or restrict the constitutional court's powers, but only if they can reconstitute themselves as a jurisdiction capable of amending the constitutional law. This last point deserves emphasis: legislators or ministers are never principals in their relationship to constitutional judges," see *Stone Sweet*, note 26, p. 89.

43 *Tom Ginsburg / Zachary Elkins*, Ancillary Powers of Constitutional Court, Texas Law Review 87 (2009), p. 1431.

44 "In contrast to the statutory adjudication by ordinary judges, which is supposed to be largely apolitical, constitutional adjudication by special judges seems inherently political," see *Michel Rosenfeld*, Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts, International Journal of Constitutional Law 2 (2004), pp. 633, 636.

partisan consequences; hence, these institutions may have to deal with partisan pressure to act – or omit acting – and with accusations of partisan behavior in almost any scenario. In cases where fourth-branch intervention is constitutionally required – especially *ex officio* – they cannot exercise what Alexander Bickel called the passive virtues[45] and leave things to the political process without giving up legality.

Consequently, fourth-branch institutions are inextricably linked to partisan dynamics, even if anchored to the principles of legality and impartiality. These institutions do not intervene in partisan politics in the same way as the political branches but operate in the same realm. In this vein, fourth-branch accountability interacts with partisan controls provided by political oppositions, and that interaction has significant consequences for how we understand the fourth branch's role.

### C. The Interaction Between the Fourth Branch and Political Oppositions

Before presenting the cases, we must clarify what we mean by interactions between fourth-branch institutions and political oppositions. Interacting means more than mere coexistence; if a fourth-branch institution and the political opposition react to the same political event without impacting each other's behavior, they would not be interacting but merely coexisting. Thus, interaction means one actor's behavior affects the other, generating dynamics of mutual observance and expectations.

We will briefly refer to the question of the desirability of these interactions in the light of impartiality in the last section. At this point, our interest is merely descriptive: we want to make clear how these institutions interact in reality. Fourth-branch institutions do not exist in a vacuum; they have no above-party-politics world to operate in. Fourth-branch institutions are in the same realm as political oppositions. Thus, fourth-branch officials are not impervious to partisan alignment, and political oppositions may rely on or hold expectations of fourth-branch accountability for their partisan purposes.

When these actors interact – not merely coexist – that interaction can be symbiotic or antagonistic. In symbiotic interactions, actors facilitate each other's accountability functions. In antagonistic interactions, they obstruct each other's roles. None of these interactions is intrinsically virtuous: the fourth branch can collaborate with political oppositions by betraying the principles of legality and impartiality; at the same time, the fourth branch can hinder an opposition's capacity to check on government by discharging its function to hold accountable public officials from the political opposition. Furthermore, as we will see, these interactions can be mediated not only by partisan pressure but capture of the institution.

We will illustrate some of these interactions by analyzing four cases: the Colombian Constitutional Court, the Peruvian Ombudsman's Office, the Bolivian Constitutional Court, and the Ecuadorian Ombudsman's Office. We aim to highlight different forms of interaction, even within symbiotic and antagonistic relations, and how it can be highly challenging

45 *Alexander M. Bickel*, The Supreme Court, 1960 Term, Harvard Law Review 75 (1961), p. 40.

to assess whether that interaction respects the core principles that ground fourth-branch accountability.

### *I. The Colombian Constitutional Court and Uribe's Second Reelection Attempt*

The interaction between the Colombian Constitutional Court and the political opposition to Uribe's second reelection attempt can be categorized as a case of strong symbiosis.[46] While the opposition provided some political cover for the fourth branch to act boldly, the fourth branch's decision also allowed the opposition to act.[47]

Before describing the case's specifics, we want to acknowledge that categorizing the Colombian Constitutional Court as a fourth-branch institution might be controversial. After all, the Constitutional Court is formally situated within the Judicial Branch under Article 116 of the Colombian Constitution. However, its mandate, functions, and power significantly differ from ordinary courts,[48] as previously characterized. The Colombian Constitutional Court has a broad scope of powers beyond adjudication: ex-ante constitutional review of laws,[49] oversight of states of emergency,[50] and control over constitutional reforms (not just laws).[51]

Furthermore, the Constitutional Court has a mixed nature, between legal and political,[52] which makes it different from ordinary courts in the Colombian system.[53] That mixed nature finds one of its expressions in the composition and nomination procedures of the Constitutional Court: its members are appointed by a distinct process involving the other three branches. This distinctiveness highlights the political role of the court, akin to our characterization of fourth-branch institutions, intentionally designed to navigate partisan dynamics while discharging its functions. Given all these factors, we believe the Colombian

46 For an overview of judicial review of presidential re-election amendments in Colombia, see *Samuel Issacharoff* / *Santiago García-Jaramillo* / *Benítez-Rojas*, Judicial Review of Presidential Re-Election Amendments in Colombia, Oxford 2020.

47 See *Tom Ginsburg* / *Aziz Huq*, Democracy's Near Misses, Journal of Democracy 29 (2018), pp. 16, 26.

48 *Julia Mercedes Nieto Deaza*, Naturaleza de la Corte Constitucional Colombiana, Revista Via Iuris 23 (2008).

49 Article 153 of the Colombian Constitution.

50 Article 214 of the Colombian Constitution

51 For an overview of the Colombian Constitutional Court control over constitutional reforms, see *Vicente F. Benítez-R*, La limitación al poder presidencial en Colombia por medio del control de reformas constitucionales: La política judicial detrás de las sentencias de reelección presidencial y paz, Anuario Iberoamericano de Justicia Constitucional 26 (2022), p. 323.

52 *Nieto Deaza*, note 48.

53 Tarapués Sandino describes the Constitutional Court as a mixed institution, distinct from ordinary courts, see *Diego Fernando Tarapués Sandino*, El Tribunal Constitucional como poder autónomo en el sistema colombiano, Criterio Jurídico 1 (2007), p. 163.

Constitutional Court can be treated as exercising a fourth-branch function, regardless of its formal location in the constitutional text.

Álvaro Uribe was elected president in 2002 and reelected in 2006. A petition drive started in 2008, collecting over four million signatures in favor of a referendum to amend the Constitution, allowing a second presidential re-election of the then-immensely popular President Uribe. Despite warnings from the political opposition about the dangers to democracy, in 2009, a Congress dominated by Uribe supporters passed a law summoning the constitutional amendment referendum.[54] Under the Colombian Constitution, any such referendum is subject to automatic judicial review; that review takes place after the law summoning the referendum is enacted and before people vote on it. The Colombian Constitutional Court was in charge of performing that review.

Even though the Court could have decided to stop the referendum on procedural grounds, because there were many, the Court agreed to analyze the substance of the constitutional amendment subject to the referendum. It determined that a constitutional reform allowing a second re-election would breach foundational constitutional principles such as political alternation and pluralism, declaring the referendum unconstitutional.[55] In contrast to similar cases, the Court was successful in Colombia: Uribe immediately announced that he would leave office at the end of his term.

Although the Court's decision was widely celebrated, domestically and internationally, as an example of how to stop abusive constitutionalism,[56] its legal foundations were questionable. The text of the Colombian Constitution does not entrench unamendable clauses. A formalist approach to the Constitution would only allow the Court to perform a procedural review of a constitutional amendment, but that was not the path the Court took. The court undertook a substantive review of a constitutional amendment.

Does the questionable justification of the court's decision indicate partisan behavior? Not necessarily. If anything, after 7 years of *Uribismo*, the Court could have been more *uribista* than when it allowed Uribe's first reelection. If the Court had been guided mainly by partisan considerations, it would have been easier to strike down the referendum on procedural grounds rather than getting involved in the messiness of a substantive review. The fact that this robust intervention was met with less hesitancy inside the Court than its first re-election decision in 2005 seems to indicate that this was not a case divided along partisan lines but a self-interested decision. It appears that it was a case of non-partisan fourth-branch aggrandizement, i.e., an institutional decision to preserve and augment the power of the Court without regard to the partisan sympathies of the justices.

54 *Eduardo Posada-Carbó*, Colombia after Uribe, Journal of Democracy 22 (2011), pp. 137, 140.

55 *Issacharoff / García-Jaramillo / Benítez-Rojas*, note 46.

56 Landau identifies the phenomenon of using mechanisms of constitutional change to erode the democratic order as abusive constitutionalism, see *David Landau*, Abusive Constitutionalism, U.C.D. Law Review 47 (2013), p. 189.

However, even if we accept that the court acted impartially, that does not mean it was utterly oblivious to the partisan context. It was unlikely that the *Uribista* Congress would perform a significant intrastate partisan check; however, the strong support that allowed Uribe to pass the amendment for his first reelection had eroded by the time the court had to issue its decision.[57] Thus, regardless of partisan alignments within Congress, there were voices opposing Uribe; some came from unlikely places, such as members of his administration and traditional allies, including some sectors of the Conservative Party and the Catholic Church. Likewise, a diverse group of opinion leaders, from constitutional scholars to major newspapers, expressed their disapproval of the amendment proposal. Uribe was still extremely popular among citizens, but many opposed the referendum.[58]

Vicente Benítez has argued that such political opposition rejecting Uribe's second reelection allowed the Court to act boldly and without reluctance. According to Benítez, the Court and Uribe were popular at the time; thus, mere popularity does not explain the fourth branch's strategy. He argues that without the endorsement of the political opposition, the Court may have been more hesitant to act as it did.[59] In other words, the political opposition did not determine the court's behavior, but it expanded its scope for action. This is an example of how political opposition can serve as political cover for the impartial action of fourth-branch institutions.

At the same time, the relationship between the fourth branch and the opposition was strongly symbiotic because it also allowed the rise of a new intraparty opposition among Uribe's collaborators. Juan Manuel Santos was Uribe's designated successor after the Court decided he was not allowed to run for a second reelection. Santos was elected by a landslide with Uribe's support, but in an unexpected turn of events, he shifted away from Uribismo, and Uribe became the head of the opposition to the Santos government. That kind of political competition was precisely the kind of pluralism the Court wanted to protect with its decision.[60]

### *II. The Peruvian Ombudsman's Office During Fujimori's Authoritarian Regime*

The relationship between the Peruvian Ombudsman's Office and the political opposition to Fujimori's authoritarian regime can be categorized as a case of a weak symbiosis between a fourth-branch institution and a political opposition. They both supported each other; however, the opposition's weakness also weighed down the Ombudsman's capacity to act.

57 *Vicente F. Benítez-R*, We the People, They the Media: Judicial Review of Constitutional Amendments and Public Opinion in Colombia, in: Richard Albert / Carlos Bernal / Juliano Zaiden Benvindo (eds.), Constitutional Change and Transformation in Latin America, London 2019, pp. 143, 159.

58 Ibid.

59 *Benítez-R*, note 58.

60 *Issacharoff* / *García-Jaramillo* / *Benítez-Rojas*, note 46.

From its creation in 1996 to the fall of the Fujimori regime in 2000, the Ombudsman office was widely accredited as a crucial actor within an accountability system highly eroded by Fujimori's authoritarianism.[61] According to Thomas Pegram, it "operated, practically, as the sole democratic agent of accountability within the state and was recognized as such by civil society and international observers."[62] The constitutional and legal framework gives the Ombudsman a broad and non-restrictive mandate, but does not provide sanctioning powers.[63] Within that broad mandate, it can initiate investigations proactively and issue non-binding recommendations, resolutions, and reports; the institution can also respond to consultations, complaints, and petitions.

The Ombudsman Office had several accomplishments in holding Fujimori's government accountable. Three are particularly relevant. First, in 1996, it successfully pushed for an Ad Hoc Commission to issue recommendations regarding presidential pardons to prisoners deemed innocent but incarcerated on dubious terrorism charges.[64] Second, in December 1997, the Ombudsman's office launched an official investigation into potential abuses of the government's "Voluntary Anti-contraceptive Surgery" program,[65] leading to a dramatic review and reduction of the program.[66] Third, in 2000, it attempted to supervise the general elections, issuing a report documenting a wide range of unfair practices and concluding that the first round of the electoral process was "defective."[67] After a fraudulent second round of elections, its focus shifted to safeguarding the opposition's right to protest, including massive demonstrations demanding new elections and promoting, with the OAS (Organization of American States), a round of negotiation between the government, opposition parties, and members of civil society.[68]

In all these instances, a fourth-branch institution's actions allowed a weak opposition to be more effective. Actors within the political opposition often invoked the Ombudsman Office's reports and declarations as the basis for their political arguments in Congress and the media, "borrowing" from the nonpartisan legitimacy of the Ombudsman's Office to

61 *Samuel B. Abad Yupanqui*, La Defensoría Del Pueblo. La Experiencia Peruana, Teoría y Realidad Constitucional 8 (2010), pp. 481, 492–493.

62 *Thomas Pegram*, Accountability in Hostile Times: The Case of the Peruvian Human Rights Ombudsman 1996–2001, Journal of Latin American Studies 40 (2008), pp. 51, 52.

63 Ibid., p. 53.

64 *Gino Costa*, Dos Años de la Comisión Ad-Hoc: Resultados y Perspectivas, Debate Defensorial, Revista de la Defensoría del Pueblo 1 (1998), pp. 127–142

65 *Abad Yupanqui*, note 62, pp. 499–500.

66 Defensoría del Pueblo, La aplicación de la anticoncepción quirúrgica y los derechos reproductivos III. Informe Defensorial no. 69, Lima 2002, p. 136.

67 Defensoría del Pueblo, Elecciones 2000: Informe de supervisión de la Defensoría del Pueblo, Lima 2000.

68 *Fredrik Uggla*, The Ombudsman in Latin America, Journal of Latin American Studies 36 (2004), pp. 423, 444–446; *Pegram*, note 63, p. 78.

make their case in the eyes of the public. In some cases, the reports provided evidence for opposition actors to initiate their own legal actions.

However, a weak opposition also hindered the capabilities of the Ombudsman's Office. Given the particular complex circumstances of Fujimori's authoritarian regime, the Ombudsman's Office could not act without considering the partisan landscape. Regardless of its nonpartisan status, the institution had to continuously gauge the political temperature to fulfill its mandate without risking its independence.[69] In the absence of a strong political opposition, the Ombudsman's Office had to avoid direct confrontation with the regime based on considerations of institutional self-preservation.[70]

In this vein, the Ombudsman's Office became the target of criticism from some opposition groups.[71] These groups accused the institution of a lack of decisiveness, especially during the fraudulent elections of 2000. Several actors voiced frustration at the institution's lack of powers to act, pointing out the almost total collapse of the political system of accountability.[72] It is a case in which, given the lack of power of other actors in the opposition, too much weight was put on the fourth branch's shoulders. These expectations could hardly be satisfied considering the political context, the Ombudsman's lack of sanctioning powers, and the necessity to maintain the principle of impartiality in the eyes of the public.

A more vigorous opposition could have facilitated the work of the Ombudsman's Office. Still, even the weak opposition in place was instrumental. Among other variables, the Ombudsman's Office was relatively successful in a far-from-ideal context because it built alliances with heterogeneous actors to enhance its accountability capacity.[73] Some of these actors were domestic – intra and nonstate – and others were part of the international community,[74] that the Ombudsman called "the shield of international support."[75]

This case expresses a weak symbiosis between the fourth branch and the political opposition. The Ombudsman Office's actions provided political ammunition for a weak political opposition, and the political opposition gave some political cover to an institution trying to hold an authoritarian regime accountable. From this perspective, the example

69 Ibid., p. 80.

70 Ibid., p 72.

71 Ibid., p. 74.

72 Ibid., p. 78.

73 Pegram emphasizes three principal factors explaining the Ombudsman's Office "relative effectiveness in a far from ideal context: [1] the robustness of the institution's foundations; [2] the capacity of the first appointee and personnel; and [3] successful alliance-building in order to enhance accountability", Ibid., pp. 52–53.

74 Regarding the relevance of the international community to hold domestic governments accountable, see *Robert Pastor*, The Third Dimension of Accountability: The International Community in National Elections, in: Marc Plattner / Larry Diamond / Andreas Schedler (eds.), The Self-Restraining State, Journal of Democracy (1999), pp. 123–44. The international community refers to a variety of different actors, including national governments, IGOs, international judicial bodies, and international NGOs.

75 *Uggla*, note 69, p. 436.

shows that a weak opposition can limit the accountability function of the fourth-branch institution because the latter has to take self-preservation considerations to determine its course of action. It is imaginable that a more vigorous opposition would have led to a stronger relationship of symbiosis.

### *III. Ecuadorian Ombudsman's Office During Correa's Government*

The relationship between the Ecuadorian Ombudsman's Office and the political opposition to Correa's authoritarian regime could be categorized as a case of antagonism. Instead of defending civil society, the institution adopted the government's narrative and weakened its own independence.

While the Ombudsman's Office is designed to function as an independent institution tasked with protecting human rights and ensuring state accountability,[76] its role during Correa's government was criticized for ignoring the concerns of political opposition groups and dissenting voices. Moreover, opposition groups frequently accused the Ombudsman's Office of avoiding politically sensitive cases that involved high-profile conflicts between the government and its critics.[77]

Instead of providing political ammunition to the opposition, the Ombudsman's Office often justified the government's controversial measures. For example, the Organic Law of Communication, introduced in 2013, imposed stringent regulations on the media.[78] Critics, including opposition leaders and civil society organizations, argued that the law curtailed freedom of expression and served as a tool to silence dissent.[79] The Ombudsman's Office, instead of challenging the law, supported its implementation,[80] framing it as necessary to ensure responsible journalism and protect citizens from media abuses.[81] By aligning with

76 For a comprehensive overview of the institution's goals and functions, see *Victor O. Ayeni*, Ombudsmen as Human Rights Institutions, Journal of Human Rights 13 (2014), p. 498.

77 *Lucía Vásconez*, Organizaciones se oponen a postulación de Rivadeneira a otro período como Defensor del Pueblo, EL COMERCIO (1AD), 15 November 2016, https://www.elcomercio.com/actualidad/politica/organizaciones-postulacion-defensordelpueblo-ecuador-politica.html (last accessed on 1 December 2024).

78 For a comprehensive analysis of the 2013 Organic Law of Communications and its critiques, see *Catherine M. Conaghan*, Surveil and Sanction: The Return of the State and Societal Regulation in Ecuador, European Review of Latin American and Caribbean Studies (2015), pp. 11–16.

79 For a description of the actors that opposed the measure and their critiques, see *Philip Kitzberger*, Counterhegemony in the Media under Rafael Correa's Citizens' Revolution, Latin American Perspectives 43 (2016), p. 53.

80 In some cases, the Ombudsman himself started legal actions against the media. See Fundamedios, Jueza ordena a diario rectificar titular y pedir disculpas públicas, 17 June 2013, https://www.fundamedios.org.ec/alertas/jueza-ordena-diario-rectificar-titular-y-pedir-disculpas-publicas/ (last accessed on 1 December 2024).

81 *Ramiro Rivadeneira*, the Ombudsman during most of Correa's government, defended the Organic Law of Communication even after the end of the regime, opposing its reform. See *Diego Arellano*, Ecuador | Proyecto de ley de libre expresión y comunicación: de la regulación a la autorregulación

the government's narrative that the law democratized media access and improved accountability, the Ombudsman's Office indirectly shielded the administration from accusations of suppressing press freedom.[82]

Similarly, the government imposed stringent regulations on NGOs through Executive Decree 16, requiring them to register and justify their activities in alignment with government policies.[83] The decree was widely criticized by civil society and the opposition as a tool to stifle dissent and limit the independence of organizations critical of the government. Instead of opposing the decree and protecting the interests of civil society organizations – as would have been expected from an Ombudsman's Office – it backed the decree, echoing the government's argument that it was necessary to ensure transparency and accountability in NGO operations.[84]

Although the Ombudsman Office sometimes advocated issues that indirectly aligned with opposition concerns, these efforts were often overshadowed by its perceived reluctance to challenge the government directly. It must be noted that, in contrast with the Peruvian case, the decision not to confront the government directly was not part of a self-preservation strategy. We acknowledge that the Ombudsman was operating in a political environment where challenging the government could mean institutional marginalization; however, during this period, the institution took steps to weaken its own independence instead of preserving it. Thus, for example, the Ombudsman's Office dissolved its own union of workers, leaving them without representation, and even persecuted officials who refused to attend government rallies.[85]

Thus, the Ombudsman's office failed to oppose and even supported measures that curtailed the capabilities of an electorally weak opposition to exercise their non-state partisan accountability. This was a case in which a fourth-branch institution obstructed the functioning of the political opposition by exercising its functions selectively, thus allowing the government to weaken the political opposition even more.

- Por Ramiro Rivadeneira Silva, NODAL, 4 July 2021, https://www.nodal.am/2021/07/ecuador-proyecto-de-ley-de-libre-expresion-y-comunicacion-de-la-regulacion-a-la-autorregulacion-por-ramiro-rivadeneira-silva/ (last accessed on 1 December 2024).

82 Jueza ordena a diario rectificar titular y pedir disculpas públicas, note 81.

83 For a comprehensive analysis of Executive Decree 16 and its critiques, see *Conaghan*, note 79, pp. 16–19.

84 It is true that the Ombudsman opposed the application of this Decree in some extreme cases, but he never questioned the logic of the regulations. For example, the Ombudsman mediated in the case of Fundamedios, an NGO vocally critical of Correa's government, to avoid its dissolution. However, while mediating, the Ombudsman recognized the power of the government to dissolve it and agreed with the government in describing the behavior of the NGO as "excessive." See *Soraya Constante*, Ecuador desiste de cerrar un observatorio de medios, El País, 25 September 2015, https://elpais.com/internacional/2015/09/25/actualidad/1443211765_511469.html (last accessed on 1 December 2024).

85 La politización, el punto débil de la Defensoría del Pueblo en 26 años, Plan V (2022), https://planv.com.ec/historias/la-politizacion-el-punto-debil-la-defensoria-del-pueblo-26-anos/ (last accessed on 1 December 2024).

### *IV. The Bolivian Constitutional Court and Morales's Third Reelection Attempt*

The relationship between the Bolivian Constitutional Court and the political opposition to Evo Morales's attempt to circumvent the term limits can also be categorized as a case of antagonism. The court shows clear signs of capture and ends up overturning an electoral victory by the opposition on questionable grounds; as a result, the opposition loses faith in the system of intrastate controls.

Bolivia's 2009 Constitution, enacted during Morales's presidency, established a two-term limit for presidents. However, Morales managed to bypass that restriction. In 2013, the Constitutional Court ruled that his first term (2006–2009) did not count under the new Constitution, allowing him to run for a third term in 2014, which he decisively won.[86] In 2016, Morales sought to amend the Constitution via a national referendum to eliminate term limits altogether. However, Bolivian voters narrowly rejected the proposal, with 51.3% voting against it. After ten years in power, the referendum was the first serious electoral defeat of Morales, and it emboldened and strengthened the political opposition.[87]

Despite that result, Morales and his Movement for Socialism (MAS) party pursued alternative avenues to challenge the term limits.[88] In 2017, the MAS petitioned the Constitutional Court to declare term limits unconstitutional, arguing that they violated the American Convention on Human Rights (ACHR). Specifically, they cited Article 23, which guarantees citizens the right to participate in elections and to be elected. The Court accepted this argument, ruling that restricting Morales or any other official from seeking reelection infringed on their political rights.[89] The decision effectively nullified term limits for all elected officials in Bolivia and allowed Morales to run for a fourth term in 2019, disregarding the 2016 referendum.

The Court's decision was widely criticized by the opposition and fueled already existing accusations that the Court was acting as an extension of the partisan branches of government. In 2011, Morales implemented judicial reforms requiring the selection of Constitutional Court justices through popular elections, a system touted as democratic but

86 For a description of the political context and questionable legal arguments that were used to justify the decision of the Constitutional Court, see *Josafat Cortez Salinas*, El Tribunal Constitucional Plurinacional de Bolivia: Cómo se distribuye el poder institucional, Boletín Mexicano de Derecho Comparado 47 (2014), p. 287.

87 For a comprehensive analysis of the referendum and its consequences, see *Yanina Welp* / *Alicia Lissidini*, Direct Democracy, Power and Counter-Power. Analysis of the Bolivian referendum 2016, Bolivian Studies Journal 22 (2017), p. 162.

88 For how, amid receding popularity, competitive authoritarian regimes like Morales's come to rely more heavily on the institutional hegemony they have carefully constructed, see *Omar Sánchez-Sibony*, Competitive Authoritarianism in Morales's Bolivia: Skewing Arenas of Competition, Latin American Politics & Society 63 (2021), pp. 118, 133.

89 Ibid.

criticized for being highly politicized.[90] Candidates were pre-selected by a MAS-controlled Congress, resulting in accusations that the judiciary became aligned with Morales' political interests. It was an institutional design that undermined any realistic expectation of the fourth branch exercising its accountability function non-partisanly.[91]

The 2017 decision significantly eroded public trust in the Constitutional Court and the general intrastate nonpartisan accountability system. This perception became a rallying point for the opposition, frequently citing the Court's decisions as evidence of Morales' power consolidation and checks and balances erosion. Opposition leaders used this decision to galvanize protests and mobilize public discontent.[92] Furthermore, the opposition grew increasingly dissatisfied with the mere exercise of nonstate accountability, seen as ineffective in the face of an increasingly authoritarian regime. That perception strengthened the idea within the opposition that extra-legal measures were legitimate,[93] with much of the opposition supporting a coup against Morales in 2019.[94]

This is a case of antagonism between the fourth branch and the opposition due to the capture of the former by the governing party. That antagonism becomes apparent when the fourth branch effectively overturned the opposition's electoral victory, justifying its decision on highly questionable grounds. When, as in this case, a fourth-branch institution actively

90 For how mechanisms of participatory democracy are not positive per se and how, in the Bolivian case, they were instrumentalized in some instances merely to override the resistance of the opposition, see *Almut Schilling-Vacaflor*, Bolivia's New Constitution: Towards Participatory Democracy and Political Pluralism?, European Review of Latin American and Caribbean Studies (2011), pp. 11–14.

91 For how under the MAS government too much emphasis on participation caused institutional erosion and a lack of checks and balances, see *Andrew Selee* / *Enrique Peruzzotti*, Participatory Innovation and Representative Democracy in Latin America, Baltimore 2009, p. 141.

92 For example, the opposition used the Court's decision to publicly urge voters to cast blank or null ballots in the 2017 Constitutional Court elections as a form of protest: "The election results show that the opposition 'boycott' calling for blank and null votes was highly successful", see *Miguel Centellas*, Bolivia in 2017: Headed into Uncertainty, Revista de Ciencia Política (2018), pp. 165–167.

93 *Dan Collyns*, Bolivian President Evo Morales Resigns after Election Result Dispute, The Guardian, 11 November 2019, https://www.theguardian.com/world/2019/nov/10/bolivian-president-evo-morales-resigns-after-election-result-dispute (last accessed on 1 December 2024); on the registering how even moderate actors opposed to Morales, like Carlos Mesa, were on board with the coup, see Ernesto Londoño, Bolivian Leader Evo Morales Steps Down, The New York Times, 10 November 2019, https://www.nytimes.com/2019/11/10/world/americas/evo-morales-bolivia.html (last accessed on 1 December 2024).

94 *Steven Levitsky* and *María Victoria Murillo* classify the resignation of Morales as a "military coup" given that Morales, "faced with a police and armed forces that abandoned their subordination to the president," was virtually "forced to resign," see, Nueva Sociedad, La tentación militar en América Latina, 2020, https://nuso.org/articulo/la-tentacion-militar-en-america-latina/ (last accessed on 1 December 2024). For an overview of the arguments in favor or against considering Morales's resignation a coup, see *Jonas Wolff*, The turbulent end of an era in Bolivia: Contested elections, the ouster of *Evo Morales*, and the beginning of a transition towards an uncertain future, Revista de Ciencia Política 40 (2020), pp. 163, 175–178.

obstructs political opposition, abandoning its core principles, it erodes its legitimacy and the legitimacy of the system of nonpartisan checks as a whole. As a result, it creates a context in which political oppositions are tempted to embrace extra-institutional measures.

### D. Impartiality and Partisan Awareness

In the story we have presented, fourth-branch accountability results from distrusting the political branches' capacity to provide a reliable check in a partisan world. These institutions complement the system of political accountability by exercising nonpartisan control, allowing us not to rely entirely on the capacity and willingness of political oppositions to oversee and check governmental behavior. However, as the cases exemplify, a supra-partisan realm from which the fourth branch can oversee political processes can only exist as a theoretical construct. In practice, accountability operates within a single dimension where intrastate and nonstate, as well as partisan and nonpartisan mechanisms, converge.

Consequently, following Tushnet, we can only expect institutions embodying the principles of legality and impartiality to participate in party politics in "a slightly different way" but not removed from it. As a descriptive matter, we see that fourth-branch institutions often interact with political oppositions, facilitating or obstructing each other's moves. That being the case, each will be interested in the action or inaction of the other to determine its own behavior. Two questions arise if the description of that intertwining is compelling. First, how to understand impartiality as a principle that legitimates fourth-branch accountability given these interactions; second, whether the strategic behavior deployed in these interactions is compatible with the impartiality principle.

As previously discussed, the principle of impartiality distinguishes between partisan and nonpartisan intrastate accountability. However, the close interactions between the fourth branch and political oppositions can obscure this distinction, necessitating a reconsideration of what impartiality entails. We think impartiality operates as an ideal of institutional design, but it is a blunt instrument to assess fourth-branch behavior.

As an ideal, impartiality guides constitution-makers in matters of institutional design. In conditions of political uncertainty over the future, constitution makers operate under an opaque veil of ignorance regarding future partisan alignments.[95] Consequently, they may agree upon empowering an institution to check on public officials if they believe that no other player will be able to instrumentalize it for partisan gain. Consequently, impartiality provides an ideal around which constitution-makers can build a consensus: in conditions of electoral uncertainty, they all have incentives to design an institution insulated from partisan pressures.[96] That means paying attention to aspects such as the composition and selection of the institution's leadership, the procedures of appointment, mechanisms of

95 *Tushnet*, note 6, p. 43.

96 *Dixon / Ginsburg*, note 27.

*ex-post* review and oversight of its decisions, and the protections afforded to its members, among others.

As a standard for evaluating fourth-branch behavior, impartiality is a blunt instrument: it is easily challenged in bad faith and poses significant difficulties for a meaningful and objective assessment. Whenever public officials are subject to accountability by a fourth-branch institution, they can politically defend themselves by instrumentalizing the principle questioning institutional impartiality, claiming the fourth branch is corrupt, captured, or just partisan motivated. If these officials succeed in convincing citizens of their case, their accusations can damage the reputation and eventually delegitimate fourth-branch accountability.[97]

Furthermore, in most cases, it is difficult to assess whether an institution respects the principle of impartiality. As noted above, well-functioning fourth-branch accountability – or lack thereof – will often affect party politics. Thus, as a standard, impartiality can only require that fourth-branch institutions do not operate motivated by partisan considerations, and in practice, that is not easy to determine. There will be a few easy cases of capture – as in Ecuador and Bolivia – in which one-party control over the appointment procedures or the apparent departure from legality by the fourth branch can give us powerful hints. However, in most cases, we can expect that the question of impartiality will give rise to partisan disagreement over the fourth branch's behavior.

A second question regards the compatibility of impartiality and the fourth branch's strategic stance towards partisan alignments to determine their own course of action. As a descriptive matter, we have pointed out that the fourth branch and political oppositions often interact, sometimes symbiotically and sometimes antagonistically; a different question is whether all these interactions are compatible with impartiality. While a political opposition should pay attention to the fourth branch to strategize its moves in the partisan game,[98] it seems more awkward to recognize that fourth-branch accountability considers the partisan alignments to determine its own course of action.

Impartiality, as mentioned, requires that the fourth branch leaves partisan considerations aside. In this regard, it is problematic that an institution reads the partisan realm to decide whether to harm or benefit one side.[99] However, it is also possible that the fourth branch analyses the partisan alignment to deploy a self-interested course of action; in other words,

97 Regarding the impact of institutional defamation, see *Jorge Gaxiola Lappe*, Why Institutional Reputation Matters, Verfassungsblog, 6 September 2024, https://verfassungsblog.de/why-institutional-reputation-matters/ (last accessed on 30 -November 2024), DOI: 10.59704/ebc6a6f112d168c5.

98 Ginsburg and Huq's analysis of democracy's near misses points out the importance of the interplay between nonpartisan institutions and political oppositions to prevent democratic backsliding; unelected authorities can create windows of opportunities for oppositions to coordinate. See *Ginsburg / Huq*, note 47, p. 29 ("A democracy under threat depends critically on support from unelected and nonmajoritarian actors. Such support serves to slow down erosion, giving political parties and public movements time to regroup and reorganize in the face of threats.")

99 This hypothesis addresses instances where the fourth branch abdicates its power to control the government to ingratiate itself with those in power. Such self-interested behavior reduces the insti-

the fourth branch can act strategically, responding to partisan alignments, without sacrificing impartiality or legality.

This self-interested agenda may take different forms. From strategies of self-aggrandizement, where the fourth branch seems to end up strengthened – as in the case of the Colombian Constitutional Court – to strategies of self-preservation, where the fourth branch adopts a less confrontational stance to avoid being targeted by a unified or authoritarian government – as in the case of the Peruvian Ombudsman's Office during Fujimori's regimen. This type of self-interested behavior will not always be straightforwardly problematic – scholars have praised these two cases—however, self-aggrandizement can be taken too far, operating as an unresponsive interference in majoritarian politics, and self-preservation may come close to cowardice, sometimes leading to institutional irrelevance or suicide.[100]

## E. Conclusion

Fourth-branch accountability can be characterized as a constitutional trust-type mandate to provide intrastate nonpartisan accountability with a broad repertoire of institutional capacities. Fourth-branch institutions play a significant role in protecting constitutional democracies, and their role in the system of political accountability becomes especially apparent when political oppositions are unwilling or unable to perform a partisan check.

In part, these institutions result from distrusting the political branches' capacity to provide a credible commitment to accountability in a partisan world. Thus, designing institutions anchored in legality and impartiality principles and insulating them from partisan politics seems a justified goal. However, these institutions do not operate in a supra-partisan world and remain intertwined with partisan politics, generating different types of interactions.

In particular, fourth-branch accountability often interacts with political oppositions. Interacting means that the behavior of one impacts the behavior of the other. That interaction can be symbiotic or antagonistic. The relationship is symbiotic when they push in the same direction, helping each other to be an effective check. The relationship is antagonistic when one operates as a barrier to the other's efficacy.

Given these interactions, we may raise two questions. First, how to understand impartiality. Second, whether the strategic behavior deployed in their interactions with political

tution to an empty shell, appearing to prioritize partisan or personal (the fourth-branch official's) interests over its institutional self-interest.

100 While not a fourth-branch official, Cecilia Sosa, the President of the Venezuelan Supreme Court during the early days of Hugo Chavez's regime, exemplifies this point perfectly when expressing her discontent with the Judiciary's passive stance towards the Constituent National Assembly's measures: "[T]he Supreme Court of Justice of Venezuela committed suicide to avoid being assassinated. The result is the same. She is dead." See *Juan Jesús Aznárez*, La presidenta del Supremo venezolano dimite y da por enterrado el Estado de derecho, El País, 25 August 1999, https://elpais.com/diario/1999/08/25/internacional/935532004_850215.html (last accessed on 30 November 2024).

oppositions is compatible with the impartiality principle. To the first question, we suggest that impartiality works as an ideal for constitution-makers when designing these institutions, but it is a blunt instrument to analyze the fourth-branch behavior because it is challenging to employ for an objective assessment. To the second question, we propose distinguishing between different types of interaction, and that fourth-branch strategies based on partisan alignments are not necessarily problematic if they look at the institution's self-interest—within certain margins to avoid either excessive aggrandizement or near-cowardice.