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SYMPOSIUM

Public Law and Political Oppositions: An Introduction to a Complex Relationship

By *Danny Schindler*[*], *Amal Sethi*[**] and *Michael Riegner*[***]

A. Introduction: How Does Public Law Treat Opposition?

This special issue brings together a range of contributions that thematize and problematize the way in which public law treats, regulates and interacts with the political opposition. The relationship is complex, contingent, and often paradoxical. While the existence of a functioning opposition is a hallmark of liberal constitutional democracy, public law frameworks can simultaneously serve as a shield that protects dissent, a stage upon which resistance is enacted, or a sword used to neutralise challengers. Legality itself emerges as a primary terrain of struggle, where opposition actors adapt, subvert, or contest the very structures that enable or constrain their activity. To navigate this complexity, this special issue suggests that adopting a "varieties of constitutionalism" framework offers a productive path for future research, allowing for a more nuanced analysis that moves beyond traditional binaries of "democratic" and "non-democratic", "liberal" and "illiberal".[1]

The importance of this inquiry is underscored by the contemporary crisis of constitutionalism unfolding against a backdrop of global polycrisis. This is not merely a crisis for liberal constitutionalism, but a period of intense contestation among different constitutional visions. The rise of autocratic legalism and constitutional authoritarianism as alternative models of governance challenges the post-Cold War assumption of a global convergence around liberal norms.[2] In this environment, the political opposition often stands as a critical line of defense. From a normative perspective, a robust opposition is seen as a key solution to deficits in accountability and a bulwark against the erosion of democratic norms. Opposi-

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1 On this framework and approach, see *Michael Riegner*, Varieties of Constitutionalism: Contestations of Liberalism in Comparative Constitutional Law, World Comparative Law 57 (2024), p. 161; *Mark Tushnet*, Editorial: Varieties of constitutionalism, International Journal of Constitutional Law 14 (2016), p. 1.

2 For a recent discussion of the concept of autocratic legalism, see *Fabio de Sa e Silva*, Autocratic Legalism 2.0: Insights from a Global Collaborative Research Project, World Comparative Law 55 (2022), p. 419, and the other contributions in that special issue.

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tion actors can use legal and political tools to challenge would-be autocrats, making them key players in resisting and mitigating autocratization processes.

However, the role of opposition is not without its own problems. Opposition can be a source of obstruction and legislative gridlock. From the perspective of militant democracy, opposition groups themselves can be extremist or anti-system forces that exploit democratic freedoms to undermine the constitutional order. The very existence of an opposition is not necessarily synonymous with the advancement of democracy or liberalism; indeed, as some contributions to this volume show, a co-opted "loyal" opposition can serve to stabilize an authoritarian regime, lending it a façade of pluralism.

Methodologically, this special issue adopts a socio-legal approach that goes beyond textual analysis and is informed by the realities of political practice. In doing so, it bridges political science and comparative constitutional law as well as the North-South divide in comparative constitutional law, taking Southern constitutional experiences seriously to not only expand the "gene pool" of comparative constitutional law, but also to pluralise its theoretical and conceptual frameworks. In this vein, this introductory article adopts a varieties of constitutionalism lens, in order to move beyond simple democratic-autocratic binaries and to provide a richer taxonomy for comparative analysis, capable of capturing the nuanced differences between liberal, social, transformative, illiberal, and authoritarian constitutional systems. Further research will help us understand how the function and legal status of oppositions differ profoundly depending on the constitutional variety in which they operate.

Against this background, this introductory article proceeds in four parts. Following this introduction, section B develops a conceptual framework to unpack the plural and complex nature of "oppositions", distinguishing between different legal statuses, regime contexts, and strategic postures. Section C, provides an overview of the contributions to this special issue, demonstrating how each paper empirically or theoretically explores the themes and typologies previously outlined. The article concludes with an outlook offering thoughts on new avenues for research at the intersection of public law and political opposition in the light of growing constitutional contestation and variety.

B. Unpacking the Concept of Political Opposition(s)

Acknowledging the fundamental importance of opposition for every political system, the term usually refers to actors criticizing and challenging the government group, thereby being "logically … the dialectic counterpart of power"[3]. Such umbrella concept, however, risks missing the underlying complexity while also letting scholars talk past each other. We start this introduction by developing a conceptual framework that helps to arrive at a more

3 *Ghiţa Ionescu / Isabel de Madariaga*, Opposition. Past and present of a political institution, London 1968, p. 1.

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nuanced analysis of the relationship between political oppositions and public law depending on national contexts and political circumstances.

At the most basic level, opposition can be recognized, legalized, alegal or illegal. Various African constitutions, for instance, today acknowledge "the opposition" as such, hence providing the highest status to the principle of opposition irrespective of the size of its forces.[4] Such explicit protection, as found in Morocco[5], goes one step further than simply legalizing multi-partyism as has been witnessed in the wake of Africa's constitutional revival following the end of the Cold war.[6] In contrast, opposition forces can be strictly forbidden forcing them to operate outside the system like in most historical dictatorships or China.[7] Another category lying in-between has been termed alegal by authoritarianism scholar Juan Linz: The governing elite in this case does not legalize but tolerates its opponents who are, thus, "outside the law".[8]

Closely related to but analytically independent of this distinction are the regime type opposition forces operate in, the question whether legal frameworks are respected or not, and the opposition's strategic stance towards the political system. To begin with, oppositions can act in democratic systems, hybrid regimes that combine autocratic features with democratic ones, and closed autocracies.[9] Adding a dynamic view, we can even include the question whether regimes move in a democratic or autocratic direction. The recent wave of autocratization[10], for example, includes several democracies suffering gradual setbacks (backsliding) that alter the political and, in some cases, legal conditions for opposition forces. Usually, opposition groups are considered key actors to mitigate autocratization[11], who, from the angle of public law, face two situations. On the one hand, they can

4 See *Danny Schindler*, Constitutionalizing dissent: The universe of opposition rules in African constitutions, Global Constitutionalism, First View (2024), pp. 1–26

5 *Rachid El Bazzim*, The Parliamentary Opposition in Morocco: Evolution and Legal Challenges, World Comparative Law 57 (2024), in this issue.

6 *Henry Kwasi Prempeh*, Africa's "constitutionalism revival". False start or new dawn?, International Journal of Constitutional Law 5 (2007), pp. 469–506.

7 *Jieren Hu / Johannes Rossi*, Control through the State of Exception: Opposition, Surveillance, and Fragmentation under Chinese Digital Authoritarianism, World Comparative Law 57 (2024), in this issue.

8 *Juan J. Linz*, Opposition to and under an authoritarian regime: The case of Spain, in: Robert A. Dahl (ed.), Regimes and oppositions, New Haven 1973, pp. 171–259, p. 191.

9 One out of many empirical operationalizations is the index by Freedom House which categorizes countries as free, partly free or unfree. Even more differentiated concepts can be used (especially for the broad type of hybrid regimes), yet some uncertainties remain about the analytical thresholds that have to be crossed to enter into another category.

10 *Anna Lührmann / Staffan I. Lindberg*, A third wave of autocratization is here: what is new about it?, Democratization 26 (2019), pp. 1095–1113.

11 *Laura Gamboa*, How Oppositions Fight Back, Journal of Democracy 34 (2023), pp. 90–104.

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weaponize legal instruments to resist processes of backsliding (democratic lawfare).[12] On the other hand, they are usually confronted with a narrowing of their own manoeuvring space through legal reforms by which autocrats and would-be autocrats seek to consolidate their power (autocratic lawfare).[13] Often, this includes borrowing and abusing democratic constitutional designs, for instance hate speech and memory laws, for autocratic ends.[14] Different from such scenarios of "opposition to autocrats in power" are autocratic-minded "populists in opposition"[15]. As recently witnessed in Germany, such forces may seek to delegitimize judicial institutions while also facing legal reforms to protect the apex courts.[16]

When it comes to non-democratic regimes, a crucial question also is constitutional compliance or legal compliance in general. Borrowing from *Law* and *Versteeg*, oppositions might operate under a sham legal framework that includes far-reaching opposition-related rules but fails to fulfil them in practice (sham constitution).[17] As another variant, we might encounter supreme laws which promise little to the opposition but are still cheap talk (weak constitution). For the sake of completeness, countries can exhibit comprehensive legal rules strengthening the opposition both in theory and in practice (strong constitutions) or they even overperform by promising relatively little but de facto respecting a panoply of opposition rights in reality (modest constitutions).

In the case of sham or weak legal systems for opposition forces, public law primarily serves as window dressing rather than as operation manuals (describing actual practice).[18] However, looking at legal compliance from the government's perspective, we also have to point to the phenomenon of autocratic legalism which can be defined as the use of law in

12 *Siri Gloppen / Lise Rakner*, Legalised resistance to autocratisation in common law Africa, Third World Quarterly 46 (2025), pp. 136–152.

13 *Kim Scheppele*, Autocratic Legalism, University of Chicago Law Review 85 (2018), pp. 545–583.

14 *Rosalind Dixon / David E. Landau*, Abusive constitutional borrowing. Legal globalization and the subversion of liberal democracy, Oxford 2021, pp. 56 ff.

15 *Sarah L. de Lange / Larissa Böckmann*, Populists in Opposition: A Neglected Threat to Liberal Democracy?, PS: Political Science & Politics 58 (2025), pp. 72–76.

16 On the role of courts for safeguarding opposition rights, see *Nomfundo Ramalekana* / *Alfred Mavedzenge,* Courts as a Forum for Safeguarding the Right of Opposition Parties to Participate in Democratic Processes: A Comparative Analysis of South Africa and Zimbabwe*,* World Comparative Law 57 (2024), in this issue; see also *Philipp Köker / Tilko Swalve / Merle Huber / Christoph Hönnige / Dominic Nyhuis*, Populists before power: delegitimization strategies against independent judiciaries, Democratization, online first (2025), pp. 1–18; *Konrad Duden*, Protect the German Federal Constitutional Court!, Verfassungsblog, 13 February 2024, https://verfassungsblog.de/protect-the-german-federal-constitutional-court/ (last accessed on 30 June 2025), DOI: 10.59704/fe9b21f9344b927a.

17 *David S. Law / Mila Versteeg*, Sham Constitutions, California Law Review 101 (2013), pp. 863–952.

18 See on the different functions of autocratic constitutions *Tom Ginsburg / Alberto Simpser*, Introduction: Constitutions in Authoritarian Regimes, in: Tom Ginsburg / Alberto Simpser (eds.), Constitutions in authoritarian regimes, New York 2014, pp. 1–17.

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the service of an illiberal agenda.[19] Autocrats and autocratic-minded incumbents nowadays more than ever apply formally legal techniques to undermine their opponents. For this purpose, they might alter provisions (for instance by enacting anti-civil society laws) or benefit from lacking legal clarity as recently in Zimbabwe where the regime was able to disrupt the opposition trough recall rules while also preserving a rule of law façade.[20] This again underlines that focusing on single provisions that formally protect opposition forces often provides a delusive picture of their legal and political leeway.[21]

Furthermore, we can look at the oppositions' overall strategies and distinguish between those who oppose a government as "loyal" opposition at one end of the spectrum and those who oppose the legitimacy of the state and the political order as "anti-system" opposition at the other one. While some might argue that radical forces unwilling to accept the constitutional system should not be included in the opposition concept, the emergence of and the debate on new anti-system parties who differ from the totalitarian counterparts in the 20th century justify such encompassing conception of opposition.[22] In particular, the distinction between constitutional/unconstitutional or system/anti-system groups is relative and can be actively established by the government to disadvantage opposition forces, as has been done with Israeli Arab parties.[23] In the same vein, regime elites can seek to divide the opposition camp into loyalists and radicals, thereby preventing the mobilization of political unrest, as has been found for Morocco.[24] Dealing with non-democratic regimes, we should also mention that loyal oppositions can serve functions entirely different from those in their democratic counterparts: They might not even be opponents of incumbents in the strict sense (as the umbrella concept of opposition implies), but as coopted allies rather act as "mechanism for societal control beyond pure repression"[25]. Hence, the government's opponents might not erode but stabilize authoritarianism which questions some passionate acknowledgment that the existence of a viable opposition always fosters democratic development. In the end, an overly loyal pseudo-opposition also goes well together with a strong

19 *Scheppele*, note 13.

20 *Danny Schindler*, Recall rules as a legalistic autocrat's toolkit. The case of Zimbabwe, Democratization, online first (2025), pp. 1–22.

21 On the legal framework promoting opposition parties in anglophone Eastern Africa, see *Johannes Socher*, Constitutionalisation of Political Parties, Multipartyism and Political Opposition in Anglophone Eastern Africa, World Comparative Law 57 (2024), in this issue.

22 *Ludger Helms*, Political Oppositions in Democratic and Authoritarian Regimes: A State-of-the-Field(s) Review, Government and Opposition 58 (2023), pp. 391–414, p. 392.

23 On the fragility of legal categories in Pakistan, see *Marva Khan Cheema,* Dictatorships and Democracy: Dissecting the Role of Political Opposition in Pakistan, World Comparative Law 57 (2024), in this issue; see also *Nathalie Brack / Sharon Weinblum*, "Political Opposition": Towards a Renewed Research Agenda, Interdisciplinary Political Studies 1 (2011), pp. 69–79, p. 72.

24 *El Bazzim,* note 5; see also *Ellen Lust-Okar*, Divided They Rule: The Management and Manipulation of Political Opposition, Comparative Politics 36 (2004), pp. 159–178.

25 *Holger Albrecht*, How can opposition support authoritarianism? Lessons from Egypt, Democratization 12 (2005), pp. 378–397, p. 391.

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system of opposition rights, i.e., it provides a low-risk path for autocrats who want to keep a democratic façade.

One of the most crucial differentiations in analytical terms is between opposition forces inside and outside parliament. Given a legislature's role as key institution of contestation, opposition placed inside the assembly has been rightly termed the "most advanced and institutionalized form of political conflict"[26]. Crucial topics for public law are of course electoral rules but also the rights given to opposition forces. Yet, identifying the parliamentary opposition can be intricate if we deal with autocratic one-party states, minority governments (supported by parties on a permanent base) or presidential systems in which executives are not automatically affiliated with an own majority by design.[27] Moreover, it is often misleading to treat the parliamentary minority as quasi-discrete and stable entity in conceptual terms.[28] Opposition forces can be highly fragmented and ideologically heterogeneous entailing intra-opposition rivalry. Therefore, it matters a lot whether opposition-related rights (interpellation, committees of inquiry etc.) are allotted to single parliamentary groups or to "the opposition" (requiring some agreement between its parts or leaving scope for interpretation and specification in the parliamentary rules of procedure).[29] Hence, scholars not only have to consider the varying relationships between government and opposition (ranging from close cooperation to fierce competition) but also the potential complexity inside the parliamentary minority. Again, legal systems are not less relevant in autocratic regimes in which opposition MPs can use tools like parliamentary questions to challenge incumbents[30] while also facing an unlevel playing field through the manipulation of legislative rules of procedure.[31]

Opposition inside parliament is not the only counterpart or ruling elites, though. Parties boycotting elections and small parties failing to pass the electoral threshold can still use extra-parliamentary tools (like strategic litigation) to keep tabs on the government. Simi-

26 *Ionescu / de Madariaga*, note 1, p. 9.

27 To be sure, presidents are usually able to build and maintain stable majority support even if their party holds less than half of the assembly's seats. See e.g., *Paul Chaisty / Nic Cheeseman / Timothy J. Power*, Coalitional presidentialism in comparative perspective. Minority presidents in multiparty systems, Oxford 2018, for the phenomenon of coalitional presidentialism and the incumbent's tools to control the coalition. This is one reason why studies in constitutional law have demonstrated that the conventional distinction between presidentialism and parliamentarism is less important than usually assumed. See *Richard Albert*, The Fusion of Presidentialism and Parliamentarism, The American Journal of Comparative Law (2009), pp. 531-577.

28 See *Pascale Cancik*, Parlamentarische Opposition in den Landesverfassungen. Eine verfassungsrechtliche Analyse der neuen Oppositionsregelungen, Berlin 2000, pp. 126 ff.; see also *El Bazzim*, note 5.

29 For empirical examples, see e.g., *Schindler*, note 4, p. 17

30 *Bryce Loidolt / Quinn Mecham*, Parliamentary Opposition Under Hybrid Regimes: Evidence from Egypt, Legislative Studies Quarterly 41 (2016), pp. 997–1022.

31 See e.g., *Regina Smyth / William Bianco / Kwan Nok Chan*, Legislative Rules in Electoral Authoritarian Regimes: The Case of Hong Kong's Legislative Council, The Journal of Politics 81 (2019), pp. 892–905.

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larly, non-partisan "fourth-branch institutions" like ombuds offices or electoral management boards can be conceptualized as opposition actors.[32] The same holds true for civil society organizations, youth movements, churches and religious groups, professional associations such as labour unions or law societies, the media or even protesting crowds.[33] In countries with weak parties or opposition parties coopted by incumbents, the mentioned non-party actors might bear the main burden to be a counterpart of power. The assumption that civil society, for instance, should be considered a potential opposition force is corroborated by the increasing legal clampdown in recent decades. A case in point is Africa where various governments imposed legal restrictions on the actions and funding options of civil society organizations, especially on those perceived as engaging in political activities.[34] Also, civic opposition groups are relevant from a public law perspective, since they often articulate grievances through a rights-based and justice-oriented framing, as has been illustrated for Hungary and Turkey.[35]

Going one step further to arrive again at a more dynamic perspective, studies might also pay attention to the interactions between parliamentary and extra-parliamentary opposition forces. Their relations can be regarded as competitive, i.e., both types of actors coexist and rival for leverage, reputation or resources, or as complementary, if they "fill in gaps" by addressing demands or constituencies not dealt with by the other force.[36] A third theoretical option, however, is a substitutive status, for instance if non-party actors stand in for failing or non-existent parliamentary opposition parties.

The listed differentiations (to be sure, more can be added) reveal a nuanced picture of the relationship between opposition and the public law. Overall, they suggest a broad notion of opposition not based on actors, actions and sites of action. Such inclusive concept for instance is offered by *Brack* and *Weinblum* who define 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".[37] Importantly, in line with this Special Issue's topic, this definition implies that opposition is not referred to in the singular anymore but rather as *oppositions*. Also, this pluralization

32 *Hernán Gómez Yuri* / *Fernando Loayza Jordán,* Fourth-Branch Institutions and Political Oppositions, World Comparative Law 57 (2024), in this issue.

33 *Francesco Cavatorta / Azzam Elananza*, Political Opposition in Civil Society: An Analysis of the Interactions of Secular and Religious Associations in Algeria and Jordan, Government and Opposition 43 (2008), pp. 561–578; *Mirjam Künkler*, Mobilization and Arenas of Opposition in Indonesia's New Order (1966–1998), American Behavioral Scientist 69 (2025), pp. 902-920; *Janette Yarwood*, The Power of Protest, Journal of Democracy 27 (2016), pp. 51–60.

34 See e.g. *Kendra Dupuy / Leonardo R. Arriola / Lise Rakner*, Political Participation and Regime Responses, in: Leonardo R. Arriola / Lise Rakner / Nicolas van de Walle (eds.), Democratic Backsliding in Africa? Autocratization, Resilience, and Contention, Oxford 2023, pp. 37–57.

35 *Bilge Yabanci*, Civic Opposition and Democratic Backsliding: Mobilization Dynamics and Rapport with Political Parties, Government and Opposition 60 (2025), pp. 431-455, p. 436.

36 *Brack / Weinblum*, note 23, p. 75.

37 Ibid., p. 74.

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allows to go beyond the sometimes rather restrictive vision of opposition prevalent in Western perspectives.

C. Public Law and the Practices of Opposition: Lessons from the Contributions

The typology outlined in section B established a vocabulary for analysing how public law frames, enables, and constrains political oppositions across different constitutional settings. It also problematised any static or universal model of "opposition," emphasising instead the interplay between legal recognition, regime trajectory, institutional form, and oppositional strategy. Part C now turns to the empirical and doctrinal contributions of the seven articles in this volume, which trace this interplay across various jurisdictions, institutions, and methodologies. These papers do not seek to generalise beyond their cases. Still, when read together, they generate a comparative mosaic that deepens our understanding of how oppositions operate within – and against – the public law frameworks that structure political life.

One theme that runs through several of the contributions is the disjunction between legal form and political practice – between constitutional recognition of opposition and the substantive space available for it to operate. *Aishwarya Singh* and *Meenakshi Ramkumar*'s study of India demonstrates this tension in the context of a constitutional democracy where opposition parties formally retain rights yet struggle to exercise meaningful influence in a populist-majoritarian political climate.[38] Focusing on India's Parliament (specifically its democratically elected lower house), their paper explores how opposition actors, facing a numerically dominant ruling coalition and a shift in political norms, have come to rely increasingly on obstructionist tactics and performative dissent. They argue that these are not symptoms of dysfunction but rather adaptations to a degraded deliberative environment and attempts to reclaim visibility and relevance through the tools that remain. The procedural devices of public law, such as adjournments, walkouts, and the staging of coordinated disruption, thus become instruments of democratic resistance. By closely analysing the institutional logic and symbolic grammar of these practices, *Singh* and *Ramkumar* show how public law is not only a system of rules but a site of contest over legitimacy and authority. Their account reminds us that oppositions, even in established democracies, often operate within shifting and contested legal terrain where formal protections mask shrinking substantive space.

This pattern of formal constitutionalism and substantive constraint also appears in *Rachid El Bazzim*'s examination of Morocco.[39] In a region where multiparty politics often operate within authoritarian parameters, Morocco stands out for having constitutionally recognised the political opposition in its 2011 constitutional reforms, notably through

38 *Aishwarya Singh / Meenakshi Ramkumar*, Oppositional Practice in India: Understanding Parliamentary Responses to Populism, World Comparative Law 57 (2024), in this issue.

39 *El Bazzim,* note 5.

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Article 10. Yet, *El Bazzim*'s analysis demonstrates how this recognition coexists with systemic marginalisation, enacted through a combination of procedural hurdles, institutional design, and executive dominance. Moroccan opposition parties, while formally included in the political system, are functionally restricted by a rationalised model of parliamentarism – one that concentrates agenda-setting and legislative initiative in the executive and renders opposition initiatives symbolically important but politically inconsequential. In this environment, public law stabilises a hegemonic political order rather than facilitates genuine contestation. *El Bazzim* further highlights how regime elites strategically differentiate between "loyal" and "disloyal" opposition forces, using constitutional and procedural categories to fragment and weaken oppositional capacity. As such, the Moroccan case reveals a subtle but powerful dynamic: constitutional recognition becomes not a shield for opposition, but a containment device – a façade of pluralism that masks executive consolidation.

A related dynamic is visible in *Johannes Socher*'s contribution on Anglophone Eastern Africa, which shifts the focus from North Africa to a regional comparison across Kenya, Uganda, and Zimbabwe.[40] These jurisdictions, too, have embraced the language of multiparty democracy and opposition rights in their post-authoritarian constitutional texts. Yet, as *Socher* shows, the operational reality is one of strategic procedural manipulation. Through measures such as campaign finance restrictions, the abuse of parliamentary standing orders, and the instrumental use of anti-defection provisions, ruling parties maintain dominance while preserving a legal order that claims to protect pluralism. Particularly in Uganda and Zimbabwe, this manipulation is not incidental but systemic: it reflects a deliberate strategy of autocratic legalism, in which the forms of constitutionalism are maintained even as their spirit is hollowed out. *Socher*'s analysis thus confirms one of the central insights of this special issue—that public law is not only a site of opposition but also a tool of regime entrenchment. His East African case studies illustrate how authoritarian-minded actors exploit the ambiguity and technicality of legal rules to reconstitute political opposition as legally permissible but practically ineffective.

Where *Singh* and *Ramkumar*, *El Bazzim*, and *Socher* focus on legislative institutions, the paper by *Marva Khan Cheema* turns to Pakistan's hybrid democracy to interrogate how opposition status itself becomes unstable and politically contingent.[41] In a system where formal democratic institutions coexist with entrenched military tutelage, *Cheema* argues that opposition is not a fixed legal identity but a fluid political category, defined and redefined by power holders. Her analysis shows how the legal status of opposition leaders—especially the Leader of the Opposition in parliament—has been instrumentalised in political bargaining and rendered conditional on the preferences of the military establishment. This creates an environment of legal uncertainty and strategic ambiguity, where opposition actors are tolerated but not institutionally protected, and where legality operates

40 *Socher*, note 21.

41 *Khan Cheema*, note 23.

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more as a discretionary resource than a binding framework. The paper captures the "alegal" opposition phenomenon as discussed in Part B, where actors are neither fully outlawed nor fully protected, but exist in a grey zone of tolerated contestation. *Cheema* also highlights the blurring of opposition and establishment identities, especially when entire segments of the political class find themselves structurally excluded from decision-making. Her analysis calls attention to the fragility of legal categories under hybrid regimes and the importance of understanding opposition not merely as a legal status but as a shifting political role that is constantly negotiated.

If the preceding contributions focus on opposition actors within or adjacent to the legislative sphere, the paper by *Nomfundo Ramalekana* and *Justice Alfred Mavedzenge* broadens the lens to judicial institutions as forums where opposition rights are either protected or undermined.[42] Their comparative study of South Africa and Zimbabwe reveals how courts can occupy sharply divergent roles in shaping the legal possibilities for opposition under democratic stress. In South Africa, the Constitutional Court has actively reinforced the institutional integrity of the opposition by invalidating laws and executive decisions that infringe upon principles of fairness, accountability, and equality in the electoral process. The Court's jurisprudence in cases dealing with party funding disclosure, voter registration access, and the role of independent electoral institutions illustrates a constitutional culture where public law serves not only as a constraint on majoritarian power but as a tool for institutional empowerment of dissent. This creates a positive feedback loop: courts strengthen the opposition's legal standing, which in turn contributes to the preservation of pluralist democratic norms.

In contrast, Zimbabwe's judicial system has often acted as an enabler of executive domination, despite operating under a constitutional framework that nominally protects multipartyism and opposition rights. *Ramalekana* and *Mavedzenge* document how the courts in Zimbabwe have issued rulings that validate executive overreach, ignore violations of opposition freedoms, and allow strategic legal reforms that entrench ruling-party control. Far from being neutral arbiters, these courts become sites of legal legitimation for the status quo, exemplifying a form of autocratic legalism where legality is preserved in form but weaponised in function. The juxtaposition of these two cases underlines a core insight of this special issue: that public law institutions are not merely passive reflections of political configurations but active participants in the construction – or deconstruction – of oppositional space. The same constitutional text can have diametrically different implications depending on judicial independence, institutional design, and prevailing political incentives.

The institutional landscape of oppositional politics is further enriched in the contribution by *Gómez Yuri* and *Loayza Jordán* , which discusses "fourth-branch institutions" as constitutional actors that mediate between government and opposition in Latin America.[43]

42 *Ramalekana* / *Mavedzenge*, note 16.

43 *Gómez Yuri* / *Loayza Jordán,* note 32.

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These bodies, such as ombuds offices, electoral management boards, and state auditors, are typically tasked with non-partisan oversight and are formally insulated from political influence. Yet as *Gómez Yuri* and *Loayza Jordán* show, they often become tangled in political conflict, especially in polarised or fragile democratic contexts. Their relationship with opposition actors can range from protective to obstructive, depending on how they are embedded in the political and legal system. In cases such as Peru, Bolivia, and Colombia, fourth-branch institutions have served as venues through which opposition parties and civil society actors challenge executive abuses and defend constitutional norms. In other settings, these same institutions are captured by dominant coalitions and repurposed to block or delegitimise dissent.

Crucially, the paper illustrates that these institutions do not simply reflect partisan alignments; instead, they constitute a distinct layer of constitutional design that can facilitate or frustrate oppositional politics. By foregrounding fourth-branch bodies as constitutional actors in their own right, *Gómez Yuri* and *Loayza Jordán* move beyond a binary view of state and opposition and invite us to think about accountability ecologies that are both institutional and strategic. Their contribution also highlights the value of expanding the analytic category of "opposition" beyond political parties to include a wider set of actors that hold power to account through quasi-legal means. This resonates with the broader argument advanced in Part B of this introduction: that oppositional contestation occurs across multiple sites and is shaped not only by formal rules but by institutional interplay, credibility, and the wider ecosystem of democratic – or authoritarian – governance.

While most contributions explore oppositions that are tolerated, marginalised, or manipulated, the final paper by *Jieren Hu* and *Johannes Rossi* shifts focus to a context where opposition is not merely constrained but structurally precluded.[44] Their study of China's digital constitutionalism introduces a strikingly different configuration – one in which the legal order is engineered to anticipate and pre-empt oppositional activity through the fusion of public law and digital governance. In China, the concept of "rightful control" over cyberspace is enshrined in a constitutional and statutory framework that defines surveillance, content moderation, and platform regulation not as exceptions but as integral to the legal order. *Hu* and *Rossi* argue that this digital paradigm effectively forecloses the conditions under which opposition could even emerge, by criminalising dissent, fragmenting associational space, and algorithmically filtering contentious expression.

What makes this contribution particularly salient for comparative public law is its insistence on legality as a site of legitimation. Rather than suspending legality to suppress opposition, the Chinese regime constitutionalises surveillance and control, thereby embedding authoritarian prerogatives into the legal fabric of the state. The opposition in such a system is not a legal category under siege; it is an ontological impossibility. Yet even here, the role of public law is central – not because it protects dissent, but because it structures the very absence of dissent. In doing so, *Hu* and *Rossi* offer a powerful counterpoint to the

44 *Hu / Rossi*, note 7.

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other contributions in this issue. Their paper reminds us that the relationship between public law and opposition is not always adversarial or dialectical – it can also be constitutive, shaping what kinds of oppositional agency are thinkable, legal, or imaginable.

Together, these contributions chart a complex and contingent landscape in which opposition is not a static institutional role but a shifting function, shaped by constitutional text, legal practice, institutional actors, and broader political dynamics. Whether operating through parliamentary tactics, constitutional litigation, fourth-branch oversight, or digital circumvention, oppositional actors adapt to the opportunities and constraints presented by public law. These case studies reveal not only the vulnerability of opposition under democratic backsliding but also its ingenuity and resilience across diverse regime types.

The contributions in this special issue offer a textured and multifaceted account of the relationship between political opposition and public law. While grounded in disparate contexts, ranging from India's performative parliamentarism to China's pre-emptive digital authoritarianism, they collectively demonstrate that opposition is neither a fixed role nor a guaranteed right. It is, instead, a contingent position continuously constituted and reconstituted through law. Public law, in turn, is revealed to be a double-edged instrument: it can serve as a shield that protects dissent, a stage upon which resistance is enacted, or a sword used to neutralise challengers. Across the papers, legality emerges as a terrain of struggle, where opposition actors adapt, subvert, or contest the structures that enable or constrain their activity.

Three cross-cutting insights merit emphasis. First, legality is elastic. From *Singh* and *Ramkumar*'s account of procedural resistance in India to *Hu* and *Rossi's* documentation of digital suppression in China, the boundaries of what is lawful are both strategic and shifting. Opposition actors often weaponise legal ambiguity – just as regimes do – to assert or preserve their space. Second, the institutional location of opposition matters, but not always in predictable ways. Parliaments, courts, and fourth-branch institutions can empower or exclude, depending not only on their formal design but on how they are positioned within a broader regime ecology. Third, the category of opposition itself is plural and expansive. Several contributions push us to consider actors beyond political parties – civil society groups, watchdog institutions, even protest movements – as crucial players in the constitutional politics of opposition.

In synthesising these themes, this special issue reframes opposition not as a residual or reactive category, but as a constitutive element of public law. Understanding how oppositions operate under pressure, whether through legal resistance, institutional innovation, or digital evasion, offers critical insight into the health and trajectory of constitutional orders. These case studies not only deepen our understanding of how oppositional agency persists or collapses under varying conditions; they also raise new questions about the design, resilience, and legitimacy of public law itself. These questions form the foundation for the last section below, where we turn to the future: What are the most pressing research agendas for scholars of opposition and public law? How might comparative constitutional

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studies better account for oppositional politics' varieties, venues, and vulnerabilities across regime types?

D. Outlook: Avenues for Future Research

The rich comparative material in this volume opens several promising avenues for future research.

A pressing agenda must involve a deeper investigation into how legal frameworks can be designed to foster constitutional resilience in the face of autocratic legalism and democratic backsliding. Adopting a varieties of constitutionalism framework can help distinguish between legitimate adaptation to new challenges and the erosion of core democratic principles. Future scholarship should explore how different constitutional varieties – be they liberal, transformative, or social – can build resilience, and what lessons can be drawn from the experiences of Global South constitutional orders that have long navigated conditions of crisis.[45] For instance, do transformative constitutions in the Global South, with their emphasis on substantive equality and social change, offer unique legal tools for opposition that are absent in classical liberal frameworks? How do illiberal constitutional systems selectively adopt opposition-related provisions whilst undermining their substance? Such comparative analysis would move beyond the democratic-autocratic binary to reveal more nuanced patterns of oppositional possibility across different constitutional varieties.

Furthermore, the contributions here call for more research into the long-term effectiveness of different oppositional strategies. What are the trade-offs between disruptive parliamentary tactics, strategic litigation, and extra-parliamentary mobilization? And how do former opposition forces behave if they come to power themselves in non-democratic settings? Do they enact legal reforms to create a level playing field as often promised during electoral campaigns or rather manipulate the law to their advantage? The role of fourth-branch institutions in hybrid and backsliding regimes also requires more sustained analysis, particularly concerning how their independence can be institutionally safeguarded.

The concern with autocratic legalism that runs through multiple papers also suggests a research agenda focused on legal innovation by regime actors. Just as this special issue documents oppositional adaptation to constrained circumstances, future work should examine how autocratic and hybrid regimes learn and borrow from each other in developing legally sophisticated tools to manage opposition.[46] Understanding these processes of authoritarian learning and borrowing in the context of suppressing oppositions could help identify emerging threats to oppositional space before they become entrenched.

Besides, the conceptual framework outlined in section B offers various starting points for comparative analyses. For instance, what role does public law play for the dynamic interactions between parliamentary and extra-parliamentary oppositions? Do legal restrictions

45 *Riegner*, note 1, p. 182 et seq.

46 For a study of how illiberal regimes learn from each other, see *Dixon* / *Landau*, note 14.

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and lack of constitutional compliance account for competitive, complementary or substitutive relations between both forces? Also, the prevalence of and constitutional compliance with opposition rights is a worthwhile topic for quantitative empirical study on a global scale. Do we observe numerous sham constitutions (as in the field of human rights law) or are constitutional guarantees for oppositions more likely uphold since they belong to the political realm?

The relationship between legal form and political practice, a central tension identified across the contributions, deserves longitudinal study. How do gaps between constitutional text and oppositional reality evolve over time? Research tracking specific jurisdictions through periods of democratic consolidation, backsliding, and potential recovery could reveal whether formal opposition rights serve as "constitutional anchors" or "focal points" that facilitate democratic restoration or merely as empty vessels that legitimate authoritarian rule. This would help answer a crucial question implicit in several contributions: when does constitutional recognition of opposition matter?

Finally, this special issue demonstrates that the study of opposition in the Global South offers vital lessons for the Global North. Phenomena like populist majoritarianism, the weaponization of legal procedure, and the erosion of institutional neutrality are not confined to emerging democracies. The experiences documented in this volume provide both cautionary tales and a potential playbook of resistance for established democracies facing similar pressures. Those experiences show, for instance, that to develop and support strategies against democratic backsliding and constitutional erosion, scholars also need to study how the law and practice of formal oppositions interacts with social movements, traditional and religious authorities, militaries and businesses, with individual and collective practices of dissidence, civil disobedience, and resistance, and with the insurgent normativities and legalities that may arise from such practices. By looking beyond traditional concepts and case studies, and by embracing the full spectrum of constitutional varieties, comparative scholarship can better account for the venues and vulnerabilities of oppositional politics, ultimately enriching our understanding of the universal struggle to hold power to account.

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The Parliamentary Opposition in Morocco: Evolution and Legal Challenges

By *Rachid El Bazzim*[*]

Abstract: Parliamentary opposition in Morocco has long been fragmented and confined. However, the Moroccan Constitution of 2011 solemnly enshrines the status of the parliamentary opposition, demonstrating the sincerity of its recognition. This enshrinement, although controlled by the majority, is enacted by four constitutional articles – notably Article 10, which grants the opposition a specific list of rights. This article provides a comprehensive reflection on the parliamentary opposition in Morocco by identifying its four essential dimensions: legal recognition, status, exercise of rights, and duties. An analysis of these aspects specifies the contours of the parliamentary opposition, evaluating its capacities for action and examining its legal characteristics and challenges. The article starts with a brief historical perspective that points to the opposition's difficult and legally weak position since the establishment of the Moroccan parliament in 1963. Turning to the constitutional reform in 2011 and subsequent developments, the analysis shows that parliamentary practice in Morocco has not fully reflected the opposition's new role. Rather, rationalized parliamentarism and the dominance of the majority continue to prevail in Moroccan parliamentary life, limiting the impact of the opposition despite the constitutional rights granted to it.

Keywords: Parliamentary Opposition; Morocco; Opposition Rights

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A. Introduction

In a democracy, parliamentary opposition is essential to ensure the balance of powers. It represents an electoral minority and plays a crucial role in monitoring the ruling majority and proposing political alternatives. This counter-power, legitimized by popular suffrage, is at the heart of democratic functioning.

However, the opposition can be described as a "politically unidentified object".[1] To establish its status, it is crucial to define it clearly. The opposition lies at the intersection of

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1 *Daniel C. Martin*, À la quête des OPNI (Objets politiques non identifiés). Comment traiter l'invention du politique ?, Revue française de science politique 39 (1989), p. 793.

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law and politics, an "elusive reality" oscillating between institutions and power dynamics.[2] Although primarily a political concept, the "rights recognized to it" reveal the place and role attributed to it within a political regime.[3] Moreover, a distinction is made between "good" opposition, which is compliant and loyal, and "bad" opposition, perceived as disloyal and anti-system. To overcome the biases of these approaches, Nathalie Brack and Sharon Weinblum define political opposition as "all positions of opposition, criticism, and reservation, publicly expressed by mobilized actors, in a non-violent manner, targeting the government, its policies, the political elite, or the regime as a whole"[4].

The opposition manifests as a dissent against power and a counterbalance to it, with particular attention to parliamentary opposition.[5] Hence, parliamentary opposition constitutes an essential component of opposition forces, "comprising actors and/or political formations present within an assembly, who seek, through institutional means and extra-parliamentary exchanges, to influence and control governmental action, while positioning themselves as a credible alternative for the next elections."[6] It is frequently described as "the most advanced and institutionalized form of political conflict."[7] As a "political minority" opposing a majority, the parliamentary opposition generally finds a privileged means of recognition and expression in the deliberative institution[8].

The relationship between law and opposition is complex. Historically informal, parliamentary opposition is now also governed by written law, albeit imperfectly. Great Britain and countries following the Westminster model have institutionalized opposition by symbolically recognizing the principal opposition party, adapted to their bipartisan system. However, this model is not universally applicable. In Book I of *The Spirit of the Laws*, Montesquieu demonstrates that the success of legal adaptation is often uncertain, as national cultures and traditions can alter its effects.[9]

The affirmation of formal rights in favor of the opposition also occurs in emerging democracies. For example, the Portuguese Constitution of 2 April 1976 first mentions the notion of opposition in Article 114.[10] Similarly, in Morocco, the parliamentary opposition

2 *Carlos Miguel Pimentel*, L'opposition ou le procès symbolique du pouvoir, Pouvoirs 108 (2004), p. 45.

3 *Olivier Nay*, Opposition, Lexique de science politique, Paris 2008, p. 365.

4 *Nathalie Brack / Sharon Weinblum*, Pour une approche renouvelée de l'opposition politique, Revue internationale de politique comparée 18 (2011), p. 13.

5 *Robert A. Dahl* (ed.), Political Oppositions in Western Democracies, New Haven CT 1966, p. 1.

6 *Yves Surel*, L'opposition et Parlement. Quelques éléments de comparaison, Revue internationale de politique comparée 18 (2011), p. 118.

7 *Ghita Ionescu / Isabel de Madariaga*, Opposition: Past and Present of a Political Institution, London 1968, p. 9.

8 *Pascal Jan*, Les oppositions, Pouvoirs 18 (2004), p. 24.

9 *Charles-Louis de Secondat Montesquieu*, De l'esprit des lois, Paris 1977.

10 Article 114.2 of the Constitution of Portugal determines that "minorities have the right to democratic opposition, as laid down by this Constitution and the law".

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is officially recognized by the 2011 Constitution, granting rights to strengthen democracy.[11] This approach, influenced by national specificities, remains complex, combining constitutional elements, legislative measures, and practical usages. Indeed, identifying the status of parliamentary opposition raises questions about its institutionalization, its institutional and behavioral variability, and its place within the constitutional order. The study of parliamentary opposition can encompass a wide range of nuances, from its protection process to the most harmonious cooperation to the most determined competition.

This article aims to analyze the legal framework governing the rights of the opposition in Morocco, focusing on the 2011 Constitution's recognition of the opposition. By integrating constitutional and sub-constitutional norms, including organic laws, ordinary laws, and parliamentary regulations, we assess the impact of these norms on the role and conception of the opposition within the parliamentary assembly.

Granting a status to the opposition means that the constitution recognizes and protects the rights of non-ruling parties, such as the rights to freedom of expression and participation in parliamentary debates. However, are these rights truly respected? Can the opposition exercise its rights without hindrance, or does it encounter institutional and political obstacles? This contribution will examine how the rights guaranteed by the constitution are effectively applied and whether the opposition can truly play its role as a counter-power.

Although extra-parliamentary oppositions are important, this analysis focuses on the opposition forces in the Moroccan parliament. It begins with a brief historical perspective that points to the opposition's difficult and legally weak position since the establishment of the Moroccan parliament in 1963 (A). Turning to the constitutional reform in 2011 and subsequent developments, the article successively examines the opposition's legal recognition (B) and the use of its rights (C), before concluding with a reflection on the duties of parliamentary opposition in Morocco (D).

B. Parliamentary Opposition and Developments Prior to the 2011 Reform: An Incomplete Path to Recognition

To understand the significance of our subject, it is essential to begin with a historical perspective. Since the establishment of the parliament in Morocco in 1963, the status of the opposition has evolved considerably. This evolution has led to the affirmation of the King's role in the political arena, as well as the majoritarian principle and the struggles among political actors which have redefined the balance of powers.

The opposition in Morocco has always occupied a difficult position in the political system. Although recognized, it has not benefited from constitutional protection or a specific legal framework, rendering it legally elusive. This deficiency led to random recognition and limited rights, often derived from the privileges granted to parliamentarians in general.

11 The Moroccan Constitution of 2011.

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From 1963 to 2011, the Moroccan opposition experienced eight legislative periods marked by various challenges:

I.1963-1965: The Beginnings of Parliamentary Opposition and Political TensionsDuring the first legislative term (between 1963 and 1965), the parliamentary opposition in Morocco, primarily led by the Istiqlal Party[12] and the National Union of Popular Forces[13], played a significant role. In the legislative elections held on May 17, 1963, the Palace aimed to weaken these parties by appealing to rural elites[14] and establishing the Front for the Defense of Constitutional Institutions (FDIC)[15]. However, the Istiqlal Party and the National Union of Popular Forces maintained substantial influence, particularly in regions such as Souss, Casablanca, and Rabat.

Despite the administration's support for the Front for the Defense of Constitutional Institutions in rural areas, the results did not meet the Palace's expectations.[16] The opposition, holding 69 out of 144 seats, strongly contested the Palace's policies. Capitalizing on the disagreements between the government and its majority, the opposition adopted an aggressive approach, filing a motion of censure against the economic policy, attempting to socialize the economy, and requesting an extraordinary session.

The period of parliamentary activism ended with the events of March 1965. Shortly before, several plots aiming at overthrowing the regime were foiled, and riots sporadically erupted across the kingdom. The most significant riots occurred in March 1965 in Casablanca[17]. They were violently suppressed by the Royal Armed Forces, resulting in several disappearances and deaths. The National Union of Popular Forces requested a parliamentary inquiry commission, but the authorities refused. More importantly, the unrests allowed the king to strengthen his power by declaring a state of emergency.[18] This measure

12 The Istiqlal Party (PI), founded in 1943 by Allal El Fassi and young nationalists, was the main force in the National Movement for Morocco's independence. After independence, a split in its left wing led to the creation of the National Union of Popular Forces (UNFP).

13 The National Union of Popular Forces (UNFP) was formed in 1959 after splitting from the Istiqlal Party (PI). Founders included Abderrahmane El Youssfi, Mehdi Ben Barka, and Abdellah Ibrahim. In 1963, the party faced repression after Morocco's first legislative elections. Internal conflicts led to a split in 1972, creating the Socialist Union of Popular Forces (USFP).

14 *Rémi Leveau*, Le Fellah marocain, défenseur du Trône, Paris 1976.

15 The Front for the Defense of Constitutional Institutions (FDIC) was created in 1963 by Ahmed Reda Guedira and other ministers. It included three political parties: the Popular Movement (MP), the Democratic Constitutional Party (PCD), and the Independent Liberals Party (PLI). In 1964, after losing its majority and the withdrawal of the MP, the FDIC decided to dissolve.

16 The Front for the Defense of Constitutional Institutions secured only 36.5% of the votes, compared to 56.5% for the opposition (32% for the Istiqlâl Party and 24.5% for the National Union of Popular Forces). See *Pierre Vermeren*, Histoire du Maroc depuis l'indépendance, Paris 2016, pp. 32-44.

17 Jeune Afrique, Que s'est-il vraiment passé le 23 mars 1965, 21 March 2005, https://www.jeuneafrique.com/86510/archives-thematique/que-s-est-il-vraiment-pass-le-23-mars-1965/, (last accessed on 1 March 2025).

18 See *Susan Gilson Miller*, A History of Modern Morocco, New York 2013.

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suspended all constitutional institutions (including parliament) and concentrated all powers in the king's hands. The surveillance of opposition parties became systematic and arrests of their activists and leaders occurred, often justified by accusations of conspiracies. A five-year period of quasi-military dictatorship followed.

II. 1970-1972: The Second Legislature With a Weakened Opposition

The second legislature of Morocco began in 1970, at a time when the monopolistic ambitions of King Hassan II were being strongly contested by a significant portion of the Moroccan elites.

To remedy this situation, Hassan II ended the state of emergency on July 7, 1970, promulgated a new Constitution, and called for new legislative elections. The legislative elections on August 21, 1970, were officially boycotted by the parties from the national movement, such as the National Union of Popular Forces (UNFP) and the Istiqlal Party. However, some members of these parties ran as independents.

In general, constitutional reforms, notably those of 1970, significantly reduced the opposition's rights and immunities, strengthening the King's power and further marginalizing the opposition. Unicameralism was established in a way that weakened the opposition. Of the members of parliament, 90 were elected by universal suffrage, 90 by local elected officials, and 60 by professional and trade union organizations[19]. The parliament then was dominated by independents (159 seats) and the Popular Movement[20] (60 seats), with a marginal presence of the National Union of Popular Forces (1 seat) and the Istiqlâl Party (8 seats).[21] Moreover, Article 37 of the 1970 Constitution abolished parliamentary immunity in cases where the opinions expressed challenge the monarchic form of the State or the Muslim religion or constitute an infringement of the due respect for the King.

III. 1977-1983: The Third Legislature and Socio-Economic Crisis

To neutralize an opposition weakened and exhausted by years of marginalization and repression, Hassan II had promised the initiation of a democratic process by organizing elections on June 3, 1977. However, this controlled opening proved to be illusory. The administration ensured the election of the Palace's supporters and divided the opposition. The third parliament of independent Morocco covered the period from 1977 to 1983.

The Istiqlal Party, which had secured 51 seats, returned to government after more than fourteen years of opposition, while the Socialist Union of Popular Forces (USFP) was

19 *Ahmed Belhaj*, Le Parlement marocain, in Édification d'un État moderne: le Maroc de Hassan II, sous la direction de Driss Basri, Ahmed Belhaj, et Mohammed Jalal Essaid, Paris 1986, p. 72

20 The Popular Movement (MP), founded in 1957 by Mahjoubi Ahderdane, Dr. Abdelkrim El Khatib, and Benabdallah Waggouti, is a party with a strong Amazigh identity and rural base. Its main goals were to support the monarchy and counter the dominance of the Istiqlal Party (PI).

21 *Dieter Nohlen et al*., Elections in Africa: A Data Handbook, Oxford 1999, pp. 623–644.

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marginalized with only 15 seats, becoming the main opposition party for twenty years. The Independents, the parliamentary base of the regime, founded the National Rally of Independents[22] (RNI) in 1978, the first in a long line of administrative parties serving the regime. This situation was explained by the nature of the electoral system, the support of rural areas, the administration's activism (criticized by the opposition), and the consensus around the Sahara issue.

Despite the dominant authority exercised by Hassan II over Morocco, the country experienced a profound socio-economic crisis in the late 1970s and early 1980s. The war in the Sahara, the decline in phosphate prices, the second oil shock, the recession in Europe, and several years of drought compelled the regime to implement unpopular measures, such as structural adjustment.[23] These measures led to riots in 1981 and 1984. The repression affected not only the rioters but also the militants and leaders of the opposition.[24] The left-wing opposition was then either silenced (such as the National Union of Moroccan Students and the far-left movements), controlled (such as the Socialist Union of Popular Forces[25]), or co-opted (such as the Party of Progress and Socialism[26]).

IV. 1984-1993: The Fourth Legislature and Political Stagnation

In a difficult context, the legislative elections of September 14, 1984, were held. Unsurprisingly, the parties supported by the king won the majority of seats. The Istiqlal Party, after having fulfilled its role of legitimization, was relegated to the opposition (forty-three deputies). The moderate far-left was introduced in small doses (two deputies from the Party of Progress and Socialism and one deputy from the Organization of Democratic and Popular Action[27]). However, the Socialist Union of Popular Forces returned to the level of Istiqlal by doubling its representation (thirty-nine deputies). The ensuing political stagnation demonstrated that the political system had reached its cruising speed. The ad-

22 The National Rally of Independents (RNI) was founded in 1978 by Ahmed Osman. After the 1977 legislative elections, where independent candidates won over 141 seats, they formed the RNI, becoming the leading electoral force in the country.

23 *Vermeren*, note 17, p. 74.

24 *Santucci Jean-Claude*, Chroniques politiques marocaines (1971-1982), Paris 1985.

25 The Socialist Union of Popular Forces (USFP) split from the National Union of Popular Forces (UNFP) in 1972 and was officially established in 1975. The party shifted from revolutionary tactics to a democratic approach, joining the Socialist International. It was the main opposition party until 1997, after which its parliamentary presence decreased.

26 The Party of Progress and Socialism, founded by Ali Yata in 1974, succeeded the Moroccan Communist Party (PCM) and the Party of Liberation and Socialism (PLS), both of which were banned multiple times.

27 In 1983, a faction of the far-left attempted to emerge on the official political scene. The heirs of the March 23 movement then created the Organization of Democratic and Popular Action (OADP), centered around the figure of the veteran of the Moroccan Liberation Army, Mohammed Bensaïd.

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ministration parties emerged largely as the majority in the fourth legislature, in place for nine years (1984-1993).

V. 1993-1997: The Fifth Legislature and the Revival of Democratic Transition

The end of the Cold War, marked by events such as the fall of the Berlin Wall, heralded the advent of a new world order and also triggered a wave of democratization. Hassan II could no longer rely on his traditional allies to govern in the same manner, especially as the economy stagnated, the regime's image was tarnished by human rights violations, and the Islamist threat began to emerge.[28] In this situation, the historical opposition, represented by the Socialist Union of Popular Forces (USFP) and the Istiqlal Party (PI), attempted to revive the democratic transition process.

The monarch sought to buy time to prepare a controlled opening. He leveraged the issue of the Sahara to postpone the elections scheduled for 1989 and 1990 by three years. Simultaneously, he demonstrated goodwill by releasing political prisoners, tasking the Advisory Council on Human Rights (CCDH) with addressing victims' issues, initiating a modest reform of the personal status code, and proposing a constitutional reform.

Although Hassan II did not address the main demands of the opposition, he sought to co-opt them to improve his image, particularly on the international stage. Negotiations for government participation failed due to the king's refusal to dismiss Driss Basri, the powerful Minister of the Interior and a symbol of the "Years of Lead"[29]. Consequently, the Socialist Union of Popular Forces (USFP) and the Istiqlal Party (PI) withdrew, and inconsequential elections were held on June 25, 1993. Despite their withdrawal from government negotiations, both the USFP and the Istiqlal Party secured seats in the legislature, with the USFP winning 48 seats and the Istiqlal Party winning 43 seats.

VI. 1997-2002: The Sixth Legislature and Controlled Political Opening

Despite the initial failure to co-opt the forces of the historical opposition, Hassan II persisted in addressing internal and external challenges, ensuring a smooth succession for his son and heir, Mohamed VI. He aimed to neutralize the Socialist Union of Popular Forces (USFP), the Istiqlal Party (PI), and their allies while demonstrating a commitment to the rule of law yet maintaining firm control over power.

The elections of November 14, 1997, characterized by consensual alternation, resulted in the definitive integration of the historical opposition, with the appointment of a government led by the USFP in March 1998. However, this opening remained under the vigilant control of the king, who retained a strong grip on power through the Chamber of

28 *Mohamed Tozy*, Monarchie et islam politique au Maroc, Paris 1999.

29 The period known as the Years of Lead in Morocco, from the 1960s to the early 1990s under Hassan II, was marked by severe repression against political dissidents, leaving a lasting impact on the country's history.

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Councillors, endowed with blocking powers. The opposition leaders agreed to participate in the government, thereby acknowledging the supremacy of the monarchy.

A more moderate opposition emerged, tempted to enter the imposed framework in exchange for partial recognition and comfortable political careers.[30] Thus, the *Koutla* parties[31] and moderate Islamists illustrate how the opposition can navigate a restrictive political framework to maintain some influence.

VII. 2002-2007: The Seventh Legislature and Political Manoeuvring

The accession of Mohammed VI to power in 1999 did not alter the extensive prerogatives of the monarchy, despite a symbolic desire to break with the past. Hopes for a democratic transition were quickly dashed. By the end of 2000, the king had regained control by arresting Islamist and leftist activists and suspending several newspapers. In 2001, the appointment of a Minister of the Interior and super-governors demonstrated the technocratic orientation of the regime.

The political parties involved in public administration, notably the USFP, gradually lost credibility. The political parties were weakened by internal struggles and dissensions. Despite the USFP's victory in the legislative elections of September 27, 2002, Mohammed VI took advantage of the fragmentation of the House of Representatives to appoint a technocrat as head of the government. This manoeuvre marked the end of the mission of the alternation government: to legitimize and facilitate the transition at the head of the state while maintaining the supremacy of the monarchy.

To participate in the elections, moderate Islamists first joined the Constitutional and Democratic Popular Movement (MPCD)[32], which allowed them to win 9 seats in the 1997 legislative elections. In 2000, they founded their own party, the Justice and Development Party (PJD), which now won 42 seats in the 2002 legislative elections. The PJD established itself as an influential political force, especially in the context of the Arab Spring, serving as an intermediary between the government and radical Islamism, skilfully using institutional resources to conform to the criteria of government parties.

30 *Bernard Cubertafond*, L'opposition au Maroc, Pouvoirs 89 (1999), p. 158.

31 *Koutla* means "coalition" in Arabic. This Moroccan political coalition comprises three main parties: the Istiqlal Party (PI), the Socialist Union of Popular Forces (USFP) and the Progress and Socialism Party (PPS). It was formed to unite these parties in their political efforts and common goals.

32 The Popular Democratic and Constitutional Movement (MPDC) was founded in 1967 by Dr. Abdelkrim El Khatib after splitting from the Popular Movement (MP). Dr. El Khatib, who opposed the 1965 state of emergency, established the MPDC, which later led to the creation of the Justice and Development Party (PJD).

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VIII. 2007-2011: The Eighth Legislature and Developmental Authoritarianism

Starting in 2002, Morocco witnessed the emergence of developmental authoritarianism, where the monarch utilized major projects as the primary lever for growth. This strategy, which benefited a portion of the population in the short term, allowed the regime to expand its support base and enhance its image, to the detriment of traditional political parties, which weakened, except for the Islamists.

Political parties, notably the USFP, saw their credibility and influence erode, while the population, depoliticized for various reasons, turned away from politics. This disinterest was reflected in a record abstention rate of 63% during the legislative elections of 2007[33]. The monarchy remained at the center of power, with the Islamists as the only opposition capable of threatening this hegemony in the long term.

Following the 2007 elections, the opposition was led by the Justice and Development Party (PJD) with 52 seats, joined by the Popular Movement (MP) with 41 seats and the Constitutional Union (UC) with 27 seats. Concurrently, the parliamentary group of Authenticity and Modernity, formed in October 2007 to initially support the government of Abbas El Fassi, withdrew its support in June 2009 and positioned itself in the opposition. However, it failed to unify the opposition, which remained fragmented. The divergences within the opposition were deeper than those among the majority parties, resulting in a lack of coordination and harmony.

C. The Granting of an Organized Status and Formal Recognition Since 2011

The provision of a structured status and formal recognition of the parliamentary opposition is crucial to ensuring effective counter-power. This process includes examining (I) Post-Arab Spring electoral milestones 2011, 2016, 2021, the formalization (II), and recognition (III) of the parliamentary opposition.

I. Post-Arab Spring Electoral Milestones: 2011, 2016, 2021

Starting in 2007, the Moroccan monarchy encouraged the creation of the Authenticity and Modernity Party (PAM)[34] to monopolize the political landscape while allowing a certain degree of freedom of expression. This party's mission was to block the rise of Islamists and revitalize the partisan landscape to better control it. Despite numerous denunciations, everything suggested that this project would succeed, as the balance of power was undeniably in

33 *Miquel Pellicer / Eva Wegner*, Socio-economic voter profile and motives for Islamist support in Morocco, Party Politics 20 (2014), p. 116.

34 The Authenticity and Modernity Party (PAM) was founded in 2008 by a coalition of politicians from various political backgrounds, including Fouad Ali El Himma, who was then the Minister Delegate to the Interior.

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favor of the monarchy and its allies. However, this balance was disrupted by exceptional events: the popular uprisings of 2011 in several countries in the region.

In Morocco, a heterogeneous protest movement emerged on February 20, 2011. The "February 20 Movement", inspired by uprisings in other countries, played a crucial role in demanding significant political reforms. Unlike traditional parliamentary oppositions, this movement emerged outside conventional political spheres and called for the establishment of a parliamentary monarchy. This popular pressure caught the political parties in parliament off guard, who reacted with some hesitation to rally to this cause. This contrast highlights the dynamic between institutional oppositions and popular movements, showing how the latter can sometimes force significant reforms outside established political channels. However, the lack of clear demands and the weakness of the mobilization allowed the monarchy to quickly regain the initiative.[35] On March 9, Mohammed VI announced a reform plan that included the overhaul of the constitution and the organization of early elections. A new supreme law was approved less than four months later, on July 1. As a kind of concession to the protestors, the new supreme law constitutionalized the opposition (see below). Yet, the king retained his extensive prerogatives.[36]

The legislative elections of November 25, 2011, allowed the regime to neutralize parliamentary Islamism by appointing an Islamist leader to head a heterogeneous government coalition. Although the Islamists were integrated into the government, they remained the only political force capable of seriously challenging the monarchy's dominance in the long term.

The 2016 electoral campaign in Morocco was dominated by the Justice and Development Party (PJD) and the Authenticity and Modernity Party (PAM), creating a bipartisan dynamic. The PJD, led by Abdel-Lilah Benkirane[37], won the elections, increasing its seats from 107 in 2011 to 125 in 2016. The PAM secured second place, rising from 47 seats in 2011 to 102 in 2016.[38]

Following the elections, King Mohammed VI tasked Benkirane with forming a new government. The PAM quickly announced its intention to join the opposition. Benkirane's consultations with other parties proved difficult, particularly due to a disagreement with the National Rally of Independents (RNI). On March 17, 2017, the king ended the deadlock by replacing Benkirane with Saad Dine El Otmani. A new government was formed on April 5, 2017. This period highlighted the challenges faced by the Moroccan opposition. The

35 *Fouad Abdelmoumni*, Le Maroc et le Printemps arabe, Pouvoirs 145 (2013), p. 123.

36 *Omar Bendourou*, La nouvelle Constitution marocaine du 29 juillet 2011, Revue française de droit constitutionnel 91 (2012), p. 511.

37 Abdelilah Benkirane is a notable Moroccan politician and the leader of the Justice and Development Party. He served as the head of government from November 29, 2011, to April 5, 2017.

38 *Youssef Ait Akdim / Charlotte Bozonnet,* Élections au Maroc: participation limitée, les islamistes dénoncent des tentatives de fraudes, Le Monde, 7 October 2016, https://www.lemonde.fr/afrique/article/2016/10/07/elections-au-maroc-participation-limitee-les-islamistes-denoncent-des-tentatives-de-fraudes_5010240_3212.html (last accessed on 1 March 2025).

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PAM sought to distinguish itself by quickly joining the opposition, but internal tensions and strategic differences complicated the formation of a unified coalition. Benkirane's refusal to accept RNI's conditions illustrated the difficulties of negotiation and compromise within the opposition.

The new opposition included the PAM with 102 seats, the Istiqlal Party with 46 seats, and the Federation of the Democratic Left with 2 seats.

The 2021 Moroccan legislative elections marked a significant shift in the political landscape. The Justice and Development Party, which had led the government since 2011, suffered a major defeat, dropping from 125 seats in 2016 to just 13 in 2021.[39] This decline was influenced by the electoral quotient reform and growing criticism of the party's governance. The National Rally of Independents, led by Aziz Akhannouch[40], emerged as the big winner, securing 102 seats. The Authenticity and Modernity Party and Istiqlal also performed well, with 87 and 81 seats, respectively. The RNI formed a government with the Authenticity and Modernity Party and Istiqlal, excluding the Socialist Union of Popular Forces and the Constitutional Union.[41]

Since the elections, the Moroccan opposition has faced fragmentation and reorganization. The Justice and Development Party's defeat led to a new political configuration dominated by the National Rally of Independents, the Authenticity and Modernity Party, and Istiqlal. The opposition parties struggle with internal divisions and ideological differences, weakening their ability to present a united front and challenge the government effectively.[42] This fragmentation benefits the current government, allowing it to operate with fewer constraints even though the opposition was now formally strengthened.

II. The Formalization of the Opposition

The opposition, as a hybrid entity at the crossroads of politics and law, manifests itself in various forms (unconstitutional opposition, parliamentary opposition, extra-parliamentary constitutional opposition) and intervenes on several fronts. Political opposition is never

39 *Thierry Desrues / Saïd Kirhlani*, De la débâcle du Parti de la justice et du développement (PJD) aux élections de 2021: les significations de l'alternance politique au Maroc, L'Année du Maghreb 28 (2022), p. 199

40 Aziz Akhannouch, born in 1961, is the current Head of Government of Morocco and the leader of the National Rally of Independents (RNI). He is also a prominent businessman, serving as the CEO of Akwa Group.

41 The Constitutional Union (UC), founded in 1983 by Maâti Bouabid, former Prime Minister from 1979 to 1983, was in opposition for four consecutive legislatures: 1997, 2002, 2007, and 2011. In 2016, the party left the opposition to join the government majority led by the PJD.

42 Opposition groups see their legislative proposals, such as the capping of hydrocarbon prices, the liquidation of Samir, and the development of mountainous areas, rejected without discussion. Despite their constitutional prerogatives, the opposition is ineffective against the majority. For example, for the 2022 Finance Bill, the opposition proposed 92 amendments, but only 3 were accepted. Their efforts to unite have not been taken into account.

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homogeneous, but diverse and sometimes very disparate, which is a potential weakening factor.[43] The constitution has, therefore, chosen to define the opposition by placing it in parliament. This choice has overcome the difficulty of defining the legal opposition. Article 10 of the new constitution specifically establishes the status of the parliamentary opposition and protects its activity in the assembly. This indicates that the supreme legislator wishes to give a privileged place to this form of opposition

Article 10 of the 2011 Constitution states, "The Constitution guarantees to the parliamentary opposition a status conferring on it the rights that will permit it to appropriately accomplish the missions that accrue to it in the parliamentary work and political life". While the constitutionalization of the parliamentary opposition transforms a political activity into an official institution, its contours remain vague. In theory, this recognition should promote the proper functioning of the parliamentary system by bringing stability and predictability to interactions between parliamentarians.[44] However, in practice, the formalization poses challenges as it attempts to fix "a plural and fluctuating political reality".[45] The question of the appropriateness of constitutionally codifying the opposition remains complex and warrants thorough reflection. Establishing fixed rules for a parliamentary assembly can be complex, as they may not always adapt to constant changes and various circumstances.[46] Also, the granting of specific rights requires prior identification of the subject of law (see below). Moreover, the constitution does not consider the possibility of opposition to the head of state. In Morocco, despite the constitutional revision, the king retains significant powers.[47] The constitutionalization of the opposition can be seen as a way for the king to compensate for the transfer of powers to the head of government.[48] Thus, the king retains his privileged role as an arbiter between political factions.

43 *Surel*, note 6, p. 120.

44 *Marie-Laure Fages*, L'opportunité manquée d'un statut de l'opposition en France, Politeia 16 (2009), p. 338.

45 *Ariane Vidal-Naquet*, L'institutionnalisation de l'opposition, Revue française de droit constitutionnel 1 (2009), p. 166.

46 *Pierre Avril,* L'improbable 'statut de l'opposition' (à propos de la décision 537 DC du Conseil constitutionnel sur le règlement de l'Assemblée nationale), Les petites affiches n°138 (12 juillet 2006), p. 9.

47 *Omar Bendourou,* La nouvelle Constitution marocaine du 29 juillet 2011, Revue française de droit constitutionnel 3 (2012), p. 512.

48 The 2011 constitutional reform in Morocco granted more executive authority to the head of government, including powers to appoint officials, preside over the Government Council, and propose legislation. This aimed to balance power between the monarchy and the elected government. However, the king still retains significant powers, such as dissolving parliament and presiding over the Council of Ministers, maintaining his central role in the political framework.

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III. Recognition of the Parliamentary Opposition

The identification of political opposition is complicated by the fact that it is a plural and protean phenomenon. This diversity makes it difficult to develop a substantive definition of "parliamentary opposition".[49] The legislator has relied on two formal criteria: one organic, relating to structure, and the other functional, relating to activities. It has been stipulated that only opposition parliamentary groups can fully enjoy the rights set out in Article 10 of the constitution[50]. Thus, although individual parliamentarians and political parties have certain constitutional rights, they cannot individually access the privileges reserved for the parliamentary opposition. In other words, these rights are designed to be exercised collectively, requiring membership in a parliamentary group to be fully effective.

Parliamentary groups are essential for the proper functioning of parliament. Their existence ensures specific rights for all parliamentarians, including those in the opposition.[51] Parliamentary work is structured both organically, through the formation of parliamentary groups, and functionally, through the dynamics between the majority and the opposition. These two aspects are interconnected, as the ability of each group to influence the decision-making process (such as legislation and government oversight) depends on their power and institutional strategies.

Being crucial for any activity within the assembly[52], parliamentary groups hold significant powers, notably in the appointment of internal parliamentary bodies such as the bureau, standing committees, delegations, and inquiry committees. However, it is important to note that the influence of opposition groups in these bodies is limited by their proportional representation in the number of seats they hold. Since the rights granted to the opposition are attributed to parliamentary groups rather than to individual parliamentarians, these competencies are recognized as a right of a collective entity and not as an individual right of each parliamentarian to oppose. Thus, opposition can only be exercised at the level of the parliamentary group, and deputies not affiliated with a group are excluded from this process.

However, the parliamentary legislator has taken into account the Constitutional Council's remarks on the constitutionality of the 2013 Rules of Procedure of the House of Representatives[53], particularly regarding the rights of the parliamentary opposition. The Council has determined that these rights should also include parliamentary groups (at least 20 members), parliamentary groupings (at least four members), and representatives not affiliated with an opposition party or parliamentary group. Thus, the Council has broadened

49 *Francis Delpérée*, L'opposition parlementaire, Paris 2010.

50 This stipulation is specified in the 2011 Constitution and the Rules of Procedure of Parliament.

51 *Nadia Bernoussi*, Les groupes parlementaires au Maroc, Revue française de droit constitutionnel (RFDC) 61 (2005), p. 207.

52 *Gilles Le Béguec*, La constitution des groupes parlementaires. Questions de méthode, Paris 2001, p. 184.

53 Constitutional Council Decision No. 2013/924, issued on August 22, 2013.

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the definition of a "parliamentary group". Indeed, the recognition of minority groups and the constitutionalization of the opposition can promote more authentic and diverse representation within multiparty regimes, thereby avoiding artificial bipolarization.

Article 60 of the constitution emphasizes the importance of the organic nature of the opposition within parliament. It specifies that "the opposition is an essential component of both Houses. It participates in the functions of legislation and oversight." This institutional recognition of the opposition makes it a key element of parliamentary functioning, thus ensuring democratic balance. The functional criterion of the parliamentary opposition is based on the assignment of specific missions that clearly distinguish it from the roles of majority groups, extra-parliamentary opposition, and political parties in general. By combining these criteria, the parliamentary opposition becomes a distinct working body within parliament, reserved for certain groups that benefit from specific missions and rights.

Defining the opposition is not limited to distinguishing the majority from the minority, as it involves political choices rather than a simple calculation.[54] The constitution has not set precise criteria for identifying the opposition, as each criterion presents challenges and political implications. Some researchers distinguish between "institutional" and "behavioral" criteria.[55] Institutional criteria, such as the results of legislative elections, identify the opposition by the losing parties. However, this method does not clearly define "defeat" and allows a defeated party to remain in a composite majority. The criterion of participation in the government is also problematic, as some groups may support the government without directly participating in it. Moreover, designating the largest minority group as the opposition is not appropriate for multiparty systems. Behavioral criteria, such as the attitudes of deputies, are subjective and vary according to the political situation, complicating the structuring of political forces desired by the constitutionalization of the opposition. The voting of parliamentarians on issues of confidence, budget, and bills poses similar difficulties.

In Morocco, a system of opposition membership has been established through communications and notices. Each parliamentary group leader must inform the presidency of the assembly in writing of their group's affiliation with the majority or the opposition. In this context, the Rules of Procedure of the House of Representatives of 2024 for the 11th legislature (2021–2026) specify how parliamentary groups, groupings, and unaffiliated deputies can declare themselves the opposition. Each parliamentary group leader and grouping leader, as well as each unaffiliated deputy who chooses the opposition, must inform the President of the House of Representatives in writing. This notification is then announced at the next public session.[56] By requiring groups to announce their opposition affiliation

54 *Eric Thiers*, La majorité contrôlée par l'opposition : pierre philosophale de la nouvelle répartition des pouvoirs ?, Pouvoirs 143 (2012), p. 63.

55 *Olivier Rozenberg / Eric Thiers*, L'opposition parlementaire, Paris 2013, p.12.

56 See in particular Article 22 of the Rules of Procedure of the Chamber of Representatives for the year 2024, https://www.chambredesrepresentants.ma/sites/default/files/2024-09/RI2024F_0.pdf (last accessed on 30 June 2025).

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and not granting decision-making power to the bureau in case of dispute, the Rules of Procedure of the House of Representatives strive to respect the second paragraph of Article 7 of the Constitution: "Political parties work to educate and politically train citizens (...) Their constitution and the exercise of their activities are free". A reading of the internal regulations of both chambers of the Moroccan parliament reveals that the provisions relating to membership prevent any interference in the internal affairs of parliamentary groups. However, the formalization of opposition membership alone is not sufficient to guarantee a true separation of powers.

The status of the parliamentary opposition provides specific rights and protections, allowing opposition parties to fulfill their oversight and critique functions without being subject to the arbitrariness of the majority. This status recognizes the opposition not only as a force present within the assembly but also as a key actor in the legislative process. Indeed, the constitution grants the opposition particular rights so that they can carry out their parliamentary and political missions effectively and without excessive constraints (see below). Thus, although subject to the same rules as other parties, the opposition has additional guarantees to fully exercise its functions.

In total, the Moroccan constitutional text highlights the importance of the parliamentary opposition by solemnly enshrining it through no less than four articles. Article 10, located in the first title relating to general provisions (and not in Title IV relating to legislative power as one might expect), lists an impressive array of 12 rights granted to the opposition. Additionally, Article 60 of Title IV, relating to legislative power, stipulates that the opposition is "an essential component of both chambers". Furthermore, Article 69 mandates that each chamber of parliament establishes internal regulations, which include rules on the composition, functioning, and affiliation of parliamentary groups, as well as the specific rights recognized for opposition groups. It also requires that the presidency of at least one or two permanent commissions be reserved for the opposition. Lastly, Article 82 ensures that the agenda of each parliamentary chamber includes the examination of opposition proposals, with at least one day per month reserved for this purpose. This broad recognition represents a significant step that has garnered positive appreciation from many observers. However, the emphasis on the rights of the opposition in the 2011 Moroccan Constitution could be seen as a "communication revision" strategy, intended to project a positive image rather than to implement profound reforms.

D. The Rights Guaranteed within the Parliamentary Institution

The 2011 constitutional text elevates the role of parliament, highlighting the importance of the parliamentary opposition. Once marginalized and perceived negatively, the supreme law now recognized the opposition as an indispensable partner of the majority and as a force playing an active role in oversight and legislation. Article 10 of the Constitution guarantees the parliamentary opposition a status that confers the rights necessary for it to effectively

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fulfill its missions in parliamentary work and political life. Specifically, it guarantees the following rights:

- Freedom of opinion, expression, and assembly;
- Air time on official media proportional to its representation;
- Public finance benefits according to law;
- Effective participation in legislative procedures, including proposing laws;
- Effective participation in government oversight through motions of censure, interpellations, oral questions, and inquiries;
- Proposing candidates and electing members of the Constitutional Court;
- Appropriate representation in parliamentary activities;
- Presidency of the legislation commission in the Chamber of Representatives;
- Necessary means to fulfill institutional functions;
- Active participation in parliamentary diplomacy to defend national interests;
- Structuring and representing citizens in political party work;
- Exercising power at local, regional, and national levels through democratic alternation.

In general, the list includes a variety of rights that touch upon different topics while also differing greatly in importance for opposition forces. Also, some issues are further specified through other rules. For instance, article 102 of the Rules of Procedure of the House of Representatives stipulates that the Bureau of the House, in consultation with the government, must ensure the allocation of broadcast time for parliamentary activities on all public media. This provision must be implemented in respect of the rights of the opposition, as defined in Article 10 of the Constitution.[57] It also guarantees public funding, in accordance with the provisions of the law. This funding mechanism is intended to enhance the effectiveness of the opposition in its performance of its parliamentary and political functions. The Moroccan state budget thus provides for an annual financial allocation for political parties. The distribution of this funding is conditioned by participation in elections and the obtaining of a minimum percentage of the votes to secure seats in elected institutions. This right to funding applies equally to all parliamentary groups, regardless of their position as majority or opposition.

Furthermore, some of the rights enshrined in Article 10 reaffirm established freedoms, such as the freedom of opinion, expression, and assembly mentioned in Articles 25[58] and 29[59] of the constitution, as well as public funding and the contribution to the training and

57 Article 32 of Organic Law No. 29-11 on political parties states: "The State grants legally constituted political parties annual support to contribute to the coverage of their management expenses", see Official Bulletin No. 5992 of November 3, 2011.

58 Article 25 provides that: "The freedoms of thought, opinion, and expression in all their forms are guaranteed."

59 Article 29 provides that: "The freedoms of assembly, gathering, peaceful demonstration, association, and union and political affiliation are guaranteed."

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representation of citizens by political parties, as indicated in Article 7.[60] Other rights apply to all parliamentarians, regardless of their position vis-à-vis the government, including participation in the legislative process, oversight of government work, proportional representation within parliamentary bodies, and the necessary means to fulfil their functions. What is more, some rights such as "the exercise of power within the framework of democratic alternation", do not confer specific competencies. In contrast, two rights are specifically granted to the parliamentary opposition: the presidency of the legislative committee in the House of Representatives and the privilege of having its bills examined during the monthly session dedicated to this purpose.

While Article 10 of the 2011 Constitution also guarantees the opposition the right to contribute to the nomination and election of members of the Constitutional Court, the impact of this right is less clear. The 2011 Constitution reconstituted the Constitutional Council as the Constitutional Court, maintaining twelve members appointed for a non-renewable nine-year term. Six members are appointed by the King, including one member appointed by the Secretary-General of the Supreme Council of Ulema (Islamic scholars). The remaining six members are elected by the two Houses of Parliament. Three members are elected by the House of Representatives and three by the House of Councillors, through a secret ballot requiring a two-thirds majority of each House's members. In theory, this electoral process involves both majority parties and the parliamentary opposition, ensuring that opposition members can be part of the Constitutional Court. However, government-affiliated MPs may not have to consider the opposition's wishes if they hold two-thirds of the seats. Hence, the opposition's influence depends on its seat share.

In sum, Article 10 guarantees numerous rights to political oppositions within the parliamentary institution. Two principal categories we deal with in the following are: (I) rights related to legislative drafting, and (II) rights to oversee government action and parliamentary inquiry.

I. Rights Relating to the Legislative Drafting

The Moroccan Constitution, in its Article 10, ensures the parliamentary opposition's active participation in the legislative process, including the inclusion of bills on the agenda of both chambers. Article 82, paragraph 2, states that "at least one day per month shall be reserved for the examination of bills, including those of the opposition". This provision requires the legislature to devote that monthly day to this review. Thus, Article 82 guarantees the effective participation of the opposition in the legislative process thereby preventing the majority from controlling the proposals of the opposition.

In addition, Article 10 confers on the opposition the chairmanship of the committee responsible for legislation in the House of Representatives. Article 69 of the 2011 Consti-

60 Article 7 states that: "Political parties work to provide guidance and political training for citizens, as well as to promote their participation in national life and the management of public affairs."

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tution, in its fifth paragraph, stipulates that "the rules of procedure shall determine, inter alia, the number, powers, and organization of the standing committees, and reserve the chairmanship of one or two of these committees for the opposition". In accordance with this provision, the House of Representatives' rules of procedure of 2024 state that the chairmanship of at least two committees must be reserved for the opposition, including, on a mandatory basis, the Committee on Justice, Legislation, Human Rights and Freedoms, whose chair hence can only be held by a member of the opposition.[61] By assuming the chairmanship of certain parliamentary committees, the opposition acquires the means to be informed of government activities which helps to participate in overseeing the government and in legislating.

During the ninth legislature (2011–2016), for instance, the opposition effectively chaired three standing committees: the Commission on Justice, Legislation, and Human Rights, led by the Party of the Constitutional Union; the Commission for Foreign Affairs, National Defence, Islamic Affairs, and Moroccan Residents Abroad, under the chairmanship of the Authenticity and Modernity Party; and the Commission for the Interior, Territorial Communities, Housing, and Urban Policy, chaired by the Istiqlal Party. These prerogatives allow the opposition to play a significant role in defining the agenda of the assembly. It is thus able to propose specific topics for debate and to animate discussions by presenting alternative points of view to majority decisions.

The constitutional text also enshrines the status of the parliamentary opposition in its "positive" logic – that is to say, as a force for initiative and proposal. This dynamic is reinforced by the affirmation of the principle of proportionality in the representation of the opposition in the bodies of parliament, further illustrating its ability to contribute to the work of the majority. Thus, the rights granted to the opposition reinforce the distinction between the opposition within the regime, which is seen as a legitimate contender for power and is expected to eventually gain power through democratic processes, and the opposition against the regime, which refuses to participate in the institutional game and does not seek to gain power through the established political system.

II. Rights of Oversight and Inquiry

The oversight function exercised by the parliamentary opposition is fundamental in a democracy. It involves monitoring and evaluating the actions of the government and its majority. Although the government and its majority are responsible for decision-making, these decisions must be executed under the vigilant eye of the opposition to revitalize parliamentary oversight.[62] The constitution guarantees the opposition an active role in overseeing government work, notably through motions of censure, government questioning, oral

61 See in particular Article 9 of the House of Representatives' Rules of Procedure for 2024, https://www.representants.ma/sites/default/files/2024-09/RI2024F_0.pdf (last accessed on 30 June 2025).

62 *Pauline Türk*, Le contrôle parlementaire en France, Paris 2011, p. 24.

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questions, and parliamentary inquiry commissions. Oral questions, in particular, offer all parliamentarians, including those in the opposition, the opportunity to publicly present their criticisms and divergent viewpoints. Additionally, other forms of oversight, such as motions of censure and inquiry commissions, are implemented collectively, thereby enhancing the opposition's capacity to exercise structured oversight.

The opposition can use the motion of censure to assert itself on the political scene and to create crises in its relationships with the majority and the government. Such motion was filed and adopted twice in Morocco's constitutional history: in 1964, against the *Bahnini* government, and on 14 May 1990, against the *Azzedine Laraki* government.[63] Both motions did not lead to a government downfall due to a lack of support by the parliamentary majority. However, they served as a pressure instrument for the opposition, creating divisions within the parliamentary majority and destabilizing the government. Even if a motion is not actively used, the mere possibility to do so can influence the government's action.

The first Moroccan Constitution of 1962 was particularly advanced in this area compared to other constitutions. Indeed, it only required the signature of one-tenth of the members of parliament to present a motion of censure. This provision encouraged the parliamentary opposition to initiate a motion of censure against the government in 1964. In all the constitutions that Morocco has known, the adoption of a motion of censure requires an absolute majority. Although this legal framework has often limited the opposition's ability to provoke major political changes, it has managed to exert significant pressure on power. By taking actions outside parliament, such as calling strikes and drafting constitutional memorandums, the opposition has succeeded in influencing the political debate and making its voice heard.[64] The 2011 Constitution significantly strengthened the role of the opposition by reducing the number of signatures required to submit a motion of censure from one-quarter under the 1996 Constitution to one-fifth (Article 105). However, even if the opposition reaches this quorum, it must still overcome the hurdle of having the motion approved, which requires the vote and agreement of the majority of the members supporting the government. This requirement highlights the challenges the opposition faces in fully exercising its role as a counterbalance.

For the House of Councillors, the 2011 Constitution removed the right to present or vote on a motion of censure, unlike the 1996 Constitution. Instead, Article 106 allows the opposition to submit a motion of interpellation, signed by one-fifth of the members, followed by a debate without a vote. This provision gives the opposition a tool to exert pressure on the government and monitor its actions in line with citizens' expectations. Although the primary goal of a motion of censure is to overthrow the government, which is difficult to achieve in practice, the submission of a motion of censure remains an

63 *Abdelhamid Benkhattab*, Le parlement marocain : Régulation politique et incertitude transitionnelle, REMALD (2012), p. 44.

64 *Sanae Kasmi*, Le statut de l'opposition au Maroc, Revue française de droit constitutionnel 102 (2015), p. 440.

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important symbolic act for the opposition. It allows the opposition to officially express its disagreement with government policy and exert pressure on the government. An illustration of this mechanism in practice occurred on November 20, 2017, when the House of Councillors rejected a motion of interpellation regarding the government's accountability in the "Sidi Boulaalam tragedy" in the province of Essaouira. Introduced by the Authenticity and Modernity Party, this motion followed the tragic event of November 19, 2017, where 15 women lost their lives in a stampede during a food distribution.[65]

Although reserved for opposition groups, other forms of oversight must meet a numerical condition. Thus, these are rights granted to the opposition as a minority. However, the opposition distinguishes itself from a mere minority by actively criticizing the ruling power and positioning itself as a political alternative. The ability to trigger constitutional review is one example. According to Article 132 of the Moroccan Constitution, one-fifth of the members of the Chamber of Representatives (or 40 members of the Chamber of Councillors) may refer matters to the Constitutional Court. This competence protects minority rights and acts as a counterbalance. Requiring a qualified two-thirds majority for certain important decisions, such as constitutional revision according to Articles 173 and 174 or the appointment of constitutional judges according to Article 130 of the constitution, helps to ensure that minority rights are not crushed by a potentially oppressive majority.

Furthermore, the oversight function allows the opposition to request information on the actions of the government and administration, to demand the communication of necessary documents, to hear from the heads of public services and enterprises, and to establish inquiry commissions. These prerogatives are essential for the opposition to fully exercise its role of oversight and counterbalance. The purpose of inquiry commissions, for example, is to achieve two main objectives: to ensure effective political oversight of the government and to collect necessary information for the legislative function.[66] They are also at the intersection of political and judicial oversight methods.[67] In this regard, the first three Moroccan constitutions (1962, 1970, 1972) did not mention the right to form parliamentary commissions of inquiry. This right was introduced in the 1992 and 1996 constitutions, but it remained difficult for the opposition to exercise, as it required a request from the parliamentary majority. Now, Article 67 of the 2011 Constitution allows one-third of the members of the House of Representatives (132 members) or the House of Councillors to form commissions of inquiry.

These commissions gather information on specific facts or the management of public services and submit their findings to Parliament. They cannot be formed if judicial proceedings are ongoing regarding the facts in question. To activate this important oversight mech-

65 Telquel, Le gouvernement ne sera pas interpellé sur le drame de Sidi Boulaalam, 27 November 2017, https://telquel.ma/2017/11/27/gouvernement-sera-pas-interpelle-drame-sidi-boulaalam_1570650 (last accessed on 1 March 2025).

66 *Nicolas Lagasse / Xavier Baeselen*, Le droit d'enquête parlementaire, Bruylant, Brussels 1998, p. 5.

67 *Vincent Marc Uyttendaele*, Trente leçons de droit constitutionnel, Brussels 2014, p. 394.

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anism and pressure the government to improve its public policy outcomes, the 2013 Rules of Procedure of the House of Representatives include several rights for the parliamentary opposition:

1. The position of chairperson or rapporteur of the commissions of inquiry is reserved for opposition groups.
2. Priority in choosing between these two positions is given to opposition groups, and only a member from the opposition can run for the chosen position.
3. Half of the time allocated for discussing the reports of the commissions of inquiry is reserved for the opposition.
4. All opposition groups are represented in these commissions.

While these provisions make it easier for the opposition to form commissions of inquiry, the commissions can also refer their reports to the judiciary, enhancing parliamentary oversight mechanisms.

The significance of parliamentary inquiry commissions became evident in the early 2000s, particularly with the investigation into the National Social Security Fund in 2002, which uncovered embezzlement and fraud. More recently, in 2021, an inquiry was conducted into the Ministry of Health's public contracts in response to the Covid-19 pandemic. The request to establish these commissions often originates from the opposition but can also come from parties within the governing coalition. For instance, the Justice and Development Party, then in power, requested an inquiry into hydrocarbons, with the report being released in May 2018.[68]

Given the current political landscape under the government of 2021-2026, the scope of these commissions is uncertain. The three parties forming the government hold a majority of nearly 68% of the seats in the House of Representatives. The Constitutional Union and the Popular Movement support this coalition, leaving the Socialist Union of Popular Forces, the Justice and Development Party, and the Party of Progress and Socialism with little room for maneuver as they only hold 17 percent of seats (Socialist Union of Popular Forces: 34 seats, Justice and Development Party: 13 seats, Party of Progress and Socialism: 22 seats). Their diversity makes it difficult to form an effective counter-power. Thus, despite the constitutional recognition of the opposition as an essential component of both chambers, it will be difficult for them to establish inquiry commissions in the current political context.

In addition to commissions of inquiry, parliamentary questions play a crucial role in overseeing government actions. Article 100 of the Constitution mandates a weekly session for parliamentary questions, with the government required to respond within twenty days. Questions on general policy are addressed monthly by the Head of Government, with responses due within thirty days. In addition, Article 275 of the Rules of Procedure of

68 *Rachid El Bazzim*, The Independence of Morocco's Competition Council, Journal of African Law 67 (2023), p. 167.

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the House of Representatives allows each member of parliament to submit written or oral questions to the Head of Government, with responses required within thirty days. Members may also direct questions to ministers regarding sectoral policies, with responses required within twenty days. Weekly and monthly public sessions are dedicated to parliamentary questions, with a session every Monday for oral questions. A portion of these questions is reserved for the opposition, reflecting its representation. Hence, parliamentary questions are straightforward to utilize and challenge the government. Though their political impact might be limited, they remain a crucial tool for the opposition to monitor and scrutinize government actions.

E. The Duties of the Parliamentary Opposition

The Moroccan Constitution grants specific rights to the parliamentary opposition, with the goal of integrating it into the majority decision-making process. However, these rights are accompanied by often undefined duties (I), which can increase the burden on the opposition. In this context, the separation of powers is manifested between, on the one hand, the government and all parliamentarians supporting its actions, and on the other, the opposition, which proposes and critiques the alternatives (II).

I. The Parliamentary Opposition: An Actor of Pluralism and Political Diversity

A major issue in the legal recognition of political opposition is the need to guarantee pluralism. The rules that grant rights to the opposition help to preserve political diversity, provided they are adapted to the various forms that these oppositions may take. It is crucial to consider the foundations of parliamentarism as well as the normative model that governs parliamentary deliberations and mandates.[69] Although the majority retains decision-making power, it is now under the scrutiny of the opposition. The latter plays a crucial role in ensuring respect for the principles of debate and pluralism of opinions.[70] Rather than positioning itself as an adversary, the opposition is perceived as a complementary partner, fostering cooperation within parliament. It is essential to note that even though the opposition participates in providing oversight, it is parliament that holds the general authority in this matter.

In exchange for the rights granted to it, the parliamentary opposition is expected to commit to fulfilling its loyal duties, criticizing the government without challenging the rules of the game.[71] According to Article 10 of the constitution, "opposition groups are required to make an active and constructive contribution to parliamentary work". Therefore,

69 *Maurice Var de Hulst*, Le mandat parlementaire. Étude comparative mondiale, Geneva 2000, p. 6.

70 Article 10 of the Constitution, which defines the status of the parliamentary opposition, ensures it "the freedom of opinion, expression, and assembly."

71 *Marie-Claire Ponthoreau*, L'opposition comme garantie constitutionnelle, Revue de droit public et de science politique en France et à l'étranger 4 (2002), p. 1136.

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in return for its rights, the parliamentary opposition is now seen as needing to fulfill its duties, showing the capacity and ambition to govern as a viable alternative. This is particularly explicit in the Moroccan context, where rights are granted to the opposition to enable it to "properly fulfill its missions related to parliamentary work and political life".

However, the Moroccan constitution does not specify the missions that the opposition must accomplish. Nevertheless, the constitution requires the parliamentary opposition to adopt an active and constructive attitude to fulfill its duties. It cannot be content with mere criticism but should participate positively in parliamentary work. This behaviour is essential to ensure that the decisions made are balanced and representative of diverse opinions. The rights of the opposition are granted in exchange for this responsibility. The goal is to ensure that the opposition contributes positively to the functioning of institutions, rather than creating obstacles. Thus, the opposition plays an important consultative role, collaborating with the majority to legitimize the decisions made rather than establishing a true counter-power. The constitutional enshrinement of the duties of the opposition reinforces the idea that its specific rights can only be exercised if it uses its prerogatives with moderation and does not hinder legislative production.[72]

The exercise of the opposition's duties is conditioned by the implementation of its status by the majority. The majority holds the power to define the components of the opposition's status, specifying them through sub-constitutional norms. The Moroccan constitution uses the technique of referral, which consists of formally referring to other provisions. Thus, Article 10 provides that the modalities for exercising the rights of the opposition are determined by organic laws, ordinary laws, or the internal regulations of each chamber of parliament. Additionally, Article 69 specifies that the internal regulations of the chambers establish the rules of membership, composition, and functioning of parliamentary groups, as well as the specific rights recognized to opposition groups.

By mentioning the duties of the parliamentary opposition, the constitution allows the majority to condition the rights of the opposition on an attitude deemed acceptable. However, it is difficult to determine when the opposition has moved from legitimate action to illegitimate obstruction. This ambiguity can be politically exploited, allowing the majority to judge the "constructive" attitude of the opposition under the supervision of a chamber president whose impartiality is crucial.[73] Although the constitutional provisions are intended to protect the opposition, they can also reinforce the dominance of the majority.

72 *Renaud Muller*, Un nouveau rôle pour l'opposition dans la procédure législative ?, Cahiers de la recherche sur les droits fondamentaux 10 (« Esclavage et travail forcé ») (2012), p. 105.

73 *Valérie Sommacco*, Le droit d'amendement et le juge constitutionnel en France et en Italie, Paris 2002, p. 65.

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II. The Parliamentary Opposition: Guardian of the Separation of Powers and Adversarial Debates

To ensure an effective democratic debate, the representative assembly would operate on the "litigants' model": "it would not be a matter of organizing a conversation, a dialogue, but rather of ensuring the presence of opposing arguments, explicitly contradicting each other".[74] This approach allows for testing of the robustness of political decisions and ensures more informed and responsible decision-making. A representative opposition makes debates livelier and can contest – and sometimes neutralize – the initiatives of the executive power. The presence of a parliamentary opposition is essential if parliament is to serve as a counterbalance to the executive power.[75]

Indeed, regardless of the absence of effective disciplinary instruments available to the ruling majority, the tendency towards the fusion of legislative and executive powers remains a characteristic of Moroccan constitutional practice. The separation of powers is now reflected in a marked divide between the majority and the opposition in parliament. This dynamic is common in regimes where the concentration of legislative and executive powers in the hands of a single party or a coalition of parties accentuates the polarization between majorities and oppositions.[76] In Morocco, coalition governments are typically formed when no single party wins a majority of seats in the parliament. Parties must then negotiate and form alliances to create a majority coalition government. This process involves significant political manoeuvring, negotiations, and compromises among the parties involved. The role of competition is crucial, as parties vie for influence and positions within the coalition, balancing their own interests with the need to form a stable government. Maurice Duverger was one of the first to analyze this phenomenon[77], and Dean Vedel also recognized it in his comments on the French Constitution of 1958, noting that the dialogue between the majority and the opposition tends to replace the traditional separation of legislative and executive powers.[78] Of all the Moroccan constitutions, the 2011 Constitution best reflects this logic: as the separation of legislative and executive powers becomes more difficult to implement, it becomes necessary to create new counterbalances between these two bodies through the constitutionalization of the rights of the parliamentary opposition. Declared an "essential component of both Houses",[79] the parliamentary opposition is promised a political status and means of action that will ultimately contribute to reinventing the meaning of the separation of powers in Moroccan constitutional practice.

74 *Bernard Manin*, Délibération et discussion, Swiss Political Science Review 10 (2004), p. 190.

75 *Yves Guchet*, Droit parlementaire, Paris 1996, p. 65.

76 *Jean Bénetti,* L'impact du fait majoritaire sur la nature du régime (Réflexions sur le régime parlementaire de la Ve République), L.P.A. 138 (2008), p. 20.

77 *Maurice Duverger*, Les partis politiques, Paris 1976, p. 515.

78 *Georges Vedel*, La continuité constitutionnelle en France de 1789 à 1989, Paris 1990, p. 148.

79 Article 60.2 of Marocco's Constitution of 2011.

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The effective implementation of opposition rights will take time. As Ariane Vidal-Naquet points out, it is important not to perceive the opposition as merely oppressed by an all-powerful majority[80]. Granting the opposition a platform in Parliament also confers responsibilities. Within the framework of rationalized parliamentarism[81], the status of the opposition involves the recognition of its rights, but also its duties, such as accepting the majority law and respecting the democratic framework.

F. Conclusion

The rights of the parliamentary opposition in Morocco stem from a coherent, determined, and constitutionalized status. They are designed to prevent a majority tyranny and take into account the balance of powers in Morocco, as well as the privileged position of the king in the political system. The status of the opposition is also recognized in the rules governing debates in parliamentary assemblies. Outside these assemblies, the rights of the opposition include proportional funding based on electoral results and access to the media.

The 2011 Moroccan constitution grants great significance to the parliamentary opposition, surpassing what is observed in many systems aspiring to democracy. Although this recognition is widely praised, some view it as a political communication strategy. Nevertheless, this advancement marks a significant turning point in the Moroccan political landscape. Recognition of the parliamentary opposition as an essential component of the Moroccan parliament reflects an ambition of profound political transformation. Constitutionalization aims not only at establishing a legitimate and active opposition but also at revitalizing a parliament that has lost credibility. Thus, the efforts of political actors converge to restore confidence in a political system seeking renewal.

A cultural transformation can accompany the process of strengthening the opposition, as the political climate in which parliamentarism operates profoundly influences the effective practice of law. Indeed, a climate of consensus and positivity fosters the harmonious and constructive application of laws. Conversely, a political climate marked by conflicts leads to a more tumultuous and often antagonistic practice of law. This dichotomy clearly illustrates the impact of the political environment on the effectiveness and nature of parliamentary practices. Therefore, a cultural evolution cannot be dissociated from the envisaged reforms, as it conditions the success of parliamentary opposition and its acceptance within society.

80 *Ariane Vidal-Naquet*, L'institutionnalisation de l'opposition. Quel statut pour quelle opposition ?, Revue française de droit constitutionnel 1 (2009), pp. 153-173.

81 Rationalized parliamentarism is a dynamic that, after World War II, influenced the constitutional law of many European states. It formalizes, through written rules, practices that were traditionally based on customs, such as the formation of the government, the resignation of ministers, and the dissolution of Parliament. This approach aims to frame all political life within a formal legal structure.

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Recognition of the parliamentary opposition is not intended to hinder the functioning of institutions but to improve their efficiency. Indeed, the evolution of political practices shows that the executive power tends to dominate, while deliberative bodies increasingly focus on oversight activities. In this context, the Moroccan parliament, as a place of deliberation, is called upon to play a crucial role through discussion and critique.

States adopting a new constitution during a democratic transition tend to grant explicit rights to the opposition. However, this recognition can be instrumentalized to simulate the acceptance of political pluralism without real implementation. Nonetheless, even symbolic recognition can be a resource for the opposition, which can use these symbolic clauses to claim its rights. In Morocco, the constitutionalization of opposition rights can play a role in balancing powers and pacifying the political arena. Although its effects may take time to manifest, it remains essential to maintain this balance and strengthen the resilience and legitimacy of the democratic process.

Without the opposition's contribution to adopting consensual policies to pacify the political arena, power disputes can overflow the institutional frameworks provided, leading to unpredictable situations. Indeed, as highlighted in this contribution, political opposition is not limited to parliamentary opposition. Although this analysis focuses primarily on this type of opposition, it is crucial to recognize the vitality of extra-parliamentary opposition forces in Moroccan society. The Al Adl Wal Ihssane (AWI) movement, founded in 1973, is an Islamist movement not recognized by the authorities. On the other hand, Annahj Addimocrati (Democratic Path), a far-left communist party with a Marxist–Leninist ideology, shares with the AWI a strategy of boycotting elections. Together, they form a political opposition outside of parliament that is also energizing the political scene in Morocco.

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Courts as a Forum for Safeguarding the Right of Opposition Parties to Participate in Democratic Processes: A Comparative Analysis of South Africa and Zimbabwe

By *Nomfundo Ramalekana*[*] and *Justice Alfred Mavedzenge*[**]

Abstract: Courts can play a critical role in protecting the democratic participation of opposition parties. In this article, we examine the role of apex courts in South Africa and Zimbabwe as forums for democratic contestation by opposition parties. Specifically, we critically assess the courts' records in enabling and protecting opposition parties' ability to equally participate in democratic processes. Our analysis focuses on four themes in the courts' jurisprudence: (i) the disenfranchisement of voters perceived to be aligned with the opposition, (ii) requirements for the registration of political parties and individual candidates seeking to participate in elections, (iii) the independence of electoral management bodies to ensure fair and equal participation for all parties, including the opposition, and (iv) the enforcement of electoral justice in cases of alleged unfair or unfree elections. Additionally, recognising the importance of political funding for opposition parties, the article examines the legislative framework governing political party funding. The article demonstrates that while South Africa and Zimbabwe share similar constitutional frameworks and commitments to political rights, their apex courts have taken divergent approaches toward protecting opposition parties. The Zimbabwean Constitutional Court has largely restricted political rights, curtailing the institutionalisation of opposition parties and hindering the development of multi-party democracy. In contrast, the South African Constitutional Court has generally served as an enabling force for institutionalising opposition parties and strengthening multi-party democracy. We attribute the difference in approach to the broader political context: while both countries formally commit to multi-party democracy, Zimbabwe's ruling party has entrenched a system of competitive authoritarianism, which it maintains by, amongst other measures, undermining independence and relegating the courts to a rubber-stamping role for measures that curtail political freedoms. By contrast, South Africa's judiciary has maintained its independence, supporting the protection of opposition rights even within a dominant-party system. We conclude our analysis with the observation that a dominant political party, including a liberation party,

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does not inevitably stifle opposition rights. Independent institutions – such as courts and electoral management bodies – serve as essential bulwarks against such attempts, ensuring the preservation of democratic principles and equitable political participation.
Keywords: Opposition Political Parties; Multi-Party Democracy; Political Party Institutionalization; Competitive Authoritarianism; Political Rights; Judicial Independence; Liberationism

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A. Introduction

Opposition parties are important for the proper consolidation and functioning of democracy.[1] They can offer an alternative vision of governance for the people and can play an important role in exercising oversight and enforcing accountability on the government.[2] However, they can only play this role if they are strong, their rights are protected, and they enjoy equal opportunities (as the ruling party) to participate in democratic processes, including elections. In a multi-party constitutional democracy, the judiciary plays a critical role in protecting political rights, including the rights of opposition parties to meaningfully participate in democratic processes.

In this article, we explore the role played by apex courts in South Africa and Zimbabwe (the South African Constitutional Court and Zimbabwean Constitutional Court) in protecting the rights of opposition parties to participate in democratic processes, in a context where both countries have had a dominant liberation party in government and share similarities in their constitutional frameworks. The analysis in this article is presented in three substantive sections (excluding the introduction and conclusion). We begin by discussing multi-partyism, institutionalization of political parties and competitive authoritarianism, to set the conceptual framework for our analysis of the decisions of the apex courts. After that, we provide an overview discussion of the historical, political, and constitutional context within which opposition parties exist in South Africa and Zimbabwe.

In the last substantive section of the article, we analyse and compare the approaches taken by the apex courts in the two countries when adjudicating cases which affect the ability of opposition parties to participate equally in the democratic process. Specifically, we critically examine and compare the approaches taken by the apex courts from the two countries in (i) addressing the disenfranchisement of voters perceived to be aligned to the opposition, (ii) dealing with requirements related to the registration of political parties and

1 *Vicky Randall / Svåsand Lars*, Party Institutionalisation in New Democracies, Party Politics 5 (2002), p. 5.

2 *William Gumede*, Policy Brief 45: The Role of Opposition Parties in Developing Democracies, Democracy Works Foundation, 20 July 2023, https://www.democracyworks.org.za/what-is-the-role-of-opposition-parties-in-developing-democracies/ (last accessed on 8 April 2025).

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individual candidates who wish to participate in elections; (iii) protecting the independence of electoral management bodies to guarantee all parties (including the opposition) fair and equal participation in elections; (iv) and enforcing electoral justice in the face of allegations that elections were not free and fair. Additionally, recognising the importance of political funding for opposition parties, the article examines the legislative framework governing political party funding in both jurisdictions, an area rife for future litigation.

Overall, our analysis will show that while the two countries have similar constitutional frameworks and a similar entrenchment of political rights in their constitution and legislation, the two apex courts have mostly taken diverging approaches to the protection of opposition parties' political rights. In particular, the Zimbabwean Constitutional Court has mostly restrained political rights, limited the institutionalisation of opposition political parties and multi-party democracy. By contrast, the South African Constitutional Court has taken the opposite stance – it has been an enabling force for the institutionalisation of opposition parties and the development of multi-party democracy. We argue that this difference is possibly explained by the fact that while both countries affirm a commitment to multi-party democracy, the ruling party in Zimbabwe has entrenched a system of competitive authoritarianism, a process which involved the capturing of judicial independence and has led to the courts playing a rubber-stamping role for measures designed to curtail political freedoms in general and the rights of opposition parties and individual candidates who stand for office. Finally, the analysis also reveals that the presence of a dominant political party, even one that was a liberation party, will not always lead to the stifling of opposition parties' political rights. The presence of independent institutions, including the courts and electoral management bodies, can be an effective bulwark against any attempts to do so – reifying the importance of these institutions in securing multi-party democracy.

B. Multi-Partyism, Institutionalization of Opposition Parties, and Competitive Authoritarianism

Multi-partyism is a political system where multiple political parties exist and operate as autonomous entities which regularly compete in democratic elections with a serious chance to win the election.[3] The Constitution of Zimbabwe and the Constitution of South Africa recognise a multi-party system of democratic government as a core constitutional value.[4]

3 *Matthias Scantamburlo Davide Vampa / Ed Turner*, The costs and benefits of governing in a multi-level system, Political Research Exchange 6 (2024), pp. 1-2; see also, *K Prah*, Multi-Party Democracy and It's Relevance in Africa, Centre for Advanced Studies of African Society (2012), p. 1; *Manfred J. Holler*, An Introduction into the Logic of Multiparty Systems, in: Manfred J. Holler (ed.), The Logic of Multiparty Systems, International Studies in Economics and Econometrics 17 (1987).

4 Section 3(2)(a) of the Zimbabwean Constitution; Section 1(d) South African Constitution (on the importance of this commitment in the South African context see *New Nation Movement NPC and Others v President of the Republic of South Africa and Others* 2020 (8) BCLR 950 (CC); 2020 (6) SA 257 (CC) para 85).

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For a political system to be genuinely multi-party in nature, it must have multiple political parties, including opposition parties, that are fully institutionalised.

The institutionalisation of political parties is a "process through which parties acquire value and stability, and in which party operatives have agency".[5] It refers to the patterns of behaviour, attitudes and cultures that either enable or limit a political party from being established in society.[6] An institutionalised political party would, at least, have the following features: it would be organised – (understood in relation to having complex and effective organisational structure and rules, as well as wide geographic spread); it would be deeply embedded in society (understood as including its relationship with voters and civil society); and it would have autonomy from other organisations.[7]

The institutionalisation of political parties is influenced by external and internal factors. The external factors include the availability of resources, access to media, an open democratic space and legal protection for their existence.[8] The internal factors include the ability of a party to adapt, especially following the first group of political leaders and in relation to its membership, coherence in relation to there being consensus about functional boundaries and dispute resolution within the party as well as having a sense of autonomy from other organizations and groupings.[9] While the internal factors are mostly in the hands of the party, in a multi-party democratic system, it is important to ensure that the legislative and policy framework and practices enable rather than limit the institutionalisation of opposition political parties by constraining the external factors that inhibit institutionalization. A government which limits access to political party funding (from the state or private actors), restricts the right to vote and stand for public office, controls and limits opposition parties' access to the media or creates onerous rules that create barriers to the registration and campaigning of opposition political parties, and imposes leaders on opposition parties, puts a strain to the institutionalisation of opposition parties and, thus, undermines multi-partyism. Of course, a party that is not flexible and is unable to extend its pool of membership, does not have clear structures and rules for dispute resolution, or fails to exert its unique identity, undermines its own ability to institutionalise.

However, as observed by some scholars, it has become a common practice for some of the contemporary dictatorships to maintain a constitutional or legal framework that formally recognises multiparty democratic governance but in practice, the regime in government constantly undermines the political and legal system to prevent opposition political parties

5 *Eloïse Bertrand / Michael Mutyaba*, Opposition Party Institutionalisation in Authoritarian Settings: The Case of Uganda, Commonwealth & Comparative Politics 62 (2024), pp. 77-78. See also, *Edalina Rodrigues Sanches*, Party Systems in Young Democracies: Varieties of Institutionalization in Sub-Saharan Africa, Oxfordshire 2018, p. 4; *Samuel Huntington,* Political Order in Changing Societies, New Haven 1968, p. 12; *Randall / Svåsand*, note 1, p. 12.

6 *Randall / Svåsand*, note 1, p. 12.

7 *Bertrand / Mutyaba*, note 5, p. 82.

8 *Randall / Svåsand*, note 1, p. 8.

9 Ibid., p 10.

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from participating in democratic processes effectively.[10] This approach to dictatorship is what Levitsky and Way characterise as competitive authoritarianism.[11] In a competitive authoritarian political system, democratic laws and institutions exist on paper, but the regime in power systematically violates core features and or rules of these institutions, including by placing arbitrary restrictions against political rights or conducting elections that are not free and fair, and maintaining institutions of accountability but subvert their independence. In this connection, Levitsky and Way have argued that:

> *"In competitive authoritarian regimes, formal democratic institutions are widely viewed as the principal means of obtaining and exercising political authority. Incumbents violate those rules so often and to such an extent, however, that the regime fails to meet conventional minimum standards for democracy."*[12]

In essence, while formal democratic institutions exist, these are abused by those in power to give them an advantage over opponents. Thus, there is political competition, but it is not fair. Those in power use a range of methods to skew competition in their favor, including manipulating electoral processes and results, and interfering with the independence of the judiciary and electoral management bodies.[13] Countries whose democratic system comprises multiple political parties but are dominated by a single party are often vulnerable to competitive authoritarianism.

Zimbabwe stands accused of pursuing competitive authoritarianism since the reign of now late President Robert Mugabe and this has been perfected under the incumbent President Mnangagwa.[14] Recent surveys and analysis show that democracy in South Africa appears to be on the decline.[15] This was quite evident during the administration of President Jacob Zuma when the executive appeared to be boldly pursuing a policy of capturing democratic institutions including the office of the National Prosecuting Authority and

10 *Steven Levitsky / Lucan Way*, The Rise of Competitive Authoritarianism, Journal of Democracy 13 (2002), p. 5.

11 Ibid.

12 *Levitsky / Way*, note 10, p. 52.

13 Ibid., p. 54.

14 Ibid., p. 51; see also *Roger Southall*, From Party Dominance to Competitive Authoritarianism? South Africa versus Zimbabwe, in: Matthijs Bogaards / Sebastian Elischer (eds.), Democratisation and Comparative Authoritarianism in Africa, Wiesbaden (2016) pp. 103–108. *Kwadwo Boateng,* Defeating Competitive Authoritarianism in Zimbabwe with Democratic Elections, Democracy from the Margins 22 (2013), pp. 1-3.

15 See Freedom House, Freedom in the World Report 2024, https://freedomhouse.org/country/south-africa/freedom-world/2024 (last accessed on 9 April 2025). Also see *Michael Walsh / Phiwokuhle Mnyandu*, Democracy at Stake in South Africa, Foreign Policy Research Institute, 10 May 2023, https://www.fpri.org/article/2023/05/democracy-at-stake-in-south-africa/ (last accessed on 9 April 2025).

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Parliament.[16] Following the recent 2024 national and provincial elections, where no single party obtained an absolute majority, at the very least the multi-party politics necessitated by the need for coalition government *may* turn the tide for South Africa.

Courts can play a critical role in pushing back against the rise of competitive authoritarianism. They can be relied upon to protect the rights of citizens and opposition parties and to enforce accountability on the government. Whether the courts can perform this role depends on their commitment towards defending their independence, as they are often the first targets for capture by competitive authoritarian regimes. Before turning to the entrenchment of multi-partyism and the performance of the South African and Zimbabwean apex courts in protecting it, in the next section, we provide an overview of the context within which opposition parties find themselves in these two jurisdictions.

C. Opposition Parties in South Africa and Zimbabwe

South Africa and Zimbabwe share a common political history – having both been subject to colonial conquest. Following years of political and armed struggle, both countries were liberated by liberation movements which came to power following the introduction of constitutional democracy. Zimbabwe achieved its political independence in 1980, and South Africa achieved equal franchise in 1994.

In Zimbabwe, the Zimbabwe African National Unity Patriotic Front (ZANU PF) has been the dominant political party after winning the first post-independence elections in 1980. Although it narrowly lost parliamentary majority in 2008 to the opposition Movement for Democratic Change (MDC),[17] ZANU PF regained control of government after winning the disputed elections of 2013 and has continued to be the dominant party in government since then. In South Africa, the African National Congress (ANC) gained control of government in 1994 after winning the first democratic elections. It was the dominant party in the South African parliament from 1994 to 2024.[18] In 2024, for the first time, the ANC did not secure a majority, with only 40.2 per cent of the national vote – requiring it to enter into a coalition with several political parties – the Government of National Unity.[19] Although the ANC lost its dominance following the results of the 2024 national elections, it remains the leading party in parliament and government.

16 *Theunis Roux*, Constitutional Populism in South Africa, in: Martin Krygier / Adam Czarnota / Wojciech Sadurski (eds.), Anti-Constitutional Populism, Cambridge 2022, who discusses the rise of populism and the capture of democratic institutions under former President Jacob Zuma's government. See also *Jonathan Hyslop*, Trumpism, Zumaism, and the Fascist Potential of Authoritarian Populism, The Journal of South African and American Studies 21 (2020), p. 464.

17 *Brian Raftopoulos / Shari Eppel*, Desperately Seeking Sanity: What Prospects for a New Beginning in Zimbabwe?, Journal of Eastern African Studies 2 (2008), pp 369-400.

18 Statistics available from Electoral Commission of South Africa, https://www.elections.org.za (last accessed on 9 April 2025).

19 The 2024 Government of National Unity comprises the ANC and several other political parties including Rise Mzansi, Al Jama-ah the Democratic Alliance (DA), Inkatha Freedom Party (IFP),

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Since 1994, the most prominent political parties in South Africa have included the Congress of the People (COPE), the Democratic Alliance (DA), the United Democratic Movement (UDM), the Freedom Front Plus (FF Plus), the Economic Freedom Fighters (EFF) and more recently, the uMkhonto weSizwe Party (MKP). These political parties represent a wide spectrum of political and ideological beliefs. While in decline, COPE emerged from the recall and subsequent resignation of former President Thabo Mbeki due to internal political splits in the ANC. Established by former members of the ANC, COPE signalled the possibility of an alternative party representing the Black majority other than the former liberation political parties.[20] The DA could be characterised as a classically liberal political party or more on the conservative side – it was formed by the merger of the conservative National Party and the Liberal Democratic Party.[21] It is currently the second largest political party represented in parliament, previously the leading opposition but now in coalition with the ANC. By contrast, the EFF represents what some call populist, leftist and or radical politics, best exemplified by its commitment to the nationalisation of state resources and the expropriation of land without compensation.[22] The party was formed in 2013 by the expelled president of the ANC Youth League, Julius Malema. While in decline following the 2024 elections, it is still the fourth largest political party represented in parliament. The third largest political party in South African parliament, the MKP, was formed in 2023 and is led by former President Jacob Zuma – who was recalled by the ANC following a trail of corruption scandals, some of which were at the centre of a commission of inquiry into state capture. The MKP's political agenda is a mixture of liberal, traditionalist and leftist ideals.[23] We mention this to highlight the ideological spectrum of political representation in South Africa, characteristic of a multi-party democratic political system.

In post-independence Zimbabwe, the major opposition parties include the Zimbabwe African Peoples Union (ZAPU), which, alongside the Zimbabwe African National Union (ZANU), fought for the independence of Zimbabwe from British colonial rule. ZAPU was forced into a union with ZANU to form ZANU PF in 1987 as part of the political settle-

Patriotic Alliance (PA), Good, the Pan Africanist Congress (PAC), Freedom Front Plus (FF+) and the United Democratic Movement (UDM). See *Velani Ludidi*, Then there were 10 – unity government hits double digits while talks continue over Cabinet posts, Daily Maverick, 23 June 2024, https://www.dailymaverick.co.za/article/2024-06-23-then-there-were-10-unity-government-hits-double-digits-while-talks-continue-over-cabinet-posts/ (last accessed on 9 April 2025).

20 *Sithembile Mbete*, Moving on Up!? Opposition Parties and Political Change in South Africa, Heinrich Boll Stiftung, 14 May 2018, https://za.boell.org/en/2018/05/14/moving-opposition-parties-and-political-change-south-africa (last accessed on 9 April 2025).

21 For a brief discussion of the history and ideological tradition of the party see *Neil Southern / Roger Southall*, Dancing Like a Monkey: The Democratic Alliance and Opposition Politics in South Africa, in: John Daniel et al. (eds.), New South Africa Review 2, Cambridge 2012, pp. 70–71.

22 See for example *Sithembile Mbete*, The Economic Freedom Fighters - South Africa's Turn towards Populism?, Journal of African Elections 14 (2015), p. 35.

23 See UmKhonto weSizwe's Manifesto, https://mkparty.org.za/wp-content/uploads/2024/04/MK-Manifesto-The-Peoples-Mandate-Paths-Final-2.pdf (last accessed on 9 April 2025).

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ment to end the genocide perpetrated by the ZANU-led government of Zimbabwe targeting supporters of ZAPU in the Matabeleland and Midlands regions.[24] In 2008, ZAPU withdrew from the union with ZANU PF and continues to exist as an opposition political party to date.[25] In 1989, the Zimbabwe Unity Movement (ZUM) emerged as the main opposition party. It was formed and led by the former Secretary General of ZANU PF, Edgar Tekere, after his expulsion from the ruling party, ZANU PF, following his opposition to ZANU PF's policy of pursuing a one-party state.[26] As a result of state-sponsored violence targeting several of its supporters, ZUM closed shop and ceased to exist by 1996.

In 1999, the Movement for Democratic Change (MDC) emerged as a coalition of students, the labour unions, academics and the women's movement.[27] In 2008, it defeated ZANU PF in the presidential elections. Although by 2008 the MDC had split into two factions[28] who contested in the 2008 general elections as separate opposition parties, the two garnered 110 National Assembly seats, while ZANU PF won 99 seats.[29] ZANU PF refused to hand over power, arguing that the opposition had not won the presidential election by a sufficient majority to form a government.[30] Following mediation efforts brokered by the Southern Africa Development Community (SADC), the MDC and ZANU PF formed a Government of National Unity, which operated from 2008 until 2013. After the disputed general election of 2013, ZANU PF bounced back as the ruling party, and since then, the MDC has been on a decline partly because of state-sponsored violence against its supporters and interference with its internal governance by the ruling party and the State.[31] However, the party remains in existence to date. In 2022, the Citizen Coalition for Change (CCC) emerged as the main opposition party. However, although the party remains in existence to date, it has been on a decline since its defeat in the disputed 2023 elections. The decline of CCC is attributed to weak leadership and vicious interference by the State and the ruling party, which has led the party to split into various splinter groups.[32]

24 *Zenzo Moyo*, Opposition Politics and the Culture of Polarisation in Zimbabwe, 1980–2018: in: Ndlovu-Gatsheni et al. (eds.), The History and Political Transition of Zimbabwe, London 2020, p. 4.

25 Ibid.

26 Ibid., p. 7.

27 *Morgan Tsvangirai*, Morgan Tsvangirai: At the Deep End, London 2011, p. 15.

28 *Brian Raftopoulos*, Reflections on the Opposition in Zimbabwe: The Politics of the Movement for Democratic Change (MDC), in: Stephen Chan / Ranka Primorac (eds.), Zimbabwe in Crisis, London 2007, p. 48.

29 Inter Parliamentary Union, Zimbabwe House of Assembly (2008), http://archive.ipu.org/parline-e/reports/arc/2361_08.htm (last accessed on 9 April 2025).

30 *Brian Raftopoulos / Shari Eppel,* Desperately Seeking Sanity: What Prospects for a New Beginning in Zimbabwe?, Journal of Eastern African Studies 2 (2008), p. 369.

31 *Raftopoulos,* note 28, p. 48.

32 *Justice Mavedzenge*, Critical reflections on Chamisa's leadership style, 2022, https://constitutionallythinking.wordpress.com/law-and-politics/ (last accessed on 9 April 2025).

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While to different extents, South Africa and Zimbabwe could be said to have 'liberationism' embedded in the liberation parties' political discourse – the belief that, having fought against the colonial and apartheid regimes and attained democracy, the party has a perpetual and unquestionable right to govern.[33] In this context, voting against the ruling party is often seen as voting against the people's will and in favour of the colonial oppressor. In the South African context, this idea has a particular racial tinge to it in that, for example, voting for the DA (because of the racial composition of its leadership as well as its policy positions on issues like affirmative action and land expropriation) is seen as voting for 'white oppressors'.[34] Thus, even legitimate dissent from the DA party is often dismissed as racist. In the Zimbabwean context, the opposition MDC and CCC have been characterised by the ruling party, ZANU PF, as fronting the interests of the former colonial powers who are accused of attempting to remove ZANU PF from power and reverse the land reform.[35]

D. The Entrenchment of Multi-Party Democracy

Notwithstanding this 'liberationism' attitude of the dominant parties (ZANU PF and the ANC), Zimbabwe and South Africa have adopted constitutions which recognise multiparty democracy, as discussed earlier in this paper. As part of this constitutional framework, the constitutions in both jurisdictions have carved out a special role for the courts within the separation of powers. The South African Constitution empowers the courts to review decisions and conduct by the other branches of the state and enforce the constitution and the law impartially.[36] Similarly, in Zimbabwe, the first post-independence constitution adopted in 1979 recognised the role of the judiciary in checking against abuse of powers by the other two branches of the state, and the current constitution (adopted in 2013) reinforced and maintained this arrangement.[37]

33 *James Hamill / John Hoffman*, The African National Congress and the Zanufication Debate, in: John Daniel / Prishani Naidoo / Roger Southall (eds,), New South African Review 2, Cambridge 2012, p. 56.

34 On the impact of race on voter preferences in South Africa, see *Carolyn Holmes*, The Black and White Rainbow: Reconciliation, Opposition, and Nation-Building in Democratic South Africa, Ann Arbor 2020; *Southern / Southall,* note 21, p. 74.

35 *Zenzo Moyo*, Opposition Politics and the Culture of Polarisation in Zimbabwe, 1980–2018, in: Ndlovu-Gatsheni et al. (eds) The History and Political Transition of Zimbabwe, London 2002, p. 23.

36 Section 172(1)(a) requires the superior courts, when deciding any constitutional matter, to 'declare any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency and at (b) empowers the courts to make an order that is just and equitable.

37 See sections 167, 169 and 171 of the Zimbabwean Constitution.

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Further, the constitutions in both jurisdictions expressly protect a range of rights related to civil and political participation; this includes the rights to vote,[38] expression,[39] freedom of association,[40] and freedom of assembly.[41] Section 19(1)(a)(c) of the South African Constitution guarantees the right to form a political party, to participate in the activities of, or recruit members for a political party, and to campaign for a political party or cause. Section 19 (2) protects the right to free, fair and regular elections while section 19(3) protects the right of adult citizens to vote in secret and to stand for public office if elected to hold such office.[42] The only constitutional restrictions for voting relate to citizenship; only those classified as citizens can vote. Every person who is eligible to vote can be a member of parliament, excluding those excluded by virtue of their office,[43] unrehabilitated insolvents, persons declared not to be of sound mind, or persons convicted of an offence and sentenced to more than twelve months imprisonment without the option of a fine.[44] In addition, the South African Constitution establishes the Electoral Commission, and according to section 181(2), the Electoral Commission is independent, subject only to the Constitution and law and must act impartially and without fear, favour, or prejudice when conducting elections. The body has the obligation to conduct elections that are democratic, free and fair.[45]

Similarly, section 67(2)(a) of the Constitution of Zimbabwe guarantees the right to establish a political party as well as the right to associate with a political party of choice. Section 67(1)(a) of the Constitution guarantees the right to a free and fair election, including the right to contest in an election as a candidate and the right to vote for a candidate of choice. Further, the Constitution establishes an independent electoral management body with the exclusive mandate to conduct democratic free and fair elections.[46]

38 Section 67(3)(a) of the Zimbabwean Constitution, section 19(3)(a), South African Constitution.

39 Section 61(1) of the Zimbabwean Constitution, section 16(1) South African Constitution.

40 Section 58(1) of the Zimbabwean Constitution, section 17 South African Constitution.

41 Section 58(1) of the Zimbabwean Constitution, section 18 South African Constitution.

42 Following the Constitutional Court's decision in *New Nation Movement NPC and Others v President of the Republic of South Africa and Others,* note 4, persons can stand for public office either through a political party or as individual candidates.

43 Section 47(1)(a); anyone who is appointed by, or is in the service of, the state and receives remuneration for that appointment or service; and per section 47(1)(b) permanent delegates to the National Council of Provinces or members of a provincial legislature or a Municipal Council.

44 This applies to crimes committed within or outside South Africa if the conduct for which the person was convicted was a crime in South Africa as well. However, the disqualification ends five years after the sentence has been completed. In *Electoral Commission of South Africa v Umkhonto Wesizwe Political Party and Others* [2024] ZACC 6; 2024 (7) BCLR 869 (CC), the South African Constitutional Court confirmed that this rule barred former president Jacob Zuma from standing for office because of his 2020 conviction and 15 month custodial sentence for contempt of court, see *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18; 2021 (5) SA 327 (CC).

45 Section 191(b) of the South African Constitution.

46 Section 232(a) and section 235 of the Zimbabwean Constitution.

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Notwithstanding these constitutional guarantees of multi-partyism in both countries, politics has been dominated by a single party, as discussed earlier. In South Africa, and until the elections of 2024, the ANC has been enjoying an overwhelming majority in the legislature. The ANC pursues a policy of 'strict party discipline' which means that MPs tend to vote in line with their political party.[47] The ANC's implementation of strict party discipline has at times undermined the independence of parliament and its ability to perform its oversight role on the executive.[48] Similarly, though to a far worse degree, in Zimbabwe, ZANU PF has utilised its dominance in parliament to undermine the independence of the legislature. As a result, parliament has not been able to hold the executive accountable in a meaningful way since independence in 1980. Instead, parliament has been used to rubber stamp legislative proposals which undermine multi-party democracy, including laws which undermine the independence of the electoral management body, and which undermine the right to vote as well as the right of opposition candidates to contest in an election – curtailing opportunities for the institutionalisation of opposition political parties. Examples of these laws are discussed below as part of examining the approach of the apex court in Zimbabwe when adjudicating disputes which concern the right of opposition parties to participate in democratic processes.

E. Role of Courts: Enabler or Barrier to Opposition Political Participation?

Both the Constitution of Zimbabwe[49] and that of South Africa[50] envisage the judiciary as an independent body with the role to interpret and enforce the law impartially, amongst other objectives, to protect and promote multi-party democracy. In the paragraphs below, we examine how the apex courts in the two countries have adjudicated disputes which relate to threats against the institutionalisation of opposition parties and their right to participate in democratic processes, in a constitutional context where multi-partyism is guaranteed as a core value. Before we do so, a few points on methodology.

First, while courts other than the apex courts in both jurisdictions have powers of judicial review,[51] the article focusses on the jurisprudence of these apex courts, the Consti-

47 *Danwood Chirwa / Phindile Ntliziywana,* Political Parties and Their Capacity to Provide Parliamentary Oversight, Political Parties in South Africa: Do they Underpin or Undermine?, Pretoria 2017. See also *Hamill / Hoffman*, note 33, p. 64 (on how internal democratic centralism in the ANC and the list system of proportional representation has limited ANC MPs autonomy).

48 As the Constitutional Court acknowledged in *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 3 SA 580 CC, parliament sometimes failed to execute its accountability and oversight mandate over the executive.

49 Sections 167, 169 and 171 of the Zimbabwean Constitution.

50 Section 165 of the South African Constitution.

51 Section 170 of the South African Constitutional Court empowers the superior courts, which include the Supreme Court of Appeal and the High Courts to declare legislation and conduct inconsistent with the Constitution unlawful. However, such declaration has to be confirmed by the

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tutional Court in South Africa and the Constitutional Court of Zimbabwe, as the highest courts of appeal. The Supreme Court of Zimbabwe sat as the Constitutional Court before the two courts were officially separated in May 2020.[52] Second, we have limited our assessment of the Zimbabwean Constitutional Court's jurisprudence to the period following the adoption of a democratic constitution in 2013 that has stronger protection of elements of multi-party democracy.

I. The Right to Vote

Since the advent of South Africa's constitutional democracy, the courts have played an important role in protecting the right to vote – an important and integral aspect of enabling opposition parties to participate in the democratic process. At the core of its jurisprudence is the recognition that the right to vote serves the symbolic function of securing equal membership to the political community and a democratic function.[53]

In *August v Electoral Commission*, the South African Constitutional Court made clear that absent express legislation excluding incarcerated persons from voting, they had the right to vote. According to the court, in addition to being important for democracy, "The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts."[54] Further, the court noted the equalising power of the right to vote by stating how, 'In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.'[55]

The South African Constitutional Court has repeatedly ensured that persons are able to exercise the right to vote. In *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders*, the court declared legislation that would exclude certain classes of incarcerated persons from being able to vote as violative of section 19 and thus unconstitutional.[56] In *Richter v Minister of Home Affairs*, the court similarly extended the franchise to make sure that persons registered to vote but not present

Constitutional Court. See section 167 of the Constitution of Zimbabwe of 2013 which outlines the judicial review powers of the Constitutional Court.

52 See section 18(2) of the Sixth Schedule of the Constitution of Zimbabwe, 2013.

53 *August and Another v Electoral Commission and Others* 1999 4 BCLR 363, para 17; *Richter v The Minister for Home Affairs and Others (with the Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* 2009 3 SA 615 CC 2009 5 BCLR 448 CC 12 March 2009, para. 52.

54 *August and Another v Electoral Commission and Others* note 53, para. 17.

55 Ibid.

56 *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* 2005 3 SA 280 CC.

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in South Africa at the time of voting can vote abroad.[57] The case was brought by Mr Richter, who was registered to vote in South Africa but would be in the United Kingdom (for work) on the polling date.[58] Several political parties, including the DA and the Inkatha Freedom Party, intervened in the application. Afriforum (a non-profit) and the Freedom Front Plus served as *amicus* in the case. The court, finding in favour of Mr Richter, held that section 33 of the Electoral Act 73 of 1998, which rendered him ineligible to vote while abroad, was an unjustifiable limitation of the right to vote. According to the court, in addition to the negative obligation not to interfere with the right to vote, the state had an obligation to take positive steps to ensure that the right to vote could be exercised.[59] Seen against the context of a history of the racist disenfranchising of the Black majority – the court's approach to the right to vote is not surprising. Even so, it cannot be ignored how these judgments, together, enable democratic participation and create fertile ground for multi-party democracy.

By contrast, when given the opportunity to rule on the protection of the right to vote for citizens abroad, the Zimbabwean Constitutional Court took the opposite approach.[60] As indicated earlier, similar to the Constitution of South Africa,[61] the Constitution of Zimbabwe[62] guarantees the right to register and vote in elections. Similar to the Constitution of South Africa, the right to vote under the Constitution of Zimbabwe is guaranteed for every citizen, and the only requirements to be met to qualify to exercise this right are that one must be 18 years or older and registered as a voter.[63]

Using its majority in parliament, the ZANU PF government enacted section 72 of the Electoral Act 25 of 2004, which stipulates that the State shall implement measures to enable eligible voters who are outside of Zimbabwe *on government business* on polling day to cast their ballots. This law excludes eligible voters who are outside of Zimbabwe on polling day on private business from casting their ballots. The applicants challenged the constitutionality of this legislative provision, asserting that it violates section 67(3)(a) of the Constitution of Zimbabwe by excluding eligible voters from exercising their right to vote on the basis of their being outside of the Republic on polling day on private business.[64] Similar to the arguments made in the South African case of *Richter v Minister of Home*

57 *Richter v The Minister for Home Affairs and Others* note 53, para 1.

58 Ibid.

59 Ibid., para. 53.

60 *Gabriel Shumba v Minister of Justice, Legal and Parliamentary Affairs* CCZ 04 – 18 (May 2018).

61 Section 19(3) of the South African Constitution.

62 Section 67(3)(a) of the Zimbabwean Constitution.

63 Section 67(3)(a) states that: "Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right – a) to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and (b) to stand for election for public office and, if elected, to hold such office".

64 *Gabriel Shumba v Minister of Justice,* note 60, pp. 2-3.

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Affairs, the applicants based their claim on the fact that the Constitution of Zimbabwe[65] imposes only three requirements for one to be eligible to vote and these are that one must be a citizen, must be 18 years or older, and must be registered as a voter, and therefore, the State must implement measures to enable eligible voters who are outside of the Republic on polling day to cast their ballot if they so choose.[66]

The Constitutional Court of Zimbabwe dismissed this application, holding that the Constitution of Zimbabwe contemplates that only eligible voters inside the political borders of the Republic can vote in an election and that there is no obligation on the State to facilitate voting by eligible voters who are outside of the political borders of Zimbabwe on polling day on private business.[67] The court based its decision on section 92(3), read together with section 160 of the Constitution of Zimbabwe. At the time this case was decided, section 92(3) of the Constitution of Zimbabwe stated that, "The President and the Vice President are directly elected jointly by registered voters throughout Zimbabwe, and the procedure for their election is as prescribed in the Electoral law." Section 160 states that:

> *"For the purpose of electing Members of Parliament, the Zimbabwe Electoral Commission must divide Zimbabwe into two hundred and ten constituencies. For the purpose of elections to local authorities, the Zimbabwe Electoral Commission must divide local authority areas into wards according to the number of members to be elected to the local authorities concerned."*

It is clear from the above that section 92(3) of the Constitution of Zimbabwe applies to presidential elections, while section 160 applies to elections for Members of Parliament and Municipal Councils. The two constitutional provisions regulate two different elections and cannot be read together as suggested by the court. Section 92(3) of the constitution, which regulates voting in presidential elections, simply states that the President is directly elected by registered voters "throughout Zimbabwe." The phrase "throughout Zimbabwe" includes the territory covered by Zimbabwean embassies in foreign countries.[68] Therefore, if an eligible voter presents themselves at a Zimbabwean foreign embassy, they should be allowed to exercise their right to vote in a Zimbabwean presidential election because they are within the Zimbabwean territory. The applicant in *Gabriel Shumba v Minister of Justice* argued that the Zimbabwean government already has mechanisms to allow those who are on government business outside of the Republic to cast their ballots at foreign embassies, and these same mechanisms must be made accessible to the rest of Zimbabweans who

65 Section 67(3)(a) of the Zimbabwean Constitution.

66 *Gabriel Shumba v Minister of Justice,* note 60, pp. 2-3

67 Ibid., p. 11.

68 By virtue of the concept of extraterritoriality as recognised in the Vienna Convention on Diplomatic Relations of 1961 of which Zimbabwe is State Party and ratified the Convention on 13 May 1991.

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are eligible voters and are outside of the Republic on private business on polling day.[69] The court rejected the applicant's claim even though the claim was consistent with the Constitution of Zimbabwe, as demonstrated above.

The approach taken by the Constitutional Court of Zimbabwe is in sharp contrast to the approach taken by the Constitutional Court of South Africa in *Richter v Minister of Home Affairs*, discussed above. The difference in the approach taken by the two Courts can be explained by the difference in the degree of independence that the judges of the two courts enjoy. Whereas the judges of the Constitutional Court of South Africa enjoy independence to enforce the law impartially, their counterparts in Zimbabwe lack such independence as a result of the ruling party's entrenchment of competitive authoritarianism.[70] As argued by Levitsky and Way, in competitive authoritarian jurisdictions, courts are generally used to legitimate draconian laws that are meant to protect the hegemony of the ruling elite.[71]

In essence, the court in *Gabriel Shumba v Minister of Justice*, rubber-stamped unconstitutional legislation which denied millions of Zimbabweans their right to vote in the presidential election. This is because Zimbabweans working in the diaspora are feared to be aligned with the opposition parties, whether or not this is true is unclear. However, it is common cause that most of them were forced out of the country due to the economic crisis orchestrated by the ruling party (ZANU PF)'s corruption. The ruling party feared that to allow these voters to participate in the elections could leave ZANU PF more vulnerable to electoral defeat.[72] Thus, whereas the Constitutional Court of South Africa nullified section 33 of the Electoral Act of South Africa, which unconstitutionally denied South Africans in the diaspora their right to vote, the Zimbabwean Constitutional Court endorsed a similar legislative provision. Three years later and ahead of the 2023 presidential election, section 92(3) of the Constitution of Zimbabwe, which clearly recognised the right of eligible voters in the diaspora to vote in presidential elections and which the Constitutional Court had failed to enforce in *Gabriel Shumba v Minister of Justice*, was expunged from the Constitution through a controversial constitutional amendment[73] that was proposed by the executive and was rubber-stamped by the ZANU PF dominated legislature.

69 *Gabriel Shumba v Minister of Justice* note 60, p. 15.

70 On the dire state of judicial independence in Zimbabwe see Also see *Justice Mavedzenge*, The Price They Pay for Their Independence: Understanding the Persecution of Judges in Africa as Retribution for their Impartiality, Southern African Public Law 13 (2024); and *Biance Mahere*, The selective application of the right to bail in Zimbabwe, Journal on Democracy, Governance and Human Rights in Zimbabwe (2023), pp. 29-33.

71 *Levitsky / Way*, note 10, p. 54.

72 *Justice Mavedzenge*, Taking Stock of Zimbabwe's 2018 Elections and Evaluating Prospects for Democratic, Free and Fair Elections in the Future, Southern African Public Law 36 (2021), pp. 13-19.

73 Section 4 of the Constitution of Zimbabwe Amendment Act 2 of 2021.

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II. Requirements for Electoral Participation

While protecting the right to vote is crucial, political participation also requires that individual candidates and parties have real opportunities to stand for public office, giving substance to the right to vote. A supportive and permissive infrastructure is crucial for this to be the case – there should be minimal barriers for individuals and parties to qualify to stand for public office. At the same time, democratic stability requires independent candidates and political parties to show some seriousness in their choice to stand for public office, necessitating laws that set specific requirements for running for office and serving in government.[74] Requirements like financial deposits and proof of electoral support are common for political parties not already represented in government. However, since these requirements could be misused to limit political participation, to support rather than thwart multi-party democracy and to enable the institutionalisation of political parties, legislation should, ideally, strike a fine balance between ensuring seriousness in candidates and parties standing for public office and maintaining fairness when setting requirements for their participation.

1. Registration and Electoral Participation Fees

The core legislation governing political parties' participation in national and provincial elections in South Africa is the Electoral Act 73 of 1998 and the Electoral Commission Act 51 of 1996. The Electoral Act's requirements for the registration of political parties are quite permissive. To register at the national level, a party needs to submit a name, party logo, the party's constitution, a deed of foundation signed by 1000 registered voters and a fee of 500 ZAR; at the provincial level, the deed of foundation needs to be signed by 500 registered voters and, only 500 ZAR has to be paid; at the local level only 300 signatures are required and, the fee is 200 ZAR.[75] However, once registered, they need to pay a deposit in order to contest elections.[76] In contrast with the registration requirements in South Africa, there is no requirement for registration of political parties in Zimbabwe. They need only submit nominations for candidates on their party-list to the Zimbabwean Electoral Commission.[77] Overall, both South Africa and Zimbabwe have fairly permissive registration requirements, the problem arises after registration - the requirement of electoral deposits to contest elections.

74 *Mbuzeni Mathenjwa*, Election Deposit and Democracy in Developing Countries: A Comparative Overview in Selected Southern African Development Community Countries, Journal of African Elections 16 (2017), pp. 180-198, p. 193.

75 See section 15 of the South African Electoral Commission Act read together with the Regulations for the Registration of Political Parties, 2004 GN R13 in GG 25894.

76 See sections 26 and 27 of the South African Electoral Act.

77 *Collen Chibango*, The Registration and Regulation of Political Parties in Zimbabwe: A Key Pillar in Prospects for Free and Fair Elections, The Journal On Democracy, Governance And Human Rights In Zimbabwe 1 (2022), pp.13-19.

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As noted above, electoral deposits are a routine requirement for unrepresented political parties or individuals seeking to stand for public office. However, a high deposit could deter political participation for new entrants who have yet to gather a support base from which to draw donors, creating a situation where only the elite can stand for office.[78] In South Africa, the fairness of electoral fees to contest national elections was dealt with in the *Economic Freedom Fighters v President of the Republic of South Africa*.[79] While not a decision of the Constitutional Court, this judgement is a high court decision and is instructive of the relative deference a court could take to the detriment of opposition parties. The High Court, in this case, had to consider the lawfulness of section 27(2) of the Electoral Act, which, when read together with its regulations, required new political parties to deposit 200 000 ZAR to contest in the national assembly or 45 000 ZAR to contest for seats in the provincial legislature. The EFF argued that as a new political party, it did not have sufficient funds to pay the fee. Dismissing the case, the court held that, absent proof of the irrationality of the fees, it could not usurp the powers of another branch of government.[80]

Given the fact that fair competition can be distorted by the requirement of fees, privileging elite groups with access to resources, and in the context where political parties who are not already represented in the parliament are not eligible for public funding, the court's approach to this case is troubling.[81] This is especially the case when, as were the facts in this case, the increase in fees was announced close to the 2014 elections,[82] creating the risk that the increase may have been a deliberate attempt to limit participation in the elections.[83]

In a similar vein, leading up to the 2023 national elections in Zimbabwe, the Zimbabwean Electoral Commission passed regulations which increased the registration fees to stand for office from 1000 USD to 20,000 USD for presidential elections and from 50 USD to 1000 USD for parliamentary elections.[84] A very steep increase that had a prohibitive impact on the exercise of the right to stand for public office.[85] These regulations were chal-

78 *Mathenjwa,* note 74, p. 193.

79 *Economic Freedom Fighters v President of South Africa (*16247/14) [2014] ZAGPPHC 109 (11 March 2014).

80 Ibid., para 23.

81 *Loammi Wolf*, The Electoral Deposit Requirement: Economic Freedom Fighters v The President and Others, South African Journal on Human Rights 32 (2016), p. 377.

82 The increase in fees were announced on 6 December 2013, in *R 969 Government Gazette 37133,* national elections were held on 7 May 2014.

83 *Wolf,* note 81, p. 385.

84 Electoral (Nomination of Candidates) (Amendment) Regulations 2022 (No.1), Statutory Instrument 144 of 2022 (S.I. 144/22); see also, *Hove v Parliament of Zimbabwe* (12 of 2023) [2023] ZWCC 14 (20 October 2023) p. 2.

85 *Linda Mujuru,* Zimbabwe's 19000% Increase in Fees to Run for Office Excludes Underrepresented Candidates, Global Press Journal, 23 August 2023,
https://globalpressjournal.com/africa/zimbabwe/zimbabwes-1900-increase-fees-run-office-excludes-underrepresented-candidates/ (last accessed on 9 April 2025).

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lenged in *Hove v Parliament of Zimbabwe,* where the applicant, the leader of an opposition political party (the Nationalist Alliance Party) brought a procedural challenge arguing that Parliament had approved the increase in fees without executing its obligation in section 152(3)(c) of the Zimbabwean Constitution, which required it to ensure that all regulations comply with the Constitution.[86] According to the applicant, had Parliament exercised its obligation, it would not have approved the regulations because they were in conflict with the political rights guaranteed in section 67 of the Zimbabwean Constitution.[87] While the court found in favour of the applicant in that Parliament had not complied with its Section 152(3)(c) obligation, it refused to entertain the arguments related to the unconstitutionality of the regulations. Instead, the court gave a remedy which required parliament to discharge its section 152(3)(c) obligation – an ineffective remedy for the vindication of section 67 of the Zimbabwean Constitution.

In both jurisdictions, the courts have taken a deferent approach in cases which challenge the payment of fees to participate in elections. While both courts cite the need to ensure the seriousness of political parties as a valid justification for the fees, it is trite that there are other mechanisms to gauge such seriousness.[88] Ultimately, both courts' deference to the discretionary powers given to the electoral commissions in setting these fees has limited opposition parties' ability to participate in elections.

2. Signatures and Proof of Support for Individual Candidates

Another requirement that could be abused to limit political participation is the requirement to show that a candidate has sufficient support. Following the South African Constitutional Court's finding in *New Nation Movement v President of the Republic of South Africa,* allowing independent candidates to stand for public office, the state was required to draft legislation allowing individual candidates to stand for political office by the 2024 national and provincial elections,[89] the Electoral Amendment Act 1 of 2023. The Amendment Act, among other things, provided the requirements that independent candidates would have to meet to stand for office. In *One Movement South Africa NPC v President of the Republic of South Africa and Others,* the applicants challenged section 31 B of the Amendment Act.[90] The provision required independent candidates who wished to stand for office to submit signatures of registered voters amounting to 15 per cent of the quota in the previous election in the region in which the independent candidate sought to stand for office. The

86 *Hove v Parliament of Zimbabwe,* note 84, p. 3.

87 *Hove v Parliament of Zimbabwe,* note 84, p. 2; *Economic Freedom Fighters v President of South Africa,* note 83, para 17.

88 *Wolf*, note 81, pp. 390–393.

89 *New Nation Movement NPC and Others v President of the Republic of South Africa* note 4, paras. 121–125.

90 *One Movement South Africa NPC v President of the Republic of South Africa and Others* 2024 2 SA 148 CC.

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applicants in the case argued that the signature requirement was violative of the section 19(3)(b) right to stand for public office and the section 18 right to freedom of association. A majority of the court held in its favour on this, with Kolapen J concluding that the signature requirement was an unreasonable limitation of the rights to stand for public office and the right to freedom of association.[91] Ultimately, the requirement for signatures was set at a 1000 signatures, a less onerous requirement – one aligned, as discussed earlier, with the requirement for the registration of political parties. In the Zimbabwean context, persons seeking to be elected to parliament need only procure five signatures of support to be eligible to stand for public office.[92]

III. Access to Political Party Funding

After registration, submitting signatures, and having paid the fees to contest elections, real political participation is costly – consolidating a voter base and running a political campaign requires access to adequate funding. In the ideal setting, the state would provide some support for registered political parties who have shown seriousness in their intent to contest in elections – failing which, the lack of access to funds could limit opposition parties' political participation. Before turning to our analysis of the different jurisdictions' approach to political funding, it is important to note that, in contrast with the issues discussed above, political funding has not received much judicial attention except for the South African Constitutional Court's decision that requires political parties to disclose private donations above a certain threshold.[93] That said, we thought it important to discuss the legislative landscape for political funding because it plays an important role in enabling the institutionalization of political parties and multi-party democracy, for reasons that will be clear below, it is also an area rife for litigation in both jurisdictions.

In South Africa, the Political Party Funding Act 6 of 2018 provides for two sources of funding for political parties already represented in Parliament– private funding and funding from the state. The source of this state funding is the public purse (from the Represented Political Parties Fund) and donations received from private sources (the Multiparty Democracy Fund), which are distributed by the state in proportion to the party's representation.[94] By contrast, new political parties not already represented rely solely on private funding. This creates an unequal funding landscape – privileging those parties already represented.[95] Further, section 8(1) of the Political Party Funding Act prohibits political parties from

91 Ibid., paras. 342-343.

92 Section 46(1)(a) of the Zimbabwean Electoral Act, 2004.

93 *My Vote Counts NPC v Minister of Justice and Correctional Services and Another* 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC).

94 See sections 2 and 3 of South Africa's Political Party Funding Act.

95 *Geo Quinot*, Snapshot or Participatory Democracy? Political Engagement as Fundamental Human Right, South African Journal on Human Rights 25 (2009), p. 400 (who argues that this restriction undermines the commitment to participatory democracy in South Africa).

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receiving donations from foreign governments or foreign government agencies, organs of state, state-owned enterprises, as well as foreign persons and entities. In relation to donations from foreign persons and entities, political parties, per section 8(4) of the same Act, can receive up to 5 million ZAR in donations for the purpose of skills and policy development.

Zimbabwe's Political Party Finance Act of 2002 makes it difficult for opposition parties to access funding. First, in relation to state funding, only political parties that have at least five per cent representation in parliament have access to this funding, and it is allocated in proportion to their representation.[96] In addition, the Political Party Finance Act prohibits political parties and individual candidates from receiving all forms of foreign donations.[97] Given the dominance of ZANU-PF in parliament, this means that they receive the lion's share of public political party funding, and most opposition political parties are not able to raise funds through donations from the diaspora, not even for skills and policy development, as is possible in the South African case.

In both jurisdictions, the funding landscape for opposition political parties is quite limited – posing a threat to the institutionalisation of political parties and multi-party democracy.

IV. Protection of the Independence of the Electoral Management Body

In a constitutional democracy and in order for opposition political parties to participate meaningfully in democratic processes, there must be adequate legal guarantees that elections are free, fair and credible. All political parties, including the opposition, must be treated fairly when they participate in an election. To achieve this, independent electoral management bodies are established to conduct elections. As discussed earlier in this paper, both in Zimbabwe[98] and South Africa,[99] the constitutions provide for the establishment of an electoral management body and guarantee its independence. However, in a context of competitive authoritarianism or attempts to introduce competitive authoritarianism, parliaments are captured by the executive, and they tend to enact legislation which undermines democratic institutions such as the electoral management body in order to subvert their independence and shield the ruling party from electoral competition from the opposition.[100] When this happens and upon being petitioned, it is the role of the courts to enforce the constitution and protect the independence of these democratic institutions, necessitating, of course, their own independence.

96 Section 3(2) Political Party Finance Act, 2002.
97 Section 6, Political Party Finance Act, 2002.
98 Sections 232 and 235 of the Zimbabwean Constitution.
99 Sections 181(1)(f) and 190(1) of the South African Constitution.
100 *Levitsky / Way*, note 10, p. 57.

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In South Africa, the courts have made clear that the Electoral Commission has a wide scope of independence.[101] In one of its early judgements, *New National Party v Government of the Republic of South Africa and Others*, Langa DP highlighted the scope of the Electoral Commission's independence. The case concerned a challenge against the constitutionality of provisions in South Africa's Electoral Act, which stipulated that potential voters could not use identity documents issued to them in terms of old legislation to identify themselves when seeking to register and vote in the general election coming up on 2 June 1999. Rather, potential voters were now required to use the bar-coded identity documents issued in the new dispensation.[102] In the course of this dispute, the Director General of the Department of Home Affairs and the Director General of the Department of Treasury averred before the court that their departments were legally empowered to make certain decisions about the Electoral Commission, including decisions regarding the allocation and management of the budget of the Electoral Commission, and accounting to Parliament on behalf of the Electoral Commission.[103]

Although the crux of the matter, in this case, did not concern the independence of the Electoral Commission, the court seized the moment to clarify the correct constitutional position on the degree and scope of independence that the South African Electoral Commission must enjoy from the executive, in light of the averments which had been made by the Director General of the Department of Home Affairs. The court clarified that the Electoral Commission's constitutionally guaranteed independence implies the independence to manage its own budget, the autonomy to preside over its administrative affairs and to account directly to parliament without having to be represented by the Department of Home Affairs or any executive branch of government. Such clarification was important because South Africa was a mere five years into its journey as a constitutional democracy. Therefore, there was a need for the court to set a clear and strong legal precedence which would compel the executive to shift its attitude and appreciate that under the new constitutional dispensation, the Electoral Commission was now an autonomous body and was no longer a "line function" [104] or a department under the executive branch of government. In a way, the clarification by the court in this case set South Africa on a progressive trajectory as a constitutional democracy where elections have mostly been held in a manner that is free, fair and credible.

The Constitutional Court of Zimbabwe has taken the opposite approach compared to its counterpart in South Africa. Four years into its constitutional democracy, the court was asked to interpret the scope of the constitutional independence of the Zimbabwe Electoral Commission. As indicated earlier in this paper, section 235 of the Constitution

101 *New National Party v Government of the Republic of South Africa and Others* 1999 (3) SA 191; 1999 (5) BCLR 489.

102 Ibid., paras. 8-9.

103 Ibid., para. 83.

104 Ibid.

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of Zimbabwe states that the Zimbabwe Electoral Commission is "(a) independent and not subject to the direction or control of anyone… (c) must exercise its functions without fear, favour or prejudice although it is accountable to Parliament for the efficient performance of its functions."

Prior to the adoption of the new Constitution of Zimbabwe in 2013, and similar to pre-1994 South Africa, the Zimbabwe Electoral Commission was treated and perceived as a department under the management of the executive branch of government. This was illuminated by the enactment of section 192(6) of the Electoral Act of Zimbabwe, which stated that administrative regulations made by the Zimbabwe Electoral Commission "shall not have effect until they have been approved by the Minister and published in the Gazette." The Minister referred to in this provision is the Minister of Justice. In *Mavedzenge v Minister of Justice,* the applicant argued that by requiring the Minister's approval before the election management body can proclaim its administrative regulations, section 192(6) of the Electoral Act prevented the Zimbabwean Electoral Commission from exercising its functions, including managing its administrative affairs independent of direction, control or interference from the executive, and this undermines the constitutionally protected independence of the electoral management body.[105]

In response, the Minister of Justice advanced two arguments in defence of the constitutional validity of the impugned provisions. First, he argued that the Minister's powers to approve regulations drafted by the electoral management body before they can be implemented were constitutionally valid because the power of the electoral management body to promulgate regulations was delegated authority from parliament, and the Minister is the executive member responsible for the administration of the Electoral Act and is accountable to parliament concerning the operations of all institutions established under the Electoral Act, including the electoral management body.[106] The Minister, therefore, argued that he cannot be accountable to parliament on behalf of the electoral management body if he is not empowered to supervise and authorise draft regulations developed by the electoral management body. Secondly, he argued that as the Minister in charge of the administration of the Electoral Act, he enjoys powers to approve regulations drafted by the electoral management body in order to ensure that they comply with government policy.[107]

The Minister's arguments, highlighted above, are similar to the arguments made by the Director General of the Department of Home Affairs in *New National Party v Government of the Republic of South Africa and Others.* However, whereas the Constitutional Court of South Africa decided to protect the independence of the South African Electoral Commission, the Zimbabwean Constitutional Court in *Mavedzenge v Minister of Justice*

105 *Mavedzenge v Minister of Justice, Legal & Parliamentary Affairs & 2 Ors* (CCZ 5 of 2018; Constitutional Application 32 of 2017) [2018] ZWCC 5 (31 May 2018).

106 See para. 21 of the First Respondent's opposing affidavit in *New National Party v Government of the Republic of South Africa and Others,* note 101.

107 Ibid.

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upheld and endorsed the view of the executive branch that despite the adoption of the then new Constitution which clearly stipulated that the electoral commission was independent of executive control, the executive can still enjoy the powers to control the enactment of administrative regulations by the electoral commission, and that the executive is accountable to parliament on behalf of the electoral commission. As a result, and unlike in South Africa, the Zimbabwean opposition's political participation, as will be seen below, has been curtailed because of the failure of the Zimbabwe Electoral Commission to conduct elections that are free, fair and credible due to executive interference.

V. Enforcing Electoral Justice

In order for opposition parties to meaningfully participate in democratic processes, including elections, they must be guaranteed effective relief to redress any violation of their right to participate in a democratic process. Having formally adopted constitutional democracy as a system of governance, both South Africa and Zimbabwe enshrine the right to free and fair elections in their Constitutions, as indicated above. Under both Constitutions,[108] the courts have jurisdiction to hear and determine electoral disputes and ensure that adequate relief is granted in order to safeguard the integrity of elections. However, the courts' approach in the South African case of *Kham v Electoral Commission,*[109] and the Zimbabwean case of *Chamisa v Mnangagwa,*[110] illuminates a sharp contrast in their willingness to vindicate electoral justice.

In the *Kham v Electoral Commission* case, the South African Constitutional Court was petitioned to overturn the result of eight by-elections which had been conducted in the Tlokwe Municipality in 2013.[111] The applicants, former members of the ANC who left the party to run as independent candidates, argued that the electoral process had been fraught with serious irregularities which undermined the integrity of the electoral process and, therefore, the election was not free and fair. The alleged irregularities included the failure by the Electoral Commission to timeously provide the applicants (who were running as independent candidates in the election) with the voters' roll, and allegations that persons who were not on the ward's voters' roll voted in the election.[112] The Electoral Commission did not deny these allegations. Instead, it argued that although ineligible voters voted in the elections, the number of such voters was insignificant to determine the winner of the election.[113]

108 See section 93 of the Constitution of Zimbabwe of 2013, and 172 of the Constitution of South Africa.

109 *Kham and Others v Electoral Commission and Another* 2016 (2) BCLR 157 (CC); 2016 (2) SA 338 (CC).

110 *Chamisa v Mnangagwa* (CCZ 42 of 2018) [2018] ZWCC 42 (24 August 2018).

111 *Kham and Others v Electoral Commission,* note 109, para 1.

112 Ibid., paras 7-12 and 47.

113 Ibid., para 14.

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The Constitutional Court of South Africa rejected the arguments by the Electoral Commission, nullified the results of the election and ordered that the elections be redone.[114] In its reasoning, the court held that the focus had to be on the impact the irregularities had on the exercise of the right to stand for public office, "not on whether they would have won or lost had the arrangements for the by-elections been different and not suffered from the flaws of which they complain".[115] While it did not provide a clear definition of what a free and fair election entails, the court did find that whether or not an election is free and fair is a value judgment that requires the court to look at whether everyone entitled to vote was able to register to do so; in the context of municipal elections, that persons vote in the wards in which they are eligible.[116]According to the court, on the one hand, it had to hold the Electoral Commission "to the high standards that its constitutional duties impose upon it". However, the court would have to be satisfied "on all the evidence placed before it that there is real – not speculative or imaginary – grounds for concluding that they were not free and fair." Mere doubt or a feeling of disquiet would not suffice to nullify an election.[117]

Further, the court made clear that the right to free and fair elections protects the "freedom to participate in the electoral process *and* the ability of the political parties and candidates, both aligned and non-aligned, to compete with one another on relatively equal terms".[118] (our emphasis) The ability to compete, according to the court,

> *[d]emands the freedom to canvass; to advertise; and to engage in the activities normal for a person seeking election.' Phenomena like "no go" areas; the denial of facilities for the conduct of meetings; disruption of meetings; the destruction of advertising material or the intimidation of candidates, workers or supporters, could all prevent an election from being categorised as free and fair.*[119]

Ultimately, the court emphasised that the results of an impugned election can be nullified if the election *process* did not comply with the law, regardless of whether there was quantitative evidence to demonstrate that the irregularities distorted the results of the election. As indicated by the court in para 86, the basis of this approach is section 190(1)(b) of the Constitution of South Africa which requires the Electoral Commission to conduct elections that are free and fair, and according to the court, implies a duty to conduct elections in which every eligible person is free to take part in, and with others, on relatively equal terms.

114 Ibid., para. 127.
115 Ibid., para. 85.
116 Ibid., para. 34.
117 Ibid., para. 91.
118 Ibid., para. 86.
119 Ibid.

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The Constitution of Zimbabwe contains similar provisions which create an obligation on the Zimbabwe Electoral Commission to ensure that elections are free and fair.[120] In addition, the Constitution of Zimbabwe guarantees the right to an election that is free and fair.[121] However, in the *Chamisa v Mnangagwa* case, the Constitutional Court of Zimbabwe took an opposite approach compared to the one taken by its South African counterpart in *Kham v Electoral Commission*. Although the *Chamisa v Mnangagwa* case in Zimbabwe concerned a challenge against the results of a presidential election, while the *Kham* in South Africa involved a challenge against the results of municipal elections, the two cases are similar in the sense that they involve a constitutional challenge against the results of an election on the basis that the election had been fraught with irregularities which made it fail to comply with the constitutional standard of a free and fair election.

In *Chamisa v Mnangagwa* the petitioner alleged that the election had been fraught with several irregularities so much that it could not be classified as an election that met the constitutional standard of being free and fair. Some of the irregularities proven by the petitioner include that the opposition had been prevented from campaigning in some voting districts while voters in some areas had been subjected to violence and intimidation by the ruling party, ZANU PF.[122] In addition, credible evidence was adduced demonstrating the involvement of the military and other security forces in intimidating voters to vote for the ruling party, ZANU PF. The applicant in the case, Nelson Chamisa, was the leader of the CCC and had run as the CCC's candidate for the presidential election. Chamisa argued that the irregularities in the presidential election were enough for the court to nullify the election. The Constitutional Court of Zimbabwe dismissed this argument and held that: "the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections".[123] The court clarified that this implies that:

> *"A court will declare an election void when it is satisfied from the evidence provided by an applicant that the legal trespasses are of such a magnitude that they have resulted in substantial non-compliance with the existing electoral laws. Additionally, a court must be satisfied that the breach has affected the result of the election."*[124] *(our emphasis)*

From the above, it is clear that to nullify election results, the Zimbabwean Constitutional Court requires the irregularities in the electoral process to be substantial *and* there must also be proof that such irregularities affected the outcome of the elections. This a very high threshold, significantly higher than that set by the South African Constitutional Court,

120 Section 155(1) of the Zimbabwean Constitution.

121 Section 67(1)(a) of the Zimbabwean Constitution.

122 *Chamisa v Mnangagwa,* note 110, pp. 50-56.

123 Ibid., p. 83.

124 Ibid., p. 84.

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wherein, as seen in the *Kham v Electoral Commission* case, irregularities in the electoral process can nullify election results. This high threshold negates the constitutional principle enshrined in section 155(1) of the Constitution of Zimbabwe that *electoral processes,* and not *just results*, must comply with the constitutional standards of being free and fair. In peremptory terms, section 155(1) states that:

> *"Elections, which must be held regularly, and referendums, to which this Constitution applies must be (a) peaceful, free and fair; (b) conducted by secret ballot; (c) based on universal adult suffrage and equality of votes; and (d) free from violence and other electoral malpractices."*

This principle is also enshrined in the Constitution of South Africa.[125] Whereas the Constitutional Court of South Africa in the *Kham v Electoral Commission* decided to protect and enforce this constitutional principle, its Zimbabwean counterpart decided to ignore it by insisting that violations which demonstrate that an election was not free and fair are inadequate to nullify the election unless statistical evidence is provided which shows that *the outcome* of the election was distorted by those violations. This, again, demonstrates the divergent approaches between the two courts when adjudicating in disputes which relate to the participation of opposition parties in democratic processes. Such divergence, notwithstanding similarities in the law between the two countries, is attributable to the difference in the degree of independence enjoyed by the judges of the two courts. Despite attempts to introduce competitive authoritarianism in South Africa, especially during the Zuma administration, the Constitutional Court has defended its independence and is thus, able to protect the Constitution and deliver electoral justice as demonstrated by its decision in the *Kham v Electoral Commission*. On the other hand, its counterpart in Zimbabwe appears to have succumbed to capture by the ruling party and may have become a victim of competitive authoritarianism and thus, is unable to protect the Constitution, particularly on issues which affect the right of the opposition to participate effectively in democratic processes as exemplified by its decision in *Chamisa v Mnangagwa*.

F. Conclusion

In a constitutional democracy, opposition political parties have the right to participate in democratic processes meaningfully and effectively. In a similar fashion, the Constitutions of South Africa and Zimbabwe recognise multi-partyism as a core principle and value of governance. The two Constitutions establish independent electoral management bodies with the mandate to conduct democratic, free and fair elections. They also underpin the independence of courts and mandate them, through judicial review powers, to protect and enforce the Constitution. Despite these similarities in the constitutional frameworks of the

125 Section 190(1)(b) as interpreted by the Constitutional Court in *Kham v Electoral Commission,* note 109.

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two countries, an analysis of the way the apex courts in the two countries have adjudicated cases which involve the right of opposition parties to participate in democratic processes reveals a sharp contrast.

In this article, we have analysed and compared the manner in which the High Court and Constitutional Court of South Africa, when compared to the Constitutional Court of Zimbabwe, have dealt with cases which concern the right of opposition parties to challenge electoral fraud and seek electoral justice, attempts to disenfranchise voters perceived to be aligned to the opposition and attempts to subvert the independence of electoral management bodies in order to shield the ruling party from competition by the opposition.

The analysis shows that, whereas the Constitutional Court of South Africa has mostly demonstrated commitment to push back against limitations on opposition political party's rights, in turn protecting the constitution and safeguarding multipartyism, its counterpart in Zimbabwe appears to have been rubberstamping and providing legal legitimacy to otherwise unconstitutional manoeuvres by the ruling party to undermine the participation of opposition parties in democratic processes. The difference in the attitudes of the two apex courts is attributable to the ability of the Constitutional Court of South Africa to defend its independence and the failure of its sister Court in Zimbabwe to withstand the rise of competitive authoritarianism. Perhaps this is because right from the commencement of the democratic era in 1994 in South Africa, judges have been appointed through procedures which have, to a large extent, ensured that only competent, impartial and independent candidates are appointed as judges.[126] In Zimbabwe, whilst the country adopted a democratic constitution in 2013, the judges who had been appointed in the pre 2013 constitutional era remained in office and most of these judges had demonstrably been partial towards the ruling party.[127]

Further, the analysis has also shown that while the dominance of a liberation political party can limit the institutionalization of other political parties and create a truly multi-party democracy, this outcome is not inevitable. Having strong institutions, in this case, independent courts and an independent electoral management body can go a long way in securing multi-party democracy by creating fertile ground for opposition parties to exercise their political rights.

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126 On the judicial appointment process in South Africa see, *Chris Oxtoby*, The Appointment of Judges: Reflections on the Performance of the South African Judicial Service Commission, Journal of Asian and African Studies 56 (2021), pp. 34-47.

127 *Lovemore Chiduza*, Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?, Potchefstroom Electronic Law Journal 17 (2014), p. 36. Also see *Baart Simbisai*, Mugabe Judges Appointments Stink, Zimbabwe Independent, 19 July 2013, https://allafrica.com/stories/201307191229.html (last accessed on 9 April 2025).

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Constitutionalisation of Political Parties, Multipartyism and Political Opposition in Anglophone Eastern Africa

By *Johannes Socher*[*]

Abstract: This article examines the relevant constitutional and legal frameworks on political parties, multipartyism and political opposition in anglophone Eastern Africa. Using Kenya, Uganda and Zimbabwe as case studies, it shows that while these countries have constitutionalised political parties and multipartyism, political opposition is only weakly protected. The article also reveals how this weak protection is rooted in a shared British colonial past and how it has evolved over time. Following brief periods of multipartyism after independence from Britain, one-party states existed sometimes for decades until democratisation in the 1990s. Uganda has returned to the multiparty system through constitutional amendments in 2005 and both Kenya and Zimbabwe have entrenched political parties and multipartyism in new constitutions in 2010 and 2013, respectively. As will be argued, although these frameworks include some dedicated provisions promoting and protecting political opposition, in practice they often work in favour of ruling parties and do not provide a level playing field for opposition parties to openly compete for power. At the same time, examples from all three countries illustrate how opposition parties in anglophone Eastern Africa are able to use or circumvent provisions in these frameworks to operate and compete in this environment.
Keywords: Constitutionalisation of Political Parties; Opposition Parties; Eastern Africa

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A. Introduction

The re-introduction of multipartyism and the expansion of political rights in Africa during the so-called third wave of democratisation in the 1990s was expected to enhance the chances of political alternation and the possibilities of opposition parties winning power. These prospects were reinforced by the African Union as part of its democracy agenda, in particular through the adoption of the African Charter on Democracy, Elections and

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Governance in 2007. Article 3 of the Charter imposes a duty on all Member States to strengthen "political pluralism and recognizing the role, rights and responsibility of legally constituted political parties, including opposition political parties".[1] The overriding aim is to counter the scourge of authoritarian rule that had emerged across the continent soon after independence when the short-lived multiparty systems provided for in the first constitutions were progressively either replaced by military regimes or authoritarian one-party rule. In fact, before 1990, with the exception of Botswana and Mauritius and to a certain extent, Gambia and Senegal, military or one-party regimes had become the order of the day. This is also true for Kenya, Uganda and Zimbabwe, the three anglophone countries in Eastern Africa forming the focus of this study.[1] In Kenya, the Kenya African National Union (KANU) ruled for nearly forty years until 2012. In Zimbabwe, the Zimbabwe African National Union and its successor, ZANU – Patriotic Front (PF) have been in power since independence from Britain in 1980. And in Uganda, Yoweri Museveni's National Resistance Movement (NRM) has ruled the country since it came to power in 1986 following the civil war against the Obote regime.

Until the 1990s, these one-party states existed sometimes not only de facto. In Kenya, KANU's status as the only political party was formalised de jure in 1982 by a constitutional amendment.[2] In Uganda, opposition parties had been banned already since 1969 and although the NRM did not formally prohibit political parties when it came to power in 1986, Museveni effectively upheld the ban by prohibiting parties from holding conferences, opening branches, sponsoring candidates, recruiting members, and displaying party colours.[3] Lastly, in Zimbabwe, although eventually never formalised de jure, Robert Mugabe had also envisaged a one-party state. For instance, the agreement merging ZANU and the Zimbabwe African People's Union (ZAPU) in 1987 explicitly provided that the newly created ZANU–PF "shall seek to establish a one-party state in Zimbabwe".[4]

Although multiparty democracy has been reintroduced in Uganda by constitutional amendment in 2005 and Zimbabwe has adopted a new Constitution in 2013 constitutionalising political parties and entrenching multipartyism, no opposition party has so far been able to win power from the dominant parties that continue to rule in the two countries. By contrast, already three different political alliances have been in government in Kenya since

1 African Charter on Democracy, Elections and Governance, adopted on 30 January 2007, entry into force on 15 February 2012.

1 While different definitions of Eastern Africa exist depending on geographical, historical and political considerations, this study uses a broad understanding of the term in line with the United Nations geoscheme for Africa.

2 Section 2A of the 1963 Constitution of Kenya, inserted by the Constitution of Kenya (Amendment) Act 1982, No. 7 of 1982, 25 June 1982.

3 *Sabiti Makara*, The Challenge of Building Strong Political Parties for Democratic Governance in Uganda: Does Multiparty Politics Have a Future?, The East African Review 41 (2009), p. 10.

4 Two Parties Merge as Zanu (PF), The Herald, 23 December 1987, https://www.herald.co.zw/two-parties-merge-as-zanu-pf/ (last accessed on 4 November 2024).

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the adoption of a new Constitution in 2010. Against this background, this comparative study analyses to what extent the different constitutional and legal frameworks regulating political parties have been contributing towards genuine multiparty democracy in the three countries. Although these frameworks include some dedicated provisions promoting and protecting political opposition, in practice, they often work in favour of ruling parties and do not provide a level playing field for opposition parties to freely compete for power.[5] At the same time, examples from all three countries illustrate how opposition parties in anglophone Eastern Africa have been able to use or circumvent provisions in these frameworks to operate and compete with some success in environments that the latest Freedom House rating assesses as only "partly free" (Kenya) or even "not free" (Uganda and Zimbabwe).[6]

B. Evolution of Party Constitutionalisation and Multiparty Politics

In the British constitutional tradition, the regulation of political parties is largely absent.[7] This weak regulation was inherited and carried over through so-called independence constitutions in many former British colonies. However, while many of these frameworks did not mention political parties directly, some presupposed their existence, for example by envisaging a Leader of the Opposition, a position originally introduced in parliaments of the British Commonwealth at the beginning of the twentieth century.[8]

I. Uganda: From the Movement System to a Multiparty System Dominated by the NRM

When Uganda gained independence from Britain in 1962, several political parties existed. Multipartyism prevailed however only for a brief period until 1969, when President Milton Obote of the Uganda National Congress (UPC) banned all opposition parties. Although multipartyism was briefly reinstated in 1981, political parties were effectively banned again when Museveni and his NRM came to power in 1986 following the civil war against the Obote regime.[9]

Despite being otherwise fairly progressive, the 1995 Constitution of Uganda initially established a peculiar political system called "the movement", a presumably "broad-based,

5 For an overview of the various ways in which African constitutions refer to political opposition see *Danny Schindler,* Constitutionalizing Dissent: The Universe of Opposition Rules in African Constitutions, Global Constitutionalism (2024), forthcoming.

6 Freedom House, Countries and Territories – Global Freedom Scores, https://freedomhouse.org/countries/freedom-world/scores (last accessed on 13 December 2024).

7 *Vernon Bogdanor* (ed.), The British Constitution in the Twentieth Century, Oxford 2004.

8 *Dean E McHenry*, Formal Recognition of the Leader of the Opposition in Parliaments of the British Commonwealth, Political Science Quarterly 69 (1954), p. 438.

9 See *James Nkuubi*, Swimming Against the Tide: Militancy and Diplomacy as Survival Mechanisms for Opposition Parties in Uganda's Militarised Politics, in: Charles M. Fombad / Johannes Socher (eds.), Constitutionalisation of Political Parties and the State of Democracy in Sub-Saharan Africa, Baden-Baden 2025.

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inclusive and nonpartisan" system based on the principles of "participatory democracy; democracy, accountability and transparency; accessibility to all positions of leadership by all citizens; [and] individual merit as a basis for election to political offices".[10] By contrast, although existing political parties were allowed to continue to operate following the adoption of the 1995 Constitution in line with a transitional provision, their activities were heavily restricted, prohibiting them to open and operate branch offices, hold delegates' conferences and public rallies, sponsor or offer a platform for candidates to run for elections, or carry out "any activities that may interfere with the movement political system for the time being in force".[11] James Nkuubi rightly finds these provisions ironic, as they restricted the most fundamental activities of political parties, thereby ensuring that political parties "remained sidelined and constrained under a de facto one-party system" dominated by Museveni's NRM.[12]

While multipartyism was not immediately introduced by Uganda's 1995 Constitution, the return to a one-party state was constitutionally prohibited.[13] The movement system was initially kept but the Constitution gave citizens the right to replace it at a later stage.[14] In 2000, a first referendum failed but a second referendum in 2005 approving a number of constitutional amendments included the return to the multiparty system (although in theory citizens could still choose to return to the movement system).[15] Since then, the Constitution sets out a multiparty framework outlining its main characteristics in a dedicated provision.[16]

At the end of 2024, Uganda had over twenty registered political parties, although only five competed in the last presidential elections in 2021.[17] While Museveni was re-elected as president and his NRM continues to hold the majority in parliament, his main competitor, the activist and musician Bobi Wine of the National Unity Platform (NUP) won over a third of the votes in the presidential elections.[18] Other noteworthy opposition parties include the UPC, the Democratic Party (DP), and the Forum for Democratic Change (FDC). In addition, the newly formed People's Front for Freedom (PFF) led by three-times presidential

10 Section 70(1) of the 1995 Constitution of Uganda.

11 Ibid, Sections 270 and 271.

12 *Nkuubi*, note 10.

13 Section 75 of the 1995 Constitution of Uganda.

14 Ibid, Section 69.

15 Ibid, Sections 69 and 70. Both provisions were not repealed by the 2005 amendments and continue to be part of the Constitution.

16 Section 71 of the 1995 Constitution of Uganda, as amended in 2005.

17 Electoral Commission of Uganda, 2021 General Elections, https://www.ec.or.ug/2021-general-elections (last accessed on 7 November 2024).

18 Ibid.

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candidate Kizza Besigye was in the process of registration at the time of writing (December 2024).[19]

II. Kenya: From a Constitutionalized One-Party State under KANU to Coalition Governments

At Kenya's independence in 1963, two main political parties existed: Jomo Kenyatta's KANU and the Kenya African Democratic Union (KADU), founded when several politicians refused to join Kenyatta's party. KADU dissolved however again a year later to merge with KANU, making it the only major political party in the country. While Kenya's Constitution initially did not mention political parties at all and only guaranteed the right to freedom of association more broadly,[20] KANU's status as the country's sole political party was eventually constitutionalised through an amendment inserting Section 2A in the Constitution declaring that "there shall be in Kenya only one political party, the Kenya African National Union".[21]

In 1991, Section 2A was repealed again and a number of references to political parties were added to Kenya's Constitution for the first time in preparation for the country's first multiparty elections since independence.[22] Apart from requiring candidates for parliamentary seats as well as presidential candidates to be members of a political party,[23] the amendment also inserted a definition of political parties in the Constitution, stating that a party is only considered as such if it "is duly registered under any law which requires political parties to be registered, and which has complied with the requirements of any law as to the constitution or rules of political parties nominating candidates for the National Assembly".[24] Until the enactment of the Political Parties Act in 2007, the requirements for registration of political parties were set out by the Societies Act dating back to 1968.[25] Another amendment in 1997 constitutionalised multipartyism by inserting a new Section 1A into the Constitution, proclaiming Kenya a "multi-party democratic state".[26]

Despite this formal re-introduction of multipartyism, KANU was initially able to keep a majority of seats in parliament and its presidential candidate, President Daniel arap Moi (who had been Kenya's head of state since 1978) was re-elected in the first two multiparty elections in 1992 and 1997. The party's dominance broke however during the

19 *Simon Wokorach*, Peoples' Front for Freedom Starts Registration of Members in Northern Uganda, Uganda Radio Network, 21 October 2024, https://ugandaradionetwork.net/story/peoples-front-for-freedom-starts-registration-of-members-in-northern-uganda (last accessed on 11 December 2024).

20 Section 24 of The Kenya Independence Order in Council 1963.

21 Section 2A of the 1963 Constitution of Kenya, as amended in 1982.

22 Constitution of Kenya (Amendment) Act 1991, Act No. 12 of 1991.

23 Section 5(3)(a) and 34(d) of the 1963 Constitution of Kenya, as amended in 1991.

24 Ibid., Section 123.

25 Societies Act of Kenya, Act No. 4 of 1968, Cap. 108.

26 Section 1A of the 1963 Constitution, as amended in 1997.

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2002 elections, when a group of KANU leaders left, created a new party, and affiliated with several other opposition parties to form the National Rainbow Coalition (NARC). NARC's candidate Mwai Kibaki won the presidency over KANU's candidate, Uhuru Kenyatta (Jomo Kenyatta's son).

After a first constitutional review process had failed in a referendum in 2005, a second attempt was made following post-election violence and a power-sharing agreement that had been reached between the two main opponents of the elections, Kibaki and Raila Odinga, both former NARC members now leading separate new parties. Following an elaborate constitution-making process, a new Constitution with an explicit commitment to multipartyism and a dedicated section on political parties was finally adopted and approved in a referendum in 2010.[27] Since its adoption, two further coalitions have governed the country: Kenyatta's Jubilee Alliance from 2013 until 2022, and William Ruto's Kenya Kwanza coalition since the last elections in 2022. While KANU's dominance can thereby be called a thing of the past, Buluma Bwire in his case study on Kenya argues that

> *"President Ruto's Kenya Kwanza government is treading the same path that Kenyatta paved in terms of blurring the separation between the executive and parliament. The political fusion of the executive and legislature with strong party politics and domination of administrative decision-making by the ruling party greatly limits parliament in constraining executive power. Moreover, it creates path dependencies and opportunities for the re-centralization of power in the executive which was the key deficiency within the Kenyan political structure that bred the dictatorial excesses of the KANU regime."*[28]

At the time of writing (December 2024), Kenya's parliament largely consisted of two big party alliances, with members of the Azimio la Umoja faction forming the opposition to the ruling Kenya Kwanza. Azimio la Umoja is led by Odinga and consists of the Orange Democratic Movement (ODM), the Jubilee Party, KANU, and other opposition parties.[29]

III. Zimbabwe: From De Facto One-Party Rule to Dominant Party Government under ZANU–PF

Zimbabwe gained independence from Britain in 1980, with its independence Constitution providing for freedom of association, "in particular to form or belong to political parties".[30] Following decades of de facto one-party rule under Mugabe's ZANU–PF, a new Constitu-

27 Section 4(2) and Part 3 (Sections 91 and 92) of the 2010 Constitution of Kenya.

28 *Buluma Bwire*, Intra-Party Democracy and the Chasm between Political Parties and Democratisation in Kenya, in: Charles M. Fombad / Johannes Socher (eds.), Constitutionalisation of Political Parties and the State of Democracy in Sub-Saharan Africa, Baden-Baden 2025.

29 Whether Odinga would continue to be the opposition alliance's leader was unclear at the time of writing due to his recent "handshake" with Ruto, see section D II below.

30 Section 21(1) of the 1980 Constitution of Zimbabwe.

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tion was adopted in 2013, explicitly listing "a multi-party democratic political system" and "respect for the rights of all political parties" as two separate principles in its catalogue of principles of good governance "which bind the State and all institutions and agencies of government at every level".[31] The Constitution furthermore guarantees the right to form, join, and participate in the activities of and the right to campaign for a political party.[32] Notwithstanding these provisions, ZANU–PF has continued to be the only party in government even after the adoption of the new constitution, first under Mugabe and since 2017 under Emmerson Mnangagwa. ZANU–PF has however faced increasing political opposition from the Movement for Democratic Change (MDC) and the Citizens Coalition for Change (CCC). Since 2018, the opposition's strongest leader has been Nelson Chamisa, who competed in the last two presidential elections against Mnangagwa.[33] In Parliament, the CCC is currently the only opposition party with 73 seats, compared to 137 seats occupied by the ruling ZANU–PF.

C. Dedicated Provisions Promoting and Protecting Political Opposition

In addition to their constitutional entrenchment, political parties are regulated in dedicated party laws in Uganda and Kenya.[34] In Zimbabwe, while no such general party law has been enacted to date, a Political Finance Act has existed since 2001 and the country's Electoral Act also has a number of provisions relevant for political parties in the context of elections.[35] As will be shown in this section, while these frameworks include some dedicated provisions promoting and protecting political opposition,[36] they are so far limited to provisions assigning the position of an opposition leader in parliament. In addition, Kenya and Zimbabwe have provisions aimed at protecting opposition parties and their supporters from intimidation and violence, while Uganda has not introduced similar provisions so far.

31 Section 3(2)(a) of the 2013 Constitution of Zimbabwe.

32 Ibid, Section 67(2)(a) and (b).

33 Chamisa has however recently resigned as CCC's president, see section D I below.

34 The Political Parties and Organisations Act of Uganda 2005, (last accessed on 4 November 2024); Political Parties Act of Kenya, Act No. 11 of 2011, 1 November 2011, CAP. 7D, http://kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=CAP.%207D (last accessed on 4 November 2024).

35 Electoral Act of Zimbabwe, Act No. 25 of 2004. The Act has been amended multiple times since it first came into operation in 2005. A consolidated version last amended in 2023 is available at https://www.veritaszim.net/sites/veritas_d/files/Electoral%20Act%20(Consolidated%20as%20at%2019-07-2023).pdf (last accessed on 30 October 2024).

36 See generally *Elliot Bulmer*, Opposition and Legislative Minorities: Constitutional Roles, Rights and Recognition, International IDEA Constitution-Building Primer 22, 9 July 2021, https://www.idea.int/sites/default/files/publications/opposition-and-legislative-minorities-constitutional-roles-rights-recognition.pdf (last accessed on 11 December 2024).

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I. Provisions Establishing the Position of Parliamentary Opposition Leaders

A first aspect in the constitutional and legal frameworks of Kenya, Uganda and Zimbabwe specifically dedicated to political opposition are provisions establishing the position of a parliamentary opposition leader. Uganda has introduced a Leader of the Opposition through its 2005 constitutional amendments by inserting Section 82A in the Constitution which explicitly recognizes the position of the Leader of the Opposition and requires that statutory law shall prescribe their selection, status, role and functions, and the benefits and privileges attached to the office. This is done by the Administration of Parliament Act which gives the Leader of the Opposition the status of a Cabinet Minister and defines the position as the member of parliament leading the opposition party with the most seats.[37] Importantly, this means that in Uganda the Leader of the Opposition is not chosen by all opposition parties but (only) by the strongest party represented in parliament that is not in government. Consequently, since the return to the multiparty system, Uganda's Leader of the Opposition came from the largest opposition party represented in parliament, that is the FDC from 2006 until 2021, and the NUP since then. The Act outlines the role and functions of the Leader of the Opposition as follows:

(1) The principal role of the Leader of the Opposition is to keep the government in check.
(2) The Leader of the Opposition shall under subsection (1), in consultation with his or her party leadership appoint a shadow cabinet from members of the opposition in Parliament with portfolios and functions that correspond to those of Cabinet Ministers.
(3) The Leader of the Opposition shall be a member of the Committee of Parliament responsible for determining and scheduling of business in Parliament and the Committee responsible for appointments and shall hold regular consultations with the Leader of Government Business and the Speaker.
(4) The Leader of the Opposition shall study all policy statements of government with his or her shadow ministers and attend committee deliberations on policy issues and give their party's views and opinions and propose possible alternatives.[38]

Recent proposals by the opposition party DP to change the election of the Leader of the Opposition and other positions reserved for the largest opposition party in parliament to be elected from among *all* opposition parties represented in parliament were rejected by

37 Sections 1(ea), 6D and 6F of the Administration of Parliament Act of Uganda, Cap. 257, as amended in 2006, https://judiciary.go.ug/files/downloads/Act%20No.22%20of%202006%20Administration%20of%20Parliament(Amendment)Act.pdf (last accessed on 12 December 2024).

38 Ibid, Section 6E.

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other smaller opposition parties, with the UPC's secretary-general arguing that the proposed reforms are "a recipe for disaster" which "causes division" among opposition parties.[39]

Kenya's Constitution also provides for the position of an opposition leader who is however called the Leader of the Minority Party.[40] The Standing Orders of the Kenya National Assembly further detail the position and assign it to the leader in parliament "of the second largest party or coalition of parties".[41] While the Standing Orders are not as detailed as Uganda's Administration of Parliament Act (for instance, they do not envisage a shadow cabinet), what is interesting to note here is that despite its name the Leader of the Minority Party can be elected among multiple opposition parties provided that they have formed a coalition of parties. Moreover, although not adopted in the end due to procedural errors in the amendment process, it is apt to remember in this context that the constitutional review process in 2020 would have inserted a new Section 107A in the Constitution, introducing a Leader of Official Opposition, a position granted to "the person who received the second greatest number of votes in a presidential election; and whose political party or coalition of parties has at least twenty-five percent of all the members of the National Assembly". This would have introduced a "consolation prize" for the presidential candidate with the second-most votes, thereby creating a constitutionally recognised position for the opposition going beyond that of a leader in parliament.[42]

While Zimbabwe's Constitution does not outline the selection, status, role and function of the Leader of the Opposition, it refers to the position at least in passing in a provision outlining the members of the parliamentary Committee on Standing Rules and Orders.[43] This has led to some confusion whether the position exists at all when newly elected President Mnangagwa had publicly suggested to "introduce" the office following the 2018 presidential elections, arguing that "there was no formal recognition of the opposition leader" but now under his government he would change that and confer the position with "certain conditions and perks in parliament".[44] However, the Leader of the Opposition is already constitutionally recognized and is also mentioned in the National Assembly's Standing Rules and Orders.[45] As has been highlighted by the Zimbabwean information

39 See Parliament of the Republic of Uganda, Opposition Parties Reject Bill on Election of LOP, 11 October 2024, https://www.parliament.go.ug/news/3364/opposition-parties-reject-bill-election-lop (last accessed on 12 December 2024).

40 Section 108(2) of the 2010 Constitution of Kenya.

41 Section 19(2) of the Kenya National Assembly Standing Orders, 6th edition, as adopted on 7 June 2022.

42 *Danny Schindler*, Keine Reform des konstitutionellen Parlamentsrechts: Kenias gescheiterte Building Bridges Initiative als eine institutionspolitisch verpasste Chance?, Law in Africa 26 (2023), p. 20.

43 Section 151(2)(e) of the Kenya National Assembly Standing Orders, note 42.

44 Quoted in *Veritas Zimbabwe*, Leader of the Opposition, Constitution Watch 2/2018, 25 September 2018, https://www.veritaszim.net/node/3224 (last accessed on 10 November 2024).

45 Ibid.

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network Veritas, the innovate aspect in Mnangagwa's proposal was therefore not the formal recognition of the position but the fact that he had mentioned in that context that he planned to offer it to Chamisa, who, although having been the opposition's presidential candidate, had not been a member of parliament at the time.[46]

II. Provisions Aimed at Protecting Political Opposition Against Intimidation and Violence

In addition to provisions establishing and recognising parliamentary opposition leaders, a second area specifically dedicated to political opposition in constitutional and legal frameworks regulating political parties are provisions aimed at protecting opposition parties and their supporters against intimidation and violence. While Kenya and Zimbabwe have enacted such provisions, Uganda's framework regulating political parties does not provide for similar provisions although its Political Parties and Organisations Act envisages a code of conduct for political parties, but no such regulations seem to have been adopted to date.[47]

The most detailed provisions in this regard exist in Kenya, where the Constitution has an explicit provision prohibiting political parties to "engage in or encourage violence by, or intimidation of, its members, supporters, opponents or any other person".[48] The provision is reiterated and refined in the Code of Conduct for Political Parties in Kenya's Political Parties Act which prohibits parties to "engage in or encourage any kind of intimidation of opponents, any other person or any other political party".[49] In Zimbabwe, although not constitutionalised like in Kenya and technically not specifically limited to opposition parties and their supporters, the Electoral Act explicitly criminalizes "intimidatory practices" against political parties.[50] In particular, the Act prohibits any attempted or successful prevention or obstruction of a political party from campaigning in an election.[51] In addition, it places a responsibility on political parties themselves to take appropriate measures to prevent politically motivated violence and any electoral malpractices and to take effective steps to discipline party members who engage in such conduct.[52]

46 Ibid.

47 A process to draft such a code of conduct has been underway in 2018 but no reporting on the subsequent development could be found. See *New Vision*, Political Parties' Code of Conduct Under Way, 8 June 2018, https://www.newvision.co.ug/news/1479341/political-parties-code-conduct (last accessed on 12 November 2024).

48 Section 91(2)(b) of the 2010 Constitution of Kenya.

49 Section 7 of the First Schedule of the 2011 Political Parties Act of Kenya, note 35.

50 Part XVIIIA of the 2004 Electoral Act of Zimbabwe, note 36.

51 Ibid., Section 133C.

52 Ibid., Section 133G.

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As the recent detention of Uganda's PFF leader Besigye under mysterious circumstances showed,[53] the absence of provisions aimed at protecting political opposition against intimidation and violence exposes opposition leaders to unfair and arbitrary treatment. On the other hand, the mere existence of such provisions is of course no guarantee for better protection and in any case have seemingly not improved the situation for opposition parties in Zimbabwe where electoral violence against the CCC and their supporters continues to be widespread. For example, ahead of the 2023 elections, Zimbabwe's Vice President had stated that the government would "crush the party like lice"; one day later, a CCC supporter was killed and at least 22 others were seriously injured.[54] By contrast in Kenya, which also has a long history of electoral violence, the 2022 elections were relatively peaceful. One aspect in the legal framework that might have contributed to electoral security apart from the criminalization of intimidation and violence is the newly introduced possibility to form party coalitions already before an election.[55] According to a recent study by ENACT Africa, prior to the amendment

> *"[…] political party coalitions crumbled quickly due to mistrust over power and resource sharing, fragile organisation and the absence of a water-tight dispute resolution mechanism. The amended law allows political parties to reach out to former bitter rivals in the hopes of gaining more support. The ruling party, Jubilee, worked with their opposition and former rival, the Orange Democratic Movement [OMD], to form Azimio law Umoja Kenya – "One Kenya", a coalition of 26 political parties, led by then president Uhuru Kenyatte, and the ODM's Raila Odinga."*[56]

D. Impact of the Wider Constitutional and Legal Frameworks on Opposition Parties

While the discussion in the preceding section has shown how dedicated provisions provide at least some formal recognition and protection of opposition parties and their supporters in Kenya, Uganda and Zimbabwe, this section will illustrate how in practice the wider constitutional and legal frameworks regulating political parties often work in favour of ruling parties and do not provide a level playing field for opposition parties to openly compete for power. At the same time, examples from all three countries show how opposition parties

53 *Wycliffe Muia*, How a Ugandan Opposition Leader Disappeared in Kenya and Ended Up in Military Court, BBC, 2 December 2024, https://www.bbc.com/news/articles/cp8x3vr6zj2o (last accessed on 12 December 2024).

54 Amnesty International, Zimbabwe: Investigate Violence on Political Opposition Supporters, 28 February 2022, https://www.amnesty.org/en/latest/news/2022/02/zimbabwe-investigate-violence-on-political-opposition/ (last accessed on 9 November 2024).

55 Section 9 of the Political Parties (Amendment) Act 2022, Act No. 2 of 2022.

56 See ENACT, Mafia-Style Crimes / Muted Violence in Kenya's 2022 Elections Masked Seething Dissent, 24 April 2023, https://enactafrica.org/enact-observer/muted-violence-in-kenyas-2022-elections-masked-seething-dissent (last accessed on 12 November 2024).

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in anglophone Eastern Africa have been able to use or circumvent provisions in these frameworks to operate in this environment.

I. Registration Requirements

A first challenge for opposition parties are high thresholds or cumbersome processes for registration. A prominent example is the controversial requirement for political parties to have a nationwide presence or not to be based on ethnicity or religion. In particular Kenya has a track record of cases where new parties have been refused to be registered based on this requirement.[57] For instance, in 2005 the New Democratic Union for Change was refused registration based on intelligence that all party founders shared the same ethnic background.[58] A second, more recent case was the refusal in 2015 to register the Coast Peoples Democratic Movement for its party programme advocating for an independent state encompassing the former Coast Province of Kenya. In its final judgment, the High Court of Kenya upheld the decision, citing Section 91 of the Constitution prohibiting particularistic parties and the provision in the preamble declaring that the people of Kenya are proud of their "ethnic, cultural and religious diversity" and "determined to live in peace and unity as one indivisible sovereign nation".[59]

High registration requirements or cumbersome registration processes might lead opposition movements to choose not to register as a political party at all or look for "shelter" in pre-existing party structures. A prominent example is the People Power movement in Uganda. Primarily sparked by civil unrest following Museveni's announced plans to extend his presidential term in 2017, the movement's leader Bobi Wine initially denounced the idea of transforming it into a party:

> *"People Power is not a political party or political organisation for that matter. We are aware that the state is so scared of the people who come together regardless of their political affiliations, regardless of tribe or religion but people who envision an idea of having power back in their hands. And I want to emphasise that every Ugandan has equal stake in the idea of people power."*[60]

57 See *Johannes Socher / Charles M. Fombad*, Prohibition of Ethnic Political Parties and Constitutionalism in Sub-Saharan Africa, in: Charles M. Fombad / Nico Steytler / Yonatan Fessha (eds.), Ethnicity and Constitutionalism in Africa, Oxford, forthcoming.

58 The decision was upheld by the High Court of Kenya in *John Musa Kilonzo & Others v Registrar of Societies*, 27 January 2006, eKLR.

59 High Court of Kenya, *Morris Jarha Maro & Another v Registrar of Societies & Another*, 18 March 2015, eKLR.

60 URN, Can 'People Power' Change Uganda's Political Fortune?, The Observer, 1 October 2018, https://observer.ug/news/headlines/58803-can-people-power-change-uganda-s-political-fortune (last accessed on 10 November 2024).

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However, in the lead-up to the 2021 elections, the movement decided to merge with the National Unity, Reconciliation and Development Party which had already existed since 2004.[61] Renamed the National Unity Platform (NUP), it was able to win 58 seats, making it instantly the strongest opposition party in parliament.[62] Using pre-existing party structures for new political movements rather than registering new parties is also common practice in Kenya. Ahead of the 2002 elections for example, Odinga had to act quickly after a merger of his National Democratic Party with the ruling KANU had failed and decided instead to forge another alliance together with other disgruntled KANU leaders, calling it the Rainbow Alliance. However, as Bwire explains,

> *"[..] since the Rainbow Alliance needed to transform into a political party for its members to be able to contest for seats in the upcoming elections, they subsequently usurped the minnow known as the Liberal Democratic Party (LDP). Undoubtedly, the takeover of LDP by the Rainbow Alliance was anything but democratic since its leadership was simply bought out, thereby setting an enduring trend of Kenyan politicians buying out registered leaders or moribund political parties to use as vehicles to contest elections."*[63]

In contrast to Uganda and Kenya, Zimbabwe's constitutional and legal framework is not only silent on the issue of particularist parties but also does not provide for a registration process at all. Although the currently contemplated introduction of a registration process has raised concerns among civil society that this will be used to stifle opposition and further shrink the democratic space,[64] the complete lack of a registration process for political parties can also work against opposition as the following example illustrates. Due to an internal dispute, MDC, the strongest opposition party at the time, split in 2005 and two parties emerged, both carrying the party's acronym in their name and contesting separately in the 2008 and 2013 elections: the MDC-T, led by Morgan Tsvangirai, and MDC-N, led by Welshman Ncube. Following the death of Tsvangirai in 2018, a newly formed MDC-Alliance (led by Nelson Chamisa) competed separately from MDC-T (led by Thokozani Khuphe) in the elections that year. As Edson Ziso argues in his case study on Zimbabwe,

61 *Ian Katusiime / Derrick Wandera,* Bobi Wine Finds Party Shelter with Eyes on 2021 Presidential Election, The East African, 23 July 2020, https://www.theeastafrican.co.ke/tea/news/east-africa/bobi-wine-party-shelter-eyes-2021-presidential-election-1904780 (last accessed on 4 November 2024).

62 Electoral Commission of Uganda, 2021 General Parliamentary Elections, 2021, Election Results, https://www.ec.or.ug/ecresults/2021/MPS_RESULTS_2021.pdf (last accessed on 10 November 2024).

63 *Bwire*, note 29, citing *C. Odhiambo-Mbai*, The Rise and Fall of the Autocratic State in Kenya, in: Walter O. Oyugi / Peter Wanyande / C. Odhiambo-Mbai (eds.), The Politics of Transition in Kenya: From KANU to NARC, Nairobi 2003, p. 70.

64 See *Kitsepile Nyathi*, Zimbabwe Targets More Restrictions on Political Parties, Nation, 11 October 2024, https://nation.africa/africa/news/zimbabwe-targets-more-restrictions-on-political-parties-4792286 (last accessed on 9 November 2024).

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the silence in the regulatory framework on party names confused voters and ultimately weakened the opposition as a whole:

> *"Over the years, this situation invariably resulted in ballot papers being spoiled as confused voters ended up voting for multiple candidates. […]. The overall effect was that this also split the vote of the opposition to the advantage of ZANU-PF. Simultaneously, disappointed voters gradually got tired or fed up with these political game […]."*[65]

In the aftermath of the 2018 elections, the dispute over the MDC escalated between the different factions, resulting in the creation of the CCC in 2022, led by Chamisa. However, after having won 44 per cent of the votes in the presidential race and 103 of the 280 parliamentary seats for the CCC in the next elections in 2023, Chamisa resigned again as the party's president at the beginning of 2024, citing government interference that has "contaminated" and "hijacked" the party.[66] The fact that the CCC did not yet have party statutes came at a high price for Chamisa, as Sengezo Tshabangu could declare himself the party's secretary-general, a position he used to recall all CCC members of parliament loyal to the party's president. As Ziso further explains:

> *"Within days of the swearing in of members after the 2023 elections, […] Tshabangu flipped the script by recalling anyone aligned with Chamisa whilst also ensuring that they were banned from re-contesting the election under the CCC banner. At the end of the bloodletting, ZANU-PF emerged as the winner and now commands 190 seats in the 280-member parliament. This is because the recalls necessitated a series of by-elections which ZANU-PF comfortably won, giving it the much needed two-thirds majority required to control parliament."*[67]

After Chamisa's resignation, another gap in the legal framework enabled the final step in Tshabangu gaining control over the CCC. Apparently without a prior party meeting in which such a decision was taken, Tshabangu was announced as the new Leader of the Opposition in parliament.[68]

65 *Edson Ziso*, External Regulation and Internal Contradiction in Zimbabwean Opposition Politics: The Case of the MDC/CCC, in: Charles M. Fombad / Johannes Socher (eds.), Constitutionalisation of Political Parties and the State of Democracy in Sub-Saharan Africa, Bade-Baden 2025.

66 See BBC, Nelson Chamisa: Zimbabwe Opposition CCC Leader Quits 'Contaminated' Party, 25 January 2024, https://www.bbc.com/news/world-africa-68095685 (last accessed on 12 November 2024).

67 *Ziso*, note 65.

68 *Anna Chibamu,* Tshabangu Appoints Self New Leader of Opposition in Parliament, New Zimbabwean, 30 May 2024, https://www.newzimbabwe.com/tshabangu-appoints-self-new-leader-of-opposition-in-parliament/ (last accessed on 12 November 2024).

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II. Co-optation and Coalition Agreements

A more subtle form through which ruling parties often suppress political opposition is co-optation, a form of "constitutional engineering directed at undermining institutions that would otherwise constrain them".[69] As Leonardo Arriola and others show, co-optation can have far-reaching effects for political opposition as a whole: "By demonstrating a willingness to trade individual ministerial appointments for temporary political allegiance, incumbents can tempt opposition politicians to create splinter parties or to pursue independent candidacies. In the process, incumbents do more than merely buy off individual opposition politicians; they weaken the opposition as a whole by inducing their fragmentation.[70]

Uganda under Museveni's NRM has a long history of co-optation of politicians going back to the period of the "movement".[71] More recently, Museveni appointed three opposition leaders as ministers in his cabinet following the 2016 elections.[72] And in the current government, co-optation reached a new level and affected an entire opposition party. In 2022, the leader of the Democratic Party (DP), Norbert Mao, signed a "cooperation agreement" with the ruling NRM, granting him the position of justice minister, among others.[73] The signing of the agreement was widely seen as a "sell out" of the oldest opposition party in the country, a "betrayal of the party's core values of truth and justice, which it had upheld for over 60 years in Ugandan politics", as Nkuubi argues in his case study on Uganda.[74] Some DP leaders challenged the agreement's validity in court based on the argument that Mao had signed it "without proper authority, consultation, or consent from the party's organs".[75] While the case had not been decided at the time of writing (December 2024), the dispute over the signing of the agreement is in any case another example of how gaps in the legal framework can be used to weaken opposition as Uganda's Political Parties and Organizations Act mentions "alliances" but does not say anything about their creation, status or the relationship between the constituent parties of such alliances.[76]

69 *Leonardo R. Arriola / Jed Devaro / Anne Meng*, Democratic Subversion: Elite Cooptation and Opposition Fragmentation, American Political Science Review 115 (2021), p. 1358.

70 Ibid.

71 *Moses Khisa*, Inclusive Co-Optation and Political Corruption in Museveni's Uganda, in: Inge Amundsen (ed.), Political Corruption in Africa, Cheltenham 2019, p. 95.

72 *Michael Mutyaba*, Co-Option and Cabinets in Uganda, Africa Research Institute, 11 October 2016, https://www.africaresearchinstitute.org/newsite/blog/co-option-cabinets-uganda/ (last accessed on 4 November 2024).

73 Observer, Details of Museveni, Mao 42-Clause Agreement, 22 July 2022, https://observer.ug/news/headlines/74458-details-of-museveni-mao-42-clause-agreement (last accessed on 12 November 2024).

74 *Nkuubi*, note 10.

75 The Independent, Court Issues Timelines in Mao-NRM Deal Case, 27 February 2024, https://www.independent.co.ug/court-issues-timelines-in-mao-nrm-deal-case/ (last accessed on 12 November 2024).

76 Section 18 of the Political Parties and Organisations Act of Uganda 2005, note 35.

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On the other hand, coalitions also offer the opportunity for opposition parties to join forces and unite against a dominant party. While this has so far not succeeded in Uganda and Zimbabwe, in Kenya the NARC coalition was able to break KANU's dominance in 2002 which has since not returned to power (even if leading politicians of KANU have pursued their career elsewhere and eventually went on to rule the country under a different banner such as current president William Ruto, who had left KANU in 2005). NARC collapsed however already three years later and one of the main reasons for this was a dispute among its leaders over how to share power despite having agreed on it in a memorandum of understanding.[77] NARC's collapse revealed a gap in Kenya's constitutional and legal framework at the time as the memorandum of understanding was not binding and provided no dispute resolution mechanism if breached by one of the parties.[78] Since 2011, this gap has however been filled and coalitions are regulated in some detail. Pursuant to the Political Parties Act, alliances of two or more political parties that want to form a coalition before or after an election have to deposit an agreement with the Registrar of Political Parties.[79] Coalition agreements have to be sanctioned by the governing bodies of the constituent parties and have to cover a number of aspects, including "the criteria or formular for sharing of positions in the coalition structure, roles and responsibilities within the coalition" and "the decision making structure, rules and procedures".[80] Importantly, coalition agreements must also provide for "dispute resolution mechanisms and procedures" and "enforcement and sanction mechanisms and procedures for breach of any of the provisions of the agreement".[81] They also have to spell out "the formular and the mechanisms for sharing of funds" and "the grounds upon which a coalition may be dissolved including the mechanism and procedures to be followed".[82] Whether these elaborate rules can provide the constitutional stability they seek to ensure seems however at least questionable amid recent reports that Kenya's main opposition coalition Azimio la Umoja is about to fall apart following Odinga's recent "handshake" with the Ruto government despite other ODM party leaders' insistence that the party itself remains in opposition and part of the coalition.[83]

77 See *Peter Wanyande / Patrick O. Asingo*, Beyond Election Campaign Rhetoric: Challenges Facing the National Rainbow Coalition (NARC), African Review 31 (2004), p. 13.

78 See also *Bwire*, note 29.

79 Section 10 of the Political Parties Act of Kenya 2011, note 35.

80 Ibid., Section 3(e) and (h) of the Third Schedule.

81 Ibid., Section 3(k) and (l) of the Third Schedule.

82 Ibid., Section 3(o) and (p) of the Third Schedule.

83 See *Victor Abuso*, Kenya: Azimio Coalition Collapsing as More Allies Announce Plans to Quit, 8 November 2024, https://www.theafricareport.com/367621/kenya-azimio-coalition-collapsing-as-more-allies-announce-plans-to-quit/ (last accessed on 9 November 2024).

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E. Conclusions

According to the latest Afrobarometer survey, the people of Kenya, Uganda and Zimbabwe continue to overwhelmingly reject one-party rule and prefer democracy to any other kind of government.[84] This support for multiparty democracy has so far only partly translated into politics, where a single party continues to dominate in Uganda and Zimbabwe and only in Kenya have new parties been able to win elections and form alternating governments (albeit largely consisting of the same politicians that were formerly members of KANU). This article has shown how the relevant constitutional and legal frameworks on political parties, multipartyism and political opposition have contributed to this situation by not being able to provide a genuine level playing field for opposition parties to openly compete for power. This finding leads to a number of conclusions.

First, the existing dedicated provisions recognising political opposition are arguably insufficient. While the constitutional frameworks of all three countries know the position of an opposition leader, this seems to be largely symbolic and is so far limited to a parliamentary role. At least in presidential systems where parliaments are regularly described as rubber stamp institutions and barely a majority of the population is of the view that parliament is rarely or never ignored by the government,[85] the contemplated idea in Kenya (and to a lesser extent also in Zimbabwe) to confer the role of the opposition leader to the presidential candidate with the second most votes is at least interesting and should be seriously considered. While the awarding of such a "consolation prize" entails the risk of co-optation, it also has the potential to strengthen the significance of the position and would reflect the political reality that the most powerful opposition politicians in Kenya (Odinga), Uganda (Wine) and Zimbabwe (Chamisa) don't compete for parliamentary seats but for the office of the president even where the constitution allows them to do both.[86] But even if the position of the opposition leader is limited to a parliamentary role, the recent reform debates in Uganda to change it into a representative position of *all* opposition parties in parliament seems a possibility to strengthen the opposition as a whole and not to weaken it, as some have suggested.

Second, while it is difficult to assess the effectiveness of the existing provisions aimed at protecting opposition parties and their supporters from intimidation and violence in Kenya and Zimbabwe, the lack of similar provisions has not helped the situation in Uganda, where almost half of the population fears intimidation and violence during elections and

84 Afrobarometer, Democracy Scorecards on Kenya, Uganda and Zimbabwe, 17 July 2024, https://www.afrobarometer.org/publication (last accessed on 13 December 2024).

85 According to the latest Afrobarometer data, only 51 per cent (Uganda and Kenya) and 53 per cent (Zimbabwe) of the population think that the president rarely or never ignores parliament, see Ibid.

86 See, e.g., section 137(3)(2)(c) of the 2010 Constitution of Kenya which explicitly exempts members of parliament from being disqualified for nomination as a presidential candidate.

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attacks and arbitrary detentions of opposition politicians are part of the political environment.[87]

Third, the analysis of the broader frameworks regulating political parties has shown how they often work in favour of ruling parties and keep opposition parties in check. This was particularly evident in relation to high thresholds or cumbersome processes for the registration of political parties. Although new political movements seem to be able to find ways to circumvent cumbersome registration requirements, for example by using pre-existing party structures as "shells" like in Kenya and Uganda, other restrictions such as prohibitions of ethnic and religious parties or the requirement of a national presence are prone to abuse and can be used as a pretext to deny new political movements registration. On the other hand, gaps in the regulatory framework can also weaken opposition parties which would otherwise protect them. As the example of Zimbabwe's MMC/CCC has shown, confusion over a party's name, the absence of requiring political parties to have statutes or the lack of clear provisions on the election of the opposition leader in parliament make the (self-)sabotage of opposition parties possible.

Lastly, although the example of Uganda's DP has shown that coalition agreements can also be used to co-opt entire opposition parties, provisions on coalitions also provide a tool for the opposition to overcome fragmentation and join forces against ruling parties.[88] In particular the experience of Kenya with forming different opposition coalitions eventually taking power point at the agency of opposition parties even in contexts where a single party has dominated politics for decades.

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87 *Dorah Babirye*, Political Freedom at Risk? Almost Hald of Ugandans Fear Intimidation and Violence During Elections, Afrobarometer Dispatch No. 886, 24 September 2024, https://www.afrobarometer.org/wp-content/uploads/2024/09/AD866-Almost-half-of-Ugandans-fear-intimidation-and-violence-during-elections-Afrobarometer-24sept24.pdf (last accessed on 13 December 2024).

88 For studies that have identified internal fragmentation as a key weakness of opposition parties see *Bertha Chiroro*, The Dilemmas of Opposition Political Parties in Southern Africa, Journal of African Elections 5 (2006), p. 100; *Wondwosen Teshome,* Opposition Parties and the Politics of Opposition in Africa: A Critical Analysis, International Journal of Humanities and Social Sciences 3 (2009), p. 1.

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Oppositional Practice in India: Understanding Parliamentary Responses to Populism

By *Aishwarya Singh*[*] and *Meenakshi Ramkumar*[**]

Abstract: The scholarship on the role of opposition in parliaments has highlighted a dual role for the opposition, that is to extract accountability from the government and to be prepared as the "government-in-waiting". However, there are significant constraints on opposition in populist regimes. Specifically, alternation of governments becomes increasingly impossible as populist governments obstruct channels of political change giving rise to authoritarian and/or competitive authoritarian regimes. However, we discuss that the opposition can still play an important role in such contexts, using India as a case study. We discuss how oppositional practice of advocacy and de-acceleration can be a response to the populist politics of anti-pluralism; and immediacy and impatience. The de-accelerating effect consists of stalling, delaying and influencing of the legislative proposals of the government. We specifically highlight how the much-maligned parliamentary disruptions in India, which were understood to be creating a state of "gridlock and dysfunction", can now present opportunities for resisting populist projects and protecting democracy and constitutionalism.

Keywords: Opposition; Parliament; Populism, India; Parliamentary Disruptions

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A. Introduction

As in many other jurisdictions, democracy in India is on a decline.[1] The growing executive aggrandisement in India has imperiled its liberal constitutional order.[2] The decline has much to do with the electoral dominance of the Bhartiya Janta Party (BJP), which has

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1 *Tarunabh Khaitan*, Executive Aggrandizement in Established Democracies: A Crisis of Liberal Democratic Constitutionalism, International Journal of Constitutional Law 17 (2019), p. 343.

2 *Tarunabh Khaitan*, Killing a Constitution with a Thousand Cuts: Executive Aggrandisement and Party-State Fusion in India, in: Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne (eds.), Constitutional Resilience in South Asia, Oxford 2023, p. 134.

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won three consecutive national elections in 2014, 2019, and 2024. BJP's dominance can be attributed to its populist leader, Narendra Modi and the ideological shift in Indian politics to Hindu majoritarianism.[3] However, the BJP has also given itself a partisan advantage in elections. This has been achieved through the increasing executive influence over the Election Commission[4] and changes in campaign financing laws.[5] Opposition leaders also continuously find themselves under the ire of government-controlled investigative agencies, facing charges of corruption, criminal defamation etc.[6] Thus, while the opposition can participate in elections, the cards are stacked against it, making India a competitive authoritarian regime.[7] A crucial question that then arises is whether the opposition can still play a substantial role in politics in contemporary India. The situation is further complicated by the fact that the Parliament, where the opposition has institutional opportunities to oppose the government, has been undermined in the last decade by flagrant violations of parliamentary procedures and conventions by the BJP government and BJP affiliated presiding officers.[8]

No doubt, in the last decade there has been a constitutional and democratic regression in India. We acknowledge that the Parliament has also come under significant pressure. However, in this article we aim to complicate this narrative by telling a story of resistance, with a focus on the period following the rise of the BJP in 2014. We explore the opposition-

3 *Christophe Jaffrelot / Gilles Verniers*, A new party system or a new political system, Contemporary South Asia 28 (2020), p. 142.

4 *Mohsin Alam Bhat*, ECI is not up to the task of sanitizing a chaotic electoral process, The Wire, 4 June 2019, https://thewire.in/politics/election-commission-model-code-hate-speech-religion (last accessed on 30 June 2025); see also the Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Terms of Office) Act 2023 (sets up a executive dominated selection committee to nominate members to election commission).

5 *Khaitan*, note 2, p. 141.

6 For example, the corruption cases launched against the Aam Aadmi Party leaders and Hemant Soren (Jharkhand Mukti Morcha party) and the case of defamation launched against the Congress party leader Rahul Gandhi, see BBC, Arvind Kejariwal: Delhi Chief Minister remanded to custody in corruption case, 22 March 2024, https://www.bbc.com/news/world-asia-india-68634000 (last accessed on 22 May 2025); *Apurva Vishwanath*, Rahul Gandhi disqualified as Lok Sabha MP after conviction, Indian Express, 24 March 2023, https://indianexpress.com/article/explained/explained-law/rahul-gandhi-can-avert-disqualification-as-mp-if-conviction-stayed-8515487/ (last accessed on 22 May 2025).

7 *David Landau*, Abusive Constitutionalism, UC Davis Law Review 47 (2013), p. 199; *James Manor*, A New, Fundamentally Different Political Order: The Emergence and Future Prospects of 'Competitive Authoritarianism' in India, Economic and Political Weekly 56 (2021); See also Freedom House, India: Freedom in the World 2023 Country Report, https://freedomhouse.org/country/india/freedom-world/2023 (last accessed on 4 December 2024).

8 Civil Society Organisations and Citizens, Charge sheet against Government of India for Subverting and Undermining Parliamentary Democracy, 9 February 2024, https://bahutvakarnataka.wordpress.com/2024/02/09/chargesheet-against-government-for-subversion-of-parliamentary-democracy/ (last accessed 22 May 2025).

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al practice of diverse oppositional actors in the national legislature[9] including non-governing parties, the Upper House of the Parliament (Rajya Sabha), and coalition partners of the BJP government to assess how they have in some forms resisted the democratic decline ushered in by the current regime. Essentially, for the purposes of this article we understand the 'opposition' as this dispersed set of forces in Parliament, and not as a singular party or actor. The article is limited in its scope to a focus on parliamentary opposition. While opposition against the government can take various forms, parliamentary opposition has institutional opportunities within the Parliament to oppose the government.[10]

The article discusses responses and strategies employed by the oppositional actors in the Parliament to overcome the democratic crisis, with a focus on two aspects of oppositional practice. The first is the forms in which the oppositional practice has had a discursive impact. This could be through the advocacy of the opposition on behalf of their constituents – such as minority communities, sub-national interests or those opposed to the establishment of an illiberal majoritarian order. The second is how oppositional practice in the Parliament has played a role in stalling, influencing and changing the governmental agenda. We argue these aspects of oppositional practice, to advocate and to de-accelerate the government's program, have been demonstrated by a combination of both legally permissive forms of parliamentary practice and disruptions. The legally permissive forms include raising questions, moving motions and exercising oversight through parliamentary committees. On the other hand, disruptions may violate rules and norms governing parliamentary conduct,[11] and may include disobedience of presiding officers, sloganeering, interrupting and boycotting.[12]

In deploying these responses and strategies, the oppositional practice has attempted to resist the democratic decline, both in terms of the thin and thick conceptions of democracy. Rosalind Dixon has referred to the thin conception as a commitment to the democratic minimum core, which includes free and fair elections and institutional checks and balances.[13] Oppositional practice over the last decade in India has attempted to prevent the complete neutralisation of the Parliament. The Parliament, as we argue, can still provide some institutional checks over the government through the oppositional practice of advocacy and de-acceleration. The thick conception of democracy relates to a commitment to broader values like protection of minorities and a deliberative form of democracy, and is not

9 The article deals with the national legislature due to the constraints of scope, although state legislatures remain important interactive sites of democratic politics in India: see *Jaffrelot / Verniers*, note 3, pp. 145-147.

10 *Julian L. Garritzmann*, Oppositional Power, in: Ali Farazmand (ed.), Global Encyclopedia of Public Administration, Public Policy, and Governance, Berlin 2018, p. 4250.

11 See Rules 349 and 352, Rules of Procedure and Conduct of Business in Lok Sabha ("Lok Sabha Rules").

12 Ibid.

13 *Rosalind Dixon*, Responsive Judicial Review, Oxford 2023, pp. 60-64.

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just limited to establishing a competitive democracy.[14] The advocacy carried out through oppositional practice entails promotion of minority interests and deliberation as a value.

The article makes three contributions. First, it adds to the comparative constitutional law literature on democratic decay by focusing on parliamentary opposition, and specifically literature that takes India as its site of enquiry.[15] Some notable work has been done in this area by political scientists, on whose work we also rely.[16] Second, the article contributes to the literature on constitutional resilience, which focuses on the "ability of institutions to react against and survive challenges against them".[17] Literature on democratic "decay" or "backsliding" is overly focused on a linear spectrum of regression.[18] Such an analysis risks missing how democratic decline and democratic consolidation in a country undergoes its own vicissitudes – rarely following a straight trajectory. Finally, this article critically engages with the role of deliberation in the Parliament. It seeks to redeem conflict as a part of the legislative process – recognising the value of protest in the Parliament in the form of disruptive behaviour.[19]

This article proceeds as follows: in Part II, we discuss how oppositional practice in Parliament can be a response to populist politics, both in terms of countering populist discourse and the populist drive for impatience and immediacy. In Part III, we examine the constitutional-institutional features of the Indian Parliament and how they enable and

14 Ibid.

15 There is an existing, but not a substantial body of legal literature studying the opposition in India: see, *Meenakshi Ramkumar, Aishwarya Singh*, The Road Not Taken: India's Failure to Entrench the Rights of the Opposition, Comparative Constitutional Law and Administrative Law Journal 6 (2022); On functioning of Indian Parliament, *Maansi Verma*, Agenda Control in the Indian Parliament and the Impact on its Oversight Function – Analysis and Evidence, Socio-Legal Review 18 (2022). There has been some general work on illiberal tendencies in law-making in rising illiberal and populist regimes. See *Tímea Drinóczi* / *Ronan Cormacain,* Introduction: illiberal tendencies in law-making, The Theory and Practice of Legislation 9 (2021).

16 See *WH Morris*, Parliament in India, Philadelphia 1957; *Shirin Rai / Rachel Johnson* (eds.), Democracy in Practice, Berlin 2014; *Ronojoy Sen*, House of the People: Parliament and the Making of Indian Democracy, Cambridge 2023.

17 *Philipp Dann*, Epilogue: Resilience and Political Constitutionalism in South Asia and Beyond, in: Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne (eds.), Constitutional Resilience in South Asia, Oxford 2023, p. 463.

18 *Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne*, Constitutional Resilience in South Asia: A Primer, in: Swati Jhaveri/ Tarunabh Khaitan / Dinesha Samararatne (eds.), Constitutional Resilience in South Asia, Oxford 2023, p. 18.

19 Disruptions in Indian Parliament have been studied in the political science literature for some time, with some authors associating disruptions with parliamentary decline and others with greater democratization, see *Devesh Kapur / Pratap Bhanu Mehta*, The Indian Parliament as an Institution of Accountability, UNRISD Programme Papers on Democracy, Governance and Human Rights 23 (2006), p. 11; *Tarunabh Khaitan*, The Real Price of Parliamentary Obstruction, https://india-seminar.com/2013/642/642_tarunabh_khaitan.htm (last accessed on 4 December 2024); *Carol Spary / Faith Armitage / Rachel E. Johnson*, Disrupting Deliberation? Comparing Repertoires of Parliamentary Representation in India, the UK and South Africa, in: Shirin Rai / Rachel Johnson (eds.), Democracy in Practice, Berlin 2014.

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constrain the oppositional practice. Part IV provides a theoretical framework to analyse oppositional practice in India, where we identify three elements – opposition as a dispersed force; oppositional practice as fulfilling an advocacy function; and reliance on debate and disruption as tools of carrying out this practice. Part V provides certain select examples where oppositional practice in India has performed the advocacy function that we identified as important in Part IV and where it has de-accelerated the execution of populist projects of the BJP government.

B. Populism and Parliamentary Processes

The Narendra Modi-led BJP government came into power in 2014. This was a coalition government, but the BJP was elected with a substantial majority in the Lower House of the Parliament (Lok Sabha). This was a significant shift in the political landscape from the prior era of coalitional politics: since the 1990s, no party had gained enough electoral support to single-handedly form the government. Political commentators have argued that post-2014, India has entered into a dominant party system under the BJP.[20]

An important factor for BJP's dominance is its populist politics under the leadership of Narendra Modi. Populism can be a difficult concept to define and not all variants are the same. In relation to the Indian context, Jaffrelot and Tillin classify populism as "a category of political leadership in India characterized by direct, personalized appeals to "the people" by leaders who deploy particular cultural registers to secure and maintain political power by circumventing intermediaries and neutralizing institutions."[21] This definition accounts for some descriptions of populism that exist in the literature, where a single leader attempts to embody the "people" and there is a de-valuation of liberal constitutional checks on power.[22] Populist politics may by itself not be anti-democractic and many populist leaders are elected through free and fair elections in the first cycle. However, over time populism can become dangerous to democracy because of its derision of institutional checks on political power and its exclusionary tendencies.[23]

While India has experienced different forms of populism at both the national and regional levels, the Narendra Modi-led BJP variant of populism has been classified as the Hindutva version, where it is the Hindus that have been framed as the "people" (instead of the poor, as is often the case in other systems).[24] The morally charged battle of the people against the elites is then not defined in socio-economic terms, as elsewhere, but cultural terms. The "people" the BJP government represents are in conflict with a group of

20 *Jaffrelot /, Verniers*, note 3.

21 *Christophe Jaffrelot / Louise Tillin*, Populism in India, in: Cristobal Rovira Kaltwasser et al. (eds.)., The Oxford Handbook of Populism, Oxford 2017, p. 180.

22 *Jane Mansbridge / Stephen Macedo*, Populism and Democratic Theory, Annual Review of Law and Social Science 15 (2019).

23 *Wojciech Sadurski*, Poland's Constitutional Breakdown, Oxford 2019, p. 243.

24 *Jaffrelot / Tillin,* note 21, p. 185.

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"English speaking, Westernized – uprooted-elites who defend secularism at the expense of an authentic, Hindu identity of the nation".[25] The homogenising impacts of such populism is that it downplays the caste/class divisions among Hindus and vilifies religious minorities like Muslims. Hindutva populism is anti-pluralistic in nature. While Hindu nationalism is not new to Indian politics, its populist variant has been used most powerfully by Narendra Modi, where he relies on direct personalised appeals to the public superseding institutional and party networks.[26]

An important feature of populist politics is its spatiotemporal elements.[27] Populists present an alternative arrangement of democratic governance – where they not only claim to reduce the gap between the government and the governed, but also claim to be better suited to demands of "temporal efficiency and rapidity".[28] Populists show an impatience with institutions like the legislature. Parliamentary processes promote deliberation, disagreement, negotiation and compromise. They slow down decision-making for good reason: they act as a buffer against majoritarian whims. This impatience is also evident in Narendra Modi's governance style which seeks to represent him as a strong man who can take quick decisions "bypassing existing institutions".[29]

The task of the opposition is then to keep the legislature as a relevant institution against the onslaught of populist politics promoting (a) anti-pluralism; and (b) immediacy and impatience. We argue it can be done through advocacy for pluralistic interests and de-acceleration of populist pojects. In effect, oppositional actors have to act as vanguards of representative democracy, which comes under threat from majoritarian and unmediated populist politics. However, the difficulty for the opposition here is that the more it delays governmental decision-making, the more it may affirm the narrative that legislatures are "lethargic" institutions, obstructing the general will of the people from being executed.[30] Stalling of decision-making in Parliament, specifically through disruptive behaviour, can negatively affect the opposition's image.

But narratives are about meaning-making. The "people" constructed by the populists are also a myth, created by ascribing homogeneity to a community and downplaying its divisions. Oppositional speech and advocacy in the Parliament carries the possibility of presenting a variety of claims and opinions that can fracture the myth of a unified "people". Further, disruptions in the Parliament, if executed well, can be understood as curated

25 Ibid.

26 Ibid, p. 188.

27 *Raphael Girard*, Populism, Executive Power, and "Constitutional Impatience": Courts as Stabilisers in the United Kingdom, Constitutional Studies 8 (2022), p. 35.

28 Ibid.

29 *Jaffrelot / Tillin,* note 21, p. 188.

30 *Girard*, note 27.

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performances for what the opposition legislators consider their electorates.[31] Ethnographic literature on the Indian Parliament has pointed out that "it is safe to assume that that the resulting performances of parliamentary 'breakdown', 'disruption' 'paralysis' or 'decline' are consciously enacted performances by politically savvy team dramaturgs (senior leadership)."[32] These are enacted with an eye on the discursive spaces that such performances open up in the media and social networks.[33]

We engage in a deeper discussion of this advocacy function of the opposition and de-accelerating parliamentary conduct in Part IV of the article. Our purpose in this Part was to show how these two tasks of oppositional practice interact with populist politics. However, before we turn to expand on the advocacy and de-accelerating function, we lay down the constitutional-institutional features of the Indian Parliament, which provide the structural context in which such oppositional practice takes place.

C. Constitutional and Institutional Features of the Parliament

There are three important constitutional-institutional features of the Indian Parliament that have a bearing on oppositional practice: first, its bicameral structure; second, the constitutional position of opposition parties and members; and third, government control of the Parliament, reflected in its control over presiding officers and parliamentary business.

I. Bicameral Structure

India has adopted the Westminister parliamentary system, where the President is the head of the government/executive. The members of the executive are drawn from the Parliament. The President is bound by the aid and advice of the Council of Ministers, headed by the Prime Minister.[34] The Indian Parliament is a bicameral legislature, consisting of two houses that consists of elected and appointed legislators. The Lok Sabha (House of the People or the Lower House) consists of 543 members who are elected through direct elections every five years, based on the first-past the post electoral system. [35] The Rajya Sabha (Council of States or the Upper House) has 250 members, with 238 members being elected and 12 members being nominated by the President on the advice of the Cabinet.[36] The Rajya

31 *Bairavee Balasubramaniam*, The Indian Parliament: Performing Decline since the 1960s, in: Shirin Rai / Rachel Johnson (eds.), Democracy in Practice, Berlin 2014, pp. 174-175.

32 Ibid, p. 174.

33 Ibid.

34 Article 74, Constitution of India.

35 Lok Sabha Secretariat, Eighteenth Lok Sabha, Parliament of India (Lok Sabha), https://sansad.in/ls/members (last accessed 4 December 2024).

36 Rajya Sabha Secretariat, FAQ on Parliament (With Special Emphasis on Rajya Sabha), https://cms.rajyasabha.nic.in/UploadedFiles/ElectronicPublications/FAQ.pdf (last accessed 4 December 2024).

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Sabha is a continuous body, whose members have a tenure of six years, and one-third of the members retire every two years. The members of the Rajya Sabha are indirectly elected by an electoral college consisting of the elected members of state legislative assemblies through a system of proportional representation by means of single transferable vote.[37] The Prime Minister and the Council of Ministers can be members of either House but they must have the majority support in the Lower House.

The elections to the Rajya Sabha are staggered and the election schedules of state legislatures differ from the election to the national legislature, creating the possibility of different political majorities in the Lok Sabha and Rajya Sabha.[38] It can then be difficult for the national government to push through its agenda in the Rajya Sabha, without building consensus with other parties. Bhat has argued that the Indian constitutional design intended to empower the Rajya Sabha as a federal, deliberative and counter-majoritarian chamber. Since the members of the Rajya Sabha are not subject to the immediate pressures of direct popular elections, Bhat highlights that they can offer a "deliberative pause in the legislative process" checking the majoritarian impulses of a popularly elected Lower House.[39] This also feeds into the counter-majoritarian function of the Rajya Sabha.[40] Thus, if political majorities in the two houses are different, the Rajya Sabha can exercise an oppositional oversight over the government.

However, the Rajya Sabha's constitutional status and legislative powers are lesser than those of the Lok Sabha, which can effect its ability to exercise an oppositional oversight. The Rajya Sabha can neither introduce nor block money bills.[41] If a money bill has remained pending with the Rajya Sabha for more than two weeks, it is deemed to have been passed.[42] The power to classify bills as money bills vests with the Speaker, the presiding officer of the Lok Sabha.[43] This has become contentious because the Speaker is elected with the support of the majority in the Lok Sabha.[44] A government that anticipates difficulty in passing bills in the Rajya Sabha can abuse the office of the Speaker to classify such bills as money bills.

37 Article 80 (4) of the Constitution of India.

38 *M Mohsin Alam Bhat*, The Parliament and State Legislatures of India, in: Po Jen Yap / Rehan Abeyratne, Routledge Handbook of Asian Parliaments, London 2023, p. 184.

39 Ibid.

40 Ibid.

41 Article 109, Clause 1 and Clause 4.

42 Article 109 (5).

43 Article 110 (3).

44 Article 93; Rule 7, Lok Sabha Rules.

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II. Absence of Constitutional Empowerment of the "Losers"

Unlike some other jurisdictions, the role of non-governing parties in the constitutional government has not been formally recognised nor prescribed under the Indian Constitution.[45] This lack of constitutional empowerment of the opposition was a contested issue when the Constitution was being drafted. There was a debate in the constituent assembly on whether the post of the Leader of Opposition should be officially recognised.[46] Z.H. Lari, a constituent assembly member, proposed that a Leader of Opposition be recognised under the Constitution and be paid a salary, similar to the practice in the UK.[47] In the UK, the largest non-governing party is given the status of His/Her Majesty's Loyal Opposition and their leader is recognised as the Leader of Opposition.[48] This leads to the formal recognition of the opposition in the constitutional structure.[49]

Lari argued that there is a symbolic value to the recognition of the Leader of Opposition: it allows criticism by the opposition to not be seen as disaffection, but as a discharge of a constitutional obligation.[50] This builds on the principle of loyal opposition in the UK. Waldron has noted that the word "loyal" as the prefix to the opposition enables the opposition to carry out their oppositional role freely without being questioned over "their loyalty" to whatever it may be (the monarch, the constitution or the nation).[51] However, Lari's proposal was rejected based on the argument that non-recognition of Leader of Opposition in the Constitution did not prohibit the creation of a salaried post of the Leader of Opposition in the future.[52] The rejection of the proposal shows that constitutionally entrenching the role of the opposition was a low priority for the majority of constituent assembly members. In fact, some members disparaged the idea on the basis that there was

45 Recognition of Leader of Opposition: Section 73, Constitution of the Republic of Mauritius; Section 57 (2), South African Constitution; Section 74, Constitution of Barbados. Leader of opposition part of the constitutional council: Article 41A, Constitution of the Democratic, Socialist Republic of Sri Lanka; see also *Elliot Bulmer*, Opposition and Legislative Minorities: Constitutional Roles, Rights and Recognition, International IDEA Constitution-Building Primer 22, 9 July 2021, https://www.idea.int/publications/catalogue/opposition-and-legislative-minorities (last accessed 4 December 2024).

46 Constituent Assembly Debates (CAD), Volume 8, 20 May 1949, https://www.constitutionofindia.net/debates/20-may-1949/ (last accessed 4 December 2024).

47 Ibid., paragraph 8.88.5-8.88.10.

48 The creation of the loyal opposition is understood to be a leading principle of the British constitutional structure, even though the UK does not have a codified constitution to embody this principle and it is a statute that defines the Leader of Opposition. See *Jeremy Waldron*, Principles of Loyal Opposition, in: Jeremy Waldron (ed.), Political Political Theory, London 2016.

49 Ibid.

50 CAD, note 46, paragraph 8.88.10

51 *Waldron*, note 48, p. 122.

52 CAD, note 46, paragraphs 8.88.23-8.88.25, 8.88.26-8.88.27.

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no "healthy opposition" and it cannot be created "willy nilly" through the creation of the post of the Leader of Opposition.[53]

In the absence of any constitutional recognition, there is currently only a statutory stipulation of the post under the Salary and Allowances of Leaders of Opposition in Parliament Act, 1977 (LOP Act). The LOP Act provides that the leader of a party in opposition to the government, that has the greatest numerical strength, would be recognized as the Leader of Opposition by the Speaker of the Lok Sabha or the Chairperson of Rajya Sabha.[54] However, the Speaker decided to leave the position vacant from 2014-2024 (two consecutive Lok Sabhas) because Congress, the opposition party having the greatest numerical strength in Lok Sabha, did not have one-tenth of the membership of the Lower House.[55] But this is not a requirement under the LOP Act. While embodiment of the post of Leader of Opposition in a statute should have some meaning, in a state with a codified constitution, the symbolism associated with the failure to follow a statutory provision could come across simply as an irregularity instead of the Speaker's disregard for the constitutional structure itself. Such codification is especially important in younger democracies that are yet to develop shared understandings of constitutional functioning and culture, that are entrenched.[56] The danger of lack of codification of such norms is evident from the Speaker's refusal to appoint a Leader of Opposition for over a decade of BJP's rule.

In the absence of constitutional empowerment of the "losers" of the political game, the losing legislators may rely on the judiciary to protect their rights. However, as we have argued elsewhere, the Supreme Court has been inconsistent in how it intervenes in the legislative process, leaving it uncertain whether it can truly protect the "losing" parties of the political competition.[57] In populist regimes, judiciaries themselves are open to capture[58] and therefore empowering the opposition legislators through constitutional codification remains a better alternative.

53 CAD, note 46, paragraph 8.88.27.

54 Section 2.

55 The requirement of having at least ten percent of seats in the House is listed in the Speaker Directions for being recognised as a political party in the Parliament. However, the numerical strength of party only has functional relevance; that is it enables certain parties to enjoy facilities in the House, see *Maheshwar Nath Kaul / SL Shakdher*, Practice and Procedure of Parliament, Greater Noida 2016, pp. 401-407.

56 *Madhav Khosla*, India's Founding Moment: The Constitution of a Most Surprising Democracy, Cambridge MA 2020, pp. 23-24.

57 *Ramkumar / Singh*, note 15.

58 *David Landau / Rosalind Dixon*, Abusive Judicial Review: Courts Against Democracy, UC Davis Law Review 53 (2020).

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III. Government Control of the Parliament

The Speaker, who is the presiding officer of the Lok Sabha, has vast powers under the Lok Sabha rules. The Speaker has the final say on the admissibility of questions[59], providing consent to motions[60], suspension of members[61] and the adjournment of the House in the case of disruptions[62]. Given their immense powers, the Speaker is expected to act in a neutral capacity. However, in India, the Speaker is not required to sever their connection with the political party on whose ticket they are elected to the Lok Sabha. The Speaker is elected like any other member to the Lok Sabha and their seat is contested. They are not expected to resign from the political party they are affiliated to, once elected as the Speaker, which is typically, the ruling party. At most a convention has arguably developed, where the Speaker affirms, on election, that they belong to the whole House.[63] The affiliation of the Speaker with a political party, and their dependence on it for their election and continuation of tenure raises concerns about their impartiality.

Such concerns have been raised by the judiciary. In a series of cases relating to the anti-defection law under the Tenth Schedule of the Indian Constitution, the Supreme Court has raised concerns about the partisan conduct of Speakers. Under the Tenth Schedule, the Speaker has been given the power to decide defection complaints. A finding of defection leads to the disqualification of a member of the house.[64] The grant of such power was challenged before the Supreme Court on the ground that the Speaker cannot be expected to act as an independent adjudicatory authority.[65] While the majority of the Court upheld the Speaker's jurisdiction to decide defection complaints on the basis that the Speaker holds a high ceremonial office and thus, is expected to behave impartially and with propriety, the minority judgement highlighted that such faith in the office of the Speaker is misplaced. The minority observed that, "[t]he Speaker being an authority within the House and his tenure being dependent on the will of the majority therein, likelihood of suspicion of bias could not be ruled out".[66] In subsequent cases, the fear of the minority came true. Speakers have been repeatedly rebuked in Supreme Court judgements for acting in a partisan manner while dealing with defection complaints.[67]

Another area of government control of the legislature can be seen in the extent to which the non-governing parties and legislators are able to utilise "intra-parliamentary opportuni-

59 Rule 43, Lok Sabha Rules.

60 Rule 56 and 194, Lok Sabha Rules.

61 Rule 374, Lok Sabha Rules.

62 Rule 375, Lok Sabha Rules.

63 *Kaul / Shakdher*, note 55, p. 107.

64 Paragraph 6, Tenth Schedule, Constitution of India.

65 Kihoto Hollohan v. Zachillhu, 1992 Supp (2) SCC 651.

66 Ibid., paragraph 181.

67 See Rajendra Singh Rana v. Swami Prasad Maurya and Others, (2007) 4 SCC 270; Keisham Meghachandra Singh v. Hon'ble Speaker Manipur, 2020 INSC 65.

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ties" to engage in oppositional practice.[68] The parliamentary rules provide them certain opportunities to direct and lead discussions in the Parliament. These include the ability to question ministers during the question hour[69] and raise matters of public importance during the zero hour[70]. Members of Parliament can also move motions of no confidence in the Council of Ministers and motions of adjournment,[71] and they can introduce private member bills (although they are unlikely to pass).[72] However, the ability to exercise these opportunities is limited in practice. First, much depends on the Speaker's discretion to admit motions, take up private member bills and allow discussions on matters of public interest raised by opposition members.[73] Second, there is no dedicated time for the non-governing parties and legislators to lead discussion. Third, agenda-setting powers lie with the government. The Business Advisory Committee (BAC) decides the time for discussion that is to be allotted for government bills and other business.[74] Verma has noted that although BAC is an all-party setup, the governing party has a dominant presence, effectively having a "veto in deciding which business gets taken up when and in what form".[75]

Despite the above structural disadvantages, one space where non-governing parties and legislators can play an active role in influencing the government's legislative agenda are parliamentary committees. Committees are either permanent or appointed for a temporary period and consist of members across parties. There are Departmentally Related Standing Committees, which examine the issues and bills related to the Ministry that have been allotted to them.[76] There are also temporary investigative committees called Joint Parliamentary Committees (JPC) – many of which have been set up to investigate government scams or to examine bills. Commentators have noted that often parliamentary committees function with a spirit of non-partisanship and consensus building.[77] Karwa notes that this deliberative spirit is a result of a lack of broadcasting of committee proceedings unlike parliamentary proceedings. This dis-incentivises members from grandstanding on issues and members can

68 *Garritzmann*, note 10, pp. 4250-4252.

69 Rule 36, Lok Sabha Rules.

70 *Kaul / Shakdher*, note 55, pp. 1050-1051. Zero hour is the period after the question hour where members of the Parliament can raise urgent matters of public interest.

71 An adjournment motion can be used to defer the discussions on the scheduled business of the House to discuss a specific matter of urgent public importance. See Rule 56, Lok Sabha Rules.

72 Rule 65, Lok Sabha Rules; *MN Kaul, SL Shakdher*, note 55, p. 665.

73 Rule 56, 194 and 198, Lok Sabha Rules; See The Week, Parliament Winter Session: Lok Sabha, Rajya Sabha adjourn sessions amid opposition ruckus over Modi-Adani row, 25 November 2024, https://www.theweek.in/news/india/2024/11/25/parliament-winter-session-lok-sabha-rajya-sabha-adjourn-sessions-amid-opposition-ruckus-over-modi-adani-row.html (last accessed 4 December 2024). However, a motion of no-confidence becomes obligatory if 50 or more members have moved it.

74 Rule 288, Lok Sabha Rules.

75 *Maansi Verma*, note 15, pp. 39-40.

76 Rule 331C, Lok Sabha Rules; *MN Kaul and SL Shakdher*, note 55, pp. 622-623.

77 *Balasubramaniam,* note 31, p. 175.

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express their views freely without being bound by the party whip.[78] But the structural issue remains that much is left to the government's discretion. The committee reports can be ignored and often are.[79] Further, the government frequently does not agree to opposition demands of referring a bill to a committee. A motion needs to be moved and adopted to refer a bill to a committee, which needs majority support.

D. Understanding Oppositional Practice in India

In this Part, we set up a theoretical framework to describe and understand oppositional practice in India. The theoretical framework borrows from the existing political theory and constitutional theory literature on opposition as well as democratic representation. We also embed our description of the oppositional practice in the context of the constitutional-institutional features of the Parliament and the current BJP regime. However, these forms of oppositional practice may have relevance for non-BJP periods of government as well.

I. Opposition as a Dispersed Force

First, we argue that a helpful way to understand opposition in India is not through the concept of the largest non-governing party in the Parliament. Rather, to understand opposition as a dispersed force, where the Rajya Sabha, opposition parties (and not just the largest non-governing party) and even the coalition partners of the ruling government should be considered as forming the opposition.

In India, there is no constitutionally embodied differentiation between the "capital-O Opposition" and opposition benches generally, in contrast to what is seen in the UK.[80] However, much of the constitutional empowerment of the "capital-O Opposition" in the UK parliament is based on its ability to be the replacement of the government in the next election. In the UK context, Webber specifically argues for this distinction between the "biggest losers" and other opposition parties to be maintained, not only because of the former's constitutional position, but because it reflects the largest non-governing party's "readiness and expectation of office".[81] Waldron also argues that the two classic functions of the loyal opposition ("capital-O Opposition") are criticising the government and to be the government-in-waiting; and that it is the latter function which is the "main role of the official opposition".[82] Despite such focus on the "capital-O-Opposition", even the UK-focused

78 *Surbhi Karwa*, Parliamentary Rules, The JPC on Waqf Bill, and the Need for Deliberative Culture, Law and Other Things, 9 February 2025, https://lawandotherthings.com/parliamentary-rules-the-jpc-on-waqf-bill-and-the-need-for-deliberative-culture-part-i/ (last accessed on 12 May 2025).

79 *Kapur / Mehta,* note 19.

80 *Grégoire Webber*, Loyal Opposition and the Political Constitution, Oxford Journal of Legal Studies 37 (2017), p. 361.

81 Ibid.

82 *Waldron*, note 48, p. 102.

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scholarship has acknowledged the oppositional role of backbenchers and smaller opposition parties.[83]

The UK is an interesting comparator, both in terms of theoretical reflection and institutional practices, because the Indian Parliament "owes its beginnings to British colonial rule" and has adopted many of the British parliamentary practices.[84] Also, as already noted, the debate on the constitutional empowerment of the opposition in India was framed in relation to the practices in the UK, with Lari explicitly invoking the British principle of loyal opposition. However, unlike the UK, India has experienced two notable phases of dominant party regimes, with the latest being under the BJP.[85] The oppositional party space against a dominant party in such times is more crowded instead of being substantially occupied by a single party, and therefore the largest non-governing party may not in fact be the "government-in-waiting". For instance, in the 2014-2019 Lok Sabha term, Congress, the largest non-governing party, had 42 seats, while in the 2019-2024 Lok Sabha term it had 52 seats. The majority mark in the Lok Sabha is 272 seats. In the 2024 elections, the Congress improved its tally to 99 seats, but it is still significantly behind the BJP, which has 240 seats. Essentially the difference in seats between the BJP and the largest non-governing party, Congress, is significantly higher than the difference between the Congress and other opposition parties. This requires us to take the *opposition benches* more seriously than focusing only on what can be considered as the "capital-O Opposition". These smaller opposition parties (often representing sub-national or community interests) also become crucial players in coalition governments. As potential coalitional partners, they are more likely to influence the legislative agenda of the government, who they may strategically rather than ideologically align with for political power. The definition of opposition can then become more complex in coalition governments, where the government-opposition dichotomy is not as clear.

Finally, the Rajya Sabha can also be considered as a site of oppositional practice. We have discussed above how the constitutional design meant to avoid "duplication of political representation" in the Rajya Sabha.[86] Bhat has argued that Rajya Sabha's "role has gained significance in recent times, owing to the need to check execessive prime-ministerial control over the Executive, and the rise of populist politics that can dominate the lower

83 *Webber*, note 80, pp. 370-371; *Nevile Johnson*, Opposition in British Political System, Government and Opposition 32 (1997), pp. 504-505; For a helpful description of varieties of opposition see *Philip Norton,* Making Sense of Opposition, The Journal of Legislative Studies 14 (2008). Norton also follows the classification of "capital O opposition" and other opposition.

84 *Bhat*, note 38, p. 180.

85 India functioned "more-or-less" as a "dominant party system" under Congress at least at the national level, until the late 1980s from the first elections in 1951-1952 (except the brief electoral loss that Congress suffered as a punishment for the proclamation of Emergency in the mid-1970s). See *Khaitan*, note 2, p. 135.

86 *Bhat,* note 38, p. 184.

https://doi.org/10.5771/0506-7286-2024-4 - am 13.01.2026, 17:10:15. https://www.inlibra.com/de/agb - Open Access -

house and undermine democracy".[87] This branch-focused understanding of the opposition rooted in a system of checks and balances is not new. Polsby, for instance, has argued that in the US "varied forms of opposition are embodied in institutions".[88] While India has a Westminister system that does not maintain a clear inter-branch separation between the executive and the legislature, bicameralism is understood to be a mechanism for "institutionalising and fragmenting opposition".[89] The possibility of the Rajya Sabha engaging in oppositional practice is contingent on the political majority in the Lok Sabha and Rajya Sabha being different. The increasing dominance of the BJP in state elections can then threaten this pole of institutional opposition. However, as we discuss in Part V, the Rajya Sabha has previously been this pole of oppositional practice against the BJP government and the state elections remain a more contested space, making Rajya Sabha still a relevant site of analysis.

We thus argue that instead of employing a definitional lens to understand *who* is the opposition, it is more useful to understand the opposition through oppositional practice – the doing as opposed to the being; the verb as opposed to the noun.This is a more functional conception of opposition.

II. Advocacy as Opposition Function

In a Westminister model, especially arranged around a two-party system,[90] the classic opposition functions are understood to be, as Waldron says, to critcise the government and to prepare as the "government-in-waiting".[91] The first function of government criticism is tempered by the second function. Webber introduces the related idea of "responsible opposition" where the opposition's office-seeking function results in an exercise of a certain self-restraint.[92] Indiscriminate criticism by the opposition can dampen its chances of forming the government as it will lose credibility.[93] Waldron and Webber focus on the "capital-O Opposition" as they conceptualise these classic opposition functions. As Webber concedes, this complication of framing criticism in a manner that does not impede pursuit of office may not affect minor parties who do not expect to hold office.[94] Studies

87 Ibid.

88 *Nelson Polsby*, Political Opposition in United States, Government and Opposition 32 (1997), p. 511.

89 Ibid., p. 512.

90 The two-party system has been noted to have limited application in other systems and over time has failed to characterise the coalition governments in Britain too. See *Robin Best*, How Party System Fragmentation has Altered Political Opposition in Established Democracies, Government and Opposition 48 (2013).

91 *Waldron*, note 48, p. 102.

92 *Webber*, note 80, p. 378.

93 Ibid., p. 376.

94 Ibid.

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on post-socialist oppositions have noted that an additional function of "new oppositions" is to transform "hidden and marginalized issues" into foci of political interest, which "gatekeepers of political system do not allow".[95] While this is helpful, it again works within the binary of what the traditional opposition does as its function, and what new oppositions can offer.

Those engaging in opposition of the government do often aim to replace it either by themselves or by garnering support, but they also engage in a representative function. As Rai points out, members of Parliament "not only make laws and hold the executive accountable, but they also make a 'representative claim' to represent different constitutiences, identity groups and interests".[96] These representative claims may also be made by coalition partners when they oppose the policies of the dominant partner in a coalition government. It is not our claim that the opposition's classically defined functions, especially its office-seeking function, are not relevant. But an expanded notion of oppositional function can help us reflect on the dimensions of oppositional practice that is not captured in these classic functions.

We advance a conception of the opposition's function relying on democratic theories that discuss representation. Here we specifically find Urbinati's account of representation as advocacy enlightening. Urbinati situates her model of representation in the agonistic model of deliberation. This model is anti-rationalistic and finds value in a representative's passionate commitment to their elector's cause. Her representative-advocate sits in contrast with Burke's representative-trustee. Burke's ideal representative is concerned with the general good and employs general reason.[97] A representative-trustee would see deliberation as a rationalistic process where distorted perceptions, and "local prejudices" can be corrected.[98] But a representative-advocate is more interested in interpreting "public interest from the point of view of those in disadvantaged conditions"; their role is to have their claims expressed rather than be responsible to the whole nation.[99] The result is not that general policies are not produced because an advocate is partisan, but that the process of deliberation is not assumed to be revelatory of a definitive truth or good. Rather it acknowledges that decision-making is a fallible process and decisions are open to revision.[100] Disagreement is a part of arriving at decisions; and posing a continued challenge to them.

The oppositional practice in the Parliament carries this advocacy function. Advocacy gives more texture to what the critical function of the opposition is. Further, advocacy is not

95 *Drago Zacj*, Role of Opposition in Contemporary Parliamentary Democracies – The Case of Slovenia, Journal of Comparative Politics 9 (2016).

96 *Shirin M. Rai*, Political Performance: A Framework for Analysing Democractic Politics, Political Studies (2014), p. 2.

97 *Nadia Urbinati*, Representation as Advocacy: A Study of Democratic Deliberation 28 (2000), pp. 773-778.

98 Ibid, p. 773

99 Ibid, pp. 777-778,

100 Ibid, p. 775.

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bound by pursuit of office. Opposition actors engaging in advocacy in the Parliament do not have to necessarily present an alternative programme of general policies for the nation that they would pursue if in office. Rather if they are able to present interests of those who are ignored; those who do not enjoy equal political consideration (identity groups, sub-national groups, ideological groups etc.) – their electors would feel that their *cause* was advocated for publically and they were heard equally. Such oppositional practice is then not simply futile, even if it is merely critical, because it is premised on the principle of "political equality"[101], to simply have a chance to speak. While perhaps an idealised view of the opposition function, it is more expansive – accounting for different forms of opposition (not just "capital-O-Opposition") and bridges the idea of representation to oppositional practice in the Parliament.

Opposition as advocacy is especially relevant in a polity like India, which is divided along many cleavage lines and has a multi-party system, but still lacks a proportional system of representation. At least those groups that are not represented by the political majority in the Lok Sabha can have a right to be heard in Parliament even if they are deprived of a right to decide. For instance, while the BJP has been able to form the government owing to the vagaries of the first past the post system, it has never achieved 51% of vote share in any of the parliamentary elections since 2014.[102] Hence, many Indian citizens remain unrepresented by the BJP and rely on the opposition parties to represent their interests.

We have discussed in Parts I and II how India is turning into a competitive authoritarian regime where alteration of government is becoming increasingly difficult. The office-seeking function of the opposition parties is, thus, constrained. We then need a different metric to assess opposition activity. The question becomes that in the absence of political change, was the opposition able to advocate for the interests of their constituents and challenge the totalising public discourse of a populist government. While we discuss examples of the opposition doing advocacy and de-accelerating governmental agenda as separate categories of oppositional practice for analytical clarity in Part V, advocacy as a broader function not only entails *voicing* different interests, but also extends to *influencing*, *delaying* and *stalling* governmental agenda. Essentially, de-accelerating policy that would damage the interests of the constituents of the opposition. The constituents who are often excluded from the BJP's majoritarian/populist projects would perhaps value a government that is made more conversant with their interests by a noisy and passionate opposition; and whose anti-democratic policies (both under thin and thick conceptions) are subject to the mediating effect of the Parliament. As Nadia puts it, minorities "want an advocate, not a rubber stamp".[103]

101 Ibid, p. 778.

102 BJP's vote share in national elections: 2014 (31%); 2019 (37.3%) and 2024 (36.6%), see e.g., *Abhishek Jha,* From 2014-2024 – 282, 303, 240: Charting shift in BJP's tally, Hindustan Times, 6 June 2024, https://www.hindustantimes.com/india-news/from-2014-2024-282-303-240-charting-shift-in-bjp-s-tally-101717616309825.html (last accessed on 4 December 2024).

103 *Urbinati*, note 97, p. 777.

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III. Debate and Disruption as Tools of Oppositional Practice

If the function of the opposition is advocacy, then what it requires is speech. As Urbinati states, "political exclusion in representative democracy would take the form of *silence*, of not being heard or represented".[104] The Parliamentary procedures and practices are also in many ways built around protecting this speech. Webber discusses that the time spent on debating government bills, asking questions and demanding answers is essentially opposition time.[105] But the space for speech is curtailed in the Indian Parliament. We have discussed the structural features that contribute to it in Part III. These include the lack of control that the opposition has over parliamentary business and agenda and the lack of dedicated time for opposition. However, speech by oppositional actors has also been constrained on account of an illiberal political regime. The BJP government has attempted to instrumentalise Parliament to implement its political projects. This has manifested in frequent irregularities in the legislative process. Kazai has argued that misuse of the legislative process can be understood as a part of the illiberal toolkit.[106]

The BJP has often abused the office of the Speaker. As discussed, the Speaker has vast powers including the ability to certify bills as money bills limiting scrutiny of the bill by the Rajya Sabha. The BJP-led government did not have majority seats in the Rajya Sabha in its first term (2014-2019). During that time, many controversial bills were categorised as money bills to bypass the oppositional oversight of the Rajya Sabha.[107] Another tactic that the government has employed is surprise bills. One such bill was the Jammu and Kashmir Reorganisation Bill, which derecognised Jammu and Kashmir as a state and reduced it to a union territory controlled by the national government. The reorganisation accompanied the abrogation of the autonomous status of Kashmir under the Indian Constitution. The bill was introduced in the Rajya Sabha without prior circulation and with many opposition members raising the concern that it was not mentioned in the list of business.[108] Other methods of intentional subversion of parliamentary procedures include the use of voice votes to

104 Ibid., p. 773.

105 *Webber*, note 80, p. 375.

106 *Viktor Zoltán Kazai*, The misuse of the legislative process as part of the illiberal toolkit. The case of Hungary, The Theory and Practice of Legislation 9 (2021).

107 See for example the Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act, 2016 which was categorised as a money bill. The bill sought to create a biometric identity for Indian citizens. The constitutionality of the classification was challenged before the Supreme Court. While the majority upheld the classification because certain provisions of the legislation dealt with delivery of welfare services charged on the Consolidated Fund of India, the dissenting opinion held that the classification was a 'fraud on the constitution' as the government sought to bypass the Rajya Sabha where it did not have the requisite majority to pass the bill (K. S. Puttaswamy v. Union of India, (2019) 1 SCC 1).

108 *Maansi Verma*, Diminishing the Role of Parliament: The Case of the Jammu and Kashmir Reorganisation Bill, Engage, 16 November 2019, https://www.epw.in/engage/article/diminishing-role-parliament-case-jammu-and-kashmir (last accessed on 4 December 2024).

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pass bills, ignoring requests for recording individual votes[109]; canceling question hours or reducing their scheduled time[110]; sending fewer bills to parliamentary committees[111]; and not taking up private member bills or adjournment motions.[112]

These constraints on speech, on account of both structural instutional factors and an illiberal political regime, pushes oppositional actors to devise other methods of engaging in oppositional practice, like disruptions. A disruption can be understood as a protest where the members of Parliament engage in disobedient conduct.[113] Disruptions can take many forms including crowding the presiding officer's chair, sloganeering, disobeying the directions of the presiding officer, arguing with the presiding officer, taking the floor beyond the scheduled time, interrupting, boycotting etc.[114] Disruptions in India have on occasion been violent, but very rarely.[115] Disruptions can often fall outside the realm of legally permissive conduct, taking the form of civil disobedience.[116] However, in certain institutional contexts like India, they are entrenched as an accepted and tolerated form of oppositional practice and occupy the liminal space between the legal and legitimate.[117] The tacit acceptance of disruptions is also evident from the lack of punishment that typically follows such conduct.[118]

Disruptions have been associated with the decline of the Parliament, much before the BJP became a dominant political force in 2014. The decline of the Parliament as an

109 For example, farm laws controversially liberalising the agricultural sector were passed in the Rajya Sabha through voice votes. This was contested but a division was not held. *Sobhana K. Nair*, Parliament proceedings | Rajya Sabha passes two farm Bills amid fierce protests, The Hindu, 20 September 2020, https://www.thehindu.com/news/national/parliament-proceedings-rajya-sabha-passes-2-farm-bills-amid-ruckus-by-opposition-mps/article61724177.ece (last accessed on 4 December 2024).

110 News18, After Opposition Uproar, Question Hour of 30 Minutes to Be Held in Parliament's Monsoon Session, 04.09.2020, https://www.news18.com/news/politics/after-opposition-uproar-question-hour-of-30-minutes-to-beheld-in-parliaments-monsoon-session-2847379.html (last accessed on 4 December 2024).

111 Less than 20% of bills were sent to committees in the last Lok Sabha (2019-2024), see PRS, Functioning of 17th Lok Sabha, https://prsindia.org/parliamenttrack/vital-stats/functioning-of-the-17th-lok-sabha (last accessed on 4 December 2024).

112 Only two private member bills were discussed out of the 729 bills that were introduced in the last Lok Sabha (2019-2024); no adjournment motion was taken up in the last two Lok Sabhas (2014-2024), Ibid.

113 *Spary / Armitage /Johnson,* note 19, p. 182.

114 Ibid., pp. 182-184.

115 *Ronojoy Sen*, House of the People: Parliament and the Making of Indian Democracy, Cambridge 2023, p. 131

116 Rules 349, 352, Lok Sabha Rules.

117 *Sen*, note 115, p. 143.

118 Ibid.

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institution is often linked to the rise of coalition era governments post-1989.[119] However, disruptions by themselves were not a new practice: Morris's work on the early years of the Parliament reveal that disruptions were always a part of the opposition's toolbox, albeit perhaps not as routine.[120] The decline thesis claims that there has been a deterioration in the standard of debates and discussions in the Parliament, disruptions being a prominent marker of it, which reduces public faith in representative institutions and politicians.[121] Further, disruptions are understood to be antithetical to the idea of rational deliberation in the Parliament.

We have already discussed how the advocacy function of the opposition provides an alternative model of anti-rationalistic deliberation. But advocacy by opposition though requiring a passionate oppositional practice may not, by itself, require disruptive behaviour. What it does, however, require is the possibility of speech. Here, Habermas's theory of discursive democracy can be useful. While he also relies on the idea of rational deliberation, he acknowledges that such deliberation can only take place in a conducive deliberative forum. It is his articulation of the conditions for deliberation that we are interested in rather than his emphasis on rationality of deliberation. Habermas notes that in a deliberative forum, all voices are treated equally and given an opportunity to be heard in a manner that fosters consensus.[122] However, as elaborated above, the Indian parliamentary processes do not facilitate such deliberation and instead systematically negate a space for discursive democracy.

However, the binary between disruption and deliberation can also be superfluous. Disruptions themselves can be seen as an act of speech as much as they are a consequence of denial of speech. It is often difficult to demarcate *contention* and *deliberation* in political participation, as deliberation includes disagreement and contestions.[123] Articulation of disagreement could be informed by disapproval and resentment that manifests in sloganeering or other disruptive practices.[124] Even Habermas views disruptions as an extension of public deliberation and as a mode of public argument in contexts where there is no conducive environment for deliberation.[125]

Disruptive acts in the Indian Parliament have been accompanied by the greater democratisation and indigenisation of the Parliament, where it has become more heteroge-

119 *Rahul Verma / Vikas Tripathi*, Making Sense of the House: Explaning the Decline of the Indian Parliament amidst Democratisation, Studies in Indian Politics 1 (2013), p. 184.

120 *WH Morris*, Parliament in India, Philadelphia 1957, p. 142.

121 *Verma / Tripathi*, note 119, p. 162.

122 *Jürgen Habermas*, Deliberative Politics, in: David Estlund (ed.), Democracy, Oxford 2002, pp. 107-126.

123 *Ricardo Fabrino Mendonça / Selen Ercan*, Deliberation and protest: strange bedfellows? Revealing the deliberative potential of 2013 protests in Turkey and Brazil, Policy Studies 36 (2015), p. 271.

124 Ibid.

125 Ibid.

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nous in terms of caste and class composition. Sen has observed that this has changed what constitutes legitimate "tenor and idiom of debates".[126] Disruptions have been "justified by claims to democratic inclusion and allowing marginalised voices to be heard" on issues that are important to them.[127]

We do not deny that sometimes disruptions may just be frivolous. They might not meet the normative ideal of engaging in a *form of speech* that enhances political representation, especially in contexts of structural-institutional and political suppression. But the hand-wringing over disruptions and how they impact parliamentary productivity is too simplistic a view of the complex function disruptions perform in the Indian Parliament. Crucially, opposition often relies on disruptions and other forms of parliamentary practices in a synergistic fashion.[128]

In this part, we aimed to show that parliamentary speech can take the form of legally permissive parliamentary processes like debate on the floor of the house, discussion in committees, raising questions etc., but also through disruptions. This makes debate and disruptions the tools of oppositional practice. We discuss in Part V how disruptions along with other parliamentary practices have been used to carry out an advocacy function and to de-accelerate the government's populist majoritarian projects.

E. Oppositional Practice and Populist Projects

Despite structural constraints and subversion of parliamentary procedures by the BJP, the opposition has attempted to carry out oppositional practice. This practice has been carried out by a diverse range of actors including all sorts of opposition parties, the Rajya Sabha (especially when it had a different political majority than Lok Sabha), and even BJP's coalition partners[129]. In this Part, we provide examples that illustrate the elements of the oppositional practice that we have discussed above.[130] We do not claim that these examples are representative of the full gamut of oppositional practice that has emerged during the

126 *Sen*, note 115, p. 149.

127 *Spary / Armitage / Johnson,* note 19, p. 204.

128 *Vernon Hewitt / Shirin Rai*, Parliament: in Niraja Jayal, Pratap Bhanu Mehta, The Oxford Companion to Politics in India, Oxford 2010, p. 35.

129 Although we do not discuss this in detail, BJP faced opposition from its coalition partner, Akali Dal, over the passing of what are popularly known as the "farm laws". These were three laws that were passed for the creation of a private market for sale of agricultural produce, which would have adversely affected the interests of smaller farmers. The passage of the bills also led to a huge civil unrest. The farm bills led to a fall out between the BJP and its ally Akali Dal, see *Jatinder Kaur Tur*, Farm bills: Farmer unions in Punjab ask political parties to stay away from their protests, Caravan Magazine, 25 September 2020, https://caravanmagazine.in/agriculture/farm-bills-unions-ask-political-parties-to-stay-away (last accessed on 4 December 2024).

130 We engage in a form of illustrative theorising which attempts to show that theoretical ideas "have some meaningful basis in existing empirical reality". Dixon and Perham discuss illustrative theorising in the context of comparative engagement. While our examples focus on India, the category of illustrative theorising generally captures what we are attempting to do, see *Rosalind*

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BJP government. We rely on the text of parliamentary debates, texts of bills, academic material and news reports to build our analysis in this section.

I. Ideological Advocacy

The ideological advocacy that we see from oppositional actors is against the nature of the BJP regime itself, i.e, its populist and illiberal character. We discuss two instances of such advocacy: the response to the demonetisation scheme, and the protests that followed the mass suspension of opposition legislators from the Parliament.

On November 8, 2016 the Union government issued a notification stating that specified bank notes would cease to be legal tender with effect from the very next day i.e. November 9, 2016.[131] This was popularly known as the demonetisation scheme. The move culled 86% of the currency notes in circulation. The entire scheme was initially implemented through executive notifications. Prime Minister Narendra Modi acted unilaterally without consulting relevant governing bodies. The Cabinet and the Reserve Bank of India were informed just hours before the action despite it being a "major policy intitiative".[132] Modi's aim was to present himself as a crusader against black money, although the effect of demonetisation on black money is contested. The means of implementing demonetisation simply through executive notification has also been considered legally dubious.[133]

Demonetisation scheme did not go unchallenged in the Parliament. The policy was "poorly implemented and caused enormous hardship" to the people, especially the poor.[134] Intially, the opposition attempted to use legally permissive practices to debate the issue. Many members of the opposition parties filed motions in the Lok Sabha[135] to adjourn the business of the house and discuss the demonetisation issue under Rule 56 of Lok Sabha Rules. However, these motions were not entertained by the Speaker.[136] The rejection of these motions led to various interruptions in the proceedings of the House. However, these disruptions were not empty obstructionism. For instance, when members of the House

Dixon / Elisabeth Perham, Theorising Constitutions Comparatively, Comparative Constitutional Roundtable UNSW, 23 May 2025 (on file with the authors).

131 Gazette Notification No. S.O. 3407(E); See also Vivek Narayan Sharma v. Union of India, 2023 SCC OnLine SC 1, paragraph 6.

132 *Amrita Basu*, Narendra Modi and India's Populist Democracy, Indian Politics and Policy 1 (2018), p. 94.

133 When demonetisation was challenged before the Supreme Court, the dissenting opinion held that demonetisation of currency could not have been carried out through an executive act and required an ordinance or a legislation. See Vivek Narayan Sharma v. Union of India, 2023 SCC OnLine SC 1. It was only on 30th December 2016 that an ordinance was introduced to implement demonetisation, which became a legislation in February 2017 - Specified Bank Notes (Cessation of Liabilities) Act, 2017.

134 *Basu*, note 132, p. 95

135 Parliament Digital Library ("PDL"), Lok Sabha Session on 16 December 2016, p. 11.

136 Ibid., p. 11.

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were walking up and standing near the table of the Speaker to protest, the opposition legislator, Mallikarjun Kharge expressed that the opposition parties were demanding for the adjournment motion to be admitted to discuss the difficulties faced by the poor, the labourers, daily wage earners and small shop-owners.[137] These groups rely on an informal cash-based economy and had to stand in long queues at banks to return demonetised notes. This session of the Parliament continued to see massive disurptions, with eventually 2 bills being passed out of the 19 listed.[138]

We would argue that the disruptions opened a discursive space. The continuous disruptions over demonetisation made news and contributed to the public discourse. While some questioned the effect of disruptions on the productivity of the Parliament[139], the protests in Parliament highlighted the distaste of the BJP government for parliamentary debate; perhaps even its inability to withstand such debate. This is because populists often offer "overly simple, unsustainable, and even counterproductive solutions to complex policy problems"[140], which parliamentary debates can expose. The opposition parties catching on to government's escapism on this issue questioned the government's attempt to "run away" from debate in the Parliament.[141]

An even clearer case of opposition practice that exposed the illiberal nature of the BJP regime relates to the protests that took place outside the Parliament when a large number of opposition legislators were suspended. At the time, the BJP-led government had launched an ambitious legislative initiative to replace the colonial era criminal laws using the rhetoric of decolonisation. However, the rhetoric was without much substance because the new bills retained most of the "colonial logic of command and control" of the old laws.[142] But the claims of indigenisation and the use of Hindi titles for the laws aligned well with the populist politics of the ruling government. The controversial aspects of these bills would have generated substantial parliamentary debate and opposition, however, the Speaker resorted to mass suspensions of members of the Lok Sabha when the bills were being considered. Around 100 members were suspended for misconduct, which is the highest in

137 Parliament Digital Library, Lok Sabha Session on 18 November 2016, pp. 7, 9. Notice the use of the Hindi word' 'व्यवधान' which means interruptions.

138 PRS, Vital Stats: Parliament Functioning in the Winter Session 2016, https://prsindia.org/session-track/winter-session-2016/vital-stats (last accessed on 4 December 2024).

139 *K.S Venkatachalam*, Demonetisation has paralysed India's Parliament, The Diplomat, 8 December 2016, https://thediplomat.com/2016/12/demonetization-has-paralyzed-indias-parliament/ (last accessed on 30 June 2025).

140 *Mansbridge / Macedo*, note 22, p. 67

141 *Aurangzeb Naqshbandi / Bhadra Sinha*, In Parliament and Supreme Court, questions over demonetization singe government, Hindustan Times, 10 December 2016, https://www.hindustantimes.com/india-news/in-parliament-and-supreme-court-questions-over-demonetisation-singe-govt/story-1TW1bJgcuUTyLcdl5ffbxJ.html (last accessed on 30 June 2025).

142 *Abhinav Sekhri*, Decolonising Criminal Law, Verfassungsblog, 4 September 2023, https://verfassungsblog.de/decolonising-criminal-law/ (last accessed on 4 December 2024), DOI: 10.17176/20230904-183210-0.

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any term of the Lok Sabha so far.[143] Similarly, the Chief Election Commissioner and Other Election Commissioners (Appointment, Conditions of Service and Term of Office) Bill, 2023 was also passed by the Lok Sabha in the absence of suspended opposition members. Those opposition party members who did participate in the proceedings opposed the bill.

The explanation given by the Speaker for the suspensions was that these legislators had engaged in disruptive behaviour over a demand to discuss a parliamentary security breach, which the government had refused to discuss. However, the fact that such important bills were passed when the suspensions were in order points to a more sinister violation of a principle of deliberative democracy. The suspended opposition members staged protests outside the Parliament, strategically sitting on the steps of the Parliament whose doors they could not enter. They sat with plycards having a picture of Modi stating that the Indian democracy was under siege.[144] The mass suspensions of members and protests were reported in both national and international media.[145] The suspensions were also criticised by civil society organisations.[146] The protests outside the Parliament demonstrated the autocratic tendencies of the ruling government.[147] Populist autocrats of today are different from autocratic leaders of yesterday. They do not rely on democratic overthrow but claim to represent the will of the common people; thus, the narrative that they have democratic legitimacy is important for them.[148] The disruptions and protests give the appearance that the opposition is not being heard. The opposition itself has been sent to the Parliament by the people through elections. It signals to the public that all is not well and their political representation is being impeded by the government in power.

143 PRS, Parliament Functioning in Winter Session 2023, https://prsindia.org/files/parliament/session_track/2023/vital_stats/Vital_Stats_Winter_Session_2023.pdf (last accessed on 4 December 2024).

144 *Meryl Sebastian*, Parliament winter session: India opposition fury as 141 MPs suspended, BBC, 19 December 2023, https://www.bbc.com/news/world-asia-india-67724698 (last accessed on 4 December 2024).

145 Ibid.; The Newslaundry Team, A record India should not be proud of: Editorials slam suspension of 141 Opposition MPs, The Newslaundry, 20 December 2023, https://www.newslaundry.com/2023/12/20/a-record-india-should-not-be-proud-of-editorials-slam-suspension-of-141-opposition-mps (last accessed on 4 December 2024).

146 *Chakshu Roy*, Let them speak: Suspension of MPs shows Parliament must find better ways to engage, Chakshu Roy, Indian Express, 20 December 2023, https://prsindia.org/articles-by-prs-team/let-them-speak-suspension-of-mps-shows-parliament-must-find-better-ways-to-engage (last accessed on 4 December 2024).

147 *Hannah Ellis-Petersen*, Indian Government accused of attack on democracy as 141 MPs suspended, The Guardian, 19 December 2023, https://www.theguardian.com/world/2023/dec/19/indian-government-accused-attack-democracy-mps-suspended-modi-bjp (last accessed on 4 December 2024); *Rahul Bedi*, Indian Government accused of 'demolishing democracy' after mass suspensions of opposition MPs, Irish Times, 20 December 2023, https://www.irishtimes.com/world/asia-pacific/2023/12/20/indian-government-accused-of-demolishing-democracy-after-mass-suspension-of-opposition-mps/ (last accessed on 4 December 2024).

148 *Mansbridge / Macedo*, note 22, pp. 60-62.

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Suspended legislators sitting on the steps of the Parliament with plycards[149]

II. Minority Advocacy

The opposition parties in India sometimes, rightly so, have been accused of being silent on issues relating to Muslims.[150] The hesitation stems from the populist rhetoric of the BJP that is aimed at delegitimising any advocacy on behalf of Muslims by opposition parties as 'minority appeasement' which harms the interests of Hindus. The opposition in the fear of alienating their Hindu voters then prefers to remain silent to actively opposing the BJP's anti-Muslim policies.[151] However, opposition's advocacy for Muslims was apparent when the Waqf Amendment Bill 2024 was introduced in the Parliament. The Waqf Act of 1995 was introduced to regulate Waqf property (a permanent dedication of property for a religious purpose recognised in Muslim personal law) through Waqf boards. The bill, *inter alia*, sought to change the composition of the Waqf boards to include non-Muslim members.

Kanimozhi Karunanidhi, representing the Dravida Munnetra Kazhagam, a regional party, opposed the Waqf Bill, when it is was introduced, for being against Muslims.[152] Opposition members like Supriya Sule and K Radhakrishnan insisted that the Waqf Bill

149 The Newslaundry Team, note 145.

150 Apoorvanand, Opposition's Shocking Silence in the Face of Anti-Muslim Violence, The Wire, 25 June 2024, https://thewire.in/communalism/oppositions-shocking-silence-in-the-face-of-anti-muslim-violence (last accessed on 4 December 2024).

151 *Jaffrelot / Tillin,* note 21, pp. 148-149.

152 Lok Sabha, Synopsis of Debates, 8 August 2024, https://sansad.in/getFile/Synop/18/II/SYN_08082024_ENG.pdf?source=loksabhadocs (last accessed on 24 May 2025).

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required consultation among the stakeholders.[153] The opposition members demanded that the bill be referred to a JPC.[154] As we discuss, parliamentary committees can be forums for the opposition to influence legislation. However, the recommendations of the JPC report were not incorporated and the Bill was tabled for discussion again in April 2025.

While the opposition was unable to modify the legislative proposal, it did carry out the task of advocacy. An unusual 12 hour debate took place in the Lok Sabha before the Bill was passed on April 2, 2025.[155] The debate was not only long but heated, which made the contested nature of the bill apparent in the media.[156] The criticism of the bill arose from various parties. During the debate, Akhilesh Yadav highlighted that the Bill by including outsiders in the Waqf board aimed to "deprive our Muslims brothers of their rights and dimnish their importance and control".[157] Even members of the previous coalition partner of the BJP, Akali Dal, argued that the bill was a reflection of the ruling party's politics of Hindu-Muslim polarisation and interfered with minorities.[158] Midhun Reddy emphasized that with the Muslim population in the country being almost 14.06 per cent, their concerns must be addressed.[159] The bill was passed in the Lok Sabha with a narrow margin of 288 members who voted in favour, and 232 who opposed it. The significant opposition to the bill both in the debate and numbers, by diverse parties representing different communities and regions (some of which are in power in state governments) cast Muslims as legitimate participants in Indian democracy. This public and formal opposition of BJP's ideological politics, of which Waqf bill was an example, challenges the hegemonic status of Hindu nationalism in India and its bidding of Hindus as the "exclusive people".[160]

III. De-acceleration

Here we discuss two instances where oppositional practice led to some delay and modification of the original legislative proposal of the government. Specifically, the technique of disruption was employed by the oppositional actors, functioning in synergy with other legally permissive parliamentary practices like scrutiny by parliamentary committees, to achieve this impact.

153 Ibid.

154 Lok Sabha, Report of the Joint Committee on Waqf (Amendment) Bill 24, January 2025.

155 *Sanndeep Phukan,* Lok Sabha passes Waqf Bill after 12-hour debate, The Hindu, 3 April 2025, https://www.thehindu.com/news/national/waqf-bill-does-not-interfere-with-religious-practices-of-muslim-community-says-home-minister/article69405292.ece (last accessed on 24 May 2025).

156 *Cherylann Mollan*, India passes controversial bill on Muslim properties after fierce debate, BBC, 4 April 2025, https://www.bbc.com/news/articles/cwyn87ly1pqo (last accessed on 22 May 2025).

157 Lok Sabha, Synopsis of Debates, 2 April 2025, https://sansad.in/getFile/Synop/18/IV/SYN_02042025_MERGED_ENG.pdf?source=loksabhadocs (last accessed on 24 May 2025), p. 11

158 Ibid., p. 34

159 Ibid., p. 21.

160 See on populist politics and "exclusive people", *Mansbridge, Macedo*, note 22, p. 63,

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The government's populist politics includes preservation of patriarchal family structures driven by religious notions of Hindutva morality.[161] This was captured in the controversial The Surrogacy (Regulation) Bill, 2016 which was tabled in the winter session of 2016. The bill intended to eliminate the practice of commercial surrogacy by providing that only a close relative of an intending couple can be a surrogate mother.[162] Further, only a married heterosexual couple could avail surrogacy under the bill.[163] The bill excluded single parents, same-sex couples and cohabitating couples from availing surrogacy. This conservative posturing falls into alignment with global trends in right wing populist campaigns that seek to preserve traditional family values, control female sexuality and are anti-LGBTQ rights.[164] Incidentally, the bill was not initially passed in the Parliament due to the demonetisation disruptions.[165] Disruptions on account of demonetisation, thus, served a dual function of both advocating (as we discuss above) and de-accelerating other legislative agendas. This surrogacy bill was later referred to a parliamentary standing committee on January 12, 2017.[166] After subsequent amendments and referrals to standing committees, the bill became a law in the form of the Surrogacy (Regulation) Act, 2021 providing wider access to surrogacy compared to the 2016 bill. The Act allowed single women (divorced or widowed) to avail surrogacy.[167] It also removed the condition that the surrogate had to be a close relative to allow any 'willing woman' to be a surrogate.[168] In its final form, the Act still preserves certain moralistic features excluding same-sex and cohabitating couples (an issue which was raised by the opposition[169]). However, the opposition was able to delay the passage of the bill, compel the government to refer the bill to parliamentary committees and modify aspects of the proposed legislation.

Similar to the *Waqf* project, the government had previously attempted to marginalise and 'other' Muslims through the criminalisation of *triple talaq*. Here too, disruptions helped in modifying the legislative agenda. In 2017, the Supreme Court declared the

161 *P.M. Aarthi*, Silent Voices: A Critical Analysis of Surrogacy's Legal Journey in India, Social Change 49 (2019), p. 344.

162 Section 4 (iii) (b) (II), The Surrogacy Regulation Bill 2016.

163 Section 2 (g), The Surrogacy Regulation Bill 2016.

164 *Dubravka Zarkov*, Populism, Polarization and Social Justice Activism, European Journal of Women's Studies 24 (2017), p. 197.

165 PRS Winter Session, Legislation, https://prsindia.org/sessiontrack/winter-session-2016/bill-legislation (last accessed on 4 December 2024).

166 PRS, Department-related Parliamentary Standing Committee on Health and Family Welfare One Hundred Second Report The Surrogacy (Regulation) Bill, 2016 https://prsindia.org/files/bills_acts/bills_parliament/2016/SCR-%20Surrogacy%20Bill,%202018.pdf (last accessed on 4 December 2024).

167 Section 2 (s), Surrogacy (Regulation) Act 2021.

168 Section 4 (iii) (b) (II), Surrogacy (Regulation) Act 2021.

169 *Jimmy Jacob*, After Opposition Objections, Centre Refers Surrogacy Bill To Select Panel, NDTV, 21 November 2019, https://www.ndtv.com/india-news/after-opposition-objections-centre-refers-surrogacy-bill-to-select-panel-2136564 (last accessed on 4 December 2024).

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practice of *triple talaq*, an Islamic form of divorce, unconstitutional.[170] Under this form of divorce, a Muslim husband could unilaterally divorce his wife by pronouncing *talaq* (divorce) thrice. While the petition was supported by certain organisations working with Muslim women as a much needed gender justice reform,[171] the ruling government saw this as an opportunity to not only support nullification of this form of divorce under personal law but to criminalise the practice.[172]

The BJP has for long communalised the issue of Muslim personal law by actively projecting Hindu personal law as progressive and Muslim personal law as regressive.[173] This is in stark contrast to the position of the Indian women's movement which has highlighted the discriminatory practices within all personal laws, including Hindu law, and have advocated for community led-reform.[174] After the judgment, the government immediately introduced The Muslim Women (Protection of Rights on Marriage) Bill, 2017 in the Lok Sabha criminalising *triple talaq*. The bill was passed in the Lok Sabha on the very same day. Knowing that the bill would be met with resistance, the law minister introduced the bill with certain amendments in the Rajya Sabha. The amendments made the offence cognizable[175] only if the complaint was made by the wife against her husband, or her relative. Thus, limiting the scope of a complainant under the bill.[176] The proposed amendments also made it easier to obtain bail under the bill and allowed the compounding of offences.[177] This shows how opposition can leverage the fear of de-acceleration to push a populist government to dilute its own legislative proposals.

However, despite the changes, the bill was not passed in the Rajya Sabha and lapsed. The BJP tried to introduce the bill again in 2018 but was not able to pass it in the Rajya Sabha and had to rely on issuing ordinances as a stop-gap measure to implement the bill.[178] Only after the 2019 Lok Sabha elections, when the BJP returned to the Lok Sabha with full majority and it had more seats in the Rajya Sabha (still not meeting the majority mark), was it able to pass the bill.[179] Then too, the bill passed with a narrow margin with 99 votes

170 Shyara Bano v. Union of India, (2017) 9 SCC 1; In India, there is a patchwork of statutory and non-statutory personal laws that govern marriage and divorce depending on the religious sect one belongs to.

171 Bebaak Collective and the Centre for Study of Society and Secularism.

172 Sections 3 and 4, The Muslim Women (Protection of Rights on Marriage) Bill 2017.

173 *Nivedita Menon*, A Uniform Civil Code in India: The State of the Debate in 2014, Feminist Studies 40 (2014).

174 Ibid.

175 Arrest can be made by a police officer for a cognizable offence without a warrant.

176 PRS, Notice of Amendments, https://prsindia.org/files/bills_acts/bills_parliament/2017/Triple%20Talaq%20Notice%20of%20Amendments.pdf (last accessed on 30 June 2025).

177 Ibid.

178 *Sohaira Siddiqui*, Triple Talaq and the Political Context of Islamic Law in India, Journal of Islamic Law 2 (2021), pp. 24-27.

179 Ibid.

https://doi.org/10.5771/0506-7286-2024-4 - am 13.01.2026, 17:10:15. https://www.inlibra.com/de/agb - Open Access -

for the bill and 84 against.[180] While the bill passed eventually, there was a delay of two years and the BJP had to continuously confront opposition leaders stalling parliamentary proceedings with the law minister even observing that the opposition had been "creating ruckus" leading to adjournments.[181] This example shows how the opposition can impede a populist government's drive to execute its projects with "temporal efficiency and rapidity".

F. Conclusion

In this article, we have sought to highlight the role parliamentary opposition can play in populist regimes to protect democracy. The study of parliamentary responses by opposition becomes important because of the electoral hegemony many populist regimes are able to establish by blocking channels of political change. In this context, we discuss how different oppositional actors in the Indian Parliament can play a role in advocating for political minorities and a democratic liberal order; and de-accelerating legislative agendas of the government. We specifically highlight how the much-maligned use of parliamentary disruptions, which were understood to be creating a state of "gridlock and dysfunction"[182] during the era of the coalition governments (pre-2014), can now be seen as presenting opportunities to protect democracy and constitutionalism. The disruptions are often deployed in tandem with the use of legally permissive parliamentary processes: for instance, disruptions may compel the government to allow legislation to be sent to parliamentary committees or to allow parliamentary debates to be held. We do not aim to conclusively comment on the state of oppositional practice in India; rather we intend to start a dialogue on what parliamentary opposition is, what it does and what it can possibly do in constrained democratic conditions.

Through our article, while we have noted the subversion of the Indian Parliament, we have also attempted to tell the story of democratic resilience and resistance. It is not our claim that the parliamentary opposition has been the most successful political force against rising populism and authoritarianism in India. However, we intend to complicate the narrative that the Indian Parliament has been completely neutralised with the rise of

180 Ibid.; see also Indian Express, Triple Talaq: How Rajya Sabha Voted to Pass Landmark Bill, 30 July 2019, https://indianexpress.com/article/india/triple-talaq-how-rajya-sabha-voted-to-pass-landmark-bill-5864693/ (last accessed on 4 December 2024).

181 India Today, Opposition Stalls Triple Talaq Bill in Rajya Sabha, 1 January 2019, https://www.indiatoday.in/mail-today/story/opposition-stalls-triple-talaq-bill-in-rajya-sabha-1421289-2019-01-01 (last accessed on 4 December 2024).

182 *Tarunabh Khaitan*, The Real Price of Parliamentary Obstruction, https://india-seminar.com/2013/642/642_tarunabh_khaitan.htm (last accessed on 4 December 2024).

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populism. It still remains an important site of advocacy and de-acceleration against populist projects.


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Control Through the State of Exception: Opposition, Surveillance, and Fragmentation under Chinese Digital Authoritarianism

By *Jieren Hu*[*] and *Johannes Rossi*[**]

Abstract: To understand the mechanism of social governance employed to facilitate surveillance and exert control over popular contention and organized opposition in the People's Republic of China by and beyond the law, we introduce the concept of "rightful control". Based on a theoretical exploration illustrated by typical cases, we examine the impact of the legal and political order constraining opposition in China. We show that the flexible use of information technology in China and its normalization by law enhance social control beyond traditional modes of dispute resolution. While digital technology opens vectors of mobilization for opposition movements, its governance empowers preventive repression, significantly restricting the potential of collective activism. Further, we explore the typology and theory of those state responses to social conflict between legality and the state of exception. The findings provide a theoretical understanding of the legal and political mechanisms of digital authoritarianism and its implications for political opposition in China.

Keywords: State of Exception; Political Opposition; Cyberspace; Authoritarian Legality; China

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"Tyrann und Märtyrer sind im Barock die Janushäupter des Gekrönten. Sie sind die notwendig extremen Ausprägungen des fürstlichen Wesens. [In the baroque tyrant and martyr are the Janus-heads of the crowned. They are the necessarily extreme incarnations of the princely character.]"[1]

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1 *Walter Benjamin*, Gesammelte Schriften, Frankfurt am Main 1991, p. 249.

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A. Introduction

In the People's Republic of China (PRC) political opposition is heavily restricted.[2] Where nonetheless popular contention rises, it is to be appeased, repressed – or predicted and prevented ahead of its eruption. Therein the Chinese cyberspace, a datafied, virtual reality of social networks, media, and applications specifically structured and governed under the auspices of the party-state, is contested. Here popular contention simultaneously forms and is engaged. The digital space enmeshing Chinese society serves as a medium for counter-articulation in social conflicts, an early warning system, and a tool of suppression.[3] Thus, the social governance of cyberspace is a necessity for the party-state to facilitate surveillance and exert control over popular contention and organized opposition.

Now, how exactly does the party-state govern its cyberspace and simultaneously the articulation of discontent in social conflicts? What characterizes the mechanism of social governance it employs in different types of cases? What are its implications?

To contour a typology of state responses to social conflict in the no-man's-land of the "state of exception" between the public legal order and political fact, seized by authoritarian rule, we use the conceptual term "rightful control"[4]. In the following, we show that the flexible use of information technology in China and its normalization by law enhances social control beyond traditional modes of dispute resolution. Subsequently, we explore the theoretical characteristics of the relationship between authoritarian legality and the state of exception exemplified by typical cases. Drawing from those findings, we explicate the theoretical underpinnings of this mechanism of authoritarian governance in China. We propose that *Walter Benjamin,* prior to *Carl Schmitt,* illuminates the character of this "blend

2 *Han Zhu / Lu Jun*, The Crackdown on Rights-advocacy NGOs in Xi's China: Politicizing the Law and Legalizing the Repression, Journal of Contemporary China 31 (2022), pp. 518-538; *Diana Fu / Greg Distelhorst*, Grassroots Participation and Repression under Hu Jintao and Xi Jinping, The China Journal 79 (2018), pp. 100-122. Increasingly this also affects Hong Kong (SAR), see *Peter Baehr*, Hong Kong Universities in the Shadow of the National Security Law, Society 59 (2022), pp. 225-239; *Stuart Hargreaves*, Hong Kong Surveillance Law: From 9/11 to the NSL, Verfassungsblog, 4 April 2022, https://verfassungsblog.de/os6-hong-kong-surveillance/ (last accessed on 15 October 2024), DOI: 10.17176/20220404-131156-0.

3 See regarding the dual-nature of datafication especially in the case of Hong Kong: *Yao-Tai Li / Katherine Whitworth*, Coordinating and Doxing Data: Hong Kong Protesters' and Government Supporters' Data Strategies in the Age of Datafication, Social Movement Studies 23 (2023), pp. 355-372.

4 This mirrors as its counterpart the concept of "rightful resistance" as developed by *Kevin J. O'Brien / Li Lianjiang*, Rightful Resistance in Rural China, Cambridge 2006, and *Kevin J. O'Brien*, Rightful resistance, World Politics 49 (1996), pp. 31-55. Instead of describing the individual and collective challenge of the legitimacy of political authority "near the boundary of an authorized channel" (p. 33), it conversely theorizes how the party-state attempts to maintain legitimacy and control in the face of popular contention through exercising political power using techniques at the edges of the law, see *Jieren Hu*, Dispute Resolution and Social Governance in Digital China, London 2024, pp. 50 ff.

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state", where authoritarian legality and the state of exception are blurred into each other to limit oppositional potential and contentious political mobilization.

B. Technologies of Control and the State of Exception in China

I. Emerging Conflicts and Authoritarian Legality

This is a vulnerable world, and crises are precarious situations. Their resolution requires a swiftly acting community, yet in this state of emergency, there is an equal risk of neglecting any limits to executive power. In the face of danger, constitutional rights may be restricted or suspended, and the legal order itself subordinated to the primacy of executive power. A temporary suspension can quickly evolve into a permanent one, effectively institutionalizing the state of exception. Realistically, in an order that is concerned with continuity and stability, the entire legal framework will neither be completely suspended until the restoration of normalcy nor can full adherence to all (constitutional) legal provisions be maintained. During the *état de siège*, while to a certain degree still legally delimited, the legal order is subjected to the necessity of a "kenomatic state, an emptiness of law"[5]. Its nature and (temporal) extent is determined by the sovereign.[6] For authoritarian regimes, danger looms wherever the political stability of the dictatorship faces an oppositional threat from groups excluded from power.[7] In the welfare state ("Vorsorgestaat")[8] of the risk society[9], where in the face of vulnerability the state becomes concerned with preparedness and resilience,[10] the concept of the state of exception increasingly transforms into a kind of preventive law of flexible governance. Ordinary (emergency) decree law integrates into the legal order that is supposed to be preserved, without suspending it in the strict sense. The law of the "anticipated state of exception"[11] allows for context-appropriate, flexible crisis management without suspending the normativity of the law of normalcy.

5 *Giorgio Agamben*, Ausnahmezustand: Homo Sacer II.1, Frankfurt a.M. 2004, p. 59.

6 *Carl Schmitt*, Politische Theologie: Vier Kapitel zur Lehre von der Souveränität, Berlin 2021 [1922], p. 13; with a critical account of Schmitt's concept of the state of exception to be noted: *Panajotis Kondylis*, Jurisprudenz, Ausnahmezustand und Entscheidung, Der Staat 34 (1995), p. 357.

7 *Milan W. Svolik*, The Politics of Authoritarian Rule, Cambridge 2012; *Yongshun Cai*, Power structure and regime resilience: Contentious politics in China, British Journal of Political Science 38 (2008), pp. 411-432.

8 *Ernst Forsthoff*, Rechtsfragen der leistenden Verwaltung, Stuttgart 1959.

9 *Ulrich Beck*, Risikogesellschaft: auf dem Weg in eine andere Moderne, Frankfurt 1986.

10 See *Stephen J. Collier / Andrew Lakoff*, The government of emergency: Vital systems, expertise, and the politics of security, Princeton 2021.

11 *Tristan Barczak*, Der nervöse Staat: Ausnahmezustand und Resilienz des Rechts in der Sicherheitsgesellschaft, Tübingen 2020, p. 350.

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In China, where Schmittian conceptions of sovereignty and decisionism have been well received and highly influential,[12] governance through and beyond executive decrees poses long-term challenges to its authoritarian legality and rule by law. Party-state punishment of corrupt officials due to a moral emergency,[13] or the promulgation of emergency laws without a normative constitutional restraint on state power,[14] bear witness to the practical application of the state of exception. Particularly when there is no legal containment of the state of exception, a "permanent state of emergency"[15] is capable of eliminating even the last remnants of "normal" legality, a balancing act haunting China's legal system. More daunting though is the transformation of legality towards the permanence of the state of exception in the preventive state.

Whereas the state of exception and its theoretical implications in (liberal) democracies have received broad scholarly attention,[16] its occurrence in authoritarian systems has been somewhat overlooked – partly because authoritarian regimes, in particular in the PRC under the all-encompassing leadership and absolute authority of the party,[17] were presumed to lack the normative and normalized (democratic and constitutional) legality which ought to be a presupposition of its exception.[18] Certainly, the legal order in China is subject to certain political-executive guidance also in its assumed state of normality, for example, through so-called "red-head documents" (*hongtou wenjian* 红头文件).[19] Nonetheless, the

12 *Libin Xie / Haig Patapan*, Schmitt Fever: The use and abuse of Carl Schmitt in contemporary China, International Journal of Constitutional Law 18 (2020), pp. 130-146.

13 *Shaoying Zhang / Derek McGhee*, State of exception: The examination of anticorruption Practices, in: Shaoying Zhang / Derek McGhee (eds.), China's Ethical Revolution and Regaining Legitimacy: Reforming the Communist Party through Its Public Servants, London 2017, pp. 109-134; see also *Johannes Rossi*, Disciplinary Action and Oversight of the Administrative State in the "Institutional Cage": The Revised Supervision Law of the People's Republic of China, German Journal of Chinese Law 32 (2025), pp. 4-14.

14 *Jacques Delisle*, States of exception in an exceptional state: Emergency powers law in China, in: Victor V. Ramraj / Arun K. Thiruvengadam (eds.), Emergency Powers in Asia: Exploring the Limits of Legality, Cambridge 2010, pp. 342-390.

15 *Alan Greene*, Permanent States of Emergency and the Rule of Law: Constitutions in an Age of Crisis, Oxford 2018, p. 33.

16 Besides, "backsliding democracies" or "electoral authoritarians" point to the fact that the distinction between democratic and authoritarian rule is of gradual nature, see further *Fabio Wolkenstein*, What is democratic backsliding?, Constellations 30, no. 3 (2023), pp. 261-275. Likewise, aspects of authoritarian legality creep into systems in transition incrementally.

17 *Donald Clarke*, Order and Law in China, University of Illinois Law Review 2 (2022), p. 552; *Zhong Zhang*, Ruling the Country without Law: The Insoluble Dilemma of Transforming China into a Law-Governed Country, Asian Journal of Comparative Law 17 (2022), pp. 198-221.

18 *Qianfan Zhang*, A constitution without constitutionalism? The paths of constitutional development in China, International Journal of Constitutional Law 8 (2010), pp. 950-976; *Carl F. Minzner*, China's turn against law, The American Journal of Comparative Law 59 (2011), pp. 935-984.

19 *Hu*, note 4, pp. 67 ff.; *Luo Dameng* 罗大蒙, *"Hongtou wenjian" luanxiang: biaoxian, yuanyou yu zhili* "红头文件"乱象：表现、缘由与治理 [Illegal "Official Documents": Phenomena, Reason

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rule by law exercised in the PRC amounts to a system of authoritarian legality.[20] Exceptions in this system are both a tool for a "rule by fear"[21] and the management of the "other".[22] In regard to this authoritarian legality, still an understudied theoretical space of how authoritarian governments use the state of exception, not to attain but to maintain control, exists.

In the shadow of the legal-theoretical considerations towering above social conflicts, specifically the areas of privacy, e.g. regarding the issue of compulsory online identification, digital health during and in the aftermath of the COVID-19 pandemic, and the exercise of religious freedom especially by ethnic minorities, are contested. The establishment of Social Credit Systems (SCS) has received extraordinary attention,[23] which could anticipate a potential combination of those fragmented conflicts into one unified system of "dataveillance"[24] or hyper enforcement in a "data state".[25] Yet, it is to be noted, that to date no such system exists, and in the current stage of development the SCS is limited to fragmented and partly experimental corporate social credit mechanisms or creditworthiness evaluations (under the *zhengxin* 征信 umbrella), but not a comprehensive and constantly updating social credit score determining an individual's general place in society.

The aforementioned conflicts and their technological governance of oppositional potential illustrate the interaction between technology and authoritarian legality in China. Regarding real or perceived crises, the state resorts to the state of exception to restore a supposed normalcy. To this end, it (mis-)appropriates technological means with the tendency to expand its emergency powers to the prevention stage and transform its legality.

and Governance], *Sichuan wenli xueyuan xuebao* 四川文理学院学报 [Sichuan University of Arts and Science Journal] 28 (2018), pp. 51-57.

20 *Taisu Zhang*, Authoritarianism and Legality, Asia Pacific Law Review 32 (2024), pp. 311-321; *Shucheng Wang*, Law as an Instrument: Sources of Chinese Law for Authoritarian Legality, Cambridge 2022; *Susan Whiting*, Authoritarian Legality and State Capitalism in China, Annual Review of Law and Social Science 19 (2023), pp. 357-373; *Hualing Fu / Michael Dowdle*, The Concept of Authoritarian Legality: The Chinese Case, in: Weitseng Chen / Hualing Fu (eds.), Authoritarian Legality in Asia: Formation, Development and Transition, Cambridge 2020, pp. 63-89; *Hualing Fu*, Duality and China's struggle for legal autonomy, China Perspectives 116 (2019), pp. 3-9; *Mary E. Gallagher*, Authoritarian legality in China: Law, workers, and the state, Cambridge 2017; and in clear opposition to *Clarke*: see *Taisu Zhang / Tom Ginsburg*, China's turn toward law, Virginia Journal of International Law 59 (2019), pp. 306-389.

21 *Eva Pils*, China's dual state revival under Xi Jinping, Fordham International Law Journal 46 (2023), pp. 339-376.

22 *Flora Sapio*, Sovereign Power and the Law in China, Leiden 2010.

23 Instead of many: *Björn Ahl / Larry Catá Backer / Yongxi Chen*, Law and Social Credit in China: An Introduction, China Review 24 (2024), pp. 1-15; *Larry Catá Backer,* China's Social Credit System, Current History 118 (2019), pp. 209-214; and specifically *Marianne von Blomberg / Wessel Reijers*, Who Deserves Credit? Banks for the Virtuous in Rural China, Journal of Contemporary China 33 (2023), pp. 955-970.

24 *Claire Seungeun Lee*, Datafication, dataveillance, and the social credit system as China's new normal, Online Information Review 43 (2019), pp. 952-970.

25 *Anne S. Y. Cheung / Yongxi Chen*, From Datafication to Data State: Making Sense of China's Social Credit System and Its Implications, Law & Social Inquiry 47 (2022), pp. 1137-1171.

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II. Digital Mobilization and Opposition: Conflict and Surveillance in Cyberspace

In relation to social conflicts and their governance, first discontent and then opposition can form, whose contention is subsequently carried out in distinct spaces. Mobilization in heavily digitized and connected societies, such as China,[26] first takes place digitally or online,[27] and subsequently, physically discharges in oppositional acts of collective protest, such as the visible eruptions of protest of veterans, investors, or against pandemic measures, from workers and students to the white paper movement.[28] Conversely, the state tries to prevent or contain such outbursts of discontent or worse, organized opposition. Traditional means of dispute resolution and stability maintenance, such as grand mediation,[29] the *Xinfang* (信访) system,[30] flexible governance,[31] relational repression,[32] or service outsourcing,[33] are largely ineffective in defusing online activism. Technological innovation expands the toolkit of governments to mobilize pro-regime support and frame public debate.[34] State-Platform governance is "anthropomorphized" and central authority is obscured through "participatory surveillance" in an effort to govern content creators more effectively.[35]

26 *Justyna Jaguścik / Jessica Imbach*, Digital society in China, Asiatische Studien - Études Asiatiques 76 (2022), pp. 1-9.

27 Over the years a national public sphere has formed online and empowered "netizens": *Ya-Wen Lei*, The Contentious Public Sphere: Law, Media, and Authoritarian Rule in China, Princeton 2018, pp. 129-170; *Ashley Esarey / Xiao Qiang*, Digital Communication and Political Change in China, International Journal of Communication 5 (2011), pp. 298-319.

28 *Kai Yang*, Beyond Parochial Activism: Cross-Regional Protests and the Changing Landscape of Popular Contention in China, Journal of Contemporary China 32 (2023), pp. 280-295.

29 *Jieren Hu*, Grand mediation in China: Mechanism and application, Asian Survey 51 (2011), pp. 1065-1089; *Jieren Hu / Lingjian Zeng*, Grand mediation mechanism and legitimacy enhancement in contemporary China: The Guang'an model, Journal of Contemporary China 24 (2015), pp. 43-63.

30 *Carl F. Minzner*, Xinfang: An alternative to formal Chinese legal institutions, Stanford Journal of International Law 42 (2006), pp. 103-179.

31 *Jieren Hu / Tong Wu / Jingyan Fei*, Flexible governance in China: Affective care, petition disputes and regime legitimacy, Asian Survey 58 (2018), pp. 679-703.

32 *Yanhua Deng / Kevin J. O'Brien*, Relational repression in China: Using social ties to demobilize protesters, The China Quarterly 215 (2013), pp. 533-552.

33 *Ruoting Zheng / Jieren Hu*, Outsourced lawyers in China: Third party mediator and their selective response in dispute resolution, China Information 34 (2020), pp. 1-23; *Lynette H. Ong*, Thugs and outsourcing of state repression in China, The China Journal 80 (2018), pp. 1-17.

34 *Erica Johnson / Beth Kolko*, E-government and transparency in authoritarian regimes: Comparison of national- and city-level e-government web sites in central Asia, Digital Icons: Studies in Russian, Eurasian and Central European New Media 3 (2010), pp. 15-48; *Rory Truex*, Consultative authoritarianism and its limits, Comparative Political Studies 50 (2017), pp. 329-361.

35 *Zhen Ye / Qian Huang / Tonny Krijnen*, Douyin's playful platform governance: Platform's self-regulation and content creators' participatory surveillance, International Journal of Cultural Studies (2024), pp. 1-19.

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Digital technology thus can increase the likelihood of demobilization or prevent social mobilization altogether.[36]

Surveillance is one of the key aspects of information gathering and (preventively) suppressing oppositional movements to maintain control and social stability. Over the last decade, digital surveillance has steadily increased.[37] The structural backbone of surveillance in China is still an extensive network of informants and labor-intensive surveillance tactics made possible and run by the party's Leninist organizational form.[38] Nonetheless, the adoption of hi-tech surveillance capabilities around 2010 has further strengthened the party-state's capacity to implement preventive repression against potential threats.[39] The combination of both labor and tech, prominently in initiatives like the "Grid-Style Management" (*wangge hua guanli* 网格化管理)[40] and the introduction of "Skynet" (*tian wang* 天网), adds to the effectiveness of Chinese techno-authoritarianism.[41] While citizens see government and technology as civilizing forces, the exposure to digital surveillance has left many dissociating.[42] Overall, open surveillance tools, such as SCS or those widely used

36 *Larry Diamond*, Liberation technology, Journal of Democracy 21 (2010), pp. 69-83; *Dragu Tiberiu / Yonatan Lupu*, Digital authoritarianism and the future of human rights, International Organization 75 (2021), pp. 991-1017.

37 *Xu Xu*, To repress or to co-opt? Authoritarian control in the age of digital surveillance, American Journal of Political Science 65 (2021), pp. 309-325; *Fu / Distelhorst*, note 3, pp. 100-122.

38 *Minxin Pei*, The Sentinel State: Surveillance and the Survival of Dictatorship in China, Cambridge MA / London 2023.

39 Ibid.; The techno-surveillance system in China nowadays consists of various different programs, from "Golden Shield" [*jindun gongcheng* 金盾工程], "Skynet" [*tian wang* 天网], "Safe Cities" to "Sharp Eyes" [*rui yan gongcheng* 锐眼工程], and most importantly the databases of the "Key population program" (mostly comprised of ex-convicts, maintained by the police for law enforcement purposes), see pp. 168-179, and the "Key Individuals Program" (maintained by local governments), see pp. 43, 162-167. Their legal infrastructure consists of local laws. Under the guidance of the political legal committees, security organs employ a wide range of innovative products, such as smart sensors, facial recognition or artificial intelligence tools to build and administer databases as well as to track subjects. Whereas for example "Skynet" had initially been a mostly urban program, with "Sharp Eyes" hi-tech mass surveillance has been expanding to the countryside as well.

40 *Xiaolong Wu / Chen Li / Andy Cao*, Party Corporatism in Urban China: Grid Governance and Resurgent Centralism, Journal of Contemporary China 33 (2024), pp. 1037-1052; *Jean C. Mittelstaedt*, The grid management system in contemporary China: Grass-roots governance in social surveillance and service provision, China Information 36 (2022), pp. 3-22.

41 *Samantha Hoffman*, China's Tech-Enhanced Authoritarianism. Journal of Democracy 33 (2022), pp. 76-89.

42 *Ariane Ollier-Malaterre*, Living with Digital Surveillance in China: Citizens' Narratives on Technology, Privacy, and Governance, London 2023.

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during the COVID-19 pandemic,[43] are accepted as necessary, beneficial, or convenient.[44] Thus, dissent often forms only after they become evidently unnecessary or pointless.

III. Preventive Repression: Digital Technology, Legal Normality and Exception

Cyberspace, in its function as a technological sphere of experience and governance, contains an interesting duality. It refers to digitality but also originates from cybernetics, the science of control and regulation of machines, living organisms, and social organizations.[45] Further, it has a specific geography[46] and is therein part of a legally structured normality. It is not only the surveillance state that takes place there, but it is a generally normalized information and communication space for commercial transactions, administrative procedures or judicial activity.[47] It is thus interwoven with all kinds of legal strands, from contract to administrative law, that in turn fosters the adoption of digital technology and furthers legal datafication. Privacy issues permeate the use of this digital space, in particular e.g., in regard to real-name identification on social networks, digital health data, or ("delegated") online censorship.[48] Social governance in China flexibly incorporates new technologies into its legal normality. This incentivized use then offers enhanced possibilities for surveillance, and social control beyond traditional, and legal modes of dispute resolution. The growing

43 *Elena Sherstoboeva / Valentina Pavlenko*, Trends in East Asian policies on digital surveillance tools during the COVID-19 pandemic, Journal of Digital Media & Policy 12 (2021), pp. 47-65.

44 *Genia Kostka / Sabrina Habich-Sobiegalla*, In times of crisis: Public perceptions toward COVID-19 contact tracing apps in China, Germany, and the United States, New Media & Society 26 (2024), pp. 2256-2294; *Genia Kostka / Léa Steinacker / Miriam Meckel*, Between security and convenience: Facial recognition technology in the eyes of citizens in China, Germany, the United Kingdom, and the United States, Public Understanding of Science 30 (2021), pp. 671-690; *Genia Kostka*, China's social credit systems and public opinion: Explaining high levels of approval, New Media & Society 21 (2019), pp. 1565-1593.

45 *Norbert Wiener*, Cybernetics or Control and Communication in the Animal and the Machine, Cambridge MA 2019 [1948]; and on Cyberspace: *Lance Strate*, The Varieties of Cyberspace: Problems in Definition and Delimitation, Western Journal of Communication 63 (1999), pp. 382-412.

46 Think of the "Great Firewall" (i.e. "Golden Shield") and for further references, see *Jun Liu*, Internet Censorship in China: Looking Through the Lens of Categorisation, Journal of Current Chinese Affairs (2024), pp. 1-16, pp. 7-8.

47 Everything, from participatory input of complaints or suggestions to the filing of cases in front of courts can be done using only a few multifunctional (chat-)applications. Regarding the digital judiciary, see *Meirong Guo*, Internet court's challenges and future in China, Computer Law & Security Review 40 (2021), and *Yang Lin*, China's Three Internet Courts, Amicus Curiae 2 (2021), pp. 531-538; and concerning the participatory channels, see *Ge Xin / Jie Huang*, Making the People's Voice Heard: Pathways of E-Participative Governance in China, Journal of Chinese Governance (2024), pp. 1-24.

48 See *Taiyi Sun / Quansheng Zhao*, Delegated Censorship: The Dynamic, Layered, and Multistage Information Control Regime in China, Politics & Society 50 (2022), pp. 191-221; *Jean-Pierre Cabestan*, The state and digital society in China: Big Brother Xi is watching you!, in: Ben Hillman / Chien-Wen Kou (eds.), Political and Social Control in China: The Consolidation of Single-Party Rule, Canberra 2024, p. 164 ff.

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interest in the rise of "digital authoritarianism" emerges after idealistic views of technology and democracy are shattered at the end of the "end of history" and a consolidation of systemic rivalries between (liberal) democracies and authoritarians.[49]

C. A Typology and Theory of Rightful Control under Authoritarianism

Chinese state responses to social conflict are rooted in the theoretical concept of the no-man's-land of the "state of exception" between the public legal order and political fact, that is seized by authoritarian rule. As a counterpart to "rightful resistance"[50], "rightful control" describes means by which the (authoritarian) state exercises political power and control over society through norm- or decision-making.[51] This mechanism legitimizes control through its law-adjacent appearance and appeals to legality, whereby it mirrors the strategy of rightful resisters to turn the law against its sovereign author.

The exercise of "full power"[52] in China does not depend on the enactment of emergency laws, as state power lies within the party. It is part of an authoritarian legality ("governing the country by law" – *yifa zhiguo* 依法治国), which emphasizes the primacy (or "leadership") of the party. While the law applies to the party and its members as well and is not suspended per se, exceptional decisions can surpass it, as no normative checks outside of the party-state exist. In line with this, the party-state flexibly governs the aforementioned cases by law, policy, or beyond law and policy by exerting different types of control along two dimensions, creating zones of rightful control (see Figure 1). The analysis of the Chinese case examples elucidates a typology of state control, in which state responses differ regarding their relation to the law and legal normality.

49 See succinctly *James S. Pearson*, Defining Digital Authoritarianism, Philosophy & Technology 37 (2024), pp. 1-19, p. 2; also *Steven Feldstein*, The Rise of Digital Repression: How Technology is Reshaping Power, Politics, and Resistance, New York 2021.

50 *O'Brien*, note 4, pp. 31-55.

51 *Hu*, note 4, p. 50.

52 See on this concept in democracies: *Clinton L. Rossiter*, Constitutional Dictatorship: Crisis Government in the Modern Democracies, Princeton 1948, p. 5.

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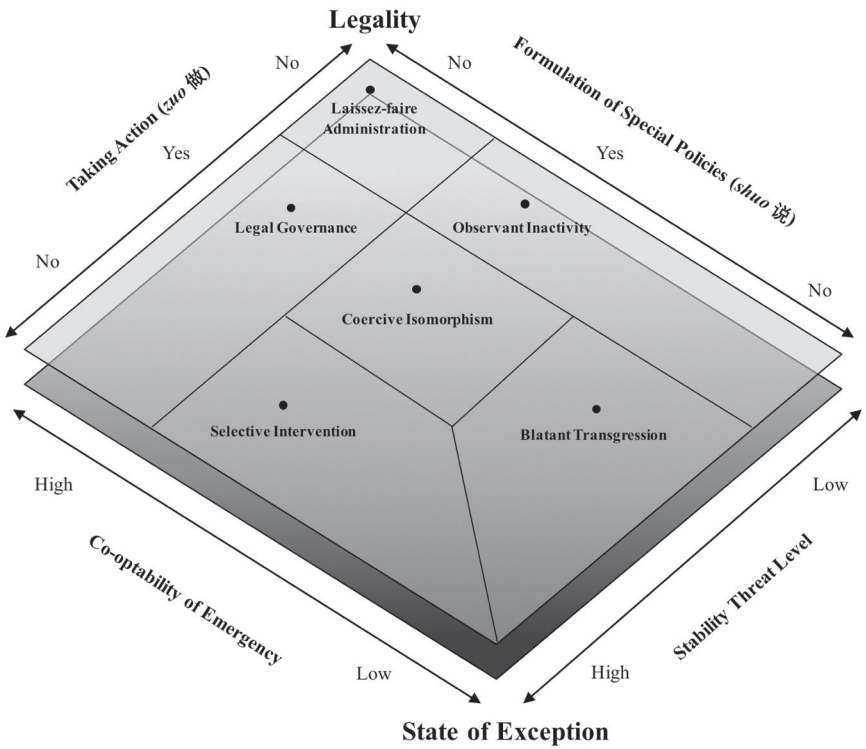

Figure 1: Zones of Rightful Control between Legality and the State of Exception

First, rightful control is, fundamentally, prepared and exercised through the law, where it normalizes and legitimizes certain modes of digital governance and dispute resolution mechanisms through legislation. This encompasses cases, such as the ever-further extension of identification tools prescribed by law, or rules for judicial procedures.

In particular, the points of tension between privacy rights[53] and the surveillance state illustrate the dimensions of such developments. For example, particularly relevant to "netizens" and free speech online is the issue of real-name-identification and online personal information control. In July 2024, the Ministry of Public Security and the Cyberspace Administration of China jointly released a draft proposal for measures to establish a

53 It would be misguided to generally brush off any mention of privacy rights in China. In fact, those rights undisputedly exist "in the books" and spark a lively debate – not necessarily in relation to the surveillance state in general but very practical issues of data governance. See also *Rebecca Ong*, Privacy and personal information protection in China's all-seeing state, International Journal of Law and Information Technology 31 (2023), pp. 349-375.

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(voluntary) system of online identification tokens, i.e., "network numbers" and "network certificates".[54] These government-issued tokens would be linked to official identification documents and could be used by web services for identity verification. Online real-name identification has long been in existence as phone numbers, which are used for signing in virtually everywhere, are linked to IDs. The tokens supposedly add a layer of anonymity in relation to platforms and service providers, because there is no need to share the full real-name information with the providers anymore – nonetheless, the government still retains the ability to trace individual digital conduct. Aside from being a monitoring tool, once authorities deny access to authentication to individuals, they would effectively be barred (or "digitally exiled") from using the Internet, resulting in a further loss of participation in online speech, access to information, and social life. The tokens could become the cyberspace equivalent of cameras and face recognition in public spaces, used to track and control people's virtual behavior.[55]

To preventively disperse large-scale conflicts the PRC has introduced various channels of ODR (see Art. 16 *Civil Procedure Law of the People's Republic of China* as well as the *People's Court Online Litigation Rules* and the *People's Court Online Mediation Rules*), with the effect, that courts denied hearing class-action cases, to split up collective litigation and large-scale activism into separate individual and small-scale cases. Without formulating special policies, the state can curb certain kinds of contention through "legal governance", especially if solutions to the underlying conflicts are relatively easy to coopt.

Second, rightful control can be exercised through policy, where it, for example, promotes the development and use of big data applications.[56] Mostly, this type refers to the formalized surveillance programs and their integration, which not only secure a more efficient flow of information through the party-state hierarchy and act as a deterrent to grassroots action but its function as a supervision and monitoring tool for local governments over their population simultaneously works as an "accountability" tool for its bureaucracy. Initially, those policy-based information-gathering programs are characterized by an "observant inactivity".

54 *Guojia wang luo shen fen ren zheng gong gong fu wu guan li ban fa (zheng qiu yi jian gao)* 国家网络身份认证公共服务管理办法（征求意见稿）[National Measures for the Administration of Public Services for Network Identity Authentication (Draft for Solicitation of Comments)], 26 July 2024, https://www.cac.gov.cn/2024-07/26/c_1723675813897965.htm (last accessed on 30 October 2024).

55 It is to be noted though, that most of the capabilities already exist with the contemporary real-name verification system, which would rather be made more centralized and efficient, see also China Law Translate, On Network Codes and Credentials, 31 July 2024, https://www.chinalawtranslate.com/on-network-codes-and-credentials/ (last accessed on 30 October 2024).

56 For example, the "smart city management system" (*zhihui chengshi guanli xitong* 智慧城管) in cities like Beijing, Shanghai or Hangzhou. Those programs integrate (technological) government capabilities to collect and monitor data in order to enhance decision-making in risk prevention and law enforcement.

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Third and most notably, the party-state is able to exercise rightful control beyond law and policy where it deems necessary. Whereas rightful control by law and policy are strategies of prevention, their transgression usually occurs as a containment tactic *ex post facto*, in the acute moment of the threat or crisis. There characteristically, two dimensions determine the relation of state action to the law – saying (*shuo* 说), i.e. the modification or enactment of special (exceptional) law and policy, and doing (*zuo* 做), i.e. taking specific action, which might violate existing law and policy.

For largely un-sensitive, ordinary cases and general (digital) governance, the state utilizes dogmatic law and general policy, to broadly guide the public and administer the country, in a way that could be characterized as "laissez-faire administration", without neither formulating special policies nor transgressing the legal boundaries (*bu zuo bu shuo* 不做不说). This is the "normal politics" of dynamic authoritarian legality in China.[57] This party-state conduct according to normalized state law is conditional and is abandoned as soon and insofar as the party identifies risks to its rule. Related to that and equally central is "coercive isomorphism", where the party-state issues special policies and acts upon them in transgression of state law (*ji zuo you shuo* 既做又说), most prominently the aforementioned "red-head documents" and campaign-style governance (*yundongshi zhili* 运动式治理).[58] In fact, even though they are of lower legal status than laws and regulations, red-head documents, an icon of party-state executive power, can turn the legal hierarchy on its head where they are used as a direct basis for special administrative measures. In other cases, e.g. in regard to the *Xinfang* system, the state has issued special policies, but only selectively acts upon them in a transgressive manner according to the gravity of the issue, direction, and perceived threat level (*zhi shuo bu zuo* 只说不做).[59]

Contrary to that, and especially in urgent cases with low chances to control oppositional organizing through channels of cooptation, if the state acts without prior formulation of law or policy (*zhi zuo bu shuo* 只做不说), it blatantly transgresses its formalized powers. Local governments for example engaged in the misappropriation of data gathered and digital technology introduced and normalized during the COVID-crisis, such as health codes and tracking records for epidemic prevention, not for the prevention of health risks but to curb social unrest.

57 *Shucheng Wang*, Varieties of Authoritarian Legality, Asia Pacific Law Review 32 (2024), pp. 293-310; *Shucheng Wang*, Authoritarian Legality and Legal Instrumentalism in China, The Chinese Journal of Comparative Law 10 (2022), pp. 154-162.

58 *Bo Yin / Yu Mou*, Centralized Law Enforcement in Contemporary China: The Campaign to "Sweep Away Black Societies and Eradicate Evil Forces", The China Quarterly 254 (2023), pp. 366-380; see also regarding specialized rectifications (*zhuanxiang zhengzhi* 专项整治): *Susan Trevaskes*, Courts and Criminal Justice in Contemporary China, Lanham 2007, and *Susan Trevaskes*, Policing Serious Crime in China: From "Strike Hard" to "Kill Fewer.", Abingdon 2010.

59 See also *Christian Göbel*, The Political Logic of Protest Repression in China, Journal of Contemporary China 30 (2021), pp. 169-185.

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This became especially apparent during the COVID-19 pandemic, where (digital) health emergency measures, formalized in *cordons sanitaires* and other "normative documents", which encroached on individual rights and freedoms of citizens in mega-cities like Wuhan for months,[60] laid the groundwork for their transgressive misappropriation. In the early stages, the state implemented laws[61] and emergency regulations in cities[62] to prevent the spread of the virus. Furthermore, digital technology (prominently through the health code) was integrated into the epidemic control measures. The massive accumulation of data made its misappropriation tempting to those under the pressure of not only containing the virus but also social unrest. Local governments in Henan Province, for example, were found to have used the health codes to target collective activism by freezing local bank accounts of depositors or assigning random risk levels to health codes.[63] Also, the implementation of health monitoring programs, from their data requirements to their consequences, in some cases, violated national health emergency or data protection laws. This could range from excessive data collection, missing privacy agreements of apps, to disproportionate and arbitrary quarantine or testing measures without the rights to appeal.[64]

Beyond that, in the shift from suppression to prevention, the restrictions of religious freedom (Art. 36 PRC Constitution) illustrate the systemic implications where normalized technology meets institutionalized (mis-)appropriation. Where religious opposition movements form and threaten social stability or the state, the state's capabilities in digital tech-

60 *Philipp Renninger*, The "People's Total War on COVID-19": Urban Pandemic Management through (Non-)Law in Wuhan, China, Washington International Law Journal 30 (2020), pp. 63-115.

61 For example: *Zhonghua renmin gongheguo tufa shijian yingduifa* 中华人民共和国突发事件应对法 [Emergency Response Law of the People's Republic of China], https://www.gov.cn/zilia o/flfg/2007-08/30/content_732593.htm (last accessed on 19 October 2024); *Zhonghua wenmin gongheguo zhuanranbing fangzhifa* 中华人民共和国传染病防治法 [Law of the People's Republic of China on the Prevention and Control of Infectious Diseases], http://www.npc.gov.cn/npc/c2/c238/202001/t20200122_304251.html (last accessed on 19 October 2024).

62 See *Shanghaishi renda chagweihui guanyu quanli zuohao dangqian xinxing guanzhuang bingdu ganran feiyan yiqing fangkong gongzuo de jueding* 上海市人大常委会关于全力做好当前新型冠 状病毒感染肺炎疫情防控工作的决定 [Decision of the Standing Committee of the Shanghai Municipal People's Congress on Doing a Good Job in the Prevention and Control of the Current COVID-19 Epidemic], https://www.shanghai.gov.cn/sjzccs/20210825/1285a041b11b4deb932d a3595579ae74.html (last accessed on 19 October 2024); *Shanghaishi gonggongweisheng yingji guanli tiaoli* 上海市公共卫生应急管理条例 [Shanghai Public Health Emergency Management Regulations], https://www.shanghai.gov.cn/sjzccs/20210825/103db87cdc834ead8e3f0861d9cf09d a.html (last accessed on 19 October 2024).

63 *Haiqing Yu / Jesper Willaing Zeuthen*, Local Politics in the Age of Automated Decision-Making in China: A Case Study of the Henan Health Code Scandal, Journal of Contemporary China 33 (2023), pp. 923-937; *Jieren Hu and Xingmei Zhang*, Digital governance in China: Dispute settlement and stability maintenance in the digital age, Journal of Contemporary China 33 (2024), pp. 561-577.

64 For more details on the cases, see *Hu*, note 4, pp. 80-83.

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nology are employed for mass surveillance and social control.[65] Often adopted in counter-insurgency operations around the world, the collection of biometrical data like Iris Scans and DNA in China arguably took place at the edges or outside of the Police Law (Art. 2), Criminal Procedure Law (Art. 132) as well as Anti-Terrorism Law (Art. 50), and is thus also in violation of Art. 37 PRC Constitution, prohibiting for example, "unlawful search", because subjects targeted by the security organs are oftentimes neither victims, suspected terrorists, nor criminal suspects.[66] While there exists a legal framework, the massive data collection and social control exercised in the name of security mostly lacks explicit legal basis[67], but is used in "sweep the black" (*saohei chue* 扫黑除恶) campaigns against organized crime, which happen to target religious minorities and political activism as well. The repression of opposition here shifts to the preventive stage, far before collective action is to take place and demonstrations or riots can take place.

Whereas the first two types of state responses (as exertion of "rightful control by law and policy") are based on officially promulgated and disseminated (quasi-)legal documents, the exertion of control beyond both law and even formalized policy (as its purest utilization of the dictatorial moment in the "state of exception") has serious implications for its legal system and attempts to organize opposition. The types are not always clearly distinguishable but can fluctuate or blend into each other as they are interconnected and build on each other. Law and political power are combined in a hybrid form, constructing authoritarian legality out of the living law within the party.[68] The deterrence effect resulting from its flexibility and unpredictability is largely successful in curbing collective action and is a

65 *James Leibold*, Surveillance in China's Xinjiang Region: Ethnic Sorting, Coercion, and Inducement, Journal of Contemporary China 29 (2019), pp. 46-60; *The Citizen Lab*, A review on the implications of mass biometric data collection and the use of biometric recognition technologies by public security organs in the Tibet Autonomous Region and Qinghai Province on the fulfillment by the People's Republic of China of its international human rights obligations and commitments, Submission to the Special Rapporteur on counter-terrorism and human rights, 21 April 2023, https://www.ohchr.org/sites/default/files/documents/issues/terrorism/sr/cfis/cfi-gs-impact-ct-measures/subm-global-study-impact-cso-citizen-lab.pdf (last accessed on 30 October 2024).

66 *Emile Dirks*, Mass Iris Scan Collection in Qinghai 2019-2022, The Citizen Lab, 14 December 2022, https://citizenlab.ca/2022/12/mass-iris-scan-collection-in-qinghai/ (last accessed on 30 October 2024); *Emile Dirks*, Mass DNA Collection in the Tibet Autonomous Region from 2016-2022, The Citizen Lab, 13 September 2022, https://citizenlab.ca/2022/09/mass-dna-collection-in-the-tibet-autonomous-region/ (last accessed on 30 October 2024); Human Rights Watch, China: Minority Region Collects DNA from Millions – Private Information Gathered by Police, Under Guise of Public Health Program, 13 December 2017, https://www.hrw.org/news/2017/12/13/china-minority-region-collects-dna-millions (last accessed on 30 October 2024).

67 See on the concerns *Lao Dongyan*, The Hidden Dangers of Facial Recognition Technology, 31 October 2019, https://www.readingthechinadream.com/lao-dongyan-artificial-intelligence.html (last accessed on 30 October 2024).

68 See *Jiang Shigong*, Written and Unwritten Constitutions: A New Approach to the Study of Constitutional Government in China, Modern China 36 (2010), pp. 12-46.; *Jiang Feng*, Party Regulations and State Laws in China: A Disappearing Boundary and Growing Tensions, Chinese Law & Government 51 (2019), pp. 260-276.

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core part of the authoritarian legality in the PRC. Legality is subjected to the political necessities of a party-state that reserves the right to make use of its sovereign authority against its enemies at any time. Simultaneously, this normalization of the exception as a determinant and means of governance is as much of a threat to the carefully constructed authoritarian legality as it is its distinct feature.

D. Effects between Dispute Settlement, Fragmented Opposition and Authoritarian Legal Theory

I. From Legal Fragmentation to Fragmented Opposition

A normalization of a functional state of exception and rightful control, i.e. adopting governance according to necessity not law as an implicit mode of operation by the party-state, which can draw on technology formerly normalized through the "ordinary" legal order, leads, in consequence, to the abandoning of popular contention by the law. When and which type of control the party-state adopts in the face of a specific issue is of course determined by the fundamental goals of socio-political stability and regime legitimacy, but equally depends on the hard facets of technology, i.e. which and to what degree digital technologies have been normalized and are thus available for their (mis-)appropriation. "Flexible", limited legality is limiting collective activism and organized opposition, which is either legally coopted in various forms of (legal) dispute settlement mechanisms, and thereby depoliticized,[69] or forced to resort to oppositional tactics like "guerrilla lawyering",[70] and "disguised" assisted individual rights claim-making instead of larger collective action.[71] The state creates a discriminatory political and legal opportunity structure, from funding to legal registration requirements, targeting and moderating resisters. Redirecting efforts through state-led programs and offering close partnerships combined with repressive "crackdowns" atomizes broader contentious efforts by pushing for self-censorship and, even though internal cohesion might be strengthened,[72] diminishing solidarity between different groups. Thus, opposition in China is fragmented both in organizational strategy and scope.

69 *Fengrui Tian / Julia Chuang*, Depoliticizing China's Grassroots NGOs: State and Civil Society as an Institutional Field of Power, The China Quarterly 250 (2022), pp. 509-530.

70 *Yueduan Wang / Ying Xia*, State-Sponsored Activism: How China's Law Reforms Impact NGO's Legal Practice, Law & Social Inquiry 49 (2024), pp. 451-477. On the perils of lawyering, see also *Yongshun Cai / Songcai Yang*, State Power and Unbalanced Legal Development in China, Journal of Contemporary China 14 (2005), pp. 117-134.

71 *Diana Fu*, Disguised Collective Action in China, Comparative Political Studies (2016), pp. 1-29.

72 *Jieren Hu / Lanyu Zhang*, Positive Function of Social Conflict: Decoding State-Church Interaction in China, Chinese Journal of International Review 5 (2023), p. 2350004-1.

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II. Authoritarian Legality and Politics

1. Blurred Transgression and Laboratory Governance

By absorbing the state of exception as its core mechanism, authoritarian legality soaks up theoretical aspects of the state of exception. The Chinese authoritarian formation elevates the sovereignty of the party and with it the exception to its ultimate principle, which finds itself in China's experimentalist governance[73] which shares its nature with the understanding of the state of exception as a "laboratory for testing and honing the functional mechanisms and apparatuses of the state of exception as a paradigm of government."[74] The authoritarian moment here is not so much the absence of the law, but its instrumentalist approach to law in which legality does not depend as much on the distinction between law and non-law. It is not necessary to rely on the construction of a "double-layered constitutional system"[75] with its temporal derogation of law, as the embrace of (permanent) states of emergency creates an elastic legal space for state action.[76] In this anomic zone, the juridical order is constantly blurred. The ambiguity opens it to justifications and legitimizations of measures of rightful control. The absence of normative law in fact is not justified as classical dictatorial power, and is not implied to leave a legal void, but rather operates as rightful control at the edges of legality, and feeds on its legitimacy and aesthetics. Echoing the traces of justification in Agamben's brief history of the state of exception,[77] notions of protracted wars (from "China's war on terrorism"[78] to the "people's war against COVID"[79]) call for the legality and legitimacy of rightful control in China where the securitized state of emergency enables the surveillance state. Paradoxically, the divergence between law and authoritarian legality is simultaneously not a turn away from law, but its characteristic – authoritarian legality is law under reserve, but likewise the blend of law and the permanent

73 *Elizabeth J. Perry*, Blurring the Boundaries of Governance: China's Work Teams in Comparative Perspective, Comparative Political Studies (2024), pp. 1-27, 4; *Wenguang Zhang / Ji Lu, Binbin Song / Hongping Lian*, Experimentalist Governance in China: The National Innovation System, 2003-2018, Journal of Chinese Governance 7 (2021), pp. 1-26; *Madeleine Martinek*, Experimental Legislation in China between Efficiency and Legality: The Delegated Legislative Power of the Shenzhen Special Economic Zone, Berlin 2018.

74 *Giorgio Agamben*, State of Exception, Chicago 2005, p. 7.

75 *Tom Hickman*, Between Human Rights and the Rule of Law: Indefinite Detention and the Derogation Model of Constitutionalism, Modern Law Review 68 (2005), p. 657.

76 See *Stephen Humphreys*, Legalizing Lawlessness: On Giorgio Agamben's State of Exception, European Journal of International Law 17 (2006), pp. 678 f.

77 See *Agamben*, note 74, pp. 15-22.

78 *Martin I. Wayne*, Inside China's War on Terrorism, Journal of Contemporary China 18 (2009), pp. 249-261.

79 *Jue Jiang*, A Question of Human Rights or Human Left? – The 'People's War against COVID-19' under the 'Gridded Management' System in China, Journal of Contemporary China 31 (2021), pp. 491-504.

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state of exception expands and preserves law,[80] which thus can remain a fix point for rightful resistance, as much as it devalues it by instrumentalizing it as a legitimate façade and normalized and normalizing framework for the adjacent rightful control by and beyond law and policy.

2. Blended Legality and the Impossibility of Politics

Instead of predating and distinguishing the parallel normative and prerogative orders in the dual state, the state of exception has become the rule in the "blend state" – it has become immanent. The prerogative state and the legality of its normative code live inseparable as two sides of one coin. Therein, in fact, Walter Benjamin, prior to Schmitt and Agamben, becomes relevant for the understanding of authoritarian legality. Not the particular emergency and political decision of Schmitt's political theology that annihilates the law, but the baroque immanence and the resulting contradictions define the issue of law and its transgression in the Chinese party-state. Benjamin writes of the sovereign function of "the restoration of order in the state of emergency: a dictatorship whose utopian goal will always be to replace the unpredictability of historical accident with the iron constitution of the laws of nature."[81] An ahistorical natural law where "violence that is […] appropriate to natural goals is thereby also legal."[82] The paternalistic, pastoral desire to exclude interruptions,[83] the state of exception *as such*, towards a total stabilization within its absolute reign, and the inability to an admission of limits is authoritarian legal theory's prison – without a place for heterogeneity decision becomes impossible.[84] Schmitt's sovereign transcends state and law, Benjamin's "lord of creatures" remains a creature,[85] absorbing and bound to its world of creation. Because sovereignty here is absolute but immanent, and without transcendence, there is no externality, the state of exception has become the rule. Like Benjamin's baroque

80 Albeit in Agamben's view as a mere "*fictio iuris* par excellence which claims to maintain the law in its very suspension' but produces instead a violence that has 'shed every relation to law", cf. *Stephen Humphreys*, note 76, p. 681, citing *Agamben*, note 74, p. 59.

81 *Walter Benjamin*, The Origin of German Tragic Drama, trans. John Osborne, New York 1998, p. 74.

82 *Walter Benjamin*, Critique of Violence, in: Marcus Bullock / Michael W. Jennings (eds.), Walter Benjamin – Selected Writings. Volume 1: 1913-1926, Cambridge 2004, pp. 236-252, p. 237. And "survival" seems to be the most natural goal.

83 *Xiaoling Zhang / Melissa Shani Brown / David O'Brien*, 'No CCP, No New China': Pastoral Power in Official Narratives in China, The China Quarterly 235 (2018), pp. 784-803; *Rosalind Cooper*, Pastoral Power and Algorithmic Governmentality, Theory, Culture & Society 37 (2020), pp. 29-52.

84 *Samuel Weber*, Taking Exception to Decision: Walter Benjamin and Carl Schmitt, Diacritics 22 (1992), p. 14.

85 *Benjamin*, note 81, p. 85.

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prince, the party-state simply does away with the proper legal distinction.[86] The sovereign, invested with this unlimited hierarchical power, is yet unable to exclude what is his own function. Without space for opposition politics, all that remains is an administration in a blurred juridico-political system that "transforms itself into a killing machine."[87] The disproportion between gathering all power as a "tyrant" and the martyrial inability to arrive at effective decisions devours this order over time.[88] Consequently, rightful control is the state's clinging to power in the permanent state of exception that is immanent in its legality and not during its suspension, but its ruin already rests in itself.

The unaccountable limitation of individual rights, for example, by the illegal use of data and technology, may have a negative impact on social governance in the longer term, where the acceptance of, or at least indifference to state measures, decreases. Rightful control can be seen as a constitutive element of the party-state's juridical normality,[89] but its sovereign transgression of law and policy threatens the popular acceptance of a carefully constructed authoritarian legality.[90] So far, the party-state has proven remarkably adaptive in governing popular contention and victorious in suppressing oppositional forces.[91] The articulation of dissatisfaction, under the looming baton of the "blend state", mostly remains "rights conscious" in the framework of the authoritarian state, and thus protests may emerge, even reinforcing rule where they allow for information and adaptation, but political opposition movements, in the sense of forces for liberalization, democratization, a "bottom-up political transformation", are unable to form effectively to date.[92]

86 *Jay-Daniel Mininger*, The Hermaphrodite Sovereign: Walter Benjamin, Carl Schmitt, and the Permanent State of Exception, Baltic Journal of Law & Politics 3 (2010), p. 149.

87 *Agamben*, note 74, p. 86.

88 *Weber*, note 84, pp. 14 f.

89 Similarly, *Zhang / McGhee*, note 13, p. 115.

90 Some find that information about "repressive potential" – as politically targeted – of certain governance measures reduces their popular support, see *Xu Xu / Genia Kostka / Xun Cao*, Information Control and Public Support for Social Credit Systems in China, The Journal of Politics 84 (2022), pp. 2230-2245. This would suggest that also experiencing or learning of the instrumental transgression of legality – its repressive turn – lessens citizens' acceptance, similar to an "informed disenchantment", see *Mary E. Gallagher*, Mobilizing the Law in China: "Informed Disenchantment" and the Development of Legal Consciousness, Law & Society Review 40 (2006), pp. 783-816.

91 Cf. D.I.

92 See *Sida Liu / Sitao Li*, Rights in China: Myths, Abuses, and Politics, Annual Review of Sociology 50 (2024), pp. 737-755; *Yao Li*, A Zero-Sum Game? Repression and Protest in China, Government & Opposition 54 (2019), pp. 309-335; *Elizabeth J. Perry*, Popular Protest in China: Playing by the Rules, in: Joseph Fewsmith (ed.), China Today, China Tomorrow: Domestic Politics, Economy and Society, Lanham 2010.

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E. Conclusion

This article aims to examine the social governance mechanism employed by the party-state regarding the articulation of discontent in social conflicts, and to structure the state responses to opposition in China. We have laid out a typology of "rightful control" by and beyond law and policy that spans measures characterized as laissez-faire administration, selective intervention, coercive isomorphism, and blatant transgression. The findings provide an understanding of the legal and political mechanisms of digital authoritarianism and its implications for political opposition in China. Technological capabilities acquired and disseminated by the party-state can be legally normalized in ordinary channels for dispute resolution or state measures, while simultaneously offering new avenues for the security apparatus to surveil and control the wider population also beyond (quasi-)legal forms. This produces a variety of state responses to conflicts in the (non-)law superposition. "Rightful control" utilizes information and communication channels, that are opened through (semi-)legal means, firstly, for cooptation and appeasement. Technology disseminated in this way can then also, secondly, be used for surveillance and (preventive) repression. This indicates lessons for changing state-society relations in digital China. Actors will either fall in line through cooptation and appeasement or have to form new strategies for contention in the face of technological social governance. The utilization of vast technological capabilities, the legalization of the surveillance state, but at the same time the instrumental suspension of its (few) legal delimitations, not as an exception but as its legal technique make oppositional collective organizing and action a perilous matter.

Furthermore, the article explored the theoretical characteristics of the relationship of authoritarian legality and the state of exception. Similar to (liberal) democracies, authoritarian regimes may suspend their (authoritarian) legality in times of crisis, but the theoretical underpinnings of the state of exception permeate the legality even during its times of normalcy as a core governance mechanism. Rather than a temporary reversal of legislative and executive power, normal legal norms can also be transgressed whenever the state considers oppositional behavior to be a threat to the state and social stability. However, the more recourse is made to instruments aside from the law, the more the carefully constructed image of an authoritarian legality cracks.

Through the theoretical structuring and exploration exemplified by cases, this article contributes to the understanding of authoritarian control governing contention in China. "Rightful control", whose analysis through typology was attempted here, significantly expands the tools for justification of the actions of the party-state limiting oppositional potential and contentious politics. Nonetheless, as it feeds off a nucleus of legality, it cannot exclude its mirror image: "Rightful resistance" likewise will remain one channel for potential creative oppositional action of those conscious of their rights.

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Dictatorships and Democracy: Dissecting the Role of Political Opposition in Pakistan

By *Marva Khan Cheema*[*]

Abstract: This article categorizes Pakistan as a hybrid regime, as opposed to one operating under deep state, by tracing the roots of military dominance to the colonial Martial Race Theory. In this context, the article dissects who constitutes as political opposition using the lens of legal realism. The article starts by a mapping of relevant laws to explain the legal role of political opposition and compares it to the status of political opposition in the Westminster system, and highlights key differences with the Indian system. The article then posits that in the context of Pakistan's political and legal history, the political elite has consistently served as the *de facto* opposition. While the military establishment's preference for political parties has changed over the years, even in times of direct dictatorial rule, the military regimes have recurrently held elections. Similarly, the establishment has also used political parties with little to no representation in the legislature, along with various statutes as a tool for controlling and curbing the status and influence of the political elite who have, or have had, sizeable representation in the legislative bodies.

Keywords: Hybrid Regime; Establishmentarian Democracy

***

A. Introduction

August 2025 will mark seventy-eight years to Pakistan's creation. During this time, the country has had a series of dictatorships, interspersed with some periods of democracy, and more recently, hybrid regimes. A hybrid regime is one that appears 'democratic in form but not in substance'.[1] The country has also adopted three constitutions to date: 1956-1958, 1962-1969, and the current one, enacted in 1973. The 1973 Constitution has been in place for over 50 years; however, it has also been suspended multiple times under the dictatorships of General Zia-ul-Haq and General Pervez Musharraf and was significantly altered by both**.** During this half-century, Pakistan's constitutional framework has oscillated between a parliamentary system and a semi-presidential system – where the Pakistani

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1 *Mohammad Waseem*, Political Conflict in Pakistan, in: Christophe Jaffrelot (ed.), Comparative Politics and International Studies Series, London 2021, p. 217.

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president was far more powerful (domestically) than the American president; and with the military establishment branding the politicians as corrupt since the inception of this country. Over the years, the military establishment has used the judiciary to legitimize each coup upon its imposition, to enable the hybrid regimes to rule without impunity, and to sideline political opposition, even going so far as to have a former Prime Minister Zulfikar Bhutto sentenced to death.

In this socio-political milieu, this article aims to understand what and who comprises the political opposition in Pakistan. The article aims to provide a historical analysis to contextualize the legal role of the political opposition in Pakistan. The legal role is expounded by demonstrating how the black letter law, including the 1973 Constitution, the National Assembly and Senate Rules of Business, amongst other laws, define and empower the opposition, highlighting the importance associated with the leader of the opposition. However, approaching the topic from the perspective of legal realism, we find that throughout history, the conventional understanding of how the political opposition is defined, particularly across the scholarship covering the Global North, does not effectively apply in Pakistan's context. Even though the Constitution and other statutes, rules and regulations provide a comprehensive understanding of the parliament and its powers, the actual functionality of each organ of the state, particularly the parliament, is predicated on supra-constitutional interventions of the establishment. Whether the intervention is in the form of direct imposition of martial law, or behind the scenes maneuvering, the clash since the inception of Pakistan has been between a dominant power in the region that now constitutes the northern provinces of Pakistan, and newly emerging political elite close to the creation of Pakistan in 1947.

The reliance on legal realism, as opposed to other theoretical frameworks, is used to highlight the stark distinctions between theory, legal texts, and the practice of how Pakistan's legal-political system functions. Moving beyond the constitutional framework is essential for understanding how Pakistan's governance system is a hybrid one. While over time, several theorists have relied on the deep state model to explain Pakistan's regulatory system, I argue, in light of our 78-year history, the hybrid system is a more apt way do categorize Pakistan, particularly in terms of how the recent decades have unfolded. This article does not use the lens of deep state to illustrate the establishment's intervention for a few reasons: the establishment has been working openly as more of a part of the political system,[2] rather than a clandestine operation;[3] the military has frequently held elections with "unfree competition",[4] even in times of direct dictatorial rule, seeking some form of

2 *Steven Levitsky / Lucan A. Way*, Competitive Authoritarianism: Hybrid Regimes After the Cold War, Cambridge 2010.

3 *Kevin G. Steven / Dennis A. Gioia*, Identity, Organizational Memory, and Learning: The Case of the FBI's Deep State, Journal of Management Studies 41 (2004), pp. 577-601; *Michael J. Glennon*, National Security and Double Government, Oxford 2014.

4 *Andreas Schedler,* Electoral Authoritarianism: The Dynamics of Unfree Competition, Boulder 2006.

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political legitimacy from the public and to appear somewhat democratic,[5] unlike a deep state where the source of legitimacy is often outside electoral purview;[6] and the visibility is such that people often criticize the political elite by appealing to the Chief of Armed forces.

Subsequently, the next section of this article analyses the historical clash between these political elite and the establishment, viewing the political class as the *de facto* opposition of Pakistan. The narrative starts from the creation of Pakistan in 1947 marred by a political vacuum. The country was unique geographically; with an over 1000 miles difference between the East Pakistan (that later succeeded to form Bangladesh in 1971) and West Pakistan. The initial years after creation were marked by unstable political rule struggling to create a constitution for the geographically and politically divided country and passed the first constitution with a parliamentary system in 1956. The 1956 Constitution and democratic rule were upended in 1958 by Field Marshal Ayub Khan – who also promulgated the second constitution (1962-1969) – and was succeeded by General Yahya Khan (1969-1971). The fall of East Pakistan in 1971 led to a brief period of civilian rule by Zulfikar Bhutto, founder of the Pakistan People's Party (PPP) (1971-1977) whose government drafted the third and current constitution of Pakistan; followed by General Zia-ul-Haq (1977-1988) – responsible for Zulfikar Bhutto's execution. General Zia's death in 1988 led to a tumultuous game of musical chairs between Benazir Bhutto (PPP) and Nawaz Sharif (PML-N), until General Pervez Musharraf's coup (1999-2008). 2008-2018 saw civilian rule – one complete five-year term by PPP followed by PMN(N) completing the 5-year term; followed by a hybrid model that continues till today, despite change in military and civilian leadership – move from "Project Imran" and PTI, to his downfall in 2022.

The article will also highlight how political parties who do not have any representation in the Parliament have been used as a coercive tool against political forces who have fallen out of favor with the military establishment like the Tehreek-e-Labaik Pakistan (TLP), which has been used to destabilize democracy. While no religious political party has ever come into power, with many like Jamat-e-Islami (JI) and Jamiat-e-Ulema-e-Islam (JUI) and their respective splinter groups only winning a handful seats across the Parliament and provincial assemblies, however, they have been recurrently used to serve in cabinets and oppositions, depending on the tilt of the establishment. Thus, within the category of *de facto* opposition, the article also creates a further distinction: those political entities who have gained favor or support from the military, versus those who have been typecast as the anti-state, corrupt villains. This narrative is then further corroborated by initiating

5 *Larry Diamond*, Elections Without Democracy: Thinking about Hybrid Regimes, Journal of Democracy 13 (2002), pp. 21-35; *Johannes Gerschewski*, The Three Pillars of Stability in Authoritarian Regimes: Legitimation, Repression, and Co-optation, Democratization 20 (2013), pp. 13-33.

6 *Firat Türkmen*, The Deep State in Turkish Political Culture: A Genealogy of the Concept, Third World Quarterly 36 (2015), pp. 1930-1946.

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a wide range of corruption allegations across various anti-corruption agencies existing in Pakistan.[7]

I. Contextualizing Pakistan's Parliamentary System

Pakistan's current legal and political system is very much ingrained in its colonial origins. In fact, the imperial elements imposed by the British were very much used by those in power against Pakistan's own citizens.[8] All three constitutions of Pakistan drew heavily from the last constitution statute of United India – The Government of India Act, 1935 – which also served as the governing law till Pakistan's first constitution was promulgated almost nine years after the country gained independence. The All India Muslim League, the legacy of which and its splinter groups still form an integral part of Pakistan's legal and political landscape, was formed as a reaction to the lack of Muslim representation of the Indian National Congress.[9] Interestingly, some frequently used repressive tools for curbing political opposition used today, like preventive detention, were also introduced during the colonial period.[10] While the All India Muslim League was created to recognize the diversity present within the Indian subcontinent, soon after partition and creation of Pakistan in August 1947, the Muslim League became the single dominant political party, and consequently it and its splinter groups became dominantly Punjabi Muslims, and have frequently been an agent of curbing dissent and denying heterogeneity within Pakistan.

With the exception of the 1962 constitution, both the constitutions of 1956 and 1973 entailed a parliamentary form of government, deriving inspiration from the Westminster model. This sentence in itself illustrates the primary distinction between the two systems. Although Pakistan's parliament, which holds constituent powers,[11] presumes that the constitution reigns supreme, it is the supra-constitutional forces, particularly the military establishment, that dictate when the constitution will and will not function. On the other hand, the English Parliament reigns supreme in the absence of a written constitution, however, the constitutional conventions are strong enough to ensure consistency and certainty in various

7 These include the regular police and prosecution departments, the Federal Investigation Agency (FIA), the Anti-Corruption Establishment (ACE), and the National Accountability Bureau (NAB). All these agencies have jurisdiction to investigate and prosecute civilians on corruption allegations. The exception being that none of these have jurisdiction to try members of the armed forces and the superior courts (high courts and supreme court).

8 See generally *Jallaluddin Abdur Rahim*, Outline of a Federal Constitution, in: Jallaluddin Abdur Rahim (ed.), Pakistan People's Party, Political Series, Lahore 1969.

9 *Belkacem Belmekki,* The Formation of the Indian National Congress: A British Manoeuvre?, Revista de filología inglesa 29 (2008), pp. 21-41; *Nadeem Shafiq*, Formation of the All-India Muslim League and its Response to some Foreign Issues – 1906 – 1911, Journal of Politics Studies 169 (2012).

10 Rowlatt Act 1919; *Sadaf Aziz*, The Constitution of Pakistan – A Contextual Analysis, London 2017.

11 See Article 238 and 239 of the 1973 Constitution.

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functions. From our perspective, the legal and political role of the opposition is fairly certain in the Westminster system, with it being one of the oldest democratic systems still in place, which also grants it a certain amount of legitimacy. The Parliament, once elected, has the Prime Minister as the leader of government, who then appoints their cabinet. In parallel, a leader of the opposition is appointed along with their shadow cabinet. The successive maintenance of this convention, coupled with the oversight of the opposition, or the 'government in waiting', acts as an internal check on the ruling party, which adds to the legitimacy.[12] Furthermore, key conversations regarding law and policy making, and implementation happy amongst these leaders, which also implies that a key consideration in the weight assigned to each voice in this conversation stems from the numbers that support them within the legislature, and the ensuing cabinet.

Against this backdrop, it must be noted that there are variances in the parliamentary systems that emerged around the world, even amongst states which were formally British colonies. In 1947, the decolonization of the Indian Subcontinent resulted in two nation states: India, which was the successor, and Pakistan, which was the succeeding nation.[13] Soon after Pakistan's inception, there was also a large influx of American assistance to the Pakistani military which further bolstered their control over the system.[14] Subsequently, civil war amongst the Eastern and Western parities of Pakistan resulted in the succession and formation of Bangladesh in 1971. When looking at the functionality of political parties and consequently opposition in India, we find clear distinctions between them and Pakistan, despite seemingly inheriting the same governance system from the former colonial masters. Dr Waseem writes:

> *"Punjab – the power base of Pakistan [also the most populous province of the country] was already a semi-military state in British India.[15] Sindh was a backward region of Bombay Presidency in terms of developing representative institutions at the local level. Most of Balochistan was a region of indirect rule… In this way, the territories that constituted (West) Pakistan had weak institutions of self - rule as compared to India."[16]*

12 While concerns of using the First Past the Post System for election does raise questions about lack of representation which can chip away from legitimacy of the formation of Parliament and consequently the government, however, the scope of this article is restricted to how oppositions function, more than the electoral system used.

13 *Waseem*, note 1, pp. 218-231.

14 *Pervez Hoodbhoy,* Pakistan: Origins, Identity, and Future, London 2023.

15 *Clive Dewey*, The Rural Roots of Pakistan Militarism, in: D. A. Lowe (ed.), The Political Inheritance of Pakistan, London 1991, pp. 260-262.

16 *Waseem*, note 1, p. 149. See also Dr Muhammad Ali Shaikh, History: How Punjab came to Dominate the Army, Dawn News, 5 March 2023, https://www.dawn.com/news/1740463 (last accessed on 12 December 2024).

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One of the reasons for Punjab's representational dominance within the military was further bolstered by the Martial Race Theory,[17] which Pakistan's military appears to have continued using. This predicated that people belonging to Punjab and the North West Frontier Province (now Khyber Pakhtunkhwa province) were 'martial races' and consequently fit to join the services of the Imperial Army.[18] This resulted in over half of all recruits of the British Army in India coming from Punjab,[19] and the resulted in the dominance of Punjab in the establishment's policies post partition. It does further set a backdrop for why two former Prime Ministers assassinated, through court,[20] and in the streets[21] belonged to Sindh – the land of non-martial races.

Another key distinction between the Indian and Pakistani frameworks is that the Pakistani system allows for multiparty system to exist.[22] The Indian National Congress did not face much contestation after 1947 at the center, as was evident from the first three general elections.[23] This is further evident that Congress was not able to effectively address the massive and sudden rise of BJP. This is also why they were unable to formally form opposition on the floor of the *Lok Sabha* for almost a decade, until the 2024 general elections. Even at this juncture, there was still no third party strong enough to warrant sufficient competition, consequently resulting in the formation of the Indian National Developmental Inclusive Alliance (INDIA) coalition. On the other hand, Pakistan has a huge plurality of political parties, which either have direct numerical strength across legislative houses, or have enough influence (such as JUI-F and MQM) which grants them a seat at most contested negotiations. The main avenue, however, for parties with minority seats and those sitting in the opposition to be dominant is by reliance on supra-constitutional support from the military establishment.

While the political dynamics in the UK and India are mostly intra-parliamentarian, this is not true for Pakistan. Since its inception, Pakistan has had a third player – the establishment. While in the early years, the establishment referred to military and bureau-

17 Ibid.

18 *Aziz*, note 10, p. 12.

19 Ibid.

20 Former Prime Minister Zulfikar Bhutto's execution on murder charges was deemed a bad judgment by the Supreme Court itself almost four-and-a-half decades after he was executed through the Presidential Reference 1 of 2011.

21 Two-time prime minister Benazir Bhutto, the daughter of Zulfikar Bhutto, was assassinated when she returned to Pakistan during Musharraf's coup, see *Owen Bennet Jones*, Benazir Bhutto Assassination: How Pakistan Covered up the Killing, BBC News, 27 December 2017, https://www.bbc.com/news/world-asia-42409374 (last accessed on 10 December 2024).

22 See Political Parties Order, 2002, which was replaced with the Elections Act 2017. Both laws were framed in a way that does not impose a numerical restriction on the number of political parties that can be registered and those that can contest elections. See Elections Act Chapter 11, Sections 200-203.

23 *N. S. Gehlot*, Opposition of Indian Political System Problem of Perception, The Indian Journal of Political Science 3 (1985), pp. 330-352.

https://doi.org/10.5771/0506-7286-2024-4 - am 13.01.2026, 17:10:15. https://www.inlibra.com/de/agb - Open Access -

cracy and their influence on government, however, in the recent years, particularly after the promulgation of Pakistan's third and current constitution in 1973, it is primarily the military establishment that has called the shots. The pervasiveness is reflective from the fact that Dr Mohammad Waseem calls Pakistan an 'establishmentarian democracy'.[24] This essentially means that the leader of the government or the leader of the house is a nominee or protegee of the establishment. Such approval automatically implies a rejection of the opposition, who are labelled as villains and cast as corrupt, anti-state actors who cannot make any appeals towards their own legitimacy. To this effect, various laws have been enacted over the years, used by most incoming governments against their respective oppositions. These include the National Accountability Ordinance (2000), enacted by the then martial law dictator General Musharraf. With many members of opposition in and out of jail, and some only being produced in parliament 'when needed', the opposition is unable to carry out the actual role theoretically envisaged in the Parliamentary system, and also the role assigned to the political opposition under Pakistan's codified legal framework. Therefore, not only does the ruling party get supra-constitutional support – which also leads to external checks on the parliament wavering – but the internal checks that separation of powers envisages in the form of an effective opposition, also do not exist. All these factors lead to a poor parliamentary performance and underscore the need for devising a more contextualized understanding of the structure and role of political opposition in Pakistan.

Another distinction between the political formation in Pakistan is the nature of polarization. Over the recent years we have witnessed a rise in populist leaders around the world, from Trump being elected for a second term to Modi forming yet another government, albeit with some decline in popularity, and finally formation of a formal opposition. It can be theorized that the fissures in these nations are, at least optically, ideology or issue based. However, the rapid political polarization as part of 'project Imran Khan' spearheaded by Generals Bajwa and Faiz, was to type cast every politician not part of Imran's party – the Pakistan Tehreek-e-Insaf – as corrupt.[25] While Imran himself, who not only was notoriously known as a playboy throughout his cricketing career and subsequently as well, propagated the idea of *Riasat-e-Madina* (the idea of somehow returning to the Islamic ways of the city state of Madina as it was in the time of the Prophet).

24 *Waseem*, note 1.

25 *Asma Faiz*, We Are on the Same Page: The Curious Case of Imran Khan's Populism in Pakistan, in: Alain Dieckhoff / Christophe Jaffrelot / Elise Massicard, (eds.) Contemporary Populists, Berlin 2022; *Najam Sethi*, Farewell to arms?, The Friday Times, 8 October 2021, https://thefridaytimes.com/08-Oct-2021/farewell-to-arms (last accessed on 11 June 2025); The Friday Times, Retired general Bajwa has a lot to say about Imran Khan but is bound by codal limitations, 20 December 2022, https://thefridaytimes.com/20-Dec-2022/retired-general-bajwa-has-a-lot-to-say-about-imran-khan-but-is-bound-by-codal-limitations (last accessed on 11 June 2025); *Umar Farooq*, 'Project Imran Khan' Created Polarization, Not Consensus, In Pakistani Society, The Friday Times, 25 December 2022, https://thefridaytimes.com/25-Dec-2022/project-imran-khan-created-polarization-not-consensus-in-pakistani-society (last accessed on 11 June 2025).

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With Imran Khan coming to power in a hybrid framework, he was fully in support of the military establishment. As soon as he fell out of favour, and the military declared itself as 'neutral', the opposition parties, who had a never-ending list of cases against their leaders, formed a coalition – the Pakistan Democratic Movement, and spearheaded a successful vote of no-confidence against Imran Khan.[26] Since then, Khan has been the biggest critic of the successor hybrid regime. However, it is pertinent to note that all mainstream political players want or, at least for survival, need to be the blue-eyed baby of the military establishment.

With each successive government, we frequently find that those elected to the Parliament, by virtue of being declared corrupt, anti-state, or generally as the villains, despite often having sizeable representation within the parliament, often do not have any option but to resort to the streets. This primitive form of political opposition that we see today is very reminiscent of how Pakistan was created in the first place. While the British empire did create local legislative body within the Indian subcontinent, the actual opposition or anti-imperial rhetoric was generated outside the legislative bodies. While Gandhi rallied the masses using notions of Hinduism, Muhammad Ali Jinnah, rallied the sizeable Muslim minority population using Islamic rhetoric and furthering the two-nation theory.

However, when Gandhi started the Quit India Movement, that is when Jinnah and consequently Muslim League gained favour with the Imperial rulers. Jinnah was successful in gaining favour for the Muslim minority population, by giving up on ideals for greater provincial autonomy, and also by offering Muslim recruits to the British during the Second World War. On the other hand, at this time, the leadership and various members of the Indian National Congress, who were previously favoured by the colonial masters, languished in prisons under various charges.[27] We find the same imperialistic legacy continuing post partition, even today.[28]

It is for these reasons that the opposition is almost always struggling, at least till it comes in favour of the supra-constitutional powers. The only thing that has changed over the years is the location of resistance. After Imran Khan obtained the establishment's support, Islamabad, the capital city of Pakistan, has become the epicentre of resistance at least by PTI and other parties like the TLP who have military support against those in power. While PTI-military relations currently are nothing short of being highly acrimonious, the

26 It should be noted that while no prime minister in Pakistan has completed the full five-year term, Imran Khan is the only prime minister removed through a vote of no confidence; see *Marva Khan*, Pakistan's new prime minister faces huge challenges, Development and Cooperation, 20 April 2022, https://dandc.eu/en/article/swift-and-decisive-action-pakistans-supreme-court-has-ended-constitutional-crisis (last accessed on 11 June 2025).

27 *Aziz*, note 10, p. 20.

28 *Rahim*, note 8.

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PTI only knows one way to function – attack the capital[29] or continue to threaten about attacking the capital.

B. Constitutional and Statutory Role of Political Parties and the Political Opposition in Pakistan

I. Political Parties and the Right to Association

In order to fully understand the role of the opposition, it is imperative to understand the elaborate constitutional framework in which it operates. The 1973 Constitution of Pakistan is one of the longest constitutions in the world. It delineates Pakistan as an ethnic federation and originally devised a parliamentary form of government. Under the 1956 and 1962 constitutions Pakistan had a unicameral parliament, with both East and West Pakistan having equal representation. Under the 1973 model, the parliament is bicameral. The National Assembly is the lower house with a 5-year term,[30] which has proportional representation of all four provinces (Punjab, Sindh, Khyber Pakhtunkhwa, and Balochistan), and is directly elected by citizens who have attained the age of majority (18 years). The Senate is the upper house, which has equal representation of all four provinces and is indirectly elected. The four provincial assemblies and the National Assembly vote for the seats allocated to the respective provinces and the federal territory. The Senate has a 6-year term, and the elections are held every three years as half the membership retires every three years after completing their 6-year term. In addition to being a bipartisan body, the parliament's structural bifurcation also ensures that the possible outgoing government will be able to

29 Imran Khan and PTI have spearheaded numerous blockades within the federal capital, particularly after the 2013 elections, when they formed provincial government in the KP Province, but were part of the opposition in the Parliament. See *Yaseen Ullah / Manzoor Ahmad / Syed Azim*, Politics of Protest in Pakistan: Causes and Features of the PTI (2014) Dharna in Islamabad, Pakistan, Global Strategic and Securities Review, Global Strategic & Securities Studies Review (2020); Al Jazeera, Pakistan: Police clash with protesters in Rawalpindi, 28 October 2016, https://www.aljazeera.com/news/2016/10/28/pakistan-police-clash-with-protesters-in-rawalpindi (last accessed: on 11 June 2025); *Rizwan Shehzad*, ATC directs police to arrest Imran, Qadri in PTV attack case, The Express Tribune, 21 October 2016, https://tribune.com.pk/story/1205354/atc-directs-police-arrest-imran-qadri-ptv-attack-case (last accessed: on 11 June 2025). Even after the 2018 general elections, where they retained power in KP, and formed federal government, the capital city did not receive any rest, especially after a vote of no confidence against Imran was successful, see *Munawer Azeem*, Day of clashes in Islamabad ends in PTI protesters' retreat', DAWN, 27 November 2024, https://www.dawn.com/news/1875003 (last accessed: on 11 June 2025); *Munawer Azeem*, FIR accuses PTI leaders of marching on capital to "force Imran's release, DAWN, 20 December 2024 https://www.dawn.com/news/1879866 (last accessed: on 11 June 2025); Deutsche Welle, Pakistan: Imran Khan Supporters storm capital , 26 November 2024, https://www.dw.com/en/pakistan-imran-khan-supporters-storm-capital/a-70885272 (last accessed on 11 June 2025); The Express Tribune, PTI convoys enter Islamabad amid violent clashes with police, 25 November 2024, https://tribune.com.pk/story/2511799/pti-convoys-face-tear-gas-as-march-towards-islamabad-continues (last accessed on 11 June 2025).

30 Articles 51 and 52 of the Constitution of Pakistan, 1973.

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secure representation in the Senate due to the indirect electoral system. Consequently, even if the ruling party or coalition is unable to form government in the next term, they can serve as an opposing force in the Senate.

In addition to the structural role of including diverse or opposing voices in the Parliament, Pakistan is also an ethnic federation with a multi-party system. The barriers to entry, at least with respect to party formation are fairly low, and embodied within the 2017 Elections Act[31] and the Political Parties Rules 2002. However, we do find a list of anti-state rhetoric that can,[32] and historically has been used to censure, restrict, and outright prohibit various political parties over the last seven decades. While barriers to entry may very well be low, there are severe hurdles in trying to stay in the playing field, especially if a political party's ideology does not strictly match that of those spearheading the establishment at that time.

In 1975, Zulfikar Bhutto disbanded the National Awami Party (an ethnic party in an ethnic federation), which was upheld by the Supreme Court on the grounds that ethnic nationalism was a violation of the Two-Nation Theory,[33] and consequently against 'sovereignty' and 'integrity of Pakistan' – which is also a limitation listed in Article 17 – freedom of association.[34] This anti-state rhetoric was subsequently bolstered by General Zia by adding Islamic ideology and morality based rhetoric to the Constitution in qualifications and disqualification of members of legislative assemblies,[35] as well as the Political Parties Act 1962,[36] which have remained a part of the legal system despite various legal amendments over the years.

In 2002, General Musharaff replaced the Political Parties Act 1962 with the Political Parties Order 2002, and he amended Article 17 to include 'public order' as an additional restriction on freedom of association. One of the pivotal changes that was subsequently undone was to impose a requirement of anyone contesting legislative elections to hold a bachelors' degree, which was not only uncommon amongst the politicians, but also across Pakistan, which has had very low literacy rates pre-and post-independence.[37] This

31 See Sections 200-211.

32 See Section 200 of Elections Act, 2017

33 The Two Nation Theory entailed that the Muslims and Hindus of the Indian subcontinent were two different nations and could not live together peacefully in a United India. This theory later became a cornerstone of the Pakistan Movement.

34 Islamic Republic of Pakistan v Abdul Wali Khan PLD 1976 SC 57; see also *Aziz*, note 10, p. 71.

35 See Articles 62 and 63 of the Constitution. Nawaz Sharif's third term as prime minister was cut short by the Supreme Court by declaring him dishonest under Article 62(1)(f) of the Constitution, for failing to declare one unused income which he had declared in his previous records.

36 *Aziz*, note 10, p. 71.

37 While the literacy rates in East Pakistan were generally high, West Pakistan or what now remains of Pakistan had low literacy rates and infrastructure during colonial times as well. See *Rahim*, note 8.

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minimum education qualification was upheld by the Supreme Court at the time,[38] but subsequently, when it was challenged again in 2008, the Supreme Court found there was no rational basis for this limitation.[39] These measures were 'intended to 'clean up' the political sphere', ensure a compliant legislature,[40] and subsequently used as tools for controlling and censuring political parties.

II. Legal Role of Political Opposition

Unlike the Indian *Lok Sabha* where there is a need for substantial numbers in the assembly to form an official opposition, there is no such requirement under Pakistan's laws. Pakistan's legal framework allows whichever political parties sit in the National Assembly to appoint a leader of opposition, regardless of their collective numerical strength, albeit the member selected as the leader of opposition has the greatest numerical strength across all candidates contesting for this position.[41] The collective strength of the treasury and opposition also changes post elections whereas candidates are allowed to contest elections as independent candidates, however, after securing a seat in the assembly, they must declare their association in joining the treasury or the opposition.[42] Similar to appointment, a majority of the members of the opposition can also have the leader of opposition removed.[43]

In addition to representing the thoughts and interests of the opposition on the floor of the assembly, the opposition leader also has a constitutionally and statutorily mandated role to play. After the recent and highly contentious 26th Constitutional Amendment in 2024,[44] the reconstituted Judicial Commission for the appointment of judges of the Supreme Court and five High Courts, now has equal representation of the treasury and opposition benches, with the nominations for these members to be made by the leaders of treasury and opposition respectively.[45]

Additionally, the leader of the government and leader of opposition collectively appoint the Chief Election Commissioner.[46] If they fail to reach a consensus, they both send a list of their preferred candidates to the Parliamentary Committee, which has equal representation

38 Pakistan Muslim League (Q) v Chief Executive of Islamic Republic of Pakistan PLD 2002 SC 994.

39 Muhammad Nasir Mehmood v Federation of Pakistan PLD 2009 SC 107.

40 Ibid., p. 72.

41 Rule 39 Rules of Procedure and Conduct of Business in the National Assembly 2007.

42 Rule 15 Rules of Procedure and Conduct of Business in the Senate (2012).

43 Rule 39A Rules of Procedure and Conduct of Business in the National Assembly 2007.

44 *Moeen Cheema / Marva Khan Cheema*, Fractured Foundations and Pakistan's Kafkaesque Constitutional Amendment, Verfassungsblog, 21 October 2024, https://verfassungsblog.de/pakistans-26-constitutional-amendment/ (last accessed on 30 June 2025), DOI: 10.59704/f72dd1e9c0e430bc.

45 Article 175A (2)(vii) of the 1973 Constitution.

46 Article 213 of the 1973 Constitution.

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from the government and the opposition.[47] Pakistan is also one of the few countries in the world where general elections are held in the supervision of a caretaker government, another legacy of General Zia. Under the current constitutional framework, the caretaker cabinet is also created by the President in consultation with the Prime Minister and the leader of opposition.[48]

While Pakistan does not have a shadow cabinet, with the constitutional courts refusing to intervene to order their creation,[49] parliament's standing committees like the Public Accounts Committee (PAC) was held to entail a similar role of oversight by the opposition on the government.[50] The leader of opposition serves as the Chairman of the PAC. The main role of this committee is to exercise review of the Auditor General's Reports on the federation's accounts which are referred to the PAC once the report is presented on the floor of the parliament.[51] Similarly, the opposition leader needs to be consulted while forming other parliamentary committees such as the Business Advisory Committee.[52] Even in the National Accountability Ordinance, 1999, a pivotal legislation used for persecuting the 'de jure' opposition installed by General Musharraf soon after he imposed a coup, now accounts for the Chairman National Accountability Bureau to be appointed after consultation of both the leaders of the house and the opposition.

The legislative powers across all six federal and provincial legislative bodies in Pakistan also envisage an opposition within political parties, regardless of whether they form part of the government or opposition on the floor of the respective assembly. This is by virtue of allowing private member bills. The only limitation here being the defection clause under Article 63A of the 1973 Constitution, where each member of a political party is bound to vote on party lines in limited situations.

C. De facto Opposition

To date, there have been only two governments who have been able to complete their constitutionally granted five-year term in the National Assembly. The first instance was the PPP government that came into power in 2008 towards the end of Musharraf's rule, with Asif Ali Zardari (husband of the then recently slain and only woman to serve as a prime minister, Benazir Bhutto) becoming the President. It was during his government that the 18th Constitutional Amendment was passed with broad consultations across political parties. This amendment is notable for reverting Pakistan back to parliamentary form of government, with the sweeping controlling powers of the president revoked, and for

47 Article 213(2B) of the 1973 Constitution.

48 Articles 224 and 48(5)(b) of the 1973 Constitution.

49 See Lawyers Foundation for Justice v Federation of Pakistan and Others 2017 CLC 1066 Lahore.

50 Ibid.

51 Rule 177 of the Rules of Procedure and Conduct of Business in the National Assembly 2007; Rule-177 of the Rules of Procedure and Conduct of Business in the National Assembly 2007.

52 Ibid., Rules 212-213.

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increasing provincial autonomy.[53] Once this government completed its term, the next general elections saw Pakistan Muslim League (N) (PML(N)) form a government in the centre. While these two successive governments did complete their five-year terms and are the only ones in Pakistan's history to do so, they were subjected to exceptional judicial overreach, with the Supreme Court disqualifying two prime ministers during this time – Yousaf Raza Gilani and Nawaz Sharif. It was during the PML(N) government that the hybrid regime started formulating its network.

This article posits that due to Pakistan's historical and political context, most of the conceptions of the role of the opposition in the Global North often do not effectively apply in our context, such as Dahls' six-point conceptualization of the opposition.[54] This is particularly true for long-standing systems like the Westminster system, which Pakistan has been a proponent of carrying forward, yet, has been unable to embody the basic tenets in how Pakistan's parliamentary system pans out. The few periods of effective political opposition through Pakistan's history can be better conceptualized as pragmatic opposition, as opposed to principled or radical opposition.[55] In this section, I look at the clash of institutions, particularly the establishment (or the ruling elite) versus the political elite, and argue that the latter has always been treated collectively as the de facto opposition. Even in periods where there was no direct authoritarian rule, the military remained in control in various ways and continued to gain stronghold by destabilizing those elected governments which had fallen in disfavour of the establishment. Which is why coalitions formed by opposition parties often entail the term 'democratic' within their nomenclature – be it the United Democratic Front (UDF) formed after Zulfikar Bhutto came to power, the Movement for Restoration of Democracy (MRD) in the 1980s against Zia's dictatorship, or the more recent Pakistan Democratic Movement (PDM) formed in retaliation of General Bajwa and his hybrid regime with Imran Khan serving as the Prime Minister.

This section highlights how 'Project Imran' was curated over the years, leading to the onset of a hybrid system from 2018 till today, despite a change in leadership within the army and a change in the ruling parties in the federal government. One key commonality, however, between periods of authoritarian and hybrid regime is the heavy reliance on rhetoric surrounding religion and/or piety. While General Zia is the dictator associated with Islamization in Pakistan, other dictators and military establishment have time and again relied on allegations of impiety, corruption, and being anti-state raised against the political elite/opposition to discredit them in the eyes of the public, even when they projected to be more 'liberal' authoritarians. An example is of General Musharraf and his 'enlightened moderation' ideology for curbing Islamist extremism.

53 *Asma Faiz*, Making Federation Work: Federalism in Pakistan After the 18th Amendment, Oxford 2015; *Mohammad Waseem,* A majority constraining federalism cases, Pakistan Monthly Review 7 (2025).

54 *Robert Dahl*, Political Opposition in Western Democracies, New Haven 1966.

55 *John Dewy*, Reconstruction in Philosophy, Ithaca 1920.

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It is also essential to clear at the outset that political parties and their representatives too have been quick in suppressing opposition. With the creation of Pakistan, Jinnah's Muslim League gained automatic stronghold and political dominance in the nascent state of Pakistan. Even prior to direct praetorian dominance,[56] the Muslim League carried out an 'assault on leftist politics in the country',[57] by imposing a ban on the Communist Party of Pakistan.[58] This was coupled with multiple legislations passed to curtail protests by workers/labour.[59]

I. Dictatorial Regimes and the Fluctuating Allegiance of the Political Elite

Pakistan has had four martial laws administered by members of the armed forces, with Zulfikar Bhutto being the only civilian martial law administrator in Pakistan's history. General Ayub Khan was the first native commander-in-chief of the Pakistan Army, first martial law administrator and the second president of Pakistan. With the general elections scheduled for February 1959, on October 7, 1958, President Iskander Mirza issued a proclamation, abrogating the two-year-old Constitution, dissolving the National Assembly, declaring martial law, and appointing General Ayub Khan as the Chief Martial Law Administrator.[60] General Ayub ruled till 1969 until he was replaced with General Yahya Khan (1969-71). The Supreme Court of Pakistan, in *State v Dosso* relied on Hans Kelsen's theory of revolutionary legality to validate the coup which consequently became a *carte blanche* for legitimizing future coups as well.[61]

General Ayub, upon taking charge, condemned the Pakistani politicians as corrupt and anti-state by claiming that they had 'ravaged the country or tried to barter it away for personal gains".[62] He felt that Pakistan was not mature enough to support democracy, therefore he created the "Basic Democracies" model, where there were direct elections

56 *Hasan Askari Rizvi*, Pakistan: Civil-Military Relations in a Praetorian State, in: R.J. May / Viberto Selochan (eds.), The Military and Democracy in Asia and the Pacific, Canberra 2004, pp. 88–100.

57 *Aziz*, note 10, p. 69

58 Ibid.; see also Akbar Khan and Faiz Ahmad Faiz v The Crown PLD 1954 FC 29; *Estelle Dryland*, Faiz Ahmad Faiz and the Rawalpindi Conspiracy Case, Journal of South Asian Literature 27 (1992).

59 See generally *Aziz*, note 10, p. 69; Essential Services Maintenance Act 1952; Sobho Gyanchandni v Crown PLD 1952 FC 29.

60 *Tayyab Mehmood*, Jurisprudence of Successful Treason, Cornell International Law Journal (1949), p. 54.

61 Ibid., pp. 54-57; see also State v Dosso 1958 PLD SC 533. The *Dosso* case was subsequently cited to uphold authoritarianism in Uganda in the *Matovu case*. This case was overturned in *Asma Jillani v Government of Punjab PLD 1972 SC 139*, after civilian leadership had regained control of the government. This is true for subsequent coups as well, with the Supreme Court upholding each coup once it was imposed and overturning that ruling after the departure of the military dictator.

62 President Ayub Khan's Broadcast, Radio Pakistan, October 8, 1958. See also *D. P. Singhal*, The New Constitution of Pakistan, Asian Survey 2 (2016), p. 15.

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for local government comprising of 80,000 constituencies divided equally between East and West Pakistan.[63] These basic democracies then would indirectly elect the unicameral parliament, which too had equal representation of the Eastern and Western wings.[64] General Ayub further bolstered this system by banning political parties prior to the election of the basic democracies.[65] Political parties were later restored through the Political Parties Act, 1962, which severely limited permissible activities for political parties, and provided broad mechanisms for censuring and banning them.[66]

For almost two years, General Ayub's brother, Sardar Bahadur Khan, served as the leader of opposition in the National Assembly.[67] General Ayub's cabinet consisted mostly of other high-ranking members of the armed forces, along with a few loyal civilians, including Zulfikar Ali Bhutto,[68] who became Pakistan's first and only civilian martial law administrator in 1971, when the war between East and West Pakistan led to the succession of Bangladesh – which is also evident of one of the biggest issues Pakistan failed to redress during the 24 years since its creation. Generals Ayub and Yahya both belonged to what is now Khyber Pakhtunkhwa province of Pakistan, much in line with the martial race theory.[69] They consequently they became a vessel for continuing this discriminatory colonial tool. The imposition of the One Unit Plan in this time, whereby all of West Pakistan was paired into one federating unit with East Pakistan as the other to counter the higher population in the Eastern parity, automatically led to the otherization of the Eastern wing. The consequent treatment of East Pakistan was nothing short of a continuation of an imperial control exerted by West Pakistan.[70] So while the non-martial races have been viewed with mistrust, the brunt of this was faced by the Bengali population who were seen as the opposition, particularly by demonizing the East Pakistan based Awami League. This is true to the extent that even after Zulfikar Bhutto came to power, he severely punished J. A. Rahim a founding member of Bhutto's Pakistan People's Party (PPP), and also a Bengali who chose to stay in what remained of Pakistan after the succession of Bangladesh.[71]

From within West Pakistan, the main politician to come up as an opposing force against Ayub and contest elections against him was Fatima Jinnah, who was the sister of Muham-

63 Ibid., pp. 15-16.

64 Ibid.

65 Electoral Bodies Disqualification Order, 1959. See also *Aziz*, note 10, p. 70.

66 Ibid., p. 70.

67 National Assembly of Pakistan, Leaders of Opposition, https://www.na.gov.pk/en/print_list.php?type=oppleaders (last accessed on 3 December 2024).

68 Presidential Cabinet 1960.

69 *Aziz*, note 10, p. 12.

70 *Rahim*, note 8.

71 DAWN, From the Past Pages of Dawn: 1974: Fifty Years Ago: J. A. Rahim Sacked, 4 July 2024, https://www.dawn.com/news/1843744 (last accessed on 1 December 2024); DAWN, A Leaf from History: Bullying Tactics, 2 February 2013, https://www.dawn.com/news/783171/a-leaf-from-history-bullying-tactics (last accessed on 1 December 2024).

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mad Ali Jinnah founder of Pakistan, and had been an active member working towards the creation of a separate Muslim nation. Even though General Ayub can be categorized as one of the less religiously inclined dictators (especially compared to Zia), he used an Islamist campaign against Fatima Jinnah – in addition to rigging[72] the elections – to defeat her in the 1965 elections. It must be noted that Mujib-ur-Rehman and many other members of the Awami League, who led the succession of Bangladesh, also supported of Fatima Jinnah against Ayub,[73] who was the candidate for re-election of the Convention Muslim Leave.[74] Fatima Jinnah, also called *Madr-e-Millat* (Mother of the Nation), had widespread support amongst the masses and could be seen as a uniting factor between East and West Pakistan which already had fractured relations by this point. She was thus not only the face of de facto opposition, but also the candidate officially selected by the opposition coalition called the Combined Opposition Parties.[75] Despite this, she was accused of conspiring to establish Pashtunistan.[76] She was also labelled as a 'foreign agent' by Ayub, who was himself responsible for establishing Pakistan's ties with the United States.[77] Fatima Jinnah passed away in 1967, with many blaming the establishment for her death to this day.[78]

Ayub's second term as president was marred with conspiracy and contempt. This came not only due to questions of legitimacy of the election through which he came to power, but also because, the divide and consequent discontent in East Pakistan continued to grow, further bolstered by Agartala Conspiracy Case.[79] Furthermore, there was growing dissatisfaction with the One Unit Plan (merging a diverse West Pakistan into one federating unit to consider it an equal parity with East Pakistan, despite the latter having greater numerical strength), and growing resentment against the authoritarian regime led massive

72 Many restrictive laws were additionally in place at this time, including Press and Publications Ordinance, Loudspeaker Ordinance, and Public Safety Act. Issues with the election included gerrymandering, faulty voter lists, bogus votes cast, misuse of state machinery, and managing results otherwise., see *Hamid Khan*, Constitution and Political History of Pakistan, Oxford 2001, pp. 163-166.

73 *Ihsan Yilmaz / Kaina Shakil*, Religious Populism and Vigilantism: The Case of Tehreek e Labaik Pakistan, European Center for Populist Studies, 23 January 2022, https://www.populismstudies.org/religious-populism-and-vigilantism-the-case-of-the-tehreek-e-labbaik-pakistan/ (last accessed on 1 November 2024), https://doi.org/10.55271/pp0001; *Sana Zaheer / Muhammad Chawla*, Reimagining the populism and leadership of Miss Jinnah, Global political review (2019).

74 *Khan*, note 72, p. 161.

75 Ibid.

76 *Mehmood Ashraf,* Fatima Jinnah – Pakistan's First Voice of Dissent, Naya Daur, 12 July 2020, https://nayadaur.tv/12-Jul-2020/fatima-jinnah-pakistan-s-first-voice-of-dissent (last accessed on 30 November 2024).

77 Naya Daur, When Fatima Jinnah was declared 'Traitor' by the Powers-That-Be, 9 July 2020, https://nayadaur.tv/09-Jul-2020/when-fatima-jinnah-was-declared-traitor-by-the-powers-that-be (last accessed on 30 November 2024).

78 Ibid., see also *Ashraf*, note 76.

79 *Khan*, note 72, pp. 181-182.

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anti-Ayub protests, resulting in change of power from Ayub to General Yahya in 1969.[80] Mujib ur Rehman's Six Point Agenda led the Awami League to a victory in elections which were held on the basis of proportional representation, implying a Bengali majority at the Center.[81] The Six Point agenda was not acceptable to Zulfikar Bhutto, who found the agenda as a threat to the integrity of the federation, which further led Yahya to delay calling the first session of the newly elected National Assembly.[82] The resistance to this delay within East Pakistan was met with the military launching Operation Search Light,[83] leading to the eventual succession of Bangladesh.

After the fall of Dhaka, the Pakistan People's Party (PPP) formed government in what remained of Pakistan, with Zulfikar Bhutto taking over from Yahya as a civilian martial law administrator, and subsequently becoming the President.[84] Although Bhutto, much like others who had worked closely with the military establishment, like Imran Khan in 2018, was a proponent of a strong presidential system,[85] the eventual constitution - the Constitution of Islamic Republic of Pakistan, 1973 – entailed a parliamentary system with a bicameral legislature, and the federation divided into four provinces, federal territory, and federal and provincial tribal areas. While the Constitution did grant right to association (Article 17), it does not come as a surprise that this right came with an ambiguous list of restrictions instituted through the first constitutional amendment.[86] Furthermore, since its inception, the Constitution has also included an aggressive colonial tool for censorship and punishment such as preventive detention, embedded in the bill of rights as an exception to the second fundamental right listed in the chapter.[87] The 1973 Constitution made the Prime Minister the chief executive of the State (and consequently Zulfikar Bhutto became the Prime Minister), with only one removal method at the time: a vote of no-confidence against him at the floor of the National Assembly. While no Prime Minister in Pakistan's history has completed a five-year term, it is only Imran Khan, product of the 2018 hybrid regime,

80 Ibid.

81 *Aziz*, note 10, p. 51.

82 Ibid.

83 Ibid., pp. 51-52.

84 Ibid.

85 The New York Times, Presidential System Backed by Bhutto, 13 April 1972, https://www.nytimes.com/1972/04/13/archives/presidential-system-backed-by-bhutto.html (last accessed on 25 June 2025); see also *Omar Azhar,* Pakistan Does Not Need A Presidential System; Let Parliamentary Democracy Flourish Without Interference, The Friday Times, 2 October 2021, https://thefridaytimes.com/02-Oct-2021/pakistan-does-not-need-a-presidential-system-let-parliamentary-democracy-flourish-without-interference (last accessed on 25 June 2025).

86 See Part 2 of this article for a discussion on the limitations.

87 Preventive detention is listed as an exception to Article 10 which provides safeguards against detention. For more insights, see *Aziz*, note 10, pp. 199-212.

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who was removed in this way,[88] after the Army top brass declared itself to be a politically neutral entity.[89]

The parliamentary system embodied within the Constitution was set aside by two dictators: General Zia ul Haq (1977-1988) who overthrew Zulfikar Bhutto and was also responsible for having him executed through the Supreme Court;[90] and General Pervez Musharraf. Both these dictators suspended several portions of the Constitution and further amended it to turn it into a semi-presidential model which stayed in place till PPP came back to power and promulgated the 18th Constitutional Amendment in 2010.

Dr Waseem holds that Pakistan has two power centers, or elite groups clashing with one another: the state elite, which he classifies as military establishment, and the political elite.[91] While the direct dictatorial regimes have come and gone, they have, at least in the last half century, been interspersed with democratic periods with a new wave of hybrid regime taking over in 2018. However, even in the democratic periods, the establishment was not sidelined, but in fact continued to play a pivotal role. The creation and usage of Tehreek-e-Labaik Pakistan (TLP) to discredit the PML-N government from 2013-2018 is a pertinent example. While this right-wing militia posing as a political party had no representation in any legislative body, however, their violent protests brought the country to a standstill and forced the ruling party of the time – PML(N) to amend the Elections Act of 2017, to ensure continued exclusion of the Ahmadiyya Community from the electoral process.[92] When the government invoked Article 245 of the Constitution, calling the military in aid of civilian power, the military refused to facilitate. Subsequently, the Director General of Punjab Rangers was seen distributing money amongst the protestors at the conclusion of the protests.[93] Even prime minister Nawaz Sharif's disqualification, which was at the time considered a lifetime disqualification by the Supreme Court, aligns closely with these external interventions of the establishment.

II. The Democratic Autocracy – Shift to a Hybrid Regime

Imran Khan, former captain of the Pakistan cricket team, formed the PTI in 1996. The PTI did not win any seat in the 1997 general elections, and in the 2002 election, Imran

88 *Khan*, note 26.

89 *Zahid Hussain*, The Saga of General Bajwa, Dawn, 21 August 2024, https://www.dawn.com/news/1853707 (last accessed on 25 June 2025).

90 Earlier this year, acting in its advisory capacity, a nine-member bench of the Supreme identified that there were major constitutional lapses and violation of due process, vindicating Zulfikar Bhutto post houmous.

91 *Waseem*, note 1, p. 149.

92 The Ahmadiyya community is a minority group who consider themselves to be Muslims, but they were declared non-Muslims by insertion of Article 260(3) of the 1973 Constitution through the Second Constitutional Amendment, 1974.

93 *M Ilyas Khan*, Why was Pakistan General giving money to protestors?, BBC, 29 November 2017, https://www.bbc.com/news/world-asia-42149535 (last accessed on 1 December 2024).

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was the only PTI member to win a seat. At this time, he supported General Musharraf and only turned on him towards the end of his tenure and went on to boycott the 2008 general elections which marked Pakistan's return to democracy and parliamentary form of government. The next time he and the PTI collectively participated was in the 2013 general elections, and the party was able to form provincial government in Khyber Pakhtunkhwa, which they have retained ever since. However, Khan, who perhaps believed he ought to have formed the government at the center as well, raised allegations of rigging, which he later withdrew, and launched the *azadi march* (freedom march) towards Islamabad. While the PTI was sitting in the opposition benches in the National Assembly, during this time, the entirety of their resistance was outside, on the streets, and not on the floor of the Parliament.

During this time, it appears that the then Prime Minister Nawaz Sharif made yet another miscalculation. Much like promoting General Musharraf, who ended his government, he appointed General Bajwa as the COAS, even though he lacked seniority, in 2016. Within a year, Nawaz Sharif lost his seat as the prime minister and was also disqualified from contesting elections for life;[94] a judgment later overturned by the Supreme Court after General Asim Munir became the COAS.[95]

It was later revealed that General Bajwa and General Faiz, the former Chief of the military-run Inter-Services Intelligence (ISI), who had been indicted for engaging in political activities, such as violating anti-espionage laws, and abusing his authority,[96] were actively involved in using various tools to bolster Imran Khan's credibility. They suppressed major critical news outlets, such as Geo News and Dawn News amongst others, and used the threats of tax investigations and/or kidnapping,[97] as well as tools like the NAB to enforce prolonged incarceration.[98] This resulted in widespread suppression of freedom of expression and led to pervasive self-censorship.[99]

All this while, Imran prolifically and very effectively used social media for communicating with the masses, particularly with the youth bulge of Pakistan. His sit-ins had a DJ on board, who provided entertainment to the attendees, and Imran continued to have verbose and vacuous speeches centred around ridiculing other politicians, calling them corrupt and immoral thieves. The same anti-state narrative that had previously been deployed by

94 Samiullah Baloch versus Abdul Karim Nausherwani, 2018 PLD 405 SC.

95 2024 PLD 1028 SC.

96 *Baqir Sajjad Syed,* Former ISI chief Faiz Hameed indicted for misusing powers, Dawn News, https://www.dawn.com/news/1877977 (last accessed on 13 December 2024).

97 *Christophe Jefferlot*, Imran Khan the Army's Choice, The Nation, 4 September 2018, https://www.thenation.com/article/archive/imran-khan-the-armys-choice/ (last accessed on 13 December 2024).

98 Mir Shakil ur Rehman, the Editor in Chief of Jang News Group, was incarcerated for 200 days, see e.g., Al Jazeera, Pakistan media mogul granted bail after 200 days in detention, 9 November 2020, https://www.aljazeera.com/news/2020/11/9/pakistan-media-mogul-granted-bail-after-200-days-in-detention (last accessed on 14 December 2024).

99 *Jefferlot*, note 97.

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earlier dictators, was now being propagated by a civilian icon. These coercive measures and ridiculing did not stop, but were only bolstered when PTI formed government in the centre after the 2018 general elections and Imran Khan became the prime minister. Not only did Imran and PTI use taxpayers' money to recruit "social media trolls",[100] but also engaged a United States based lobbying firm, to further gain support across other countries as well.[101] However, this strong narrative alignment between Imran and the establishment,[102] did not last too long. With the PDM initiating negotiations with the establishment,[103] General Bajwa declared that the army had shunned politics and declared itself as neutral,[104] to which Imran declared that only animals are neutral.[105] These growing frictions between the two culminated in Imran's removal as Prime Minister through a vote of no-confidence. The 'corrupt' political parties like PPP and PML(N), who had previously lost favour in the eyes of the establishment led this vote, and subsequently their coalition (PDM) formed government at the centre, and Shehbaz Sharif, the younger brother of former prime minister Nawaz Sharif was elected as the prime minister.[106] This coalition, which was also responsible for appointing General Asim Munir as the Chief of Army staff, stayed in power till August 2023, when they dissolved the government a few days before the tenure came to an end, in order to allow the caretaker government to stay on longer. However, after excessive delays, the general elections were finally held on 8 February 2024, which also marks the date when usage of X (formerly known as Twitter) was banned in Pakistan for over a year.

In the current hybrid model, which was formed after the highly controversial 2024 elections, although the PTI has been cast as the villains, it is important to note that the establishment has selective criteria even within this political party. This is evident from the fact that the current leader of opposition in the National Assembly is Omar Ayub Khan,

100 Arab News, Ex-PM Khan's party to face charge of inducting 'social media trolls' on taxpayers' dime – KP official, 30 March 2023, https://www.arabnews.pk/node/2278176/pakistan (last accessed on 14 December 2024).

101 The Friday Times, PTI Hires American Lobbying Firm To Mend Ties With US, 12 August 2022, https://thefridaytimes.com/12-Aug-2022/pti-hires-american-lobbying-firm-to-mend-ties-with-us (last accessed on 14 December 2024); The News, PTI steps up efforts to establish 'good relations' with US, hires lobbying firm, 12 August 2022, https://www.thenews.com.pk/latest/981678-pti-hires-lobbying-firm-in-us-to-establish-good-relation (last accessed on 14 December 2024); The Friday Times, PTI Hires Another Lobbying Firm In US To Enhance Party's Reputation, 23 March 2023, https://thefridaytimes.com/23-Mar-2023/pti-hires-another-lobbying-firm-in-us-to-enhance-party-s-reputation (last accessed on 14 December 2024).

102 *Asfandyar Mir / Tamar Mitts / Paul Staniland*, Political Coalitions and Social Media: Evidence from Pakistan, Pakistani Political Coalitions & Media 21 (2021).

103 *Zahid Hussain*, note 89.

104 *Baqir Syed*, Army has resolved to shun Politics, DAWN, 24 November 2022, https://www.dawn.com/news/1722761 (last accessed on 14 December 2024).

105 The News, Only Animals are Neutral, 12 March 2022, https://www.thenews.com.pk/print/940622-only-animals-are-neutral-pm (last accessed on 14 December 2024).

106 *Khan*, note 26.

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who served as the secretary-general of PTI, and is still an active member of the political party which has otherwise been cast away. Albeit, he is also the grandson of General Ayub - Pakistan's first military dictator.[107]

At this point, Imran Khan has been in jail for almost two years on a multitude of charges ranging from corruption to immorality. His current wife, Bushra Bibi, was also arrested, and was only released on bail in November 2024. However, during this time, the PTI attacked army and state installations on the 9th of November 2024 and answered Imran's 'final call' to march on the Capital during the same month, which was considered a failure. Despite these losses, PTI members sitting in the Parliament keep seeking clemency while also threatening the current regime with yet another 'final call' or attack on the capital.

D. Conclusion

To understand who belongs to the political opposition in Pakistan, one needs to look beyond the laws in place. While the 1973 Constitution does create a parliamentary structure, and ensuing legislation recognizes the role of the leader of opposition, the governance system of Pakistan is however not akin to India, nor to its former British colonial masters. Over the years we have witnessed one entity, the military establishment, which has almost always been in control, either overtly or behind the scenes. While in the first fifty years the establishment relied more on imposition of martial law, over the last seven years, we have witnessed a shift towards hybrid mode of governance. The status and role of the opposition, however, has not changed much. Whoever loses favor with the establishment becomes the opposition, but in many ways, the political elite has remained the collective opposition.

What we have witnessed over the last seven years is that despite the change in the military high command from General Bajwa to General Asim Munir, one tactical point remains the same. Instead of imposing direct coup, they have maintained the semblance of civilian rule through a hybrid regime. Some argue that this demonstrates the lingering or wavering strength of the Charter of Democracy signed between PML(N) and PPPP in 2006 to work against Musharraf. This could also be a tool for further discrediting the politicians, while maintaining the establishment's credibility in the eyes of the public. Even those parties that had gained public sympathy due to repeated assaults against them by the establishment have now been discredited. It could, however, simply be a strategic image management: the idea of projecting a democratic image to the world in order to obtain necessary loans – such as those from IMF –and to maintain preferential trading status with other countries, like GSP+, which require some assurance of fundamental rights protections. Such conditions might be difficult to prove for an overtly authoritarian military dictatorship. What remained of the discord and fissures amongst the political elite, the state elite, and the public at large has further subsided in the aftermath of the short war between India and Pakistan in May

107 National Assembly of Pakistan, Leaders of Opposition, note 67.

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2025 – a war that appears to have united the country and solidified the current hybrid system – at least for now.

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Fourth-Branch Institutions and Political Oppositions

By *Hernán Gómez Yuri*[*] and *Fernando Loayza Jordán*[**]

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.

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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

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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).

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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.

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> *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.

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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.

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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.

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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.

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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

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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

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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.

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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

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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).

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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.

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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.

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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.

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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-

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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).

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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.

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ABHANDLUNGEN / ARTICLES

Unenumerated Constitutional Rights: Diluting the Separation of Powers Objection

By *Gauri Pillai*[*]

Abstract: When courts are faced with claims for unenumerated constitutional rights, it is very common for them to state that the separation of powers requires them to stay away from recognising such rights. I scrutinise the validity of this argument through a close study of *Supriyo Chakraborty v Union of India* (2024). In *Supriyo* the Indian Supreme Court refused to recognise the unenumerated constitutional right to marry because such court action was seen as violating the separation of powers. I argue that this reading of separation of powers understands the doctrine as being driven by a singular value: that of maintaining institutional specialisation of State branches. While important, this reading causes separation of powers disputes to become turf demarcation exercises, entirely obscuring rights. It thus takes away from a second key value underpinning the doctrine: its role in preserving rights and protecting rights-holders. When rights preservation is reinstated as a value driving the doctrine, court action to recognise and protect unenumerated constitutional rights – including the right to marry – is no longer inconsistent with the separation of powers. Nor is it a carefully regulated exception it. Rather, it is part and parcel of the doctrine, an essential facet of its demands. Yet, authorising all forms of court action in the name of protecting rights with no institutional constraints whatsoever brings risks of its own. Thus, both the value of rights preservation and that of maintaining institutional specialisation ought to be simultaneously maintained within the separation of powers assessment. For this, rights preservation and democratic protection need to be understood as multi-institutional, collaborative constitutional enterprises, with each State institution contributing in light of its distinct skills. Several parts of the *Supriyo* dicta, beyond its conclusions on the right to marry, reflect this understanding. Overall, they demonstrate how the Court could have recognised a constitutional right to marry while also respecting the institutional skills of different State branches. The separation of powers objec-

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tion to court action recognising and protecting unenumerated constitutional rights – as deployed in *Supriyo* – is therefore diluted.
Keywords: Separation of Powers; Courts; Legislature; Same-Sex Marriage

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A. Introduction

Constitutions are written at specific points in time. Most constitutions list rights. The listed rights are those that enjoy salience at the moment of constitutional drafting. However, things evolve. New interests emerge. Or age-old interests begin to attract legal attention. Either way, claims are made for rights not expressly listed in the constitution. These rights are commonly called unenumerated rights. Demands for these rights are often made before courts. Courts are asked to read these rights into rights already existing within constitutional texts.

This ask has been, and continues to remain, very controversial globally. For some, the fear is that in recognising a right that has not been expressly provided for by the constitution, the unelected court is replacing the democratically elected parliament and dictating State policy.[1] For others, this is not just a question of democratic illegitimacy. It also raises issues of institutional competence. Courts, they argue, do not have the institutional skills to decide what State policy should be. Yet, in granting recognition to an unenumerated right, this is precisely what courts do.[2] There exists a collective shorthand for these arguments. In recognising unenumerated constitutional rights, courts violate the separation of powers.

Strangely, separation of powers arguments have not enjoyed much salience in India when it comes to unenumerated constitutional rights. The Indian Supreme Court has recognised many such rights by reading them into existing constitutional rights, particularly the right to life and personal liberty under Article 21.[3] The rights to health,[4] housing,[5] education,[6] food,[7] privacy,[8] dignity,[9] and reproductive autonomy[10] – to name a few –

1 Giving an account of these arguments, see *Randy Barnett*, Who's Afraid of Unenumerated Rights, Journal of Constitutional Law 9 (2006), pp. 1-22.

2 Giving an account of these arguments, see *Nicola Daley*, Unenumerated Rights Reconsidered, Galway Student Law Review 3 (2007), p. 226.

3 *Anup Surendranath*, Life and Personal Liberty, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016, p. 756.

4 *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426.

5 *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180.

6 *Unnikrishnan v State of Andhra Pradesh* AIR 1993 SC 2187.

7 *People's Union for Civil Liberties v Union of India* AIR 1982 SC 1473.

8 *KS Puttaswamy v Union of India* (2017) 10 SCC 1 ('*Puttaswamy*').

9 *Francis Coralie Mullin v Union of India* (1981) 1 SCC 608.

10 *Suchitra Srivastava v Chandigarh Administration* (2009) 9 SCC 1.

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were recognised in India through this route without facing separation of powers obstacles. Tellingly, separation of powers arguments were not even considered by the Court in these cases.

Yet, separation of powers lies at the heart of the Indian Supreme Court's recent decision in *Supriyo Chakraborty v Union of India* ('*Supriyo*').[11] *Supriyo* was a case about same-sex marriage. In *Supriyo*, the petitioners argued that the Court ought to recognise the unenumerated constitutional right to marry, such that the exclusion of same-sex couples from the Special Marriage Act 1954 was unconstitutional. The respondents vehemently opposed this claim. They argued:

> *"The court cannot create substantive rights and obligations to fill a legislative vacuum because it would amount to judicial legislation…These are established parameters of separation of powers and must be respected".*[12]

The Court agreed with the respondents. The five-judge bench unanimously decided not to recognise the unenumerated right to marry on separation of powers of grounds.

As I was reading *Supriyo*, I recalled a constitutional law module I had taught on the separation of powers. We were discussing Bilchitz and Landau's writing on the evolution of the doctrine in the Global South.[13] The text contained a line which raised many questions, both in my mind and amongst the students. 'The separation of powers doctrine', Bilchitz and Landau pointed out, 'has often become an end in itself without having strong regard to the underpinning values and purposes that it is meant to realize'.[14] What does it mean, we wondered, for separation of powers to be means to an end? And what are the ends the doctrine seeks to preserve? After a stimulating discussion, but without arriving at many answers, we moved on; there was much else left to cover. But the line the stayed with me.

Reading *Supriyo* brought the line back to life. Did Bilchitz and Landau's provocation – that the separation of powers ought to be treated as means to certain ends, as a mechanism to achieve given values – a stance seemingly supported by other constitutional theorists,[15] challenge the Court's reasoning and conclusion in *Supriyo*? This time, I resolved to find

11 *Supriyo Chakraborty v Union of India* 2023 INSC 920 ('*Supriyo*').

12 Submissions by Advocate Kapil Sibal, recorded in Ibid., para. 43 (m) (Chandrachud J.).

13 *David Landau / David Bilchitz*, The evolution of separation of powers in the global south and global north, in: David Landau / David Bilchitz (eds.), The Evolution of the Separation of Powers: Between the Global North and the Global South, Cheltenham 2018.

14 Ibid., p. 2.

15 *Aziz Huq / John Michaels*, The Cycles of Separation-of-Powers Jurisprudence, The Yale Law Journal 126 (2016), p. 382; *Bruce Peabody / John Nugent*, Toward a Unifying Theory of the Separation of Powers, American University Law Review 53 (2003) p. 2; *Rebecca Brown*, Separated Powers and Ordered Liberty University of Pennsylvania Law Review 139 (1991), p. 1515; *Adam Carrington*, Constructed for Liberty: Justice Clarence Thomas's Understanding of Separation of Powers, American Political Thought 5 (2016), p. 661; *Matthew Lawrence*, Subordination and Separation of Powers, The Yale Law Journal 131 (2022), p. 94; *Eoin Carolan*, The New Separation of Powers: A Theory of the Modern State, Oxford 2009, p. 2.

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an answer. I studied the ends the separation of powers claims to achieve, the values driving the doctrine. To my surprise, I realised that the doctrine is regarded as a means to preserve rights and protect rights-holders.[16] This brought with it a curious paradox. If rights preservation is a value driving the doctrine, how can court action to recognise and protect the unenumerated constitutional right to marry be a violation of the separation of powers? Is not the court advancing the purpose behind the doctrine rather than detracting from it?

My task here is to unravel this paradox. For this, I read *Supriyo* alongside the vast literature on the separation of powers. I find that the most common reading of separation of powers sees the key motivating purpose behind the doctrine as maintaining the institutional specialisation of State branches such that each branch makes decisions that they are 'structurally well-suited to achieve'.[17] While important, this reading poses the risk of separation of powers disputes becoming turf demarcation exercises where the sole focus of the doctrine is delineating (with precision) the special skills of each institution to, in turn, determine whether the task in question falls within the identified skill set or not. Under this reading, rights are irrelevant to the separation of powers assessment (section B).

I find that this reading of the doctrine animated the *Supriyo* Court's understanding of the separation of powers. I trace the Court's inclination to prioritise the value of maintaining institutional specialisation at three interlinked stages of adjudication: in deciding the Court's jurisdiction, in rejecting the right to marry and in shaping appropriate remedies. I conclude that the Court denied the existence of a right to marry and shied away from designing remedies because it understood separation of powers as intending *solely* to maintain institutional specialisation (section C).

Now, I bring back my earlier finding. That the separation of powers is *also* means to preserve rights and protect rights-holders. I argue that when rights preservation is centred as a value driving the doctrine, court action to recognise and protect the unenumerated constitutional right to marry is no longer inconsistent with the separation of powers. Nor is it a carefully regulated exception to it. Rather, it is part and parcel of the doctrine, an essential facet of its demands. The *Supriyo* Court's claim that the separation of powers requires it to stay out of protecting the right to marry therefore does not hold water (section D).

That said, the Court was justified in paying attention to its institutional limitations. Court action in the name of protecting rights with no institutional constraints whatsoever is risky. If so, both the value of maintaining institutional specialisation and that of rights preservation ought to be simultaneously maintained within the separation of powers exercise. What would this look like? I find answers within other parts of the *Supriyo* dicta, beyond its holdings on the constitutional right to marry. I conclude that when rights preservation and democracy protection are seen as multi-institutional, collaborative constitutional enterprises, courts can recognise unenumerated constitutional rights while also respecting

16 See section D.

17 *Nick Barber*, Principles of Constitutionalism, Oxford 2018, p. 54.

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the distinct institutional skills of other State branches (section E). So modified, separation of powers arguments would lead the *Supriyo* Court to recognising the right to marry. Presenting *Supriyo* as my test case, I therefore dilute the separation of powers objection to the judicial recognition of unenumerated constitutional rights.

B. Maintaining Institutional Specialisation

The most common reading of separation of powers sees the doctrine as being centrally concerned with maintaining institutional specialisation amongst State branches, resulting in efficient government. That is, the separation of powers aims to ensure that power is not divided at random amongst branches of the State. Rather, the branches are matched to the tasks they are 'structurally well-suited to achieve'.[18] The structural fit is decided based on institutional features such as:

> *"the composition and skills of an institution…the knowledge and experience of the actors within it…the scope of the institution's information-gathering powers…some bodies are better than others at gathering different types of information…the manner of the institution's decision-making process; some issues may lend themselves well to expert decision-making, others will be better allocated to amateur processes which have the virtues of openness and inclusivity…[and] the vulnerability of the institution to outside pressures".*[19]

Following this allocation of 'function to form'[20] (also called 'purpose interrelation'),[21] the separation of powers typically allocates the task of deciding the broad direction of laws for the polity to the legislature. This guarantees democratic deliberation amongst representatives who serve as conduits to diverse public opinion. They are accountable to the electorate and responsive to its wishes, which, in turn, serves as an effective guide for broad policy formulation.

However, legislators are rarely experts. They are most likely amateurs or bureaucrats before whom expert opinion is tested. The separation of powers thus vests the task of formulating specialised opinion and crafting detailed rules in the executive, comprising of members with technical capacity, knowledge, and merit. In controlling the police and the army, the executive is also able to exercise force, rendering effective decisions by other

18 *Barber*, note 17, p. 54; *William Eskridge*, Relationships between Formalism and Functionalism in Separation of Powers Cases, Harvard Journal of Law and Policy 22 (1999), p. 383; *Dimitrios Kyritsis*, Where Our Protection Lies: Separation of Powers and Constitutional Review, Oxford 2017, p. 211; *John F. Manning*, Separation of Powers as Ordinary Interpretation, Harvard Law Review 124 (2011), p. 1944.

19 *Nick Barber*, Prelude to the Separation of Powers, The Cambridge Law Journal 60 (2001) p. 72 (emphasis added).

20 Ibid., p. 73.

21 *Kyritsis*, note 18, p. 42.

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branches. Moreover, executive decision-making is usually speedy, enabling quick responses where necessary.

Following a similar rationale, separation of powers gives the judiciary the responsibility of adjudicating legal disputes. Judges are legal experts with factual, evidentiary and forensic skills, adept at surmising the applicable law and evaluating its application within individual cases. Constitutional systems also generally guarantee judicial independence from individual parties to the dispute, electoral politics and from other branches. This ensures that judicial decision-making is, at least in theory, impartial, capable of resisting political pressure and performing inter-branch supervision.

This reading of the separation of powers has many benefits. In matching institutional roles to institutional features, it offers a 'principled starting point' to begin the process of delineating the roles of State branches.[22] This task has been described as one of the most 'intractable puzzles of constitutional law'[23] because of the 'unconvincing, inauthoritative, and ever-shifting'[24] criteria usually employed in line-drawing. The reading thus does away with (some of) the 'indeterminacy'[25] and 'extraordinary confusion'[26] that has plagued the separation of powers for decades, causing many to dismiss the doctrine as 'increasingly obsolete and incoherent' and in a state of 'deep crisis',[27] fostering 'deep ambivalence' and 'widespread disillusionment'[28] about its value for modern government[29] and it's very legal and constitutional status.[30]

This reading of separation of powers also recognises how different State branches can work together to ensure good governance. A well-functioning State needs "healthy opposition' and creative constitutional tension between branches of government'.[31] Dividing power based on institutional specialisation guarantees this. The institutional features of each branch 'embodied in the procedures of the different agencies, and in the representation of varying interests in the separate branches' promises 'different sets of values',[32] enabling

22 *Aileen Kavanagh*, The Constitutional Separation of Powers, in: David Dyzenhaus / Malcolm Thorburn (eds.), Philosophical Foundations of Constitutional Law, Oxford 2016, p. 234.

23 *Gary Lawson*, The Rise and Rise of the Administrative State, Harvard Law Review 107 (1994) p. 1238.

24 *Carolan*, note 15, p. 24.

25 *Daniel Maldonado*, The conceptual architecture of the principle of separation of powers, in: David Bilchitz / David Landau (eds.), The Evolution of the Separation of Powers, London 2018, p. 149.

26 *Maurice J. C. Vile*, Constitutionalism and the Separation of Powers, Oxford 1967, p. 2.

27 Ibid.

28 *Kavanagh*, note 22, p. 238.

29 *Eric Posner / Adrian Vermeule*, The Executive Unbound: After the Madisonian Republic, Oxford 2010.

30 *Manning*, note 18, pp. 1939, 1944-45.

31 *Aileen Kavanagh*, Collaborative Constitutionalism, Cambridge 2023, p. 106.

32 *Vile*, note 26, p. 16.

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each branch to bring a 'distinct role morality'[33] to the process of governance. Each branch thus presents different 'constituent perspectives',[34] identifies 'different features of the problem as salient', proposes 'different solutions' and brings something 'potentially unique to the resolution' of governance problems.[35] This provides 'numerous opportunities to revisit entrenched positions', slows down policymaking, negotiates interbranch compromise, and adds overall value to the 'ultimate products of government'.[36]

However, reading the separation of powers as means to maintain institutional specialisation alone also presents a real and pressing danger. Because the separation of powers is seen as being concerned centrally with ensuring that the institution with the appropriate skill makes the relevant decision, disputes involving the doctrine invariably become turf demarcation exercises. Within this reading, the sole focus of the doctrine is delineating with precision the special skills of each institution in light of its structural features to, in turn, determine whether the task in question falls within the identified skill set or not. The doctrine is thus ultimately concerned *only* with differentiating the turf of each branch and protecting it from invasion by other branches. As long as this task is carried out, the demands of the doctrine are *fully* satisfied. Under this formulation, rights-holders are completely obscured. They are nowhere in sight. The separation of powers assessment is wholly unconcerned with its implications on them.

It is this reading of the doctrine that dominated the Indian Supreme Court's understanding of the separation of powers in *Supriyo*. I trace the reading across the three consecutive stages of the adjudication: in deciding the Court's jurisdiction to hear the case, in assessing whether there is a constitutional right to marry, and in determining the Court's capacity to offer meaningful remedies. Note that all five judges of the *Supriyo* Court arrived at the same conclusion on these three points. They also agreed that unlike same-sex couples, transgender couples do have a right to marry because their right has been statutorily recognised. The judges however disagreed on whether a constitutional right to union exists, requiring the State to legally recognise a 'bouquet of entitlements'.[37] They also disagreed about the constitutionality of adoption regulations which excluded queer couples. While the majority (3 judges) held against a right to union and in favour of the adoption regulations, the minority (2 judges) recognised a right to union and read down the adoption regulations to make them constitutionally compliant.

33 *Michael Foran*, Rights, Common Good, and the Separation of Powers, Modern Law Review 86 (2023), p. 617; *Kyritsis*, note 18, p. 40.

34 *Carolan*, note 15, p. 129.

35 *Tara Ginnane*, Separation of Powers: Legitimacy not Liberty, Polity 53 (2021), p. 144.

36 *Peabody / Nugent*, note 15, pp. 24-26.

37 Supriyo, note 11, para 223 (Chandrachud J.).

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C. Separation of Powers in *Supriyo*

I. Jurisdiction

Supriyo was a writ petition filed under Article 32 of the Constitution of India, challenging, amongst other legislation, the Special Marriage Act 1954 for excluding same-sex couples from its scope. The Respondents in *Supriyo* contested the Supreme Court's jurisdiction to hear the petition. Relying on the structural differences in capacity between the legislature and the judiciary, they argued that the Court should not decide the case. Whether legal recognition should be granted to same-sex marriage ought to be decided by the people's representatives in the Parliament. In deciding the issue one way or the other, the Court would pre-empt deliberation and debate.[38]

The Court swiftly rejected these claims, holding that separation of powers 'certainly does not operate as a bar against judicial review'.[39] In fact,

> *"judicial review promotes the separation of powers by seeing to it that no organ acts in excess of its constitutional mandate. It ensures that each organ acts within the bounds of its remit".*[40]

Judicial review is thus a form of check and balances. Check and balances guarantee 'limits on government power', with each branch monitoring the other to ensure that no branch 'exceeds its authority or invades another's sphere'.[41] In this way, they put in place a system of 'governmental insurance'[42] where the 'exercise of power by any one power-holder…[is] balanced and checked by the exercise of power by other power-holders'.[43] Check and balances – including through judicial review – therefore maintain and complement the separation of powers and are 'axiomatic' to it.[44]

This extended to judicial review of legislative and executive action on rights grounds. For the *Supriyo* Court,

> *"the Constitution demands that this Court conduct judicial review and enforce the fundamental rights of the people*[45]*…Judicial review is all about adjudicating the validity of legislative or executive action (or inaction) on the anvil of the fundamental*

38 Ibid., para. 59 (Chandrachud J.).

39 Ibid., para. 67 (Chandrachud J.).

40 Ibid., para. 67 (Chandrachud J.).

41 *Nancy Kassop*, The Constitutional Check and Balances that Neither Check Nor Balance, in: Michael Genovese / Lori Cox Han (eds.), The Presidency and the Challenge of Democracy, Berlin 2006, p. 73.

42 Ibid.

43 *Jeremy Waldron*, Separation of Powers in Thought and Practice, Boston College Law Review 54 (2013), p. 433.

44 *Kavanagh*, note 31, p. 106.

45 *Supriyo*, note 11, para. 67 (Chandrachud J.).

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> *freedoms incorporated in Part III*[46] *…The doctrine of separation of powers cannot, therefore, stand in the way of this Court issuing directions, orders, or writs for the enforcement of fundamental rights".*[47]

Concluding that it has the institutional capacity to review legislation for rights compliance, the Court dismissed the separation of powers objection to its jurisdiction.

II. Right-Duty

However, the same did not hold true for the next two stages. In deciding that there did not exist a constitutional right to marry, the Court was driven by two arguments, the second of which was based on its firm belief that recognising such a right fell outside its institutional capacity and within the turf of other State branches.

The Court's first argument was that the interest in marriage was not fundamental enough to be elevated to the status of a constitutional right. For Justice Bhat, who wrote the majority opinion, the 'fundamental importance of marriage remains that it is based on *personal preference* and confers social status. Importance of something to an individual does not *per se* justify considering it a fundamental right, even if that preference enjoys popular acceptance or support'.[48] For Justice Chandrachud, who wrote the dissent, the significance of marriage came not from its alliance with core constitutional values but from the benefits accorded to marital status by State regulation: 'Marriage may not have attained the social and legal significance it currently has if the State had not regulated it through law'.[49] The judges also drew support from the fact that previous decisions of the Supreme Court had not recognised marriage as a fundamental right.[50] While they protected the right to marry a person of one's choice,[51] a right to marry *simpliciter* was not part of Indian constitutional jurisprudence.

At the outset, it is unclear why the interest in marriage is not important enough to achieve the status of a fundamental right. Marriage is a deeply personal, intimate choice. For some, it is an expression and celebration of their love and commitment to their partners. For others, it is a necessary condition to be able to build a relationship and start a family within India's social context where unmarried couples and children born outside marriage are subject to intense social stigma. So understood, marriage easily meets the criteria on the basis of which several other unenumerated rights – such as the right to privacy[52] or the

46 Ibid., para. 68 (Chandrachud J.).

47 Ibid., para. 67 (Chandrachud J.) (emphasis added).

48 Ibid., para. 49 (Bhat J.) (emphasis in original).

49 Ibid., para. 183 (Chandrachud J.).

50 Ibid., para. 175-6 (Chandrachud J.)., Ibid., para. 50 (Bhat J.).

51 *Shafin Jahan v Asokan KM* AIRONLINE 2018 SC 1136; *Shakti Vahini v Union of India* AIR 2018 SC 1601.

52 *Puttaswamy*, note 8.

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right to reproductive autonomy[53] – have been accepted as fundamental rights. It 'protects for the individual a zone of choice and self-determination…[recognizing] the ability of each individual to make choices and to take decisions governing matters intimate and personal'.[54] These decisions, including the marriage decision, present, 'profound questions of identity, agency, self-determination and the right to make an informed choice'.[55] The Court was well aware of this disparity. As Justice Chandrachud himself admitted,

> *"The Constitution does not expressly recognize a fundamental right to marry. Yet it cannot be gainsaid that many of our constitutional values, including the right to life and personal liberty may comprehend the values which a marital relationship entails."*[56]

Thus, that the interest in marriage is not important enough to be a fundamental right was not the Court's main argument, or its strongest one. Instead, the Court's primary justification for denying constitutional status to the right to marry was that the institutional considerations underlying the separation of powers barred it from recognising the right. The Court reasoned that reading in a right to marry into the Constitution would necessarily require the Court to place a positive duty on the State to set up an institution of marriage for same-sex couples:

> *"The petitioners seek that the Court recognise the right to marry as a fundamental right. As explained above, this would mean that even if Parliament and the State legislatures have not created an institution of marriage in exercise of their powers under Entry 5 of the Concurrent list, they would be obligated to create an institution because of the positive postulate encompassed in the right to marry."*[57]

This 'weigh[ed]'…heavily' on the court's mind because 'the creation of the institution…here depend[ed] on state action, which is sought to be compelled through the agency of this court'.[58] For the Court, in asking the State to design an institution of marriage for same-sex couples, 'the doctrine of separation of powers [would be] violated…[because] the direction in effect, [would be] to amend existing statutory frameworks, if not to legislate afresh'.[59] In exercising its power of judicial review, the Court refused to 'enter upon the legislative domain…by issuing directions which for all intents and purposes would amount to enacting law or framing policy'.[60] The Court also repeatedly emphasised that the

53 *X v NCT Delhi* AIR 2022 SC 4917 ('*X v NCT*').
54 *Puttaswamy*, note 8, para. 168 (Chandrchud J.) (emphasis added).
55 *ABC v State of Maharashtra* WP No. 1357/2023 (Bombay High Court, 20 January 2023), para. 32.
56 *Supriyo*, note 11, para. 185 (Chandrachud J.) (emphasis added).
57 Ibid., para. 182 (Chandrachud J.) (emphasis added).
58 Ibid., para. 47 (Bhat J.).
59 Ibid., para. 17 (Narasimha J.).
60 Ibid., para. 69 (Chandrachud J.).

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'legislature [was the] democratically elected body…mandated to carry out the will of the people', not the Court.[61]

The complex nature of the positive duty that would flow from a right to marry also contributed to the Court's reticence to recognise the right. The Court drew attention to the 'intractable difficulties in *creating, through judicial diktat*, a civil right to marry':[62]

> *"Ordering a social institution or re-arranging existing social structures, by creating an entirely new kind of parallel framework for non-heterosexual couples, would require conception of an entirely different code, and a new universe of rights and obligations. This would entail fashioning a regime of state registration, of marriage between non-heterosexual couples; the conditions for a valid matrimonial relationship amongst them, spelling out eligibility conditions, such as minimum age, relationships which fall within "prohibited degrees"; grounds for divorce, right to maintenance, alimony, etc."*[63]

In other words,

> *"the creation of social institutions and consequent re-ordering of societal relationships are 'polycentric decisions', which have 'multiplicity of variable and interlocking factors, decisions on each one of which presupposes a decision on all others', decisions that cannot be rendered by one stroke of the judicial gavel."*[64]

Thus, in essence, *because* it could not require the State to set up an institution of marriage for same-sex couples, the Court concluded that it *also* could not recognise the prior fundamental right to marry from which such duty would emerge: 'The content of the right claimed by the Petitioners is such that it clearly places positive legislative obligations on the State, and therefore, cannot be acceded to'.[65] The Court's decision to reject the existence of a constitutional right to marry thus hinged entirely on the need to maintain institutional specialisation as required by the doctrine of separation of powers: 'courts may not exercise [the] power [of judicial review] to make decisions for which they are ill equipped. This Court is not equipped to recognize the right of queer persons to marry'.[66]

III. Right-Remedy

A similar concern underlay the Court's decision-making at the third, remedial stage. The Court was clear that striking down the SMA as unconstitutional for excluding same-sex

61 Ibid., para. 69 (Chandrachud J.).
62 Ibid., para. 69 (Bhat J.) (emphasis in original).
63 Ibid., para. 69 (Bhat J.) (emphasis in original).
64 Ibid., para. 14 (Narasimha J.); Ibid., para. 54 (Bhat J.) (emphasis in original).
65 Ibid., para. 14 (Narasimha J.) (emphasis added).
66 Ibid., para. 203 (Chandrachud J.) (emphasis added).

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couples would be foolhardy as it would deny the benefit of the progressive legislation to heterosexual couples from different religions and castes.[67] The alternative remedy suggested by the petitioners was reading the SMA to make it gender neutral by replacing gender specific words or pronouns with gender neutral ones. For the Court, such a remedy could not be granted because of the 'constitution's entrenchment of separation of powers'.[68] The remedy 'would in effect be entering into the realm of the legislature',[69] especially because the entitlements attached to marriage are spread across a 'spider's web of legislations and regulations' such that altering the scope of marriage under the SMA could have a 'cascading effect across…disparate laws':[70]

> *The Court is not equipped to undertake an exercise of such wide amplitude because of its institutional limitations. This Court would in effect be redrafting the law(s) in the garb of reading words into the provisions. It is trite law that judicial legislation is impermissible.*[71]

The Court especially saw the remedy as requiring a 'range of policy choices, involving multiplicity of legislative architecture governing the regulations' to be considered, 'guided by diverse interests and concerns - many of them possibly coalescing'.[72] In other words, the reform needed was too complex to be 'captured and evaluated within a singular judicial proceeding', instead requiring a 'deliberative and consultative exercise, which the legislature and executive are constitutionally suited, and tasked, to undertake'.[73] After all, it is the Parliament who has 'access to varied sources of information and represents in itself a diversity of viewpoints in the polity'[74] and therefore it should be the Parliament who 'engage[s] in democratic decision-making and settle[s] upon a suitable course of action'.[75] While the Court's powers of judicial review are expansive, the

> *"breadth of this power is restrained by the awareness that it is in essence judicial. The court may feel the wisdom of a measure or norm that is lacking; nevertheless, its role is not to venture into functions which the constitution has authorised other departments and organs to discharge".*[76]

67 Ibid., para. 209 (Chandrachud J.); Ibid., para. 18 (Kaul J.).
68 Ibid., para. 138 (Bhat J.).
69 Ibid., para. 208 (Chandrachud J.) (emphasis added).
70 Ibid., para. 17 (Kaul J.).
71 Ibid., para. 208 (Chandrachud J.) (emphasis added).
72 Ibid., para. 118 (Bhat J.).
73 Ibid., para. 19 (Narasimha J.).
74 Ibid., para. 208 (Chandrachud J.).
75 Ibid., para. 210 (Chandrachud J.).
76 Ibid., para. 136 (Bhat J.) (emphasis in original).

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Thus, just like the Court's institutional limitations in imposing the appropriate positive duty on the State drove it to deny constitutional recognition to the right to marry, the Court's 'limited institutional capacity'[77] to design necessary remedies cemented its conclusion to deny the right to marry: 'The realization of a right is effectuated when there is a remedy available to enforce it…Absent the grant of remedies, the formulation of doctrines is no more than judicial platitude.[78]

Underlying the Court's decision across all three stages was an understanding of the separation of powers as key to maintaining institutional specialisation amongst branches. For the Court, *this* was what separation of powers was meant to achieve, and this was what the Court was required to protect in applying the doctrine. At the first stage of deciding jurisdiction, the Court saw itself as possessing the institutional capacity to conduct judicial review. However, at the second stage of determining the existence of a constitutional right to marry, the Court decided that its institutional capacity fell far short. The structural features of the judiciary did not support the recognition of such a right as it would require the imposition of polycentric positive duties on the State and the designing of complex remedies, both of which existed outside the 'judicial' nature of the Court's capacity. For the Court, these tasks were much better suited to decision-making by other State branches, especially the legislative branch which offered representation to diverse groups of the policy and was thus an ideal forum for consultation and deliberation.

The Court's consistent emphasis on the doctrine as a means to maintain institutional specialisation caused its separation of powers assessment to quickly become a turf demarcation exercise. As is evident across the decisions of all five judges, the Court's main concern was delineating, with care, the judicial and legislative turfs – or 'domains'[79] – based on the skills possessed by each branch in light of its structural features. For instance, the Court concluded that the judiciary has the relevant legal skill (and constitutional authority) to conduct review of legislation on rights grounds while the legislature, in light of its composition and direct accountability to the electorate, is better able to decide the shape of the civil right to marry. Once such delineation was complete, the Court simply did its best to stay out of the legislative turf. This was the *sole* parameter on the basis of which the Court adjudicated whether there ought to be a constitutional right to marry. The implications for rights-holders – same-sex couples, already stigmatised on account of their sexuality and further marginalised by the law excluding them from an important social institutional like marriage – were largely missing within this separation of powers assessment. Of course, the Court did acknowledge their disadvantage:

77 Ibid., para. 18 (Kaul J.).

78 Ibid., para. 333 (Chandrachud J.).

79 Ibid., para. 67 (Chandrachud J.); Ibid., para. 18 (Kaul J.).

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> *"This court is alive to the feelings of being left out, experienced by the queer community*[80]*…The feeling of exclusion that comes with this status quo, is undoubtedly one which furthers the feeling of exclusion on a daily basis, in society for members of the queer community".*[81]

However, the Court's bottom line was clear. The separation of powers, and its focus on maintaining institutional specialisation, demanded that the Court stay out of recognising a constitutional right to marry, *irrespective* of what it meant for queer couples:

> *"addressing [the] concerns [of the queer community] would require a comprehensive study…involving a multidisciplinary approach and polycentric resolution, for which the court is not an appropriate forum".*[82]

D. Rights Preservation

This reading of separation of powers would have been entirely acceptable had the sole purpose of the doctrine been to ensure that governance decisions are made by State branches best suited to make them. In that case, the marginalisation of the rights-holder would have been an unfortunate byproduct of the doctrine, a consequence that would have to be borne if separation of powers had to be guaranteed. However, this is not the case. Separation of powers is *not* driven solely by the value of maintaining institutional specialisation. Rather, across contexts, it is, and has historically been, *also* means to preserve rights and protect rights-holders.

From the time of Montesquieu and Madison, to whom the origins of the doctrine are commonly attributed, the separation of powers has sought to divide power amongst branches of the State to avoid excessive concentration of power in the hands of one branch alone:[83]

> *"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny*[84]*…when legislative*

80 Ibid., para. 149 (xiii) (Bhat J.).

81 Ibid., para. 147 (Bhat J.).

82 Ibid., para. 149(xiii) (Bhat J.) (emphasis added).

83 *Waldron*, note 43, pp. 433, 437; *Steven Calabresi / Mark Berghausen / Skylar Albertson*, The Rise and the Fall of Separation of Powers, Northwestern University Law 106 (2012), p. 533; *Huq / Michaels*, note 15, p. 382; *Luca Pietro Vanoni*, New Challenges to the Separation of Powers: The Role of Constitutional Courts, in: Antonia Baraggia / Cristina Fasone / Luca Vanoni (eds.), New Challenges to the Separation of Powers: Dividing Power, Cheltenham 2020, p. 49.

84 *James Madison*, The Federalist Papers: No. 47 (1 February 1778) https://avalon.law.yale.edu/18th_century/fed47.asp ('Federalist 47') (emphasis added) (last accessed on 7 May 2025).

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> *power is united with executive power in a single person or in a single body of the magistracy, there is no liberty".*[85]

In contrast, dividing power reduces the possibility of 'authoritarianism'[86] and dilutes the State's ability to violate rights.[87] In separating law makers from law enforcers and interpreters, the doctrine also does away with 'partiality and self-interest'[88] which would otherwise 'dramatically diminish' the value of constitutional rights:'[89]

> *"Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power the judge might behave with all the violence of an oppressor."*[90]

Separating power also brings with it greater accountability. It creates 'multiple centres of recourse' to which citizens can appeal to satisfy their rights,[91] such that if one branch makes a rights-eroding error, other branches exist to offer them rights-protective remedies.[92] And, the division of power raises 'transaction costs' of enacting new rules: 'requiring the agreement of multiple institutions makes it less likely that the government will intrude upon

85 *Montesquieu*, The Spirit of the Laws, in: Anne Cohler / Basia Miller / Harold Stone (eds.), Cambridge Texts in the History of Political Thought, Cambridge 1989, p. 157 (emphasis added).

86 *Arianna Vedaschi*, Introduction to Part III: Separation of Powers in Times of Crisis, in: Antonia Baraggia / Cristina Fasone / Luca P. Vanoni (eds.), Cheltenham 2020, p. 166; *Landau / Bilchitz*, note 13, p. 1; *Kavanagh*, note 22, p. 221.

87 *Maldonado*, note 25, p. 145; *Andrew Hessick*, Standing, Injury in Facts and Private Rights, Cornell Law Review 93 (2008), p. 318; *Vile*, note 26, p. 13; *Waldron*, note 43, p. 439; *Peabody / Nugent*, note 15, p. 12; *William B. Gwyn*, The Separation of Powers and Modern Forms of Democratic Governance, in: Robert Goldwin / Art Kaufman (eds.), Separation of Powers: Does It Still Work?, American Enterprise Institute for Policy Research 1986, pp. 65-66; *Kent Barnett*, Standing for (and up to) Separation of Powers, Indiana Law Journal 91 (2016), p. 58; *T.R.S Allan*, Law, Liberty and Justice: The Legal Foundations of British Constitutionalism, Oxford 1994.

88 *Carolan*, note 15, pp. 27-28.

89 *Brown*, note 15, p. 1514.

90 Madison, Federalist No. 47, note 84; See also *John Locke*, Second Treatise of Government, Hackett Publishing Company 1980, sec. 143: "[I]t may be too great a temptation to human frailty . . . for the same Persons who have the power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage."; see also *Montesquieu*, note 85, p. 157: "Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator."

91 *Waldron*, note 43, p. 439; *Martin Flaherty*, The Most Dangerous Branch, The Yale Law Journal 105 (1996) p. 1730; *Huq / Michaels*, note 15, p. 385; *Eoin Carolan*, Revitalising the social foundations of the separation of powers?, in: Antonia Baraggia / Cristina Fasone / Luca P. Vanoni (eds.), Cheltenham 2020, p. 26.

92 *Barber*, note 17, p. 72.

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individual liberties'.[93] This is especially so when the branches are intentionally varied, with members of each chosen in a different way and representing a different sets of interest. This 'complexity and diversity' makes friction likely. The 'friction, in its turn, protects liberty' (or rights more generally).[94]

The separation of powers thus is, and has always been, means to preserve rights and protect rights-holders. It is 'inextricably linked' to the 'enhancement'[95] of guaranteed rights, an 'indispensable correlative' of these rights[96] and a 'bulwark of liberty' without which rights are 'nothing but paper'.[97] In constructing its reading of separation of powers around the value of maintaining institutional specialisation alone, *Supriyo* missed out on capturing this second value driving the doctrine. The Court's reading of separation of powers was therefore truncated and imbalanced. It amplified one aspect of the doctrine and diminished the other. The imbalance requires correction. Rights preservation should be reinstated as a key value driving the separation of powers: 'the protection of individual rights…should be an explicit factor in the analysis of structural issues and should provide an animating principle for the jurisprudence of separation of powers'.[98]

Typically, the separation of powers preserves rights by ensuring that State branches do not overstep their boundaries to usurp power from another branch and concentrate power in themselves. This is evident within Montesquieu and Madison's call to 'give one power a ballast…to put it in a position to resist another',[99] such that the constituent parts of government 'may, by their mutual relations, be the means of keeping each other

93 *Jonathan Macey*, How Separation of Powers Protects Individual Liberties, Rutgers Law Review 41 (1989), p. 814 (emphasis added); *Kate Andrias*, Separations of Wealth: Inequality and the Erosion of Checks and Balances, Journal of Constitutional Law 18 (2015), p. 485; *Daryl Levinson / Richard Pildes*, Separation of Parties, not Powers, Harvard Law Review 119 (2006), p. 27 ('The cardinal virtue of the Madisonian separation of powers is supposed to be that, by raising the transaction costs of governance, it preserves liberty and prevents tyranny').

94 *Barber*, note 17, p. 52; *Eric Barendt*, An Introduction to Constitutional Law, Oxford 1998; *Jiří Baroš / Pavel Dufek / David Kosař*, Unpacking the separation of powers, in: Antonia Baraggia / Cristina Fasone / Luca P. Vanoni (eds.), Cheltenham 2020, p. 127.

95 *Bruce Ackerman*, The New Separation of Powers Harvard Law Review 113 (2000), p. 640.

96 *Brown*, note 15, p. 1539.

97 *Richard Murphy*, Book Review: The Constitution as Political Structure, Constitutional Commentary 13 (1996), p. 343; *Ron Merkel*, Separation of Powers - A Bulwark for Liberty and a Rights Culture, Saskatchewan Law Review 69 (2006), p. 129; *Dennis LaGory*, Federalism, Separation of Powers, and Individual Liberties, Vanderbilt Law Review 40 (1987), p. 1353; *David Lewittes*, Constitutional Separation of War Powers: Protecting Public and Private Liberty, Brooklyn Law Review 57 (1992), p. 1083; *Martin Feigenbaum*, The Preservation of Individual Liberty Through the Separation of Powers and Federalism: Reflections on the Shaping of Constitutional Immortality, Emory Law Journal 37 (1988), p. 613; *Carrington*, note 15, p. 661.

98 *Brown*, note 15, p. 1516 (emphasis added).

99 Montesquieu, note 85, Book V, ch. 14.

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in their proper places'.[100] Here, the primary threat to rights is seen as coming from an all-too-powerful State and the demand is therefore for power to be divided. However, this point of view assumes that rights and a strong State are 'inevitably opposed' to one another.[101] It advances an 'essentially negative view of political liberty, one too concerned with the view of freedom as absence of restraint, rather than with a more positive approach to freedom'.[102] It creates 'so much friction' that State action becomes 'extremely difficult', preventing 'the state from protecting its citizens'[103] and gumming up the 'government to liberty's detriment'.[104]

Fortunately, this 'unattractive account' of the State and rights[105] is no longer dominant within constitutional theory and practice in India. It has been replaced by the clear acceptance that positive State action is required for meaningful rights protection.[106] Rights are seen as 'achieved through state action, not against it'.[107] As Justice Chandrachud himself recognised in *Supriyo*,

> *"Fundamental rights consist of both negative and positive postulates preventing the State from interfering with the rights of the citizens and creating conditions for the exercise of such rights respectively. This understanding of fundamental rights is unique to Indian constitutional jurisprudence.[108] Fundamental rights are not merely a restraint on the power of the State but provisions which promote and safeguard the interests of the citizens. They require the State to restrain its exercise of power and create conducive conditions for the exercise of rights. If such a positive obligation is not read into the State's power, then the rights which are guaranteed by the Constitution would become a dead letter."*[109]

With this fundamental shift in the understanding of rights and the nature of the State, I argue, a parallel shift ought to be triggered in the reading of separation of powers. Under

100 *James Madison*, 'The Federalist Papers: No. 51' (8 February 1778) https://avalon.law.yale.edu/18th_century/fed51.asp (last accessed on 8 August 2024).

101 *Barber*, Principles of Constitutionalism, note 17, p. 53

102 *Vile*, note 26, p. 15.

103 *Barber*, Principles of Constitutionalism, note 9, p. 17; *Foran*, note 33, p. 616; *Ginnane*, note 35, p. 139; *Paolo Sandro*, The Making of Constitutional Democracy: From Creation to Application of Law, London 2022, p. 243.

104 *Ginnane*, note 35, p. 137.

105 *Barber*, note 17, p. 51.

106 For instance, see *Henry Shue*, Basic Rights: Subsistence, Affluence, and US Foreign Policy, Princeton 1996; *Sandra Fredman*, Comparative Human Rights Law, Oxford 2018.

107 *Christoph Möllers*, The Separation of Powers, in: Roger Masterman / Robert Schultze (eds.), The Cambridge Companion to Comparative Constitutional Law, Cambridge 2019, p. 245 (emphasis added).

108 *Supriyo*, note 11, para. 157 (Chandrachud J.).

109 Ibid., para. 158 (Chandrachud J.) (emphasis added), a stance supported by earlier cases like *Puttaswamy*, note 8, para. 140 (Chandrachud J.); *X v NCT*, note 53, paras. 130, 133.

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this reading, the separation of powers requires not just State inaction to guarantee rights protection. It also calls for different forms of State action. That is, rights are protected not just by dividing power up amongst branches and keeping them in check to ensure that they do not usurp power from the other. Rights are also protected by State branches acting *to* guarantee rights.

The judiciary is one such branch of the State. When the separation of powers is understood as the means to maintain institutional specialisation alone, court action to recognise and protect unenumerated rights – like the right to marry – is typically seen as infringing on the legislative turf and therefore inconsistent with separation of powers. *Supriyo* epitomises this impulse. Alternatively, and at best, such court action is seen as an exception to the separation of powers. While the separation of powers normally calls for court inaction with respect to unenumerated rights, in special situations of political dysfunction[110] or when the State has obstructed political change by suppressing citizen voices (for instance through restrictions on speech or voting) and hindering minority participation,[111] the doctrine is relaxed and rendered flexible to permit court action. However, when rights preservation is reinstated as a value driving the separation of powers, court action to recognise and protect unenumerated rights – like the right to marry – no longer detracts from the doctrine. Nor is it just a carefully regulated exception to it. Rather, it is consistent with the doctrine, part and parcel of what it demands.

In formulating the three categories – court action as inconsistent with separation of powers, court action as an exception to separation of powers, and court action as part and parcel of separation of powers – I draw inspiration from another area of Indian constitutional jurisprudence: the Supreme Court's holdings on affirmative action. Under Articles 15(1) and 16(1), the Indian Constitution commands that the State shall not discriminate against its citizens on the basis of certain listed grounds while under Articles 15(3)-(4) and 16(4)-(5), the Constitution allows the State to enact certain forms of affirmative action for members of disadvantaged groups. The relationship between the two sets of clauses has been the subject of fierce constitutional debate in India. Going simply by the text of the Constitution, affirmative action is not inconsistent with the demand for equality, such that if equality is to be protected, affirmative action would always have to be outlawed. Had the relationship been one of pure inconsistency, the Constitution would not have explicitly provided for equality and affirmative action side-by-side. So, inconsistency can be safely set aside. The Supreme Court initially read the affirmative action clauses as exceptions to the equality

110 *David Landau*, Institutional failure and intertemporal theories of judicial role in the global south, in: David Bilchitz / David Landau, The Evolution of the Separation of Powers, Cheltenham 2020, pp. 40-45.

111 For instance, *John Hart Ely*, Democracy and Distrust: A Theory of Judicial Review, Cambridge MA 1980, pp. 105-179; Dixon develops Ely's representation reinforcement theory of judicial review, see *Rosalind Dixon*, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age, Oxford 2023.

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clause, such that the equality norm required all groups be treated identically[112] but some forms of differential treatment through affirmative action was permitted to redress group disadvantage.[113] Affirmative action was thus on principle understood as taking away from equality but was justified in light of its specific constitutional purpose. However, with time, the Court adopted a different reading of the two clauses. It read the affirmative action clauses as part and parcel of the equality clause such that affirmative action did not detract from equality but rather helped achieve its aims.[114] This altered understanding emerged from a new equality norm which no longer demanded identical treatment of similar persons in the name of equality. Rather, it sought to redress historic disadvantage,[115] shifting how affirmative action was conceived. If the very purpose of the equality clause was to redress disadvantage, affirmative action – which did exactly that – could no longer be an exception to equality. Rather, it became part and parcel of the equality clause.

Let us now bring these three categories to *Supriyo*. As we saw in section C, *Supriyo* understood court action to recognise and protect the unenumerated constitutional right to marry as being inconsistent with the separation of powers. It was against the dominant separation of powers norm, which sought to maintain the institutional specialisation of branches. Judicial intervention was thus simply not allowed. One way the Court could have intervened would have been to construct its intervention to recognise and protect the right to marry as an exception to separation of powers. While normally the doctrine demands that the court stay away from such action so as to respect the institutional capacities of other State branches, in certain exceptional situations – such as political dysfunction or obstructed political participation (such as of sexual minorities) – the doctrine permits court intervention. This interpretative manoeuvre would have allowed for the recognition of a constitutional right to marry but would have retained the norm: that the separation of powers is meant simply to maintain institutional specialisation.

What if the norm is instead recast? If rights preservation is reinstated as a value driving the doctrine? If the separation of powers is also means to preserve rights, then judicial action to recognise and protect the unenumerated constitutional right to marry – which does exactly that – would no longer be inconsistent with the doctrine, nor a carefully regulated

112 This equality norm is also called 'formal equality': *Catherine MacKinnon*, Sex equality under the Constitution of India: Problems, prospects, and ''personal laws'', International Journal of Constitutional Law 4 (2006), p. 181.

113 *General Manager, Southern Railway v Rangachari* AIR 1962 SC 36*; M.R. Balaji v State of Mysore* AIR 1963 SC 649.

114 *State of Kerala v N.M. Thomas* AIR 1976 SC 490*; Indra Sawhney v Union of India* AIR 1993 SC 477.

115 This equality norm is called substantive equality: *Indra Jaising*, Gender Justice and the Supreme Court, in: BN Kirpal et al. (eds.), Essays in Honor of the Supreme Court of India, Oxford 2000, p. 293; *Ratna Kapur / Brenda Cossman*, On women, equality and the Constitution: Through the Looking Glass of Feminism, in :Nivedita Menon (ed.), Gender and Politics in India, Oxford 1999, p. 200; *Sandra Fredman*, Substantive Equality Revisited, International Journal of Constitutional Law 14 (2016), p. 729.

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exception to it. Rather, it would be part and parcel of the doctrine. So understood, the separation of powers would not ask courts to stay out of protecting the unenumerated right to marry. Rather, it would invite courts in and support the role of courts. It would transform judicial intervention from an outlaw (not allowed) or an outlier (an exception) to an essential feature of the doctrine. Within this frame, the most common threshold objection to courts protecting unenumerated constitutional rights, including the right to marry – that the separation of powers requires the judiciary to keep away – is dissolved. Judicial intervention is certainly allowed. And in some cases – such as where the majoritarian political process is hostile to the claims of some groups, discussed below – it might even be required.

Strictly speaking, even when maintaining institutional specialisation is the only value at play, an argument for court intervention could be made by showing that courts too have the institutional capacity to protect the right to marry, just in ways that are different from the Parliament (something the *Supriyo* Court refused to acknowledge). Courts have the legal and technical capacity to creatively interpret constitutional rights in light of precedent. Being outside of electoral politics, courts also offer a unique form of deliberative and democratic space. I consider these arguments in greater detail below. However, the difficulty with this claim is that the value of maintaining institutional specialisation inherently downplays the role of courts and emphasises the place of political branches in relation to the right to marry. This is possibly because of right's contentious political nature, which all judges repeatedly pointed to in *Supriyo* in anointing the Parliament as the appropriate institutional forum for recognising the right. A case for court intervention therefore needs to stand on a stronger values-based footing, one that will dilute the dominance of the Parliament and carve out space for courts. The value of rights preservation performs this role.

E. Modified Separation of Powers in Supriyo

Reinstating rights does not mean that the value of maintaining institutional specialisation plays no part within the separation of powers assessment. That courts have carte blanche when it comes to rights protection, such that all forms of court action in the name of protecting rights is justified. When courts act to preserve rights entirely mindless of institutional limitations, their actions often threaten rights themselves. The work of Octavio Ferraz in the context of right to health litigation in Brazil demonstrates this risk well.[116] Ferraz shows how judicial intervention to recognise and enforce the right to health of an individual citizen without altering the background political economy (including patenting regimes) – a task outside the institutional capacity of courts – has only worsened health

116 *Octavio Ferraz*, Health as a Human Right: the Politics and Judicialisation of Health in Brazil, Cambridge 2021.

https://doi.org/10.5771/0506-7286-2024-4 - am 13.01.2026, 17:10:15. https://www.inlibra.com/de/agb - Open Access -

inequalities in Brazil.[117] Anuj Bhuwania's ground-breaking work on the public interest litigations in India documents another variant of this same concern. Bhuwania skilfully shows how the 'teleological'[118] focus on rights has led to a 'new kind of judicial process' in India which is 'entirely court led and managed' with 'no institutional control…except such self-control that the court wished to exercise'.[119] While public interest litigation originated with an intent to preserve rights, it eventually morphed into a 'dangerous farce',[120] a means to target the most vulnerable rights-holders living on the 'margins of legality' who became 'collateral damage' in the courts' endeavour to find 'neat solutions to the problems of the city'.[121] Bhuwania therefore urges us to 'think in terms of institutional consequences'[122] while adjudicating rights.

This is an important call to heed. The risks posed by forms of court action that shun institutional considerations are significant. Therefore, it is not my claim that rights preservation ought to be the sole value driving the separation of powers exercise. Rather, I argue that rights preservation should co-exist alongside the value of maintaining institutional specialisation in guiding how separation of powers is understood and applied. The problem with *Supriyo* was therefore not that it paid attention to institutional capacities but that it paid attention *only* to institutional capacities. It did not recognise rights preservation as a value driving the separation of powers. Modifying *Supriyo's* understanding of the doctrine would therefore involve bringing its attention to the value of rights preservation as well rather than removing its focus on institutional capacities. The task of the Court would then be to carry out a separation of powers assessment that simultaneously protects both values.

To guarantee the value of rights preservation, the Court would intervene to recognise and protect the unenumerated constitutional right to marry. It would not keep away on separation of powers grounds. Yet the Court's intervention would simultaneously respect its own institutional capacity and that of other State branches. In other words, while the value of rights preservation makes space for court action in relation to the right to marry, the value of maintaining institutional specialisation prescribes the forms of (and limits on) such action. For insights on what this could look like in practice, we fortunately don't have to venture too far. Other parts of the *Supriyo* dicta, beyond the Court's holdings on the constitutional right to marry, indicate how courts can protect rights while also simultaneously respecting the institutional strengths and limitations of State branches.

117 See also *Amy Kapczynski*, The Right to Medicines in an Age of Neoliberalism, Humanity (2019), pp. 79-107.

118 *Anuj Bhuwania*, Courting the People: Public Interest Litigation in Post-Emergency India, Cambridge 2017, p. 136.

119 Ibid., p. 8.

120 Ibid., p.12.

121 Ibid., p. 9.

122 Ibid., p.136.

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Recall that there were two main objections posed by the *Supriyo* Court to recognising a right to marry. *First*, that the very act of the Court requiring the State to put in place an institution of marriage for same-sex couples would violate the separation of powers because it would amount to the Court asking the State to legislate. Whether this institution should exist for queer couples in the first place is something the Parliament should decide after consulting diverse stakeholders. It is not the unelected Court to determine. *Second*, the innate complexity of the duties flowing from the right to marry and the remedies required to effectuate the right concerned the Court. Giving substantive content to the right to marry – and its corresponding duties – is polycentric, requiring a range of policy choices which the Court would be obligated dictate: 'The court would have to fashion a parallel legal regime, comprising of defined entitlements and obligations'.[123] The Court rightly held that designing such a regime fell outside its institutional capacity.

Other parts of the *Supriyo* dicta however reveal that the Court's concerns can be addressed in a way which does not sacrifice rights but respects institutional capacity. Let's start with the second objection first. While Justice Chandrachud's dissent refused to recognise a constitutional right to marry, it did grant recognition to a constitutional right to union, another unenumerated right: 'The state has an obligation to recognize same-sex unions and grant them benefit under law'.[124] Justice Chandrachud dismissed the concern that recognising such a right – and the corresponding State duty– would require the *Court* to give substantive shape and content to both, designing the legal regime supporting them. He instead passed the responsibility of this complex task to a State Committee comprising of members of the queer community and experts with domain knowledge in dealing with the social, psychological, and emotional needs of persons belonging to this community. He required that before finalising its decision, the Committee 'conduct wide stakeholder consultation amongst persons belonging to the queer community, including persons belonging to marginalized groups and with the governments of the States and Union Territories'.[125] The recommendations of the Committee, Justice Chandrachud declared, 'shall be implemented' at the Union and State levels.[126]

It is unclear why the same analysis could not have applied to the right to marry. Why the right could not have been recognised without placing on the Court the responsibility to design the legal institution. What makes the unenumerated right to union different from the unenumerated right to marry? Justice Chandrachud does not provide us an answer, which is where the majority took issue with his reasoning. Justice Bhat and Justice Nariman both held that recognising an unenumerated right to union fell prey to the same institutional concerns as recognising the right to marry: 'in positively mandating the State…grant recog-

123 *Supriyo*, note 11, para. 145 (Bhat J.) (emphasis added).

124 Ibid., para. 340(i) (Chandrachud J.).

125 Ibid., para. 340(s) (Chandrachud J.).

126 Ibid., para. 340(s) (Chandrachud J.); Ibid., para. 11 (Kaul J.).

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nition or legal status to 'unions' from which benefits will flow…the doctrine of separation of powers is violated'.[127] The *Supriyo* majority therefore refused to sanctify to both rights.

However, Justice Bhat did, to some extent, follow Justice Chandrachud's lead. Justice Bhat found that the State's exclusion of same-sex couples from the SMA (and related legislation) had an adverse discriminatory impact on them and violated Article 15 of the Constitution. Recognising this violation, he argued, was 'this court's obligation, falling within its remit':[128] 'this discriminatory impact cannot be ignored by the State; the State has a legitimate interest necessitating action'.[129] Note the mandatory language, repeatedly found across Justice Bhat's decision: 'the State has to address and eliminate…the consequences[s] of the non-recognition of queer unions…through appropriate mitigating measures'.[130] The violation being of an explicitly listed right (Article 15) and not an unenumerated one, placing this duty on the State arguably raised less institutional concerns. Even so, after holding that the State *has to* take action to protect the rights of same-sex couples against discrimination, Justice Bhat rightly brought institutional considerations back into the picture:

> *"The form of [State] action – whether it will be by enacting a new umbrella legislation, amendments to existing statutes, rules, and regulations that as of now, disentitle a same-sex partner from benefits accruing to a 'spouse' (or 'family' as defined in the heteronormative sense), etc.– are policy decisions left to the realm of the legislature and executive[131]…this court cannot within the judicial framework engage in this complex task."*[132]

The requisite decisions were thus left to be taken by the appropriate State branches after undertaking 'wide scale public consultation [and] consensus building' to 'reflect the will of people'.[133] For this purpose, Justice Bhat secured the agreement of the Union Government that a High Powered Committee chaired by the Union Cabinet Secretary would be set up.[134] Justice Bhat also required that the State take action with 'expedition because inaction will result in injustice and unfairness'.[135]

A common theme is now visible. Both judges found that a constitutional right was implicated and violated: the (unenumerated) right to union for Justice Chandrachud and the (enumerated) Article 15 for Justice Bhat. However, the judges did not assume the whole

127 Ibid., para. 17 (Narasimha J.); see also paras. 52-70 (Bhat J.).
128 Ibid., para. 148 (Bhat J.).
129 Ibid., para. 148 (Bhat J.) (emphasis added).
130 Ibid., para. 132 (Bhat J.) (emphasis added).
131 Ibid., para. 148 (Bhat J.) (emphasis in original).
132 Ibid., para. 149 (vii) (Bhat J.).
133 Ibid., para. 148 (Bhat J.).
134 Ibid., para. 149 (vii) (Bhat J.).
135 Ibid., para. 149 (vii) (Bhat J.).

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responsibility of preserving these rights onto themselves. They did not see rights preservation as the 'solitary domain' of courts.[136] Rather, preserving rights was understood as a multi-institutional, collaborative, constitutional enterprise.[137] The judges did what courts are adept at doing in light of their distinct legal skills. They located the right within the Constitution, assessed its possible violation, and indicated corresponding State duties. Then they stopped, recognising that the capacity of courts to protect rights has inherent limits. Due to courts' necessarily piecemeal law-making tools, they find it difficult to effectively conceptualise more forward-looking, holistic policy and legislative frameworks. At this point, the judges made way for other State branches and *their* distinct institutional skills. They 'reached out to their partners in the collaborative scheme, imploring them to remedy the problem comprehensively and democratically, as only the government and legislature can'.[138] They recommended that State Committees be set up to determine the broader and more nuanced contours of the policy after widespread consultations. And they required that this be done quickly.

Applying the same approach to the constitutional right to marry, the *Supriyo* Court could have drawn a distinction between recognising a right and requiring the State to protect it *and* the task of giving shape to the State's duty and designing the legal regime supporting it. While the former fell within the institutional capacity of the Court, the latter could have been handed over to the other State branches. So understood, the Court would *not* have to 'fashion a parallel legal regime, comprising of defined entitlements and obligations' to effectuate the right to marry,[139] a major factor deterring it from recognising the right to marry. Instead, this would be the responsibility of the Court's partners within the multi-institutional, collaborative constitutional enterprise of rights protection.

This approach would transform *Supriyo's* separation of powers assessment. No longer would the sole focus of the Court be on maintaining the institutional specialisation of State branches, with separation of powers becoming a turf demarcation exercise leading ultimately to the marginalisation of rights. Rights preservation would instead be reinstated as a core value driving the separation of powers exercise. At the same time, the Court would not have the power to do as it pleases in the name of protecting rights, with no form of institutional control. Rather, rights would be protected precisely by tapping into the distinct institutional roles of the branches, so that each branch does its part while supporting other branches in their own roles. Both values driving the separation of powers doctrine would therefore be simultaneously maintained.

136 *Kavanagh*, note 31, p. 9.

137 *Christoph Möllers*, The Three Branches: A Comparative Model of Separation of Powers, Oxford 2013, pp. 106-108; *Kavanagh*, note 31, pp. 1-9; *Kyritsis*, note 18, pp. 121-214; *Maldonado*, note 25, p. 154; *Foran*, note 33, p. 604; *Baroš / Dufek / Kosař*, note 94, p. 129.

138 *Kavanagh*, note 31, p. 329.

139 *Supriyo*, note 11, para. 145 (Bhat J.).

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Let us now return to *Supriyo's* first objection to recognising the unenumerated right to marry. That even if the other State branches decide the shape of the State's duties and design the appropriate legal regime as suggested above, in its very demand that the State set up the institution of marriage for same-sex couples, the Court is asking the State to legislate on an issue that the State should democratically decide through voting in the Parliament. Put simply, even if the Court did not shape/design the institution of civil marriage, in requiring the State to set it up, the Court would violate the separation of powers. Here, the concern is not with the Court's lack of technical capacity to craft a spider-web of legislation on marriage but its apparent democratic deficit, as it – unlike the Parliament – does not represent the people who ought to decide whether same-sex couples should be allowed to marry or not. As Counsel for one of the Respondent's argued, 'A judicial sanctioned legal recognition of non-heterosexual union would be a colonial top-down imposition of morality. Such an approach would diminish democratic voices in the process'.[140] The Parliament's evident democratic credentials and the Court's ostensible lack of them therefore became a key institutional consideration configuring the Court's separation of powers assessment.

This holding however turns on the notion of democracy at play. Of course, democracy can be understood simplistically as majoritarian decision-making, such that whatever the majority decides is the democratically optimal answer and any deviation from it would take away from democratic politics. However, as Justice Chandrachud himself recognised in *Supriyo*, this is a 'narrow definition of democracy' understood solely as the electorate mandate of the majority.[141] He made this observation made while dismissing the Respondent's objections to the Court's jurisdiction on ground that judicial review of legislation is anti-democratic and therefore violates the separation of powers:

> *"Electoral democracy – the process of elections based on the principle of 'one person one vote' where all citizens who have the capacity to make rational decisions (which the law assumes are those who have crossed the age of eighteen) contribute towards collective decision making is a cardinal element of constitutional democracy. Yet the Constitution does not confine the universe of a constitutional democracy to an electoral democracy. Other institutions of governance have critical roles and functions in enhancing the values of constitutional democracy."*[142]

140 Submissions of Advocate Sai Deepak, recorded in Ibid., para. 50(1) (Chandrachud J.) (emphasis added).

141 Ibid., para. 77 (Chandrachud J.), a point of view endorsed by many democratic theorists such as *Gerry Mackie*, Deliberation and Voting Entwined, in: Andre Bachtiger et al. (eds.), The Oxford Handbook of Deliberative Democracy, Oxford 2018, p. 218; *Tom Christiano,* Democracy, in: Edward N. Zalta (ed.), Stanford Encyclopedia of Philosophy Archive, Stanford 2018; *Amy Gutmann,* Democracy, in: Robert Goodin et al. (eds.), A Companion to Contemporary Political Philosophy, Hoboken 2007, p. 521 ('Majoritarian decision making may be a presumptive means of democratic rule, but it cannot be a sufficient democratic standard;); *Melissa Murray / Katharine Shaw*, Dobbs and Democracy Harvard Law Review 134 (2024), pp. 760-76.

142 *Supriyo*, note 11, para. 78 (Chandrachud J.) (emphasis added).

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This includes courts, which can be 'democracy-enabling' rather than 'democracy-disabling':[143]

> *"Courts contribute to the democratic process while deciding an issue based on competing constitutional values, or when persons who are unable to exercise their constitutional rights through the political process knock on its doors. For instance, members of marginalized communities who are excluded from the political process because of the structural imbalance of power can approach the court through its writ jurisdiction to seek the enforcement of their rights."*[144]

Extend this more substantive understanding of democracy to the actual exercise of the power of judicial review. When democracy is understood substantively, the Court's action in protecting the unenumerated constitutional right to marry and requiring the State to set up the institution of civil marriage is much less antagonistic to democracy. While it may not be democratic in the majoritarian decision-making sense, it is democratic in an alternate, 'bottom-up' sense.[145] Due to courts' distinctive institutional features – set out in section B – courts are 'differently open' from representative bodies like the Parliament. They employ different methods of factfinding, legal argument and reasoning and bear the responsibility of providing the public with reasons for their holdings.[146] Groups 'marginalized in democratic politics may [therefore] find that courts provide *alternative fora…*strengthen[ing] the groups' ability to communicate in democratic politics'.[147] Their turn to courts introduces previously sidelined voices and claims into societal deliberations, injects new agendas, and reshapes democratic norms. This then could initiate rights-protective shifts within the legislature, opening 'channels of communication across institutional domains'.[148] Courts could thus 'articulate and enforce rights in ways that reshape politics'.[149]

Had the *Supriyo* Court recognised same-sex couples' constitutional right to marry, it might have had this effect. The majoritarian political process is hostile to the claims and concerns of same-sex couples, both because they are a numerical minority and due to the stigma around these relationships. They therefore require the assistance of a State branch not governed by majoritarian democratic politics – the Court – to insert their claims into the political agenda through judicial recognition of their right to marry. Once this is done, the shaping of the institution of civil marriage for same-sex couples goes back to electoral democracy through the legislature. Each fora thus promotes democracy in the way that best

143 Ibid., para. 79 (Chandrachud J.).

144 Ibid., para. 80 (Chandrachud J.) (emphasis added).

145 *Douglas NeJaime / Reva Siegel*, Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy, New York University Law Review 96 (2021), p. 1908.

146 Ibid., p. 1954.

147 Ibid., p. 1911.

148 Ibid., p. 1951.

149 Ibid., p. 1956.

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exemplifies its structural features. That is, democracy protection, like rights preservation, implicates several State institutions.

Reinstating the value of rights preservation therefore does not mean that the value of maintaining institutional specialisation is discarded as a focus of the separation of powers doctrine. Rather, the dual values underlying the separation of powers exercise can be simultaneously maintained by treating rights preservation and democracy protection as multi-institutional, collaborative constitutional enterprises. Rights are preserved and democracy is protected precisely by tapping into the distinctive institutional skills of each State branch. So understood, the *Supriyo* Court's claim that the separation of powers requires it to stay away from recognising a constitutional right to marry loses its power. I show how *Supriyo* could have recognised the right to marry while also respecting its partner State branches. Both actions are consistent with, and sometimes even called for, by the doctrine of separation of powers.

F. Conclusion

My central contribution has been to dilute the separation of powers objection to the judicial recognition of unenumerated constitutional rights. *Supriyo's* turn to this objection mirrors a common trend within the adjudication of the constitutional right to same-sex marriage across contexts.[150] It also extends beyond same-sex marriage to other unenumerated rights like the right to abortion[151] or socio-economic rights.[152]

At the first stage, my arguments here are diagnostic. They distil that which is at play when courts refuse to act to recognise and protect unenumerated constitutional rights citing the separation of powers. I show – convincingly, I hope – that these arguments are typically built on a singular conception of the doctrine: the separation of powers as means to maintain institutional specialisation, whether it be technical capacity or democracy legitimacy. At the second stage, my arguments are disruptive. They dispute this dominant trend within constitutional theory and practice. I trace how the separation of powers has a second core purpose, one that is just as important as ensuring that the right branch makes the right decision. The doctrine is means to preserve rights and protect rights-holders. So understood, court intervention to recognise and protect unenumerated constitutional rights is no longer inconsistent with the doctrine or an exception to it. It is part and parcel of the doctrine, an essential facet to satisfy its demands. At the third and final stage, my arguments are dialogic. They recognise the importance of retaining the value of maintaining institutional specialisation alongside the value of rights preservation. And they show, drawing on other

150 *Lynn Wardle*, The Judicial Imposition of Same-Sex Marriage: The Boundaries of Judicial Legitimacy and Legitimate Redefinition of Marriage, Washburn Law Journal 50 (2011), p. 79.

151 *Dobbs v Jackson Women's Health Organisation* 142 S. Ct. 2228 (2022).

152 *Jeff King*, Judging Social Rights, Cambridge 2012.

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parts of the *Supriyo* dicta, how the two values can be brought into conversation with one another, such that both their impulses can be preserved.

On the one hand, I was heartened that I was able to draw support for my arguments from within *Supriyo* itself, just parts outside of the Court's observations on the right to marry. But on the other, it made me wonder why the right to marry was treated differently from the right to union by Justice Chandrachud. There does not seem to be any constitutional or legal reasons for doing so, a point noted by the majority. Was it then driven by political considerations and deference to the Executive? We will never know for sure, but what I have done here is to show that Justice Chandrachud's conclusions on the two rights are driven by two different conceptions of the separation of powers. One sees the doctrine as means to maintain institutional specialisation *alone* and is thus reductive. The other brings both relevant values into the separation of powers assessment and is thus better aligned with the doctrine's aims. Separation of powers objections to courts recognising unenumerated constitutional rights are typically based on the first conception. It would do us well to remember that there is an alternate conception on offer: one that is more consistent with what the separation of powers seeks to do *and* one that the Supreme Court itself seems to draw on sometimes. Separation of powers *simpliciter* can therefore no longer be used as a convenient, seemingly neutral constitutional facade for courts to hide behind when they want to stay out of the fray and avoid conflict with other State branches about politically unpopular rights (like the right to same-sex marriage).[153]

In India, this conclusion assumes special significance at a moment where commentators are increasingly calling out the Indian Supreme Court for its pro-Executive slant.[154] It is only telling that separation of powers arguments that have not really enjoyed much salience amongst the Court in relation to other unenumerated rights have suddenly emerged as the primary obstacle to recognising a right to marry. If the shift in *Supriyo* is indicative of a wider, upcoming trend in Indian constitutional law – one reminiscent of India's global counterparts – it is then an appropriate moment to diffuse the power of these objections by proposing a different conception of separation of powers. A conception that promotes the dual values of rights preservation and maintaining institutional specialisation and thus designs a blueprint for court intervention that protects rights while simultaneously respecting institutional capacity.

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153 Ahdout terms this phenomenon 'separation of powers avoidance', see *ZP Ahdout*, Separation-of-Powers Avoidance, Yale Law Journal 132 (2023), p. 2360.

154 *Gautam Bhatia*, Unsealed Covers: A Decade of the Constitution, the Courts, and the State, New York 2023; *Nandini Sundar*, The Supreme Court in Modi's India, Journal of Right-Wing Studies 1 (2023), pp. 106-144.

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BUCHBESPRECHUNGEN / BOOK REVIEWS

Anna Dziedzic / Simon N. M. Young (eds.), **The Cambridge Handbook of Foreign Judges on Domestic Courts**, Cambridge University Press, Cambridge 2023, 480 pages, AUD $364, ISBN: 9781009098786

As a law student, I took up an internship at the Extraordinary Chambers in the Courts of Cambodia ('ECCC'). The ECCC is a hybrid tribunal composed of both local and foreign judges. I arrived in Cambodia to find the work of the Court in a stalemate. The foreign and local judges disagreed about whether the case I worked on should be brought before the Court, and the disagreement meant they were not able to issue decisions on the case. At the time, I mused that a fatal flaw in the design of the ECCC had led to this stalemate between the foreign and local judges.[1] But behind the Court's design lay a much wider phenomenon that the literature was yet to speak to: the influence, implications and impact of foreign judges sitting on domestic courts. Anna Dziedzic and Simon N. M. Young's *The Cambridge Handbook of Foreign Judges on Domestic Courts* ('Handbook') is therefore an exciting and important intervention that breaks new ground in studying foreign judges on domestic courts.

The Handbook seeks to understand foreign judging in domestic courts and its variants, and to lay the ground work for meaningful comparison of foreign judging around the world (p. 2). In chapter 1, Anna Dziedzic situates the Handbook as building on foundational comparative work on foreign judges in courts of constitutional jurisdictions (p. 1, fn. 1). It is a highly ambitious project; not limited by jurisdiction nor by type of domestic court, though this expansive framing does cause some conceptual confusion about the domestic character of international commercial courts (ch. 5) or regional courts (ch. 13). The contributors to the Handbook range from foreign judges themselves to researchers and academics. The editors have made a bold choice in structuring the Handbook by theme, allowing for a sophisticated cross-jurisdictional analysis of the drivers and impacts of foreign judging. The result is a 26-chapter, 480-page tour de force exploring foreign judging across the world, from multiple perspectives and through different points in time.

The Handbook is divided into two Parts. Part I explores the rationales and motivations for the use of foreign judges on domestic courts. It comprises a section on 'domestic drivers' and another on 'international influences'. The chapters center around the question: why do foreign judges sit on domestic courts? A number of comprehensive answers emerge. Foreign judges are used as a transitional measure where local judges are unavailable, where impartiality or the distance of foreignness is valued, to enhance the expertise of

1 *Natasha Naidu / Sarah Williams*, The Function and Dysfunction of the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia, Journal of International Criminal Justice 18 (2020).

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a jurisdiction, or in post-conflict institution-building processes. Here, the strongest chapters are critical of these explanatory factors, by considering, for example, whether foreignness equates with expertise or impartiality. As such, Harry Hobbs' account (ch. 10) of the dual audiences of hybrid courts – both local and international – accounts for the accusations of apprehended bias leveled against both foreign and local judges in international criminal law (pp. 173-175).

Part II asks the question: what are the implications and impacts of foreign judging in law, politics and society (p. 3)? The first section comprises first-hand accounts by those who have been foreign judges or have worked with foreign judges. Some of the chapters here lack the academic rigour otherwise present throughout the Handbook. For example, one chapter combines personal reflections on foreign judging in the Caribbean with structured interviews via surveys with 23 participants (ch. 13). The chapter uses the survey results to conclude that foreign judges in Caribbean regional courts are well received by the public because of the perception that they promote objectivity and impartiality (p. 228). However, the author does so without accounting for the positionality of the survey's respondents, most likely foreign judges themselves, or countering other ethical considerations that arise in an interview or survey process, such as bias.

The second section of Part II includes chapters that scrutinise the impact of foreignness on judicial identity and the judicial role. In grappling with what it means to be foreign, the authors of the chapters in these two sections do so with reference to nationality and citizenship. Yet the most impressive chapters in these two sections develop a thicker conception of foreignness that account for the many ways that one can be rendered "foreign" on a court. Thus, Laurence Burgorgue-Larsen's account (ch 12) of being a young, French, female academic on the Constitutional Court of Andorra, with the ability to speak French and Spanish and read Catalan, effectively complicates what it means to be "foreign" on a domestic court, and how the many experiences of foreignness come to bear on the judicial role.

The final chapters of Part II consider the implications of foreign judging on adjudication, accountability and independence in authoritarian, democratic and transitional contexts. The chapters explore the role of foreign judges in avoiding manipulation of judicial appointments and in helping in the transition from authoritarian rule to a new democracy. Here, the most exceptional chapters are the ones that venture inside the law to consider how foreign judges influence the jurisprudence of domestic courts. In particular, Bal Kama's critique (ch. 25) of the legalistic tradition of foreign (Australian) judges inhibiting the development of a transformative, liberal constitutionalism in Papua New Guinea is a compelling example of how colonial hangovers persist through foreign judging.

Dziedzic and Young's Handbook brings new light to the stalemate between the foreign and local judges I encountered at the ECCC in Cambodia. This was not just an issue of institutional design, but of the identity crisis imbued on a hybrid court when it attempts to speak to both local and international audiences. The Handbook is a defining work in a nascent field of literature on foreign judges in domestic courts. The sheer volume, breadth

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and scope of the Handbook is to be commended. The Handbook will be highly informative for academics and practitioners engaged in the question of who judges are and how judges judge. It will also be helpful for those who, like me, seek to locate and understand their encounters with foreign judges across a range of jurisdictions and subject-matters.

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Diego Werneck Arguelhes, O Supremo: Entre o Direito e a Política (The Supreme Court: Between Law and Politics), História Real, Rio de Janeiro 2023, 255 pages, R$59,90, ISBN: 978-65-87518-27-5

How do Supreme Courts function? What is behind their decisions? What do their design tell us about the incentives for the judges? Those are the sort of questions that Arguelles presents on his book, regarding the Brazilian Supreme Court (Supremo Tribunal Federal or "STF" in Portuguese). As I later show, while campaigning for its readership, this book offers a range of valid questions about the intertwining of law and politics in the STF, without demonizing the political character of the Court. The book always questions what the meaning of such political influence is, and what sort of politics should surround a Supreme Court.

Arguelles starts his reflections on the functioning of the STF stating how the perception of the Brazilian legal academy has shifted by the years: going from a collective naivety, that believed in a Supreme Court that was totally departed from politics and just applied the Constitution, to a widespread cynicism, that identifies the Supreme Court as a political institution as any other (p. 14).

In his first chapter, Arguelles analyses the question if „*can they do that?*", referring to constant questions about the competences of the STF. He starts reflecting on how it is possible for the STF and its eleven judges to have that much power without being subject to people's vote. And for that he highlights the importance of distinguishing what is actually strange about it, from what is a natural consequence of having an institution designed like the Supreme Court (p. 31). Considering being a judge in a court means applying criteria that you did not create to solve problems that you are not part of (p. 32), judges are much more defined by what they cannot do (p. 33), and so are the Supreme Court judges. Although in their case, there will always be disputes around the meaning of the Constitution (p. 36), so that the application of the criteria created by others may not be that obvious. Moreover, the power of the judges derives from the deference to the norms created by those elected and not from an abstract notion of justice or knowledge (p. 37). This is why the

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Supreme Court judges base their decisions on legal arguments (p. 38), that should not be obliviated by catchphrases used to impress the public (p. 40).

Nonetheless, recognizing the importance of an institution like the STF does not mean being satisfied with its present configuration and design (p. 45). Arguelles indicates that the Court can always be criticized for its decisions, and this is not a problem. The aim should be to foster better decisions in the future. However, it is important that the Supreme Court can demonstrate the legitimacy of its decisions, even to those who do not agree with them. This legitimacy is based on three conditions: the people who took the decision — how they behave and relate to the case; the design of their position and the incentives it gives them to deliver a certain decision; and the proceedings related to the decision-making process (p. 49). Those elements will guide the discussions in the book on how the STF decides and its legitimacy to do so.

In chapter 2, Arguelles focuses on the question „*who are those people?*". Here, the focus is on the discussion about how someone is nominated for a position at the Supreme Court, the criteria he or she has to fulfill and what this represents as incentives for the politicians involved in the nominations and for the ones that become STF judges. The judges of the Supreme Court are nominated by the president, but have to be confirmed by the Senate, which limits the powers of the president to some extent (p. 58).

The formal requisites to become a member of the STF are notorious legal knowledge and an unblemished reputation, however those elements are necessary but not sufficient. Other elements such as character, responsibility and professionalism are essential for this position. This is why it would make no sense to replace the current way of entering the Supreme Court with a public examination, as happens in other areas of the judiciary (p. 64). In practice, as the requisites to become a Supreme Court judge are quite open, the only tool available to assure that the nominations are made on a republican basis is the public opinion (p. 73). At this point, Arguelles highlights three points that the Constitution left open for the political debate related to the nominations: the nominee does not have to be a career judge (p. 76); there is no formal requirement related to diversity — although that should be morally mandatory considering Brazilian history (p. 77); and there is no formal proceeding that leads to the decision of the president (p. 77).

In this scenario, there are three main reasons for the president to nominate a certain person to the Supreme Court: to influence future decisions by the court; to give a signal to his electors and to the society regarding a certain agenda; and to fulfil certain demands by the current political coalition (p.79). All that reasons can be compatible with a republican posture (p. 79), as they are just a characteristic of the current design (p. 80). Nonetheless, they can represent a pathology if they affect the independence of the Supreme Court, so that it cannot assume positions contrary to the interests of the politicians and is not recognized as an institution that works following a different logic from the one of the politicians (p. 89). Those criteria are particularly important when the nomination to the Supreme Court aims to suppress the institution's haughtiness and independence (p. 90). This may be hard to gauge on concrete cases, and this is why Arguelles proposes a test (p. 93) where the

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following two questions should be asked about the nominated person: does he or she has a legal carrier path that would include him or her among the most notable legal professionals of his or her times? And is he or she haughty enough in order to oppose the president's opinion or interests? If the answer to both questions is yes, the political aims previously indicated are legit (p. 94).

With that in mind, he starts discussing the problems related to the way STF judges are currently nominated. Here, the author highlights the uneven period of time the Supreme Court judges stay at the Court (p. 103). As they can stay at their position until they complete seventy-five years of age, the earlier they were nominated, the longer they stay (p. 104). This is a problem because it leads to: different presidents influencing for uneven periods of time the Court; uneven periods of time for the renewal of the Court; and the inequality among the presidents put the citizens who elected those presidents in uneven positions (p. 105). All that could be solved by the judges having a fixed mandate at the Court (p. 105), demonstrating that no judge is more relevant for the formation of the jurisprudence of the Court than the others (p. 106). However, transitional rules may be implemented in order to prevent some political actors to obtain disproportional gains (p. 109).

Other changes in the design of the Supreme Court, that are object of propositions of Constitutional Amendments are related to the number and sort of institutions involved in the nomination of new judges — e.g., limiting the nomination to names listed by other institutions, like the public prosecutions office, association of judges or the bar association — and to increasing the voting quorum for the decisions made by the Court (p. 110). Arguelles criticizes those propositions because they usually intend to limit the influence of politics in the STF (p. 111), although they cannot deliver such result. In the context of a Supreme Court that has an enlarged criminal competence over many politicians, such changes do not influence in the incentives for the judges decide in a more republican way and the answer for that is not to pretend that the STF is an institution departed from politics (p. 115).

In the sequence, the author discusses the effective power of the Senate in limiting the president while nominating someone to the Supreme Court (p. 115). Here, it is possible to consider that the veto power of the Senate is effective not just as it has been used lately, but also when the threat of having it used is sufficient to modulate the nomination made by president (p. 116). Arguelles defends that more than confirming or not the president's nomination, key are the reasons why the Senate did it and the nomination hearings should be used to better inform the population regarding the political reasons and the institutional implications of it (p. 119) and vague or false answers by the nominee should influence the Senate's decision (p. 123).

In chapter 3 Arguelles deals with the question „*what does the Supreme Court do?*" (p. 127). Following this, he presents the main sort of cases over which the Supreme Court has jurisdiction: (I) constitutional review cases; (II) criminal cases; (III) appeals; and (IV) other cases of original competence (p. 129). It is given special attention to STF's original

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jurisdiction on criminal cases related to a number of politicians, because this always puts the Court under the suspicion of deciding according to political motivations (p. 134). Due to the complexity of dealing with criminal cases from the beginning and the lack of time to decide all of them before prescription, in 2018 the Court decided that it has jurisdiction over criminal cases related to politicians just if the alleged crimes had been carried out during a mandate and in connection with the exercise of the function. This decision is presented by Arguelles as positive, however it does not solve the issue of the STF being accused of having political biases, as it still has to decide on which criminal cases it has jurisdiction (p. 137). Moreover, the Court has been expanding its jurisdiction over many sensible topics, related to the current political and electoral environment, what also impacts on the public perception that the judges are subject to no limits (p. 139).

Another issue that Arguelles highlights as problematic is the number of cases that are decided monocratically at the STF (p. 142). Although such decisions exist because single judges can decide urgent issues faster than the collegiate and the time of the collegiate is rare (so it should be used to decide core cases), it is a problem that single judges of the Supreme Court can rule on topics that are central to the society (p. 146).

On chapter 4, Arguelles focuses on the questions „*why this case?*“ and „*why now?*“, to discuss when the cases are decided by the STF (p. 153). Firstly, the agenda of the Court is decided externally, as it can rule just on cases that were presented to it (p. 157). However, considering the amount and range of cases that are presented to the STF, it ends up having some discretion on what is going to be decided and when (p. 164), especially because there is no other authority able to enforce the Court's deadlines (p. 172).

In this context, it becomes relevant to understand who can make a case before the Court (p. 174). For that, first it is necessary to consider that the cases can be collegially decided by the Supreme Court in the plenary, in the virtual plenary or in one of the two chambers (each one composed of five judges) (p. 175). The plenary and the virtual plenary are presided over by the president of the Supreme Court and the chambers also have presidents (p. 176). Each case has a rapporteur, that is responsible for resuming the case and delivering the first vote (p. 177). Presidents and rapporteurs have special competencies (p. 176): rapporteurs can decide when a case is ready to be ruled by the Court (p. 177) and presidents can decide which cases (among those that were considered ready to be ruled) are actually being added to the agenda of the Court (p. 184). And those decisions can be taken considering the most variable factors (p. 178), including how well accepted will the vote by the rapporteur be — by the other judges or by society (p. 181).

In the virtual plenary — that expanded during COVID-19 pandemic — there is no debate among the Supreme Court judges, they just upload their votes (p. 185). Here, the rapporteur can start the voting process without the agreement of the president (p. 186). Nevertheless, the other judges also have some power in preventing a certain judgment: they can request the so called “vistas” — a request to see the proceedings that comes from the period when they were not all digital, so the judges would request more time to see and better understand them (p. 189). This request is meaningful specially if it is made

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for a reasonable period of time (p. 189). In practice, a judge can take years to give the proceedings back to the plenum (p. 190) and, thereby, control when a case will be ruled by the Court (p. 193).

This scenario of an agenda that is formed according to the criteria of the judges combined with a large number of monocratic decisions contributes to the public perception of the STF, that has no boundaries and acts according to its political preferences (p. 195). Arguelles points out that some reasonable criteria, like clear deadlines, would limit the judges, but would also contribute to the image of a Supreme Court that acts according to the law (p. 196).

Chapter 5, on its side, presents the question „*why so much exposure?*“, and here Arguelles questions the presence of the Supreme Court itself and from its judges in the social debate (p. 201). It is expected that someone with the power of the STF gets public attention (p. 203) and it is important that the Court also communicates and explains its decisions on its own terms (p. 205). But the question here regards how this communication is done (p. 207) and the author indicates that such communication becomes pathological when it is done in an individual, and not institutional, way and when it is illegal, violating norms that apply to all judges (p. 210).

The author proposes a difference between institutional issues, that should be communicated officially from the moment on the Court reaches a decision, and judicial issues, where dissenting opinions from the judges are welcomed in the formal contexts of the Court (p. 211). Regarding judicial issues, it would be hard to have just an institutional communication, because each judge delivers their own vote and, since 2002, the public debates among the judges are broadcasted live in TV Justiça (p. 212). But even in a context that incentives the judges to give appealing discourses to the public (p. 215) it is possible for them not to share their opinions outside the Court (p. 216). Arguelles also highlights the pathological aspect of STF judges giving informal opinions outside the cases (p. 217), trying to signalize to politicians how they would decide a non-yet-existing case and exercising more individual power over the Court (p. 218). Lastly, all that should also be considered illegal, as the law that organizes the national judiciary in Brazil forbids a judge to speak about any case that is yet to be ruled or to criticize any other ruling, except if in teaching or in a technical work (p. 223).

Those communication strategies by the judges of the Supreme Court are usually justified with three arguments: the Court is under attack — mainly during Bolsonaro's government — and needs to be aggressive in its defense (p. 227); the judges hold freedom of speech (p. 228); that limitation would impose a too high demand for the judges (p. 232). Arguelles indicates that all those justifications are not valid, because, first, such communication problems did not start during Bolsonaro's government, and they also do not strengthen a Court that is under attack (p. 228). Secondly, being a judge of a Supreme Court comes with certain responsibilities, and this may limit one's presence in social media or in public debates, if it, otherwise, would compromise his or her image as a judge (p.

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231). Third, there are great examples of STF judges that did not disrespect the individual communication limitations, showing that it is possible to do so (p. 232).

To conclude, Arguelles indicates that the function of the Supreme Court will always foster the argument that the Court is acting politically, by the nature of the cases it decides. However, it is not possible to tackle such arguments, if, even before that, the judges have wide individual power to decide what and when is going to be ruled, affecting public policies but also the lives of politicians (p. 238). The current design of the Brazilian Supreme Court let the judges themselves decide if they will act based on their political preferences or not (p. 239). Added to this design, personal choices of some judges to publicly discuss the topics that are yet to be decided also to contribute to an image of a Supreme Court that is politically guided (p. 239).

Overall (and this is not just one of those book review clichés), this book condenses key discussions and presents the right questions about the functioning of the Brazilian Supreme Court and is useful not just to understand the STF, but the Brazilian judiciary as a whole. Although Arguelles says this is not an academic book, this book should be read by academics and constitutionalists.

Jessica Holl

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