

# **Goldilocks and Party Law:**

## **How Much Law Is Just Right?\***

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## INTRODUCTION

How closely should nations regulate political parties? If governments have no laws stating what parties can and cannot do, nations risk ruthless politics with little or no public accountability. If governments enact strict laws specifying how parties should organize, campaign, and operate, nations might discourage or prevent political parties from participating in public affairs. Should parties have free rein to do as they wish? Or should parties be governed by comprehensive laws?

That quandary recalls the “Goldilocks” predicament—from the fairy tale about Goldilocks and the Three Bears, which is told in some variant across the world. According to the fable, poor little Goldilocks was lost in a forest and took refuge in an empty cottage. There she found three chairs—one too big and another too small; three bowls of porridge—one too hot and another too cold; and three beds—one too hard and another too soft. Fortunately, the third choice in each case was “just right” for Goldilocks, who sat, ate, and slept in comfort. (Then the bear family returned and she fled the cottage.)

How much regulation of political parties is “just right” for a society? Goldilocks actually faced that question in a little-known variant of the fable (see Box 1). In that version, Goldilocks learned that laws intended to help parties may serve rulers’ interests instead. Its moral was that democracy is not always served when nations enact party law.

### **Box 1: Goldilocks Ponders Party Law**

Once upon a time, there was a child with curly blond hair called Goldilocks. She lived with her parents, Mr. and Mrs. Democracy, outside the Unfree Forest, a dark place devoid of civil society. As wardens of the forest, her parents often asked Goldilocks to care for the young political parties struggling to live in that fearful place.

Goldilocks eagerly tended to the parties, providing things from her parents' storehouse. Most of the young parties were small and fragile, but some were medium-sized, and a few had grown rather large. Yet even the big ones seemed worried about surviving. One day, all the parties asked Goldilocks for laws to protect them from the nasty, brutish bullies of the forest.

When Goldilocks told her parents, Mom and Dad Democracy were pleased, because the bullies who ruled the forest had also asked the wardens for laws to regulate life for the parties. So Goldilocks's parents went into their legal storeroom and gave laws to the rulers of the Unfree Forest. But, Mom and Dad warned, don't use too much law and don't use too little law. Use just the right amount!

The family was glad; the parties were glad; and the rulers were gladdest of all!

Later, Goldilocks would try to see whether party laws were used too much, too little, or just right. But now, she wondered, "Why were the rulers the gladdest?"

### **What Is "Party Law"?**

The term "party law" invokes different meanings to different people—even to party scholars. The term is sometimes used for internal rules (e.g., in party charters or by-laws) that parties pass to govern themselves. "Party law" also refers to the body of state law concerning what parties must and must not do—what is legal and illegal in party politics.

Addressing the distinction between internal party rules and external state regulation of parties, Richard Katz cited three objectives of state law concerning political parties:

1. *To determine what constitutes a political party.* This determination often spawns additional party laws: who qualifies for ballot access, who benefits from public resources (such as subsidies or broadcast media), who participates in the government and how, and so on.
2. *To regulate the form of activity in which parties may engage.* This umbrella heading covers the raising and spending of funds, campaign activities, issue stands in party platforms or manifestos, and more.
3. *To insure appropriate forms of party organization and behavior.* Katz held this to be the most controversial objective, because it intruded into internal issues of party leadership

and social relationships. Laws could require parties to elect officers by party members, but a party might prefer to choose them through a party congress. Laws might also demand gender or ethnic equality, or laws might require maintaining party organizations in various national regions. One can imagine other policy goals that nations seek to implement through party law.<sup>1</sup>

Following Katz, this paper defines **party law**—the common noun—as the body of state-based regulations that determine the legal status of political parties and that often specify what constitutes party membership, how parties must be organized, how they should campaign, how they must handle party funds, and so on. **Party Law**—the proper noun—refers to statutes regulating political parties and codified under a comparably descriptive title, e.g., Germany’s “Law on Political Parties” or South Korea’s “Political Parties Act.”<sup>2</sup>

In this work, when the term “Party Law” is written with capitals, it refers to specific Party Law statutes. The term “party law” in lower case refers to a body of party law. Party law for any nation derives from its Party Law (if it has one) and from legislative statutes, administrative rulings, court decisions, or even national constitutions. Laws governing the definition, composition, structure, and activities of political parties lie at the core of party law, which focuses on political parties as *organizations*. The boundaries of party law can be illuminated by considering three related bodies of law: *electoral* law, *campaign* law, and *political finance* law.

## **Electoral, Campaign, and Political Finance Laws**

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<sup>1</sup> Richard S. Katz, “Democracy and the Legal Regulation of Political Parties,” Paper prepared for the USAID conference on “Changes in Political Parties: United States Agency for International Development, Washington, D.C., October 1, 2004, p. 2

<sup>2</sup> Gesetz über die politischen Parteien in German. The Korean translation was furnished by Lee Ki Sun, Director General of Public Information of the Republic of Korea’s National Election Commission. I am indebted to Mr. Lee for providing English translations of all the Korean laws cited herein.

In addition to a Party Law, some nations—such as South Korea—have enacted distinct laws governing elections, campaigns, and political finance. Each overlaps with party law but each focuses on something distinctive at its core.

**Electoral law:** National elections are dynamic events in which millions of citizens typically cast ballots for hundreds of candidates and scores of parties. Thousands of government officials then tally these ballots. This complex process requires minute rules to guide behavior of all the political actors. Electoral law in the United Kingdom, based on a 2003 government study,

developed in a piecemeal fashion over many years, and is to be found in no fewer than 36 separate pieces of legislation dating back to the Parliamentary Elections Act 1695. Although the Representation of the People Act 1983 was a consolidation Act, there are no less than 19 extant new Acts and 63 pieces of subsidiary legislation affecting electoral law since that time.<sup>3</sup>

According to Shaheen Mozzar and Andreas Schedler, electoral law (which they term “electoral governance”) consists of

the wider set of activities that creates and maintains the broad institutional framework in which voting and electoral competition take place. It ... involves the design of institutions that define the basic framework of democratic elections. ... Traditional electoral rules covering suffrage rights, rules of representation, assembly size, district magnitude, district boundaries, and electoral calendars form part of the agenda.<sup>4</sup>

Following the convention set forth above for “Party Law” and “party law,” I use **Electoral Law** for national statutes regulating elections, although the titles might be worded differently.<sup>5</sup> I use **electoral law** for the body of electoral law for any nation. This body of law derives from Electoral Law (if it exists) and from legislative statutes, administrative rulings, court decisions, and national constitutions.

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<sup>3</sup> Electoral Commission, *Voting for Change: An Electoral Law Modernisation Programme* (London: The Electoral Commission, 2003), p. 28.

<sup>4</sup> Shaheen Mozzar and Andreas Schedler, “The Comparative Study of Electoral Governance—Introduction,” *International Political Science Review* 25 (January 2002), p. 7.

<sup>5</sup> The German Bundewahlgesetz translates simply as the Federal Electoral Law. The South Korean Election Law is the “Act on the Election of Public Officials and the Prevention of Election Malpractices.”

Electoral law often ranges quite widely across the political scene. Within electoral law, Mozzar and Schedler include

the formal rules that govern voter, party, and candidate eligibility and registration; . . . laws and regulations that affect the resource endowments of parties and candidates (their access to money and media) . . .<sup>6</sup>

Whereas national Election Laws often specify how political parties should operate, Party Laws seldom specify how *elections* should operate. Nations are more likely to have a titled Election Law than a Party Law, but if they have both, their Electoral Laws tend to be longer, reflecting regulation of *both* elections and parties. For instance, the English version of the South Korean Election Law is about 200 pages versus about 70 pages for its Party Law. Similarly, the German Electoral Law is longer than the German Party Law.

**Campaign Law:** Electoral law contains detailed procedures for running elections.

Election administration is an important topic, but it is of limited concern to those interested in party politics. They focus instead on the subset of electoral regulations that pertain to election campaigns. Although campaign regulations are largely subsumed under Electoral Laws, they also issue from other sources and constitute a relatively distinct body of campaign law.

Moreover, some nations enact titled Campaign Laws—consider the 1971 U.S. Federal Election Campaign Act and its Bipartisan Campaign Reform Act of 2002.

Campaign law can specify the duration of election campaigns, what activities are permissible, whether poll results can be published prior to the vote, and other aspects of election campaigns.<sup>7</sup> Like the two U.S. Campaign Laws, campaign law can also regulate political parties, specifying how candidates or parties can raise and spend funds, how finance committees, must be organized and so on. To the extent that campaign law deals with political parties, it

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<sup>6</sup> *Ibid.*

<sup>7</sup> Fritz Plasser with Gunda Plasser, *Global Political Campaigning: A Worldwide Analysis of Campaign Professionals and Their Practices* (Westport, CT: Praeger, 2002), especially Chapter 6, “Regulatory Frameworks of Campaigns,” 137-175.

becomes a source of party law.

**Political Finance Laws:** Karl-Heinz Nassmacher uses the term “political finance” to encompass both “party finance” and “campaign finance.”<sup>8</sup> Both topics are relevant to party law. However, some groups—like Transparency International—are concerned more broadly with the role of money in buying favors in public policy and in defrauding the government to obtain services and material. They focus on money as a lubricant for political corruption.<sup>9</sup> Political finance in its narrower sense—limited to party and campaign finance—is included in party law.

The body of political finance law can issue from many sources, sometimes from a specific Political Finance Law. South Korea, for instance, has a “Political Fund Act” that encompasses political parties, candidates, and political associations. To the extent that political finance law deals with political parties, it becomes a source of party law.

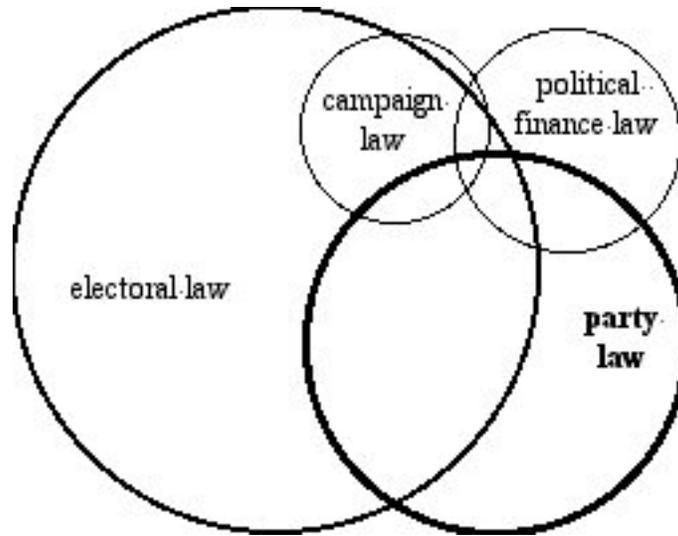
#### **Relationships among the Four Bodies of Law:**

Figure 1 sketches the hypothetical relationships among these four bodies of law. The heavy black circle in Figure 1 represents the body of party law—all state regulations of political parties, regardless of source. The overlapping area between the circles for electoral law and party law in Figure 1 indicates that some portion of state regulations of political parties originates in state regulations of elections. Although a nation’s electoral laws can also affect the number and type of parties that occur and prosper, such indirect effects are regarded as being on the periphery and not at the core of party law as defined here.

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<sup>8</sup>Karl-Heinz Nassmacher, “Comparative Political Finance in Established Democracies (Introduction)”, in Karl-Heinz Nassmacher (ed.), *Foundations for Democracy: Approaches to Comparative Political Finance* (Baden-Baden: Nomos Verlagsgesellschaft, 2001), pp. 9-33; at p. 10.

<sup>9</sup> Transparency International, *Global Corruption Report 2004* (Berlin, Germany, 2004), p 12. The report is available as a PDF file on the internet at < <http://www.globalcorruptionreport.org/index.shtml>>.



**Figure 1: Relationships Among Bodies of Law Affecting Political Parties**

The small circle labeled “campaign law” refers to a body of regulations that is often treated separately from electoral law, while often being subsumed under it.<sup>10</sup> The larger circle, “political finance law,” represents the body of law concerned with raising and spending money in politics, which is of general interest to many political observers. Because political finance law applies to politics outside of parties and campaigns, it is presumed to be a somewhat larger body.

**Constitutions as a source of party law:**

As defined, party law consists of state-based regulations concerning the definition, composition, structure, and activities of political parties as *organizations*. This body of law can be distinguished from related bodies of electoral, campaign, and political finance law, which overlap with party law and often serve as sources of party law. As mentioned, other sources of

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<sup>10</sup> For example, The South Korean Election Law is the “Act on the Election of Public Officials and the Prevention of Election Malpractices.”

party law include legislative statutes, administrative rulings, court decisions, and national constitutions. Of these, national constitutions deserve special discussion.

Few writers treat constitutions as sources of party law. After noting the key role that parties play in parliamentary democracies, the British constitutional scholar, Eric Barendt, says:

One might, therefore, expect constitutions to lay down some framework rules for political parties, at least to prevent them adopting totalitarian policies and to safeguard the rights of individual members. But constitutions rarely say much about parties, while some have totally ignored their existence. The United States Constitution has never taken any notice of them, an attitude which is shared by the uncodified arrangements in the United Kingdom.<sup>11</sup>

Nevertheless, Barendt says that courts make *constitutional law* through rulings on political parties under other constitutional provisions. That is certainly true in the United States, and even in Britain, which has fundamental law if not a single constitutional text.<sup>12</sup>

Barendt, moreover, was wrong in contending that national constitutions “rarely say much about political parties.” A 1976 survey of 142 constitutions found that two-thirds at least mentioned parties.<sup>13</sup> Six years prior to Barendt’s study, Jorge Laguardia’s essay on the constitutional framework for parties in Central America said, “Recognition of political parties first began with the Guatemalan Constitution of 1945. . . . From then on all countries in the region recognized political parties in their constitutions.”<sup>14</sup>

Incorporating party law into constitutions may be a consequence of the latest wave of democratization in developing states. Thomas Carothers writes:

The democracy wave of the 1980s and 1990s has included a good deal of rewriting old constitutions in transitional countries and writing new ones for new states.

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<sup>11</sup> Eric Barendt, *An Introduction to Constitutional Law* (Oxford: Oxford University Press, 1998), p. 149.

<sup>12</sup> *Ibid.*, pp. 26-29.

<sup>13</sup> Hence van Maarseveen and Ger van der Tang, *Written Constitutions: A Computerized Comparative Study* (Dobbs Ferry, New York: Oceana Publications, 1978), pp. 71-72.

<sup>14</sup> Jorge Mario García Laguardia, “Constitutional Framework for Political Parties in Central America: From Exclusion to Participation,” in Louis W. Goodman, William M. LeoGrande, and Johanna Mendelson Forman, *Political Parties and Democracy in Central America* (Boulder, CO: Westview Press, 1992), p. 82.

Getting certain provisions included in the document—and other provisions taken out—becomes a natural focus of attention.<sup>15</sup>

Regardless of when the trend began, constitutions must now be considered a source of party law, for many often say a great deal about political parties.

## Why Study Party Law?

That political parties are necessary for democratic government is an axiom of political theory. The National Democratic Institute presumes that

political parties form the cornerstone of a democratic society and serve a function unlike any other institution in a democracy. Parties aggregate and represent social interests and provide a structure for political participation. They train political leaders who will assume a role in governing society. In addition, parties contest and win elections to seek a measure of control of government institutions.<sup>16</sup>

In a paper on party law commissioned by NDI, Leslie Seidle noted that parties play a central role as intermediaries in government, provide political leadership, and develop public policy, which makes them

adjunct to, if not part of, the public realm. For this reason, and because public confidence in the activities of political parties is essential to their legitimacy, it would be an anomaly if they remained entirely unregulated by law.<sup>17</sup>

Moreover, United States Agency for International Development supports the creation of party law as a means for promoting democracy as a matter of policy:

Election and party laws are critically important to the functioning of parties in countries where a basic respect for rule of law with a functioning judicial system exists. Laws that determine the configuration of the electoral system are often embedded in or reflective of constitutional provisions; therefore, they are not frequently or easily changed. However, laws and regulations governing the administration and conduct of elections—such as the duration of the campaign period, rules governing parties and monitors, and regulations governing campaign expenditures—are acts of legislation or administrative regulations. The same is true for laws and regulations governing the formation, membership, conduct, and financing of political parties.<sup>18</sup>

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<sup>15</sup> Thomas Carothers, *Aiding Democracy Abroad: the Learning Curve* (Carnegie Endowment for International Peace, 1999), pp. 160-161.

<sup>16</sup> *Guide to Political Party Development* (Washington, D.C.: National Democratic Institute for International Affairs, 2001), p. 1.

<sup>17</sup> F. Leslie Seidle, “Regulation of Political Parties: Rationale and Modalities,” paper prepared for the National Democratic Institute for International Affairs, dated July 25, 1994. Pp. 1-16, at p. 12.

<sup>18</sup> Center for Democracy and Governance, *USAID Political Party Development Assistance* Washington, D.C: U.S. Agency for International Development, Document PN-ACE-500, April, 1999, p. 39-40.

In contrast to USAID’s sanguine view of regulating parties through law to promote democracy, some party scholars warn about theoretical and practical problems in doing so. In his study of nine nations that enacted Party Laws between World War II and 1994, Dan Avnon asked: “Should a legislature comprised of representatives of political parties undertake to legislate laws regulating the activities of political parties in a democratic parliamentary system?”<sup>19</sup> More ominously, Katz warned:

Those who advocate not just specific content for party laws, but even the principle that there should be party laws, would be well advised to recognize that such a proposal is not above politics, but is of politics.<sup>20</sup>

Unintended political consequences of regulating political parties remind us of Goldilocks’ question (Box 1) after Mom and Dad Democracy gave law to parties and rulers in the Unfree Forest: “Why were the rulers the gladdest?”

### **PARTY LAW AND PARTY POLITICS**

Without doubt, a nation’s party law affects its political parties. The question is, which laws have which effects? Scholars who study political parties tend to be dubious about the success of engineering party politics through legislation, especially in developing countries with unsettled political traditions. Whereas laws requiring parties to maintain lists of members might aid party organization in advanced democracies, similar laws are likely to curtail party competition in new democracies—where authorities might easily access lists of their opponents. This suggests why rulers might be glad for party law.

Even in advanced democracies with stable party systems, how party law operates can be controversial. As documented by law professors Samuel Issacharoff and Richard Pildes, the United States Supreme Court tends to rule against minor parties in favor of both major parties.<sup>21</sup>

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<sup>19</sup> Dan Avnon, “Parties Laws in Democratic Systems of Government,” *The Journal of Legislative Studies*, 1, (Summer 1995), p. 283.

<sup>20</sup> *Ibid.*, p. 10.

<sup>21</sup> Issacharoff, Samuel and Richard H. Pildes, “Politics As Markets: Partisan Lockups of the Democratic Process,” *Stanford Law Review*, 50 (February, 1998), 643-717.

Describing the “lockup” of the American party system by the Democratic and Republican parties with Court support, they argue that

when two-party dominance is enforced through state restrictions that have as their purpose and effect a guarantee of two-party domination, a two-party market may be insufficiently open to guarantee appropriate access to groups seeking to challenge the status quo.<sup>22</sup>

Gregory Magarian, another law professor, ascribed the Court’s rulings to its normative belief

that a stable two-party political system is essential to our democratic institutions, and that the best way to achieve the myriad benefits the major political parties provide is to maximize their autonomy. . . . In contrast, governmental interests in political stability have outweighed minor parties’ expressive interests.<sup>23</sup>

Party law is not only controversial concerning its intended effects, it also carries unintended consequences—even when experienced political actors work in a bipartisan manner to craft party law. For example, the 2002 Bipartisan Campaign Financing Reform Act was supposed to curb the flow of so-called “soft money” to political parties from special interests in national campaigns. Indeed, the Act’s first title reads “REDUCTION OF SPECIAL INTEREST INFLUENCE.” Nevertheless, the 2004 presidential election was influenced by an unprecedented flood of money from non-party groups formed primarily to influence elections that were tax-exempt under Section 527 of the Internal Revenue Code. According to a Washington organization that monitors campaign finance, so-called 527 committees raised (and largely spent) a total of \$434 million in 2004 alone, \$60 million more than the amount raised in all of the previous three years combined.<sup>24</sup> As another legal scholar wrote, “The unique characteristics of political parties pose a challenge for any institution seeking to regulate them.”<sup>25</sup>

If regulating parties through law is problematic in the United States (where knowledge of party politics is good) designing law to produce desirable parties in transitional countries is

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<sup>22</sup> *Ibid*, p. 669

<sup>23</sup> Gregory P. Magarian, “Regulating Political Parties under a ‘Public Rights’ First Amendment,” *William and Mary Law Review*, 44 (No. 5, 2003), 1942-2061, at p. 1944.

<sup>24</sup> Center for Public Integrity, “527s in 2004 Shatter Previous Records for Political Fundraising,” December 16, 2004, available at <<http://www.bop2004.org/527/report.aspx?aid=435> >

<sup>25</sup> Elizabeth Garrett, “Is the Party Over? Courts and the Political Process,” *Supreme Court Law Review* (2002), p. 96.

hazardous. Writing about democratic party-building abroad, Carothers says that American practitioners believe that parties should play three essential roles:

1. aggregating and articulating the interests of citizens;
2. structuring electoral competition and shaping the political landscape; and
3. providing coherent political groups to run the government.<sup>26</sup>

According to Carothers, “not just any kind of party will do”:

The parties should be organized around political ideologies rather than ethnic, religious, or regional identities. Their ideological differences should be distinct but not too sharp; extreme ideologies are dangerous. They parties should not be personalistic vehicles for the self-aggrandizement of charismatic leaders but organizations with democratic internal structures that seek a constituency among citizens and strive for openness, accountability, and lawful behavior. They should cultivate relations with other social and political organizations and be willing to work in coalitions when circumstances require.<sup>27</sup>

Unfortunately, parties of this type are not very common in developing countries. In their cross-national analysis of *Political Parties and Democracy*, Gunther and Diamond identified fifteen distinct types of political parties worldwide, and only five correspond to the Western-style party that Carothers described. According to their terminology, these were the (1) class-mass, (2) pluralist nationalist, (3) denominational mass, (4) catch-all, and (5) programmatic parties. Falling outside Carothers’ description are these party types: (6) local notables, (7) clientelistic, (8) ethnic, (9) congress, (10) personalistic, (11) Leninist, (12) ultranationalist, (13) religious fundamentalist, (14) left-libertarian, and (15) post-industrial extreme-right.<sup>28</sup> In many developing countries, as Carothers said, “The parties cannot be understood as simply underdeveloped or weak; they are fundamentally different kinds of organizations than Western ones.”<sup>29</sup>

Having acknowledged the difficulty in shaping party politics through party law, I do not want to dissuade democratic practitioners from trying to design competitive party systems.

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<sup>26</sup> Carothers, p. 142.

<sup>27</sup> Carothers, pp. 142-143.

<sup>28</sup> Richard Gunther and Larry Diamond, "Types and Functions of Parties" in Larry Diamond and Richard Gunther (eds.), *Political Parties and Democracy* (Baltimore and London: The Johns Hopkins University Press, 2001), Chapter 1, pp. 3-39.

<sup>29</sup> Carothers, p. 153,

Political parties *are* necessary for democratic government, and there *is* need for a legal framework to facilitate the emergence and growth of strong, competitive political parties. I hope to contribute to the democratic enterprise by assessing party law across nations and by identifying five alternative models that characterize policies for regulating parties.

I contend that nations tend to follow policies that *proscribe*, *permit*, *promote*, *protect*, or *prescribe* political parties and party activities in the political process. These policy models are conceptualized as pure forms, and nations may not follow each exactly in making party law. Nations “tend to” follow these models, but specific laws may fit different regulatory policies, reflecting the complexity of the law-making process. In general, nations that **proscribe** parties by law forbid them from operating at all; nations that **permit** parties allow them to operate freely; nations that **promote** parties actively support them; nations that **protect** parties favor certain ones over others; and nations that **prescribe** for parties seek to mold them to fit an ideal.

Each of these models will be illustrated below by citing cross-national examples of party law. Obtaining as complete knowledge as possible about alternative legal frameworks under which parties operate promises to improve our understanding of how to design competitive party systems. But first, the study needs to describe how the party law examples were obtained.

## A WORLDWIDE SURVEY OF PARTY LAW

Unfortunately, there are not many systematic cross-national surveys of party law. Individual chapters in the massive handbook by Katz and Mair on party organizations reported party laws for twelve countries.<sup>30</sup> However, that volume did not compare party laws across nations. Other scholars have compared party laws on selected topics. For example, Plasser and Plasser cataloged and analyzed the regulatory framework of election campaigns in some 70 countries.<sup>31</sup> Pinto-Dushinsky compiled and analyzed government regulations for party finance and extent of government subsidies in 104 countries.<sup>32</sup> Pinto-Dushinsky's compilation was later used in USAID's expanded report on money in politics in 118 nations.<sup>33</sup>

The most recent and most comprehensive cross-national study of political finance was sponsored by IDEA—the International Institute for Democracy and Electoral Assistance.<sup>34</sup> With justification, IDEA describes its database on political finance laws and regulations in 111 countries as the largest collection of such information assembled to date. Even more recently, Transparency International, an international non-governmental organization devoted to combating corruption, issued its 2004 report on worldwide corruption, which embraces party finance in its report.<sup>35</sup>

At this point, it is helpful to define terms for assessing the scholarly literature on party law. Let us use the term *origin* for the source of the regulations—whether they were promulgated in the constitution, in court law, in a legislative statute, in an executive order, or in an

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<sup>30</sup> Richard S. Katz and Peter Mair (eds.). *Party Organizations: A Data Handbook in Western Democracies, 1960-90* (London, SAGE Publications, 1992),

<sup>31</sup> Fritz Plasser with Gunda Plasser, "Regulatory Frameworks of Campaigns", *Global Political Campaigning: A Worldwide Analysis of Campaign Professionals and Their Practices* (Westport, CT, Praeger, 2002), pp. 137-179.

<sup>32</sup> Michael Pinto-Duschinsky, "Financing Politics: A Global View," *Journal of Democracy*, 13, (October 2002), pp.69-86

<sup>33</sup> Office of Democracy and Governance, *Money in Politics Handbook: A Guide to Increasing Transparency in Emerging Democracies*, Bureau for Democracy, Conflict, and Humanitarian Assistance, U.S. Agency for International Development: Washington, D.C., Document PN-ACR-223, November, 2003.

<sup>34</sup> Reginald Austin and Maja Tjernström (eds.), *Funding of Political Parties and Election Campaigns* (Stockholm, Sweden: International Institute for Democracy and Electoral Assistance 2003. The book is available in portable document format (PDF) on the internet at < [http://www.idea.int/publications/funding\\_parties/index.cfm](http://www.idea.int/publications/funding_parties/index.cfm) > .

administrative rule. Let us call the objective of the legislation—e.g., the definition of party, party activities, or party organization—the legislative *target*. Accordingly, Plasser and Plasser inventoried party law that had campaign practices as the regulatory target. In contrast, the compilations of party laws conducted by Pinto-Dushinsky, USAID, and IDEA all targeted party finance. Party finance was also the prime target of Transparency International, but it also inventoried laws dealing with corrupt practices in politics. In fact, more cross-national inventories of party law have focused on party finance than on any other topic.

### **A database of party law:**

Lacking adequate cross-national surveys of party law, I undertook my own research for this study. I created a database containing 1,101 laws identified by governmental *origin* and intended *target*. These laws were entered into a searchable database using the widely used commercial program, FileMaker Pro 7.<sup>36</sup> Figure 2 illustrates one of the 1,101 pages in the database as captured from the computer screen.

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<sup>35</sup> Transparency International, *Global Corruption Report 2004* (Berlin: 2004). The report is available as a PDF file on the internet at <<http://www.globalcorruptionreport.org/Index.shtml>>.

<sup>36</sup> This program runs on both Windows and Macintosh computers and can also be run from a server over the Internet. Unlike the Microsoft database, ACCESS, FileMaker Pro is user friendly, and one can create “buttons” to press to automate much of the searching. In addition, “run-time” versions of the database can be created for stand-alone usage by practitioners in the field who wish to review legal practices concern political parties

		<b>Janda's Party Laws</b>		Updated 02/17/05		
Government regulations of political parties and party politics across nations						
<b>Nation</b> Cambodia	<b>Origin of National Rule</b>		Special Party Law			
<b>Subnational unit</b>	<b>Subnational Origin</b>					
<b>Political parties</b>	<b>Political groups</b>	<b>Elections</b>	<b>Campaigns</b>	<b>Candidates</b>	<b>Voters</b>	<b>Government</b>
Definition						
<b>Rule</b>						
<b>Article 2:</b> A "political party" is a group of persons who have the same ideas and willingness and who voluntarily join together through a contract, to form a permanent and autonomous organization in order to participate in the national political life in accordance with liberal democratic and pluralism regime through free and fair elections as determined by the Constitution of the Kingdom of Cambodia and relevant laws in vigor.						
<b>Source</b> Kingdom of Cambodia, The Law on Political Party, n° 1197/07, dated 18 November, 1997.						

**Figure 2: One of the 1,101 Entries in the Database of Party Laws**

The boxes in the figure hold “pull-down” menus that, when clicked on the computer, display various options for retrieving party laws. For example, the menu in the box under **Political parties** allows one to search for laws pertaining to *Definition, Legal status, Membership, Organization, Selecting candidates, Activities, Public subsidies, Party finance, Prohibited members, and History*. Searching the database for *Political Party / Definition* returned 37 laws out of 1,101 entries. The entry shown in Figure 2 is the definition of a political party as contained in the 1997 Party Law for Cambodia. Box 2 lists the full set of search options hidden in each of the topical boxes.

**Box 2: Search Options Offered in Computer Database Menus**

<b>Origin:</b>	Constitution, Referendum, Legislative statute, Court law, Executive order, Parliamentary rule, Administrative rule, Unspecified
<b>Political Parties:</b>	Definition, Legal status, Membership, Organization, Selecting candidates, Activities, Public subsidies, Party finance, Prohibited members, and History.
<b>Elections:</b>	Principles, Method, Timing, Ballot, Sanctions
<b>Groups:</b>	Definition, Legal status, Social basis, Organization, Activities, Raising funds, Spending funds
<b>Candidates:</b>	Definition, Selection, Deposits, Activities, Raising funds, Spending funds
<b>Voters:</b>	Qualifications, Registration, Absentee
<b>Campaigns:</b>	Duration, Raising funds, Spending funds, Public subsidies, Activities, Media, Polling
<b>Government:</b>	Qualifications, Disqualifications, Organization, Jurisdiction

**Contents of the database**

The database is comprehensive, covering 169 polities from across the world. Table 1 reports the distribution of party laws by world regions.

**Table 1: Distribution of Party Laws by Region of the World**

<u>Region of the World</u>	<u>Number of Laws</u>	<u>Percent</u>
West European/Anglo-American	247	22.4
Latin America/Caribbean	188	17.1
Asia, Far East	154	14.0
Middle East	74	6.7
Africa	221	20.1
Central Europe/Ex Soviet	196	17.8
Oceania	21	1.9
Total	1101	100.0

Although comprehensive, the database is far from exhaustive, including only a portion of the world’s party laws. Moreover, it is not representative—in the statistical sense of being a probabilistic sample

Laws came from whatever was handy—mainly books and sources on the Internet. More laws in the database come from national constitutions than from any other source, which is due to the existence of a searchable Internet source of the world’s constitutions translated into

English.<sup>37</sup> All the most recent constitutions were electronically searched for references to “political” or “party” or “parties.”<sup>38</sup> A smaller but still large segment of party laws (198) originates in legislative statutes, and nearly as many (117) come from special Party Laws. Another large group (126) are of “unspecified” origin. Fewer than 100 come from other governmental sources. The distribution of the origin of laws by region is given in Table 2.

**Table 2: Distribution of Party Laws Origins by Region of the World**

<b>Origin of party laws</b>	West Eur/ Ang- Amer.	Latin Amer/ Carib.	Asia, Far East	Mid- East	Afr.	Cen Eur/ Old Sov.	Oceana	<b>Total</b>
Constitution	55	133	68	30	176	106	11	579
Constitutional law	6		1					7
Court law	7		1					8
Legislative statute	78	14	45	15	7	39		198
None	15					2		17
Parliamentary rule	4							4
Referendum	1							1
Electoral Law	21					11		32
Party Law	20	11	28	26	12	20		117
Unspecified	28	30	11	3	26	18	10	126
Other	12							12
<b>Totals</b>	<b>247</b>	<b>188</b>	<b>154</b>	<b>74</b>	<b>221</b>	<b>196</b>	<b>21</b>	<b>1101</b>

National constitutions are a source of party laws more often in Latin America, Africa, and Central/Eastern Europe than in Western Europe and Anglo-America. The unrepresentative nature of my database precludes definitive statements about party law across nations. Nevertheless, it does contain a large number of party laws, which permit illustrative if not definitive observations.

Readers also need to know what counts as a party law — what gets entered into the database. Although every entry pertains to a legal regulation that affects party politics, the entries vary widely in length and detail. Figure 2 (above) displayed the definition of a political

<sup>37</sup> Go to <<http://www.oceanalaw.com/>>, but there is a hefty fee to subscribe to the online service. The parent printed source is Albert P. Blaustein and Gisbert. H. Flanz (eds.), *Constitutions of the Countries of the World* (Dobbs Ferry, N.Y., Oceana Publications, 1971). The source is regularly updated.

<sup>38</sup> Searching national constitutions only for “political party” or “political parties” proved inadequate, for some constitutions simply used “party” as shorthand for “political party.” Unfortunately, virtually all constitutions also

party from the Cambodian Party Law of 1997. Compare that brief entry from the Cambodian law with the lengthy entry in Box 3 from the Jordanian Party Law of 1992, which also counts as only one entry in the database under the same heading, *Political Parties / Definitions*.

### **Box 3: A Long Entry in the Database—Jordan’s Definition of a Political Party**

#### Article 3

A Party is every political organisation which is formed by a group of Jordanians in accordance with the Constitution and the provisions of the Law, for the purpose of participating in political life and achieving specific goals concerning political, economic and social affairs, which works through legitimate and peaceful means.

#### Article 5

The number of the founding members of any Party shall not be less than fifty persons who meet the following conditions:

- A. to have completed 25 years of age.
- B. to have been a Jordanian for at least ten years.
- C. not to have been finally convicted by a court of proper jurisdiction of a crime (except political crimes) unless he has been rehabilitated.
- D. to enjoy full civil and legal competence.
- E. to reside in the Kingdom permanently.
- F. not to claim the nationality of another country or foreign protection.
- G. not to be a member in any other Party, or any other non- Jordanian political partisan organisation.
- H. not to be a member of the Jordanian Armed Forces, Security Instrumentalities or the Civil Defence.
- I. not to be a judge.

#### Article 12

If, for any reason whatsoever, the number of the founding members becomes less than fifty before the announcement of the establishment of the Party in accordance with the provisions of this Law, the Establishment Application shall be considered as cancelled.

Although these two examples of party law differ substantially in length, each counts as one entry. Both laws pertain to the legal definition of a political party, but the Jordanian law specifies a number of conditions, which makes it more restrictive. According to the regulatory models outlined in the previous section, the vague Cambodian definition of a political party is *permissive*, while the detailed Jordanian definition *prescribes* what a party should be. The next section will illustrate all five regulatory models with additional examples from the database.

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used “party” in the more legal sense of “affected party” which meant that most hits in the search of over 100 constitutions were irrelevant.

## MODELS OF REGULATION AND EXAMPLES OF PARTY LAW

In principle, one should be able to evaluate national party laws according to whether they facilitate or obstruct party politics. In their 2002 study of “global political campaigning,” Plasser and Plasser evaluated national campaign laws along comparable lines. They amassed a maze of specific rules on “regulatory framework of campaigns” from 52 countries. To impose some order on the rules they collected, Plasser and Plasser classified countries according to whether campaign practices were “strictly regulated,” “moderately regulated,” or “minimally regulated.” They cite Japan as having “strictly regulated” campaigns; Russia as a country with “moderately regulated” campaigns; and say about “minimally regulated” campaigns:

The most popular example of minimal restrictions of campaign practices are in the United States, but campaigns in Australia, New Zealand and Canada also face only minor restrictions by prevailing electoral laws.<sup>39</sup>

I am unable at this stage to classify nations on regulating political parties in any rigorous way. But I can conceptualize alternative models of regulation and cite examples illustrating each of the five models—*proscribe*, *permit*, *promote*, *protect*, or *prescribe*—that I outlined above.

### **The Proscription model:**

To *proscribe* means to declare illegal or outlaw. However, the words “illegal” or “outlaw” are not used in any of the 159 laws under the heading *political parties / legal status*. If nations seek to outlaw all political parties, they tend instead to do so by denying them legal status. One way to do this is by not mentioning parties in the constitution, which occurs in thirteen nations in the database:

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<sup>39</sup>Plasser and Plasser, *Global Political Campaigning*; Chapter 6, is on “Regulatory Frameworks of Campaigns,” pp. 137-179; at p. 151.

Grenada	Japan	Oman	Tonga	Saudi Arabia	United States
Ireland	Malaysia	Qatar	Tunisia	United Arab	Venezuela
Jamaica				Emirates	

But failing to mention political parties in constitutions is not a foolproof sign of the proscription model. These thirteen countries above represent a mixed bag of established democracies, transitional democracies, and authoritarian regimes. The constitutions of Grenada, Ireland, Jamaica, Japan, and the United States— all rated as “Free” in the 2004 Freedom House ratings<sup>40</sup>—do not provide for political parties. Neither do the constitutions of Oman, Qatar, Saudi Arabia, and the United Arab Emirates; all are rated “Not Free.”

Even if a national constitution acknowledges political parties, that does not insure that parties operate freely. Turkmenistan’s constitution (Article 28) guarantees that “Citizens have the right to create political parties and other public associations that function within the framework of the Constitution and laws.” However, Freedom House rates Turkmenistan as even less free than the three Arab nations mentioned above.

The constitutions of some established democracies, like the United States, predate the origin of parties, which accounts for their omission in such countries. Nevertheless, strong constitutional provisions for freedom of expression can authorize parties without mentioning them. See Box 4, which compares the First Amendment to the U.S. Constitution with Article 39 in the Saudi Arabian constitution on freedom of expression. Neither constitution specifically mentions political parties. However, parties fall within the protection of free speech, assembly, and petition under the First Amendment to the U.S. Constitution. The Saudi document, in contrast, discourages acts that foster division or disunity, which parties usually do when they criticize government policy.

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<sup>40</sup> Go to < <http://www.freedomhouse.org/>>

#### **Box 4: Contrasting Constitutional Provision on Freedom of Expression**

##### **First Amendment to the U.S. Constitution**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

##### **Article 39 [Expression] In the Constitution of Saudi Arabia**

Information, publication, and all other media shall employ courteous language and the state's regulations, and they shall contribute to the education of the nation and the bolstering of its unity. All acts that foster sedition or division or harm the state's security and its public relations or detract from man's dignity and rights shall be prohibited. The statutes shall define all that.

Moreover, some nations do outlaw certain *types* of parties. A search for “forbid” under *political parties / legal status* identifies six nations—The Netherlands, Algeria, Ivory Coast, Poland, Senegal, and Italy—that forbid parties on various grounds. The most common prohibitions against social biases, foreign control, and the use of violence are all exhibited in Article 42 of the Algerian Constitution (Box 5).

#### **Box 5: Algerian Constitution Prohibition of Party Types**

##### **Article 42:**

With respect to the provisions of the present Constitution, the political parties cannot be founded on a religious, linguistic, racial, sexual, corporatist or regional basis.

The political parties cannot resort to partisan propaganda pertaining to the elements referred to in the previous paragraph.

All obedience of political parties under whatever form be it interests or foreign parties is forbidden.

No political party may resort to violence or constraint, of whatever nature or forms.

In a different vein, Article 12 of the Italian constitution says, “It is forbidden to reorganize, under any form whatever, the dissolved fascist party.” Such legal proscriptions aim to limit certain types of parties or party activity, but they are not designed to prohibit political parties in general.

## **The Permission Model:**

To *permit* means to allow. The permission model of party law allows parties to exist and operate without specifying what constitutes party membership, how parties should organize, how they should select their leaders, and even how they should finance their operations (outside the prohibitions of criminal law). It is a minimalist model of regulation—at the extreme, a *laissez faire* model.

Perhaps no nation is completely permissive, but the minimalist model is visible in the constitution of tiny Andorra (see Box 6). Even Andorra’s permissiveness is limited by requiring that party “organization must be democratic.” This seemingly minor requirement—legislating internal democracy in party affairs—raises a serious issue that is discussed at length later in the paper. Several countries that fit the permissive model also guard against legalizing paramilitary groups. For example, the Estonian constitution (Box 6) has only one provision pertaining to political parties, Article 48 on the “Right to Associate,” but it sets limits on what they can do.

### **Box 6: Permissive Regulation—Andorra and Estonia**

#### **Andorra Constitution, Article 26:**

Andorrans have the right freely to create political parties. Their functioning and organization must be democratic and their activities lawful. The suspension of their activities and their dissolution is the responsibility of the judicial organs.

#### **Estonian Constitution, Article 48:**

- (1) Everyone shall have the right to form non-profit associations and leagues. Only Estonian citizens may be members of political parties.
- (2) The establishment of associations and leagues possessing weapons or organized in a military fashion or conducting military exercises requires a prior permit, the issuing of which shall be in accordance with conditions and procedures determined by law.
- (3) Associations, leagues or political parties whose aims or activities are directed towards the violent change of the Estonian constitutional system or otherwise violate a criminal law shall be prohibited.
- (4) The termination or suspension of the activities of an association, a league or a political party, and its penalization, may only be invoked by a court, in cases where a law has been violated.

detailed parliamentary laws regulating parties, which is true of both Andorra and Estonia, and

perhaps Australia.<sup>41</sup>

### **The Promotion Model:**

To *promote* is to advance, further, encourage. Governments sometimes enact laws that promote not only the activities of political parties but also their creation. Typically, they do so through electoral laws that favor the creation or continuance of numerous political parties.

Scholars and practitioners have long noted that legislative elections based on proportional representation in multimember districts yield a larger number of parties than elections in which seats are won by simple voting pluralities in single-member districts. Often, the nature of the electoral system is specified in legislative statutes, usually in codified bodies of electoral law. But at least twelve countries make proportional representation a constitutional requirement.

Some observers argue that proportional representation does not create multiple parties as much as it preserves various parties already in existence. According to this argument, existing parliamentary parties collude to ensure their proportional shares of parliamentary seats in subsequent elections by designing and passing electoral laws for proportional representation.<sup>42</sup>

Consider the case of Norway, which adopted its original constitution in 1814, only 25 years after the U. S. Constitution was ratified. Neither document mentioned parties. Over time, both constitutions were amended. Still today, the U.S. constitution does not mention parties. Norway's also does not discuss the legal status of parties, but as amended to 1995 it details the electoral method of proportional representation (see Box 7), even specifying numerical divisors for party votes to yield party seats. Enshrining the electoral method in the constitution helps to

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<sup>41</sup> Joint Standing Committee on Electoral Matters, *User Friendly, Not Abuser Friendly: Report of the Inquiry into the Integrity of the Electoral Roll* (Canberra: The Parliament of the Commonwealth of Australia; May, 2001), p. 81.

<sup>42</sup> Josep M. Colomer, "It's the Parties that Choose Electoral Systems (or Duverger's Laws Upside Down)," *Political Studies*, 53, (No. 1, 2005), 1-21.

promote party interests by preserving institutions with which they are comfortable.

### **Box 7: Legislating PR in the Constitution—Norway**

#### **Article 59**

Each municipality constitutes a separate polling district.

The polls shall be held separately for each polling district. At the polls votes shall be cast directly for representatives to the Storting, together with their proxies, to represent the entire constituency.

The election of representatives of constituencies is based on proportional representation and the seats are distributed among the political parties in accordance with the following rules.

The total number of votes cast for each party within each separate constituency is divided by 1, 4, 3, 5, 7 and so on until the number of votes cast is divided as many times as the number of seats that the party in question may expect to obtain. The party which in accordance with the foregoing obtains the largest quotient is allotted the first seat, while the second seat is allotted to the party with the second largest quotient, and so on until all the seats are distributed. If several parties have the same quotient, lots are drawn to decide to which party the seat shall be allotted. List alliances are not permitted.

The seats at large are distributed among the parties taking part in such distribution on the basis of the relation between the total number of votes cast for the individual parties in the entire Realm in order to achieve the highest possible degree of proportionality among the parties. The total number of seats in the Storting to be held by each party is determined by applying the rules concerning the distribution of constituency seats correspondingly to the entire Realm and to the parties taking part in the distribution of the seats at large. The parties are then allotted so many seats at large that these, together with the constituency seats already allotted, correspond to the number of seats in the Storting to which the party in question is entitled in accordance with the foregoing. If according to these rules two or more parties are equally entitled to a seat, preference shall be given to the party receiving the greatest number of votes or, in the event of a tie, the one which is chosen by drawing lots. If a party has already through the distribution of constituency seats obtained a greater number of seats than that to which it is entitled in accordance with the foregoing, a new distribution of the seats at large shall be carried out exclusively among the other parties, in such a way that no account is taken of the number of votes cast for and constituency seats obtained by the said party.

No party may be allotted a seat at large unless it has received at least 4 per cent of the total number of votes cast in the entire Realm.

The seats at large obtained by a party are distributed among that party's lists of candidates for constituency elections so that the first seat is allotted to the list left with the largest quotient after the constituency's seats are distributed, the second seat to the list with the second largest quotient, and so on until all the party's seats at large have been distributed.

Many citizens may not think of electoral law as promoting political parties. A more obvious form of promotion is to grant them public subsidies, a common practice that has grown over time. Searching the party law database for *Political parties / public subsidies* returns 47 entries. Many originate in legislative statutes, but about half have constitutional origins. Box 8 reports constitutional commitments to party subsidies made by Argentina, Colombia, Congo, El Salvador, Guatemala, and Malawi.

### **Box 8: Promoting Parties with Subsidies, a Constitutional Commitment**

#### **Argentina, Article 38**

The State shall contribute to the financial support of their activities and educational improvement of their leaders.

Political parties must make public the source and destination of their funds and their economic net worth.

Richard Katz and Peter Mair have argued that political parties in many countries have colluded to extract funds from the state for their own support, saying:

In short, the state, which is invaded by the parties, and the rules of which are determined by the parties, becomes a fount of resources through which these parties not only help to ensure their won survival, but through which they can also enhance their capacity to resist challenges from newly mobilized alternatives.  
<sup>43</sup>

Katz and Mair contend that this dynamic has produced a new type of party, the “cartel” party, that lives off state largess. If Goldilocks had foreseen the way in which parties might engineer state legislation to promote party interests, she would have understood better why they asked for party laws.

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<sup>43</sup> Richard S. Katz and Peter Mair, "Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party," *Party Politics*, 1 (January, 1995), 5-28, at p. 16.

## **The Protection Model:**

To *protect* is to shield from injury or loss. The most extreme protection possible for any party is to declare it the only legitimate one, which Syria has done for the Ba'th Party (Box 9).

### **Box 9: Extreme Form of Party Protection—Syrian Constitution**

#### **Article 8**

The leading party in the society and the state shall be the Socialist Arab Ba'th Party. It shall lead a patriotic and progressive front seeking to unify the resources of the people's masses and place them at the service of the Arab nation's goals.

Short of declaring a one-party state, some nations protect certain parties by judicious dispensation and interpretation of party law. Consequently, the protection model differs only in degree from the previous promotion model. Nations (or regimes) that follow the protection model go beyond enacting law simply to assist parties; they build a legal framework to fend off competition to existing parties. A clear example lies in controlling candidate and party access to election ballots.

Consider, for example, the United States, where the administrative responsibility for conducting elections—including elections for president and congress—lies with state governments. Under state law, most state governments grant positions on the ballot for the *next* election to parties that have won a certain percentage of the vote for a given office at the *previous* election. This practice automatically grants ballot spots to candidates of the established Democratic and Republican parties. But candidates of minor parties typically gain access only by filing petitions containing thousands of signatures. The disadvantageous ballot situation confronting the 2004 presidential candidate of the Green Party, David Cobb, was described prior

to the election in *Ballot Access News*:<sup>44</sup>

David Cobb, Green: 54.3% of the voters will see his name on ballots. He is on in all jurisdictions except 13 places in which the requirements were too difficult to attempt (Arizona, Georgia, Indiana, Kentucky, New Hampshire, North Carolina, North Dakota, Oklahoma, South Dakota, Texas, Virginia, West Virginia, Wyoming), and 8 places in which the party made a good attempt but fell short (Alabama, Idaho, Illinois, Kansas, Missouri, New York, Ohio, Tennessee), and in 2 places where the party was on the ballot but something still went wrong.

An even more blatant exercise of the protection model of party law can be seen in some developing nations, where leaders of established parties have structured the legal framework to increase discipline among their own party members within parliament. Some countries have adopted constitutional provisions that cause members of parliament to lose their seats if they “cross the floor” and defect to another party. To illustrate how prevalent the practice, I cite numerous examples of such constitutional provisions in Box 10 (next page).

Such legislation gives great power to party leaders. Party dissidents in the parliamentary delegation cannot leave the party without losing their seats. Sometimes such laws, also called “anti-hopping” provisions, are defended as a way to increase party discipline and cohesion in parliament.<sup>45</sup> Given such legislation in the United States, Senator James Jeffers of Vermont could not have left the Republican Party and become an Independent in 2001, nor could many southern members of Congress before him have switched from Democrat to Republican. Making such defection an “unconstitutional” act costing loss of elective office surely exemplifies the protection model of making party law.

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<sup>44</sup> Volume 20, Number 7, November, 2004.

<sup>45</sup> Benjamin Reilly, “Political Engineering of Parties and Party Systems,” paper prepared for delivery at the 2003 Annual Meeting of the American Political Science Association.

## **Box 10: Protecting Parties with Constitutional Provisions Against “Crossing the Floor”**

### **Belize, Article 59, Tenure of Office of Members**

(1) Every member of the House of Representatives shall vacate his seat in the House at the next dissolution of the National Assembly after his election.

(2) A member of the House of Representatives shall also vacate his seat in the House—

(e) if, having been a candidate of a political party and elected to the House of Representatives as a candidate of that political party, he resigns from that political party or crosses the floor.

### **Namibia, Article 48, Vacation of Seats**

(1) Members of the National Assembly shall vacate their seats:

(b) if the political party which nominated them to sit in the National Assembly informs the Speaker that such members are no longer members of such political party;

### **Nepal, Article 49. Vacation of seat**

(1) The seat of a member of Parliament shall become vacant in the following circumstances:

(f) if the party of which he was a member when elected provides notification in the manner set forth by law that he has abandoned the party.

### **Nigeria, 68. Tenure of seat of members.**

(g) being a person whose election to the House was sponsored by a political party, he becomes a member of another political party before the expiration of the period for which that House was elected:

### **Seychelles, Article 81. Vacation of seats**

(1) A person ceases to be a member of the National Assembly and the seat occupied by that person in the Assembly shall become vacant—

27(h) if, in the case of a proportionally elected member—

(i) the political party which nominated the person as member nominates another person as member in place of the first-mentioned person and notifies the Speaker in writing of the new nomination;

(ii) the person ceases to be a member of the political party of which that person was a member at the time of the election; or

### **Sierra Leone, Article 77. Tenure of seats of Members of Parliament.**

(1) A Member of Parliament shall vacate his seat in Parliament—

(k) if he ceases to be a member of the political party of which he was a member at the time of his election to Parliament and he so informs the Speaker, or the Speaker is so informed by the Leader of that political party;

### **Singapore, Article 46.**

(2) The seat of a Member of Parliament shall become vacant—

(b) if he ceases to be a member of, or is expelled or resigns from, the political party for which he stood in the election;

### **Zimbabwe, Article 41 Tenure of seats of members**

(1) Subject to the provisions of this section, the seat of a member of Parliament shall become vacant only—

(e) if, being a member referred to in section 38 (1) (a) and having ceased to be a member of the political party of which he was a member at the date of his election to Parliament, the political party concerned, by written notice to the Speaker, declares that he has ceased to represent its interests in Parliament;

## **Prescription Model:**

To *prescribe* means to issue orders, to dictate. Doctors prescribe medications to remedy ailments. National governments prescribe party laws to cure what they think is wrong about the way parties function. At the extreme, the prescription model of party regulation allows regimes to boast that they have a multiparty system while controlling the parties' organization and behavior. If Goldilocks had foreseen how clever regimes could devise legislation to promote their interests under the facade of party competition, she would have understood better why the rulers of the Unfree Forest were “the gladdest of all” for getting party laws.

Of course, national governments need not push the prescription model to the extreme in enacting party law. I'll provide examples of the extreme version of the prescription model first, and then consider nations that prescribe in moderation. My presentation begins by involves searching the database of party laws for entries under *political parties / organization* only in national constitutions. I look first to prescriptions concerning party organization in constitutions, which constitute the most durable and authoritative method of regulation.

The database contains 42 entries for constitutional prescriptions concerning party organization. Only four entries come from Western European constitutions—those of Germany, Spain, and Portugal (2 entries). None of these European constitutions prescribe party organization in detail, but Germany and Spain both require parties to operate according to “democratic” principles. While this is not a trivial prescription, it is also not specifically detailed. The relevant provisions for Germany and Spain are in Box 11.

### **Box 11: Constitutions that Prescribe Party Organization: Germany and Spain**

#### **Germany, Article 21**

(1) Political parties participate in the formation of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for their assets and for the sources and the use of their funds.

#### **Spain, Article 6 [Political Parties]**

Political parties express democratic pluralism, assist in the formulation and manifestation of the popular will, and are a basic instrument for political participation. Their creation and the exercise of their activity are free within the observance of the Constitution and the laws. Their internal structure and operation must be democratic.

Portugal's constitution is more detailed in prescribing party organization (see Box 12). It not only requires parties to demonstrate "democratic organization and management," but also restricts how they can be named and what can be used as party symbols.

### **Box 12: A Constitution that Prescribes Party Organization: Portugal**

#### **Portugal, Article 51 Political Associations and Parties**

3. Without prejudice to the philosophy or ideology underlying their programs, political parties cannot use names that contain expressions directly connected with any religion or church, or use emblems that may be mistaken for national or religious symbols.

4. No party can be established with a name or stated aims that indicate a regional connection or field of action.

5. Political parties must be governed by the principles of transparency, democratic organization and management and the participation of all of its members.

6. The law shall establish regulations on the financing of political parties, specifically in relation to the requirements and limits of public financing, as well as requirement of publicity relating to their property and accounts.

This assessment of provisions on party organization in Western European constitutions makes two main points: (1) Relatively few western nations deal with party organization at the constitutional level. (2) The few that prescribe party organization in constitutions do so with moderation. In fact, moderation also characterizes most of the other 38 constitutional prescriptions on party organization. All eleven Latin American countries in the set of 38 have provisions similar to those of Germany, Spain and Portugal. Most nations—even those in transitional stages of democratic development—do not use their constitutions to prescribe how

parties should be organized.

A few developing nations, however, have used their constitutions to micro-manage party organization and behavior. For example, consider the constitutions of Nepal, Liberia, and Nigeria. The 1990 constitution of Nepal (Box 13) prescribes rules for party registration that include providing names and addresses of its leaders, requiring election of officers at least every five years, and restricting what names or symbols it can use.

**Box 13: Constitutions that Micro-Manage Political Parties: Nepal**

**113. Registration Required for Securing Recognition for the purpose of Contesting Elections as a Political Organisation or Party**

(1) Any political organisation or party wishing to secure recognition from the Election Commission for the purposes of elections, shall be required to register its name with the office of the Election Commission in accordance with the procedure as determined by the Commission. A Petition so submitted for registration shall contain clear information about the name of the concerned political organisation or party, the names and addresses of the members of its executive committee or any such other committee and such petition shall be accompanied by the rules and manifesto of the organisation or the party.

(2) Political organisations and parties shall be required to fulfill, in addition to the matters contained in this Part, the following conditions in order to qualify for registration pursuant to clause (1) above:

- (a) the constitution and the rules of the political organisation or party must be democratic;
- (b) the constitution or the rules of the organisation or party must provide for election of office bearers of the organisation or party at least once every five years;
- (c) must have complied with the provisions of Article 114; and
- (d) must have secured a minimum of three percent of the total votes cast in the election to the House of Representatives:

(3) The Election Commission shall not register any political organisation or party if any Nepali citizen is discriminated against in becoming a member on the basis of religion, caste, tribe, language or sex or if the name, objectives, insignia or flag is of such a nature that it is religious or communal or tends to fragment the country.

Two articles in the 1984 Liberian constitution (Box 14) are even more detailed as to how parties must register, how they are named, where they can be located, and when they must select officers.

#### **Box 14: Constitutions That Micro-Manage Political Parties: Liberia**

##### **Article 79**

No association, by whatever name called, shall function as a political party, nor shall any citizen be an independent candidate for election to public office, unless:

- a. the association or independent candidate and his organization meet the minimum registration requirements laid down by the Elections Commission and are registered with it. Registration requirements shall include filing with the Elections Commission a copy of the constitution of the association and guidelines of the independent candidate and his organization, a detailed statement of the names and addresses of the association and its officers or of the independent candidate and the officers of his organization, and fulfillment of the provision of subsections (b), (c), (d) and (e) hereof. Registration by the Elections Commission of any association or independent candidate and his organization shall vest in the entity or candidate and his organization so registered legal personality, with the capacity to own property, real, personal or mixed, to sue and be sued and to hold accounts. A denial of registration or failure by the Elections Commission to register any applicant may be challenged by the applicant in the Supreme Court;
- b. the membership of the association or the independent candidate's organization is open to every citizen of Liberia, irrespective of sex, religion or ethnic background, except as otherwise provided in this Constitution.
- c. the headquarters of the association or independent candidate and his organization is situated:
  - i. in the capital of the Republic where an association is involved or where an independent candidate seeks election to the office of President or Vice- President;
  - ii. in the headquarters of the county where an independent candidate seeks election as a Senator; and
  - iii. in the electoral center in the constituency where the candidate seeks election as a member of the House of Representatives or to any other public office;
- d. the name, objective, emblem or motto of the association or of the independent candidate and his organization is free from any religious connotations or divisive ethnic implications and that the activities of the association or independent candidate are not limited to a special group or, in the case of an association, limited to a particular geographic area of Liberia;
- e. the constitution and rules of the political party shall conform to the provisions of this Constitution, provide for the democratic elections of officers and/or governing body at least once every six years, and ensure the election of officers from as many of the regions and ethnic groupings in the country as possible. All amendments to the Constitution or rules of a political party shall be registered with the Elections Commission no later than ten days from the effective dates of such amendments.

The constitution of Nigeria discusses political parties in several articles. As documented in Box 15, one article (“Restrictions on Formation of Political Parties”) requires that names and addresses of party officials be registered with the national election commission, that any changes in party rules be reported to the election commission within thirty days, and that the party

headquarters be located in the Federal Capital Territory. It also forbids parties from using names or symbols that pertain to any ethnic, religious, or regional group. The other article prescribes periodical elections (no more than every four years) of party officials, who must be drawn from two-thirds of all the federal states.

### **Box 15: Constitutions That Micro-Manage Political Parties: Nigeria**

#### **222. Restriction on formation of political parties.**

No association by whatever name called shall function as a political party, unless—

- (a) the names and addresses of its national officers are registered with the Independent National Electoral Commission;
- (b) the membership of the association is open to every citizen of Nigeria irrespective of his place of origin, circumstance of birth, sex, religion or ethnic grouping;
- (c) a copy of its constitution is registered in the principal office of the Independent National Electoral Commission in such form as may be prescribed by the Independent National Electoral Commission;
- (d) any alteration in its registered constitution is also registered in the principal office of the Independent National Electoral Commission within thirty days of the making of such alteration;
- (e) the name of the association, its symbol or logo does not contain any ethnic or religious connotation or give the appearance that the activities of the association are confined to a part only of the geographical area of Nigeria; and
- (f) the headquarters of the association is situated in the Federal Capital Territory, Abuja.

#### **223. Constitution and rules of political parties.**

(1) The constitution and rules of a political party shall—

- (a) provide for the periodical election on a democratic basis of the principal officers and members of the executive committee or other governing body of the political party; and
- (b) ensure that the members of the executive committee or other governing body of the political party reflect the federal character of Nigeria.

(2) For the purposes of this section—

- (a) the election of the officers or members of the executive committee of a political party shall be deemed to be periodical only if it is made at regular intervals not exceeding four years; and
- (b) the members of the executive committee or other governing body of the political party shall be deemed to reflect the federal character of Nigeria only if the members thereof belong to different States not being less in number than two-thirds of all the States of the Federation and the Federal Capital Territory, Abuja.

Of course, these sections of the Nigerian constitution reflect the strong ethnic (tribal and religious) differences among the majority groups that dominated each of Nigeria's three regions: the Hausa/Fulani in the north, the Yoruba in the west, and the Igbo in the east. As stated in the CIA Factbook:

The major political parties that emerged in the regions and controlled them were based on these groups.

With regional autonomy, the major groups became the major "shareholders" of the federation. Power-sharing and political calculations have consequently centered on ensuring a balance of power among these groups.<sup>46</sup>

Accordingly, the constitution makers sought to insure the political parties would have to aggregate ethnic interests across interests to encourage cooperation in party politics. As Benjamin Reilly has written, both scholars and policymakers have endorsed such political engineering that constrains the growth of ethnic parties and encourages "broad-based, aggregative and multi-ethnic" parties to avoid inter-ethnic violence.<sup>47</sup>

Regardless of the reasoning that prompted these prescriptions in the Nigerian constitution, its example in Box 15 and those for Nepal and Liberia in Boxes 13 and 14 illustrate how political parties can be shaped and controlled through national constitutions. For the most part, however, governments prescribe party behavior not in constitutions but through legislative statutes, often through special Party Laws.

The database contains 117 entries under "Special Party Laws"—codified statutes for governing political parties. Thirteen of those entries prescribe, often in great detail, how political parties should be organized. For example, the 1964 German Party Law (as amended to 1994) prescribes party organization in great detail. Wolfgang Müller argues that it is "*the* Western European country in which party law has the greatest relevance."<sup>48</sup> The single entry for *political party / organization* in the database for the German Party Law (not shown here) contains over 2,000 words from 11 Articles. It is very prescriptive.

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<sup>46</sup> [http://www.photius.com/countries/nigeria/government/nigeria\\_government\\_government\\_and\\_polit~10019.html](http://www.photius.com/countries/nigeria/government/nigeria_government_government_and_polit~10019.html)

<sup>47</sup> Benjamin Reilly, "Political Engineering of Parties and Party Systems," paper prepared for delivery at the 2003 Annual Meeting of the American Political Science Association.

<sup>48</sup> Wolfgang Müller, "Parties and the Institutional Framework," in Kurt Richard Luther and Ferdinand Müller-Rommel (eds.), *Political Parties in the New Europe: Political and Analytical Challenges*. (New York: Oxford University Press, 2002), p. 262.

Given the vigor of contemporary German party politics, Germany’s meticulous state regulation of party organization and activity obviously has not hampered the development of strong, democratic parties. One wonders, however, what the effect of heavy state regulation is on political party formation and operation in countries such as Jordan, Yemen, Cambodia, and Indonesia. None of these nations was rated as “Free” in the 2003 Freedom House ratings, yet all prescribe party organization and operation in great detail. Let us look more closely at some provisions in the Jordanian 1992 Political Parties Law (Box 16).

**Box 16: Prescribing Party Organization in Party Laws—Jordan**

**Article 4**

“Jordanians have the right to form political parties and to voluntarily join them according to the provisions of the Law.”

**Article 7**

A. The application for establishing the Party shall be submitted to the Minister signed by the founders with the following information and documents attached thereto:

1. Three copies of the Party’s Memorandum of Association signed by the founders.
2. A list of the names of the founders in four parties, and the place and date of birth, occupation, work and address of each founder.
3. A certified copy of the Birth Certificate of each of the founders, or a certified copy of the Family Book or Personal Identification Card.
4. A non-conviction certificate for each of the founders.
5. A certificate signed by five of the founders before the employee designated by the Minister testifying to the authenticity of the signatures of all the founders and the information concerning them. Each one of these five founders shall specify, in this certificate, his address or chosen residence where documents, notices and letters issued by the Ministry can be delivered to him.

B. The designated employee shall issue a notice of receipt of the establishment application indicating herein the date of submitting the application and the information and documents attached thereto.

**Article 22**

The Party shall keep the following records and statements at its main headquarters:

- (a) The Party’s Memorandum of Association.
- (b) The names, addresses and residences of the Party’s members, founding members and leadership members.
- (c) A record of the decisions of the leadership.
- (d) A detailed record of the revenues and expenditures of the Party.

voluntarily join them according to the provisions of the Law.” These provisions are quite specific (see Articles 7 and 22 in Box 16). The Jordanian government requires (among other things): (a) addresses of all branch party offices; (b) knowledge of “procedures for forming the Party’s echelons, choosing its leaders, regulating its relationship with its members”; (c) reports

on the “financial and administrative competencies for any of these echelons”; (d) storage at the party’s main headquarters of “names, addresses and residences of the Party’s members,” records of “decisions of the leadership,” and (e) a “detailed record of the revenues and expenditures of the Party.”

One can argue that the Jordan Party Law (Box 16)—and the Party Laws of Yeman, Cambodia, and Indonesia not illustrated here—are not much more detailed than the German Party Law and similar laws in advanced democracies. Party Laws in advanced and transitional democracies, however, differ greatly according to when they were created and who created them. The German Party Law was passed only after thirty-five years of experience with party politics, and it was created with the participation of vigorous political parties. Although the German law regulated party practices, it effectively recognized established practices of competitive parties. In this regard, its passage fits the promotion model more than the prescription model. Because strong, independent parties did not design party laws in Jordan, Yemen, Cambodia, and Indonesia, authoritarian ruling forces had more latitude to prescribe how parties would be created and organized.

### **CONTEXTUAL FACTORS AND KEY ISSUES IN PARTY LAW**

The type of parties that operate in a nation and the nature of its party politics depend heavily on the nation’s legal framework that governs parties and party politics. Writing on the role of institutions in party change, Wolfgang Müller held that state laws governing political parties constitute

the most direct form of state intervention in party politics. In principle, party laws can require political parties to fulfill specific conditions that relate to content’ (e.g., intra-party democracy, acceptance of the

democratic order) and/or to 'form' (e.g., party statute, minimal level of activity).<sup>49</sup>

Recognizing the power of party law, we must consider contextual factors and issues that condition its design and implementation. Drawing on information presented above under the five models of party law, this section discusses the models' suitability to different socioeconomic and political circumstances.

### **Civil Prerequisites: Is the Nation Ready for Party Law?**

As implied above, contemporary party systems in most advanced democracies predated party law. Usually, these countries' constitutions did not mention parties, which were either nonexistent or embryonic when the constitution was adopted. Moreover, party law in these countries usually regulated parties only after they had taken shape, grown strong, and participated in government. Through party law, nations can preserve a competitive party system once created, but states or their rulers are unlikely to create a system of independent competitive political parties through legislation or fiat.

To illustrate limits on even a strong state's ability to create a competitive party system from scratch, consider the case of Iran in the mid-1950s under the rule of Muhammad Reza Shah Pahlavi. At the time, western leaders welcomed the Shah of Iran as a modernizer. He enacted some economic reforms, advanced the status of women, and generally curbed the power of religious leaders. Although Iran had a parliament, the shah practiced imperial rule, and his country lacked few trappings of democracy that might make his rule more acceptable to his western friends. Much closer to that time I wrote:

By 1957, the shah decided that the country needed a stable two-party system, and he sponsored the start of two parties. He invited then prime minister Manuchehr Eqlbal to form one party, called the Nationalist (Melliyun) Party, and encouraged the former prime minister, Assadollah Alam, to form the other party,

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<sup>49</sup> Wolfgang C. Müller, "The Relevance of the State for Party System Change," *Journal of Theoretical Politics*, 5, (October 1993), pp. 419-454.

called the People's (Mardom) Party. These parties engaged primarily members of the elite and had little penetration outside the Iranian parliament (Majlis). Nevertheless, the two parties squabbled during the 1960 elections, which were annulled because of charges of fraud on behalf of the Nationalist Party, which held the government. A second election in 1961 was also voided, as the shah despaired of his attempt to fashion Iranian politics after the British two-party model and dissolved the Majlis.<sup>50</sup>

The shah's flirtation with a two-party system in the 1960s ended upon learning that party competition can be messy and unpredictable, even for parties created in-house. As Ingrid van Biezen observes, many parties in democratizing countries today also had "almost no presence on the ground" before they were "created from within the party in public office, or acquired "parliamentary representation (and often also government responsibility) almost immediately after their formation."<sup>51</sup> In political life, every organization is a rival to every other organization. Once formed, parties do not encourage rivals.

Creating a political party is a risky business, and the business analogy is instructive. Indeed, Issacharoff and Pildes evaluate court decisions on regulating parties according to whether the decisions advance or obstruct the "market" for partisan control of government.<sup>52</sup> Economic entrepreneurs incur financial costs when starting companies that may not repay their investments, but political entrepreneurs incur both financial and political costs when starting parties. Beyond risking money, party founders risk loss of reputation and even political retaliation. There are other parallels between starting a business and founding a party. Just as comprehensive and detailed government regulations can prevent economic entrepreneurs from starting, building, and growing their businesses, comprehensive and detailed party law can prevent political entrepreneurs from starting, building, and growing parties. In legal terminology, it can have a "chilling effect" on the formation and development of political parties.

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<sup>50</sup> Kenneth Janda, *Political Parties: A Cross-National Survey* (New York: The Free Press, 1980), p. 861.

<sup>51</sup> Ingrid van Biezen, "On the theory and practice of party formation and adaptation in new democracies," *European Journal of Political Research* 44 (2005), 147–174, at pp. 154 and 165.

<sup>52</sup> Issacharoff and Pildes, p. 643.

Therefore, before drafting party law for nations in transition to democracy, one should ask the question, “Is the nation, and its parties, ready for party law”? Simon Chesterman cautions that elections held soon after the end of armed conflict in developing nations can spawn political parties “that are primarily—and sometimes solely—vehicles to provide local elites with access to governing power. Such parties may be little more than a repackaging of the armed groups that fought the original conflict.”<sup>53</sup> Governing without parties, however, is not the answer. In that case, Chesterman warns, “political life is dominated exclusively by the elite personalities involved: this is the danger of a ‘no-party democracy’ such as that embraced in Yoweri Museveni’s Uganda.”<sup>54</sup>

### **The Level of the Law: Starting at the Top?**

Suppose a nation has a young but vigorous multiparty system. Suppose also that democratic practitioners find that it is *too* vigorous. Perhaps the parties do not campaign very chivalrously, or perhaps so many parties split the popular vote that none has close to a parliamentary majority, making stable government impossible. If democratic practitioners decide that some law is needed to impose order, at what level should it be written? Should party law be enacted in constitutions or in legislative statutes?

My database reveals that many countries use their constitutions as a vehicle for party law, prescribing party organization and behavior in considerable detail. Given that constitutions are more difficult to change than statutes, ensconcing party law in constitutions produces rigid regulation that can freeze parties and party systems in awkward, dysfunctional shapes. If party

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<sup>53</sup> Simon Chesterman *You, the People: The United Nations, Transitional Administration, and State-Building* (New York: Oxford University Press, 2004), p. 221.

<sup>54</sup> *Ibid.*, p. 223.

law is needed, legislative statutes provide more nimble vehicles than constitutions for carrying the needed regulations.

### **Type of Party: To Aggregate or Articulate Interests?**

Party scholars often toss off the terms “aggregation” and “articulation” as functions of political parties without elaborating on their meanings. For example, Gunther and Diamond refer to parties as “vehicles for the articulation and aggregation of interests” but then list only interest aggregation as one of seven key party functions.<sup>55</sup> Democratic practitioners need to consider more carefully the differences between these often linked but rarely differentiated concepts.

To *articulate* an interest means to express it clearly. To *aggregate* interests means to collect and balance different interests (often competing interests). Elsewhere, I wrote, “Parties that have broad social bases are assumed to aggregate diverse interests rather than articulate specific ones. Presumably, parties differ from interest groups by aggregating rather than articulating interests.”<sup>56</sup> However, some parties (such as Green and religious parties) rate higher than others in interest articulation and rate lower in interest aggregation. Ethnic parties in particular are thought to articulate their ethnic interests ahead of societal concerns. That explains why Reilly (quoted earlier) said:

scholars and policymakers alike have frequently identified the need to build broad-based, aggregative and multi-ethnic political parties if inter-ethnic violence is to be avoided and the routines of peaceful democratic politics consolidated in fragile multi-ethnic states.<sup>57</sup>

That ethnic parties promote domestic instability and threaten democratic institutions is the prevailing view in comparative politics.<sup>58</sup>

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<sup>55</sup> Gunther and Diamond, pp. 3 and 8. Presumably, they would include interest articulation under the “societal representation” function.

<sup>56</sup> Kenneth Janda, “Comparative Political Parties: Research and Theory,” in Ada W. Finifter (ed.), *Political Science: The State of the Discipline II* (Washington, D.C.: American Political Science Association, 1993), pp. 163-191.

<sup>57</sup> Reilly, p. 4.

However, there is a contradictory view, often associated with Arend Lijphart, that sees democratic potential in ethnic parties. Lijphart argues for a “consociational” democracy in which ethnic are directly represented in government.<sup>59</sup> More recently, Kanchan Chandra (citing the example of India but in a theoretical context) argues that ethnic parties can *sustain* a democracy if the political institutions are appropriately devised, e.g., to ensure variation of ethnic identities across public policy contexts and levels of government.<sup>60</sup> Others closer to implementing democracy in multiethnic countries contend that democratic practitioners need to face the inevitability of ethnic parties. Speaking about making party law in contemporary Iraq, Morton Abramowitz says:

The instinctual reaction may be for members of the drafting committee to press for legislation outlawing religious political parties. However, an outright ban on religious parties may have the effect of adding to the groups’ luster as well as decreasing the legitimacy of the burgeoning democracy. A law that requires all political parties to be secular is not natural to the region and would most likely be seen as forced upon the people by the American government.<sup>61</sup>

These considerations of the articulative functions of political parties should at least lead one to reexamine the tendency (as in the Nigerian constitution, Box 15) to prevent the formation of ethnic parties.

### **A Curious Case, Parties and Presidents: Are They Incompatible?**

The powers of the office of president vary greatly across nations. In some nations, as in the United States, the president is both head of government and head of state. In other nations, as in Germany, the president is head of state (serving largely in a ceremonial role) and not head of government. Therefore, any analysis of the partisan nature of the office needs to consider

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<sup>58</sup> For example, see Alvin Rabushka and Kenneth Shepsle, *Politica in Plurali Societies: A Theory in Democratic Instability* (Columbus, OH: Charles E. Merrill, 1972).

<sup>59</sup> Arend Lijphart, *Democracy in Plural Societies*. (New Haven: Yale University Press, 1997).

<sup>60</sup> Kanchan Chandra, “Ethnic Parties and Democratic Stability,” *Perspectives on Politics*, 3 (June 2005), pp. 235-252.

<sup>61</sup> Abramowitz, Morton, *Establishing a Stable Democratic Constitutional Structure in Iraq Some Basic Considerations*. (New York and Washington: The Century Foundation, 2003), p. 50.

whether the president is actually head of government or only head of state. If presidents do indeed head governments composed of political parties, one would expect that presidents should be linked to parties in their governments.

Given that expectation, I was surprised to find that presidents were prohibited from engaging in party activities in about 20 national constitutions. The wording in constitutions for eleven countries—Albania (1998), Belarus (1996), Bulgaria (amended in 2003), Chad (1996), Estonia (1992), Kazakhstan (amended in 1998), Kyrgyz (amended 2003), Lithuania (1992), Niger (1999), Turkey (amended 2002), and Uruguay (amended 1996)—is given in Box 17. All contain nearly blanket prohibitions against leading a party in government. (The 1996 Bangladesh constitution [not shown] offers a different twist, saying that the president must appoint advisors from those who are “not members of any political party or of any organisation associated with or affiliated to any political party.”<sup>62</sup>)

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<sup>62</sup> Article 58c.

**Box 17: Constitutional Prohibitions against Party Politics by Presidents**

**Albania, Article 89**

The President of the Republic may not hold any other public duty, may not be a member of a party or carry out other private activity.

**Belarus, Article 86**

The President shall suspend his membership in political parties and other public associations that pursue political goals during the whole term in office.

**Bulgaria, Article 95**

(2) The President and the Vice President may not be national representatives, engage in another state, public, or economic activity, and participate in the leadership of any political party.

**Chad, Article 71.**

The functions of the President of the Republic are incompatible with the exercise of any other elected mandate, any public employment and of any other professional and lucrative activity.

They are also incompatible with any activity within a party or a group of political parties or a syndical organization.

**Estonia, Art. 84.**

Upon assuming office the authority and duties of the President of the Republic in all elected and appointed offices shall terminate, and he or she shall suspend his or her membership in political parties for the duration of his or her term of office.

**Kazakhstan, Article 43.**

2. For the period he exercises his powers the President of the Republic suspends activity in a political party.

**Kyrgyz, Article 43**

5. The President of the Kyrgyz Republic must suspend his activity in political parties and organizations during the term of office until the beginning of new elections of the President of the Kyrgyz Republic.

**Lithuania, Article 83**

The President of the Republic may not be a member of the Seimas or hold any other office, and may not receive any remuneration other than the salary established for the President as well as compensation for creative activities.

A person elected President of the Republic must suspend his or her activities in political parties and political organisations until a new presidential election campaign begins.

**Niger, Article 44**

During the duration of his mandate, the President of the Republic may not be President or member of the government body of a political party or of any national association.

**Turkey, Article 101**

The President-elect, if a member of a party, severs his relations with his party and his status as a member of the Grand National Assembly of Turkey ceases.

**Uruguay, Article 77**

5) The President of the Republic and members of the Electoral Court may not belong to political committees or clubs, nor hold directive positions in party organizations, nor take part in any way in political election propaganda;

I have not analyzed these constitution prohibitions according to the governmental status of the presidency. However, the presidents of Chad and Kazakhstan serve as both head of government and head of state, and both presidents wield enormous powers. Therefore, the “head of state” defense of the party prohibition cannot apply in all cases in Box 17. I suspect instead

that nullifying any party role for the president reflects a romantic attempt to portray the president as “above” party politics.<sup>63</sup> (Russian President Boris Yeltsin took that posture during his tenure, with unsatisfactory results.) To the extent that constitutions insulate government leadership from political parties, their framers deny that parties play a positive role in democratic government. Or perhaps the framers see the role but do not value it, which is even more troublesome.

### **Type of Government: Parliamentary or Presidential?**

Two of USAID’s key publications on democratic development pay little attention to the type of government in developing nations. *Democracy and Government: A Conceptual Framework* (1998) mentions neither “parliamentary” nor “presidential” among its concepts. *USAID Political Party Development Assistance* (1999) mentions “parliamentary” on four pages and “presidential” on one page, but only once links the terms on the same page. There it simply contends that the U.S. party model is not relevant due (in part) to the relative scarcity of majority presidential systems in emerging democracies.<sup>64</sup> NDI’s *Political Parties and the Transition To Democracy* (2001) mentions each term only three times in 45 pages, and juxtaposes the terms in only one place, vaguely stating:

Both external and internal factors may affect a party's methods and abilities. For example, the nature of the political system C whether it is a presidential or parliamentary system, whether electoral balloting is through open or closed lists, whether the legislature is organized around single, or multi-member districts C will place different demands on a party's structure and strategic planning process.<sup>65</sup>

Although the NDI publication does not elaborate on how the type of government affects political parties, at least it recognizes that parties operate differently in parliamentary and presidential systems. This contextual distinction needs to be considered in thinking about shaping parties

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<sup>63</sup> Ivan Doherty, “Democracy Out of Balance: Civil society Can’t Replace Political Parties,” *Policy Review* (April-May, 2001), pp. 25-35.

<sup>64</sup> *USAID Political Party Development Assistance*, p. 40.

<sup>65</sup> *Political Parties and the Transition to Democracy,:: A Primer in Democratic Party-Building for Leaders, Organizers and Activists* (Washington, DC: National Democratic Institute for International Affairs, 2001), p. 3.

through party law.

More than fifty years ago in his classic book, *Les Partis Politiques*, Maurice Duverger wrote that political parties are influenced by the structure of government, especially by the separation of powers in presidential systems versus the joining of powers in parliamentary governments. Recently, however, David Samuels has argued that party scholars have ignored this factor, writing:

Comparative research on political parties truly began with the study of western Europe, where parliamentarism dominates and constitutional structure is thus not an independent variable. Because comparativists interested in political parties have largely built on concepts developed for the western European experience and have ignored potential insights from presidentialism in the United States, we lack general hypotheses about how the separation of powers affects political parties.<sup>66</sup>

Moreover, many emerging democracies have adopted presidential forms of government. Long characteristic of Latin America, presidentialism has become common in postcommunist and African states. Noting the “limited degree of scholarly attention” given to the effect of presidentialism on party systems, Terry Clark and Jill Wittrock found in their cross-national study of postcommunist states in Europe that “Strong presidents greatly reduce the incentives for parties to vie for control of a legislature that lacks control over either policy making or the process of making and breaking governments.”<sup>67</sup> Other studies have shown the distorting effect of strong presidents on party politics in Latin America and Africa.<sup>68</sup>

Whether the governmental structure is presidential or parliamentary is especially important for the power structure within a political party. In *Party Discipline and Parliamentary Government*, the editors state at the outset: “Cohesion and discipline matter in the daily running of

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<sup>66</sup> David J. Samuels, “Presidentialized Parties: The Separation of Powers and Party Organization and Behavior,” *Comparative Political Studies*, 35 (May 2002), 461-483, at pp. 461-462.

<sup>67</sup> Terry Clark and Jill Wittrock, “Presidentialism and the Effect of Electoral Law in Postcommunist Systems: Regime Type Matters,” *Comparative Political Studies*, 38 (March 2005), 171-188, at 172-173.

<sup>68</sup> Luigi Manzetti, “Keeping Accounts: A Case Study of Civic Initiatives and Campaign Finance Oversight in Argentina,” (Washington, D.C.: USAIDPCE-I-00-97-00042-00, Working Paper No. 248, November 2000. ; Todd A. Eisenstadt, “Catching the State Off Guard: Electoral Courts, Campaign Finance, and Mexico’s Separation of State and Ruling Party,” *Party Politics*, 10, No.6 pp. 723-745; Matthijs Bogaards, “Counting parties and identifying dominant party systems in Africa,” *European Journal of Political Research* 43: (2004), 173-197.

parliaments. The maintenance of a cohesive voting bloc inside a legislative body is a crucially important feature of parliamentary life.”<sup>69</sup> This brings us to the matter of intra-party democracy.

### **Political Parties and Democracy: Inter or Intra?**

The most vexing issue in the prescription model of party law is the tension between achieving democracy through *inter-party competition* versus *intra-party democracy*. Inter-party competition means competition among parties to win popular votes in order to gain political office. Intra-party democracy is manifested in internal party procedures that extend, if not maximize, the participation of the party rank-and-file in decisions of public policy and party practice. Should democratic practitioners try to draft laws that promote intra-party democracy as well as inter-party competition?

Agencies for democratic development (like NDI and USAID) tend to value intra-party democracy far more than most scholars who study political parties. NDI says, “To promote democracy in their country, however, political parties must be democratic themselves.”<sup>70</sup> That means that a party should reflect democratic principles

not only in its written constitution, but also in its day-to-day interaction between leaders and members. That is, a party must be committed to practicing democratic behavior. A democratic party will allow members to express their views freely, promote the membership of women, encourage participation by all members, be tolerant of different ideas, abide by agreed upon rules and procedures for decision-making, and hold leaders accountable to members and supporters.<sup>71</sup>

At one place in its “Primer in Democratic Party-Building for Leaders, Organizers and Activists,” USAID denies that it has a “fixed standard for international organization democracy as a condition of funding.”<sup>72</sup> But later in the same document, USAID says that the “core” of its

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<sup>69</sup> Shaun Bowler, David M. Farrell, and Richard S. Katz, *Party Discipline and Parliamentary Government* (Columbus: Ohio State University Press, 1998), p.3.

<sup>70</sup> Political Parties and the Transition to Democracy: A Primer in Democratic Party-Building for Leaders, Organizers and Activists (Washington, DC: National Democratic Institute for International Affairs, 1997), p. 4-5.

<sup>71</sup> *Ibid.*, p. 6.

<sup>72</sup> Center for Democracy and Governance, *USAID Political Party Development Assistance: A Primer in Democratic*

funding for political party programming went to

a) competing in elections, b) developing into broad-based, viable, *and internally democratic organizations*, and c) participating effectively in governance. Given the concentration of the institutes' programs in these three areas, they can be considered the "core" of USAID-funded political party programming.<sup>73</sup> [emphasis added]

Party scholars, who readily grant that democracy within nations requires *inter-party competition*, are dubious about the need for *intra-party democracy*. Two Scandinavian scholars, while agreeing that democracy without political parties is unthinkable, argue that democratic government emanates mainly from the competition *between* parties and not from competition *within* them. They explore the ways that "parties are instrumental to democracy":

One line of argument is that parties allow citizens to exercise some control over public policy, especially by giving voters a choice between competing programmes. Another view is that parties offer the voters a choice between competing teams of leaders, or at least that the voters have the opportunity to kick the incumbent rascals out. But while inter party competition is widely appreciated, intra-party democracy is questioned. Is intra-party democracy possible? Ought parties to be internally democratic? Why should we expect parties to be internally democratic?<sup>74</sup>

Their view is common in the party literature. In his paper for USAID on party law, Katz reviewed possible problems in promoting internal democracy. For example, Katz suggests that more internal democracy may make party leaders less willing and able "to compromise with one another to form coalitions." That may occur "because internal democracy is likely to empower activists, who tend to be stronger and often more extreme in their preferences, rather than either base party members or party supporters in general . . ."<sup>75</sup>

Intra-party democracy is commonly associated with decentralization of power within a party. If intra-party democracy and decentralization of power are valued, then centralization of power is not. Perhaps party scholars are less worried than democratic practitioners about the absence of intra-party democracy, because party scholars see value in centralization of power,

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Party-Building for Leaders, Organizers and Activists (Washington, D.C.: U.S. Agency for International Development, Document PN-ACE-500, April, 199), p. 24.

<sup>73</sup> *Ibid.*, p. 35.

<sup>74</sup> Jo Saglie and Knut Heidar, "Democracy within Norwegian Political Parties: Complacency or Pressure for Change?" *Party Politics*, 10 (July 2004), p. 35.

<sup>75</sup> Katz, p. 6.

thought to promote party cohesion in parliamentary government.<sup>76</sup> According to this view, intra-party democracy works at cross-purposes with the theory of parliamentary government.

Party scholars, therefore, differ from democratic practitioners concerning how much importance they attach to intra-party democracy. To the extent that democratic practitioners want party law to prescribe how parties should organize themselves, they may be moving beyond what party scholars understand to be the connection between political parties and democracy.

## CONCLUSION

This paper began with a question, “How closely should nations regulate political parties”? Its subtitle, which invokes the Goldilocks fable, asked “How Much Law Is Just Right”? Other writers on party law have posed the same question in virtually the same words. Evaluating Australian law, for example, Gary Johns asked, “How much regulation is too much”?<sup>77</sup> Others have inquired about the limits of party regulations without phrasing the question that way.<sup>78</sup>

My reading of how and when party law has been applied across nations leads to these conclusions:

1. In most advanced democracies, political parties were created and grew strong without being mentioned in national constitutions.
2. Even today, many advanced democracies lack any overarching legislative statute regulating parties in the form of a Party Law.

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<sup>76</sup> For a mixed assessment of how well centralization of power promotes party unity see Gabriela Borz, “Determinants of Party Unity in Western Europe,” paper Presented at the 7th Annual Graduate Retreat of the Society for Comparative Research 3-4 July 2005, Central European University, Budapest.

<sup>77</sup> Gary Johns, “Desirability of Regulating Political Parties,” *Agenda* 8 (December 2001), 291-302, at 293.

<sup>78</sup> Richard Cullen, “Regulating Parties in Hong Kong,” Paper prepared for the Panel On Constitutional Affairs, Legislative Council of the Hong Kong Special Administrative Region Meeting, *The Role and Development of Political Parties* (February, 2005; Elizabeth Garrett, “Is the Party Over? Courts and the Political Process”; Scott Bennett, “Australia’s Political Parties: More Regulation?” (Australia: Department of the Parliamentary Library, Research Paper No. 21, 2002; Fabrice E. Lehoucq, “Can Parties Police Themselves? Electoral Governance and Democratization,” *International Political Science Review*, 25 (January 2002), 29-46.

3. Most advanced democracies that do have a Party Law enacted it after their parties had matured and with the parties' participation.
4. In contrast, governments in many developing nations regulate parties in constitutions written prior to the formation or development of political parties.
5. In addition, governments in some developing nations have enacted detailed statutes that prescribe how fledgling parties should organize and operate.
6. Whether incorporated in constitutions or statutes, detailed party law that prescribes how parties should operate may have a chilling effect on the formation and functioning of political parties in emerging democracies.
7. Moreover, governments in some developing nations have enacted statutes that protect existing parties or bolster the parties' leadership.
8. By enacting "too much" party law under the "prescription" or "protection" models, governments can deter the creation of political parties or control the development of parties created.
9. By enacting "too little" party law under the "permissive" model, nations can suffer having a surfeit of minor parties in chaotic government.
10. However, having "too little" party law tends to be a temporary condition soon corrected by legislation backed by government and the larger parties.
11. The "permissive" model of party law may encourage the formation and development of political parties in developing countries better than the "prescription" model.
12. Democratizing agencies should be very cautious about drafting party law to strengthen political parties for the purpose of advancing democracy.

Scholars of party law—both lawyers and political scientists—are sensitive to normative and empirical issues in theories that underlie party regulation. Magarian's distinction between "private rights" versus "public rights" legal theories raises a normative issue. He links the private rights theory in the United States to

an explicitly pluralist vision of political parties, in which the major parties serve as mediating institutions that channel interest group competition and prevent conflicts from shredding the social fabric or producing majoritarian tyranny. On the account, the major parties need substantial autonomy from regulation.<sup>79</sup>

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<sup>79</sup> Magarian, p. 1966.

Magarian favors a public rights theory of regulation that elevates group (public) rights over individual (private) rights. Magarian would permit regulating campaign finance more aggressively and ending the U.S. party duopoly with multiparty politics. His view differs sharply from current practice of party regulation in the U.S. and from the minimalist school of regulation, which is also popular in other advanced democracies, such as Australia.<sup>80</sup>

Empirical theory, which predicts how party law will affect party politics, is also problematic. Reviewing attempts at “political engineering” of party systems, Reilly concludes that “viewing parties as malleable entities which can be engineered in the same manner as other parts of the political system remains controversial.”<sup>81</sup> Party law often has unintended, if not perverse, effects.

Democratic practitioners should not abandon attempts to advance democracy through party politics, but they should be cautious and questioning in their efforts. They should heed Hippocrates’s advice on healing: “Declare the past, diagnose the present, foretell the future; practice these acts. As to diseases, make a habit of two things—to help, or at least to do no harm.”<sup>82</sup>

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<sup>80</sup> Joint Stand Committee on Electoral Matters, p. 81; and Bennett, p. 14.

<sup>81</sup> Reilly, p. 20.

<sup>82</sup> Translation of *Epidemics*, Bk. I, Sect. XI. from <http://www.geocities.com/everwild7/noharm.html>.