POLITICAL PARTIES AND DEMOCRACY IN THEORETICAL AND PRACTICAL PERSPECTIVES

ADOPTING PARTY LAW

Kenneth Janda

National Democratic Institute for International Affairs

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For more information on NDI's political party programs or to obtain electronic copies of the *Political Parties and Democracy in Theoretical and Practical Perspectives* series, please visit http://www.ndi.org/globalp/polparties/polparties.asp.

PREFACE

A democracy needs strong and sustainable political parties with the capacity to represent citizens and provide policy choices that demonstrate their ability to govern for the public good. With an increasing disconnect between citizens and their elected leaders, a decline in political activism, and a growing sophistication of anti-democratic forces, democratic political parties are continually challenged.

For more than 20 years, the National Democratic Institute (NDI) has worked with political parties around the world to create more open political environments in which citizens can actively participate in the democratic process. As a political party institute, NDI approaches its work from a practical viewpoint, offering assistance to promote parties' long-term organizational development, enhance their competitiveness in local and national elections, and help them participate constructively in government. This support takes many forms, from interactive training and guided practice to consultations and tailored resources that help parties become more open and representative organizations.

In 2004, NDI began producing a series of research papers that examine four topics central to the role and function of political parties. Two of the papers, "Adopting Party Law" and "Political Finance Policy, Parties, and Democratic Development," discuss regulatory mechanisms that directly impact parties, while the other two, "Implementing Intra-Party Democracy" and "Developments in Party Communications," relate to parties' internal governance and organization. Together, these papers aim to provide comparative information on elements of party politics and to shed light on different methods and their associated causes and effects. They also examine some of the implications of a political party's action or strategy in each area.

These papers do not offer theories on party organization or instant solutions for addressing the issues explored. Rather, they consider obstacles to, and possible approaches for, creating more effective and inclusive political parties. They flag potential pitfalls and bumps along the way, and illustrate the practical considerations of which parties may need to be aware. The papers also encourage greater exploration of the many excellent resources, articles, and books cited by the authors.

It is hoped that the *Political Parties and Democracy in Theoretical and Practical Perspectives* series will help readers gain a better understanding of each topic and, in particular, the complexities of the issues addressed. This paper, "Adopting Party Law," provides cautions leaders should heed and outlines a number of questions to consider in devising party law.

The series is an experiment in blending theoretical knowledge, empirical research, and practical experience. NDI invited four eminent scholars to write the papers and engaged a range of people—including party leaders, democracy practitioners, NDI staff members, and other noted academics—in every stage of the process, from developing the initial terms of reference to reviewing outlines and drafts. NDI is indebted to a large number of people who helped bring this series to fruition, particularly the authors who took part in a cumbersome, collaborative process and graciously accepted feedback and guidance, and the project's consultant, Dr. Denise Baer. Special appreciation is due to NDI Senior Program Officer Victoria Canavor, who managed the project from its inception.

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ADOPTING PARTY LAW

Emerging democracies face a quandary in devising party law: deciding how much governmental authority should be used in regulating parties while parties themselves are meanwhile expected to provide the agendas for citizens to choose among in determining their government. If governments have no laws stating what parties can and cannot do, nations risk ruthless politics with little or no public accountability. Yet if governments enact strict laws specifying how parties should organize, campaign, and operate, nations can discourage or prevent political parties from participating in public affairs.

That quandary recalls the predicament from the fairy tale of "Goldilocks and the Three Bears": How much regulation of political parties is "just right" for a society? While practitioners may wish to create opportunities for "just the right kind of party," the moral may be that democracy is not always served when nations enact party law.

This paper provides several cautions that party leaders should heed and outlines a number of questions that they should consider in devising party law. To this end, the paper reviews five models that reflect different ways in which states have regulated parties: policies that either *proscribe, permit, promote, protect,* or *prescribe* parties and party activities. Party leaders in emerging democracies might wish to consider how older democracies have followed different trajectories in adopting party law, and consider to what extent local factors might condition which model of party regulation best fits their needs. For example, "too much" party law may have a chilling effect on the formation and development of political parties, as well as deterring the creation of political parties. On the other hand, when enacting "too little" party law, governments may result in a surfeit of minor parties producing chaotic government. These points are illustrated through a systematic review of party laws covering 169 polities as well as an analysis of experiences in established democracies.

What Is "Party Law"?

The term "party law" has different meanings to different people, even among party scholars. The term is sometimes used in reference to internal rules, such as party charters or bylaws by which parties 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: Generally, this includes law concerning what constitutes a political party, the form of activity in which parties may engage, and what forms of party organization and behavior are appropriate.

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 ensure 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.[1]

Following Katz, this paper defines *"party law"*—the common noun—as the body of state-based regulations that

determines 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: for example, Germany's "Law on Political Parties" or South Korea's "Political Parties Act."[2]

In this paper, 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

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 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 the behavior of all the political actors. The core focus of electoral law is the framework and administration of these elections. Such law in the United Kingdom, according to 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.[3]

According to Shaheen Mozaffar 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.[4]

Following the convention set forth above for "Party Law" and "party law," *"Electoral Law"* is used for national statutes regulating elections, even though the actual nomenclature varies from country to country.[5] And *"electoral law"* is used for a nation's body of electoral law. This body of law derives from Electoral Law (if it exists) and from legislative statutes, administrative rulings, court decisions, and national constitutions.

Electoral law is often quite comprehensive. Within electoral law, Mozaffar 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)."[6]

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 considerably 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, who tend to focus 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.[7] 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 becomes a source of party law.

Political finance law. Karl-Heinz Nassmacher uses the term "political finance" to encompass both "party finance" and "campaign finance."[8] 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 so as to obtain services and material. They focus on money as a lubricant for political corruption.[9] Political finance in its narrower sense—limited to party and campaign finance—is included in party law.

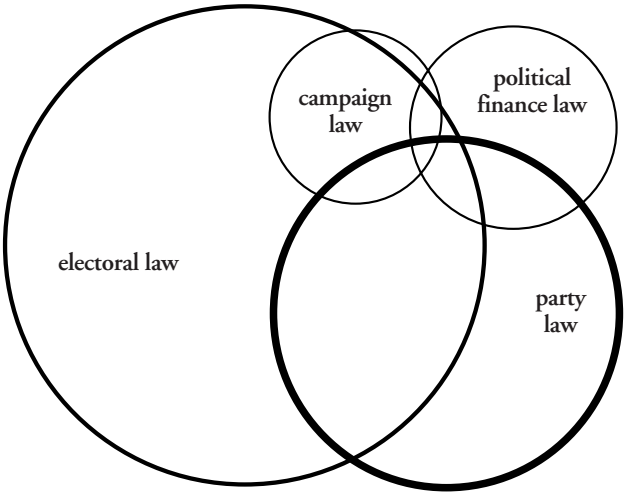
The body of political finance law can issue from many sources, sometimes from a specific Political Finance Law. South Korea, for instance, has a "Political Fund Act" that encompasses political parties, candidates, and political associations. To the extent that political finance law deals with political 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 can exist and that prosper, such indirect effects are regarded as being on the periphery and not at the core of party law as defined here.

The small circle labeled "campaign law" refers to a body of regulations that is often treated separately from electoral law

Figure 1: Selected Models of Party Organization and Organizational Tendencies



while nominally and legally subsumed under it.[10] 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 above, 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. Again, other sources of 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. Upon noting the key role that parties play in parliamentary democracies, the British constitutional scholar, Eric Barendt, writes:

> One might, therefore, expect constitutions to lay down some framework rules for political parties, at least to prevent them from 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.[11]

Nevertheless, Barendt explains 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 a fundamental law if not a single constitutional text.[12]

Barendt was wrong, moreover, in contending that national constitutions "rarely say much about political parties." A 1976 survey of 142 constitutions found that at least two-thirds mentioned parties.[13] As Jorge Laguardia pointed out in an essay on the constitutional framework for parties in Central America, "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."[14]

Incorporating party law into constitutions may be a consequence of the latest wave of democratization in developing states. As 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.… Getting certain provisions included in the document—and other provisions taken out—becomes a natural focus of attention.[15]

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

A Worldwide Survey of Party Law

There are not many systematic cross-national surveys of party law. Individual chapters in the massive handbook by Richard Katz and Peter Mair on party organizations reported party laws for 12 countries.[16] However, that volume did not compare party laws across nations. Other scholars have compared party laws on selected topics. For example, Fritz Plasser and Gunda Plasser cataloged and analyzed the regulatory framework of election campaigns in some 70 countries.[17] Michael Pinto-Duschinsky compiled and analyzed government regulations for party finance and extent of government subsidies in 104 countries.[18] Pinto-Duschinsky's compilation was later used in USAID's expanded report on money in politics in 118 nations.[19]

The most recent and most comprehensive cross-national study of political finance was sponsored by the International Institute for Democracy and Electoral Assistance (IDEA).[20] International IDEA's database on political finance laws and regulations in 111 countries is perhaps the largest collection of such information assembled to date. Even more recently, Transparency International, an international, non-governmental anti-corruption organization, included questions of party finance in its 2004 report on worldwide corruption.[21]

It is helpful here 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 administrative rule. Let us call the objective of the legislation—for example, 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-Duschinsky, USAID, and International IDEA all targeted party finance. Party finance was also the main target of Transparency International, but it also inventoried laws dealing with corrupt political practices. In fact, more cross-national inventories of party law have focused on party finance than on any other topic. For this study, a database was created containing 1,101 laws, identified by governmental *origin* and intended *target.* To understand how the party law examples for the database were obtained, see the **Appendix** on pages 25-28.

Party Law and Party Politics

Without doubt, a nation's party law affects its political parties. The question is: Which laws have what 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.

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.[22] 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.[23]

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.[24]

Party law is not only controversial concerning its intended effects; it also carries unintended consequences—even when experienced political actors work in a multipartisan manner to craft party law. For example, the U.S. 2002 Bipartisan Campaign Financing Reform Act was supposed to curb the flow of so-called "soft money" to political parties from special interests during 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 one 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 the previous three years combined.[25] As another legal scholar wrote, "The unique characteristics of political parties pose a challenge for any institution seeking to regulate them."[26]

If regulating parties through law is problematic in an established democracy such as the United States, designing law to produce desirable parties in transitional countries is 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.[27] 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. The 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.[28]

Unfortunately, parties of this type are not very common in developing countries. In their cross-national analysis, *Political Parties and Democracy,* Richard Gunther and Larry Diamond identified 15 distinct types of political parties worldwide, only five of which correspond to the Western-style party that Carothers described. According to their terminology, these were: (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.[29] In many developing countries, as Carothers has written, "The parties cannot be understood as simply underdeveloped or weak; they are fundamentally different kinds of organizations than Western ones."[30]

Political parties *are* necessary for democratic government, and there *is* a need for legal frameworks to facilitate the emergence and growth of strong, competitive political parties. The intention of this paper is to assess party law across nations

and to identify five alternative models that characterize policies for regulating parties.

The paper contends that nations tend to follow policies that *proscribe, permit, promote, protect,* or *prescribe* parties and party activities. These policy models are conceptualized as pure forms; nations may not follow any one of them 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 entirely; 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 in reference to cross-national examples of party law. The more we know about the alternative legal frameworks under which parties operate, the better our understanding will be of how to design competitive party systems.

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 the "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."[31]

In what follows, this paper conceptualizes alternative models of regulation and cites examples illustrating each of the five models—*proscribe, permit, promote, protect,* or *prescribe*—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 13 nations in the database:

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

But failing to mention political parties in constitutions is not a certain sign of the proscription model. The 13 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

Box 1: Contrasting Constitutional Provisions 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.

Box 2: Prohibition of Party Types—Algeria

Constitution, 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.

House ratings[32]—do not provide for political parties. Neither do the constitutions of Oman, Qatar, Saudi Arabia, and the United Arab Emirates, all of which are rated "Not Free."

Even if a national constitution acknowledges political parties, that does not ensure 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—the United States is one example—predate the origin of parties, which accounts for their omission in these democracies' constitutions. Nevertheless, strong constitutional provisions for freedom of expression can authorize parties without mentioning them. See **Box 1**, which compares the First Amendment of 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 U.S. First Amendment. The Saudi document, in contrast, discourages acts that foster division or disunity, which parties usually do as a matter of course when they criticize government policy.

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 ban parties on various grounds. The most common prohibitions are those against social biases, foreign control, and the use of violence—all of which are exhibited in Article 42 of the Algerian Constitution (see **Box 2**).

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,* of course, means to allow. The permission model of party law allows parties to exist and operate without

Box 3: 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 nonprofit 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.

specifying what constitutes party membership, how parties should organize, how they should select their leaders, and 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 3**, on the previous page). Even Andorra's permissiveness is limited by requiring internal democracy in party affairs—that party organization "must be democratic." Several countries fitting the permissive model also guard against legalizing paramilitary groups. For example, the Estonian constitution has only one provision pertaining to political parties, Article 48 on the "Right to Associate," but it sets limits on what they can do (see Box 3).

Even nations that fit the permissive model of party law in their constitutions may enact more detailed parliamentary laws regulating parties, which is true of both Andorra and Estonia, and perhaps Australia also.[33]

The Promotion Model

To *promote* is to advance, further, or 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

Box 4: Legislating Proportional Representation 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.

Box 5: 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.

Colombia, Article 109

The state will contribute to the financing of the functioning and holding of election campaigns of parties and political movements with a legal identity.

The other parties, movements, and significant groups of citizens which run candidates will enjoy this privilege as soon as they secure the percentage of votes prescribed by the law.

Republic of Congo (Brazzaville), Article 54

The State assures the financing of political parties. The law determines the conditions and the modalities of the financing of political parties.

El Salvador, Article 210

The State recognizes the political debt as a mechanism for financing contending political parties, which seeks to provide them with their freedom and independence. The secondary law shall regulate that referring to this matter.

Guatemala, Article 17

Political parties will receive funding beginning with the general elections of November 3, 1985, a matter that will be regulated by the Constitutional Electoral Law.

Malawi, Article 40

(92) The State shall provide funds so as to ensure that, during the life of any Parliament, any political party which has secured more than one-tenth of the national vote in elections to that Parliament has sufficient funds to continue to represent its constituency.

creation or continuance of numerous political parties. It has long been noted that legislative elections based on proportional representation in multimember districts yield a larger number of parties than do 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 12 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.[34]

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 does not discuss the legal status of parties, but as amended in 1995, it details the electoral method of proportional representation (see **Box 4**), even specifying numerical divisors for party votes to yield party seats. Enshrining the electoral method in the constitution helps to promote party interests by preserving institutions with which they are comfortable.

Many citizens may not think of electoral law as relevant to promoting political parties. A more obvious form of promotion is to grant parties public subsidies, an increasingly common practice 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 5**, on the previous page, reports constitutional commitments to party subsidies made by Argentina, Colombia, the Republic of Congo (Brazzaville), El Salvador, Guatemala, and Malawi.

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 own survival, but through which they can also enhance their capacity to resist challenges from newly mobilized alternatives.[35]

Katz and Mair contend that this dynamic has produced a new type of party, the "cartel" party, which lives off state largess.

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 (see **Box 6**).

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

Consider the United States, for instance, 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 in the *previous* election. This practice automatically grants ballot spots to candidates of the established Democratic and Republican parties. Candidates of minor parties typically gain access only by filing petitions containing thousands of signatures. The disadvantageous ballot situation confronting the 2004 Green Party presidential candidate, David Cobb, was described prior to the election in *Ballot Access News*:

> 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 eight places in which the party made a good attempt but fell short (Alabama, Idaho, Illinois, Kansas, Missouri, New York, Ohio, Tennessee), and in two places where the party was on the ballot but something still went wrong.[36]

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 is, numerous examples of such constitutional provisions are cited in **Box 7**.

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.[37] Were such legislation in effect in the United States, Senator James Jeffords of Vermont could not have left the Republican Party and become an Independent in

Box 6: Extreme Form of Party Protection—Syria

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.

Box 7: 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 Seats

(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, Article 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.

2001, nor could many southern members of Congress before him have switched from Democrat to Republican. Making such defection an "unconstitutional" act resulting in the loss of elective office exemplifies the protection model of making party law.

The 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 with 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.

Of course, national governments need not push the prescription model to the extreme in enacting party law. This paper will provide examples of the extreme version of the prescription model and then consider nations that prescribe in moderation. The method here involves searching the database of party laws for entries under *political parties / organization* only in national constitutions. The paper looks 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 (two 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 given in **Box 8**.

Portugal's constitution is more detailed in prescribing party organization (see **Box 9**). It not only requires parties to demonstrate "democratic organization and management"; it also restricts how they can be named and what can be used as party symbols.

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; and (2) the few that prescribe party organization in constitutions do so in moderation. In fact, moderation also characterizes most of the other 38 constitutional prescriptions on party organization. All 11 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.

Box 8: 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.

A few developing nations, however, have used their constitutions to micromanage party organization and behavior. For example, consider the constitutions of Nepal, Liberia, and Nigeria. The 1990 constitution of Nepal (see **Box 10**) prescribes rules for party registration that include providing names and addresses of party leaders, requiring election of officers at minimum every five years, and restricting what names or symbols a party can use.

Two articles in the 1984 Liberian constitution (see **Box 11**, on page 16) 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.

The constitution of Nigeria discusses political parties in several articles. As documented in **Box 12**, on page 17, one article ("Restrictions on Formation of Political Parties") requires that names and addresses of party officials be

Box 9: A Constitution that Prescribes Party Organization—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.

registered with the national election commission, that any changes in party rules be reported to the election commission within 30 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 the periodic elections (no more than every four years) of party officials, who must be drawn from no less than two-thirds of all the federal states.

Of course, these sections of the Nigerian constitution reflect the strong ethnic (tribal and religious) differences among the majority groups that have 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 World 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.[38]

Box 10: Constitutions that Micromanage Political Parties—Nepal

Article 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.

Box 11: Constitutions that Micromanage 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 sub-sections (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.

Accordingly, the constitution makers sought to ensure that the political parties would have to aggregate ethnic interests along with interests encouraging cooperation in party politics. As Benjamin Reilly has written, both scholars and policy makers have endorsed such political engineering, which constrains the growth of ethnic parties and encourages "broad-based, aggregative, and multi-ethnic" parties to avoid interethnic violence.[39]

Regardless of the reasoning that prompted these prescriptions in the Nigerian constitution, the example in Box 12—and those for Nepal and Liberia in Boxes 10 and 11, respectively—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

Box 12: Constitutions that Micromanage Political Parties—Nigeria

Article 222. Restrictions 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.

Article 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.

German Party Law (as amended in 1994) prescribes party organization in great detail. Wolfgang Müller argues that Germany is "*the* Western European country in which party law has the greatest relevance."[40] The single entry for *political party / organization* in the database for the German Party Law (not shown here) contains more than 2,000 words from 11 Articles. It is highly prescriptive.

Given the vigor of contemporary German party politics, Germany's meticulous state regulation of party organization and activity has obviously 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 (see **Box 13** on the following page).

Article 4 in Box 13 says that "Jordanians have the right to form political parties and to voluntarily join them according to the provisions of the Law." These provisions are quite specific (see Articles 7 and 22 in Box 13). The Jordanian

Box 13: 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.

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 13)—and the Party Laws of Yemen, Cambodia, and Indonesia, not illustrated here—are not much more detailed than the German Party Law or similar laws in other 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 35 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 that nation's party politics depend heavily on the legal framework that governs parties and party politics. Writing on the role of institutions in party change, Wolfgang Müller holds 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).[41]

Recognizing the power of party law, one must consider the 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 Country 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 it has been created, but states or their rulers are unlikely to create a system of independent competitive political parties through legislation or fiat.

To illustrate the 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 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 have made his rule more acceptable to his Western friends. As I have written:

> 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 Eqbal to form one party, called the Nationalist (Melliyun) Party, and encouraged the former prime minister, Assadollah Alam, to form the other party, 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.[42]

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."[43] 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 party regulation according to whether the decisions advance or obstruct the "market" for the partisan control of government.[44] 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 the loss of their reputations 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.

Therefore, before drafting party law for a nation in transition to democracy, one should ask: "Are the nation, and its parties, ready for party law?" Simon Chesterman cautions that elections held in developing nations soon after the end of armed conflict 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."[45] 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."[46]

The Level of the Law: Starting at the Top?

Suppose a nation has a young but vigorous multiparty system. Suppose also that those in power, or those exerting external influence, find that it is *too* vigorous. Perhaps the parties do not campaign very civilly; or perhaps so many parties split the popular vote that none has close to a parliamentary majority, making stable government impossible. If it is decided 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?

The 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 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 use 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.[47] The differences between these often linked but rarely differentiated concepts need to be considered carefully.

To articulate an interest means to express it clearly. To aggregate interests means to collect and balance different (often competing) interests. Parties with broad social bases normally aggregate diverse interests rather than articulate specific ones. And parties normally differ from interest groups by aggregating rather than articulating interests.[48] However, some parties (such as European Green and religious parties) rate higher than others in interest articulation and lower in interest aggregation. Ethnic parties in particular are thought to articulate their ethnic interests ahead of societal concerns. That explains why Reilly writes that "scholars and policy makers 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."[49] That ethnic parties promote domestic instability and threaten democratic institutions is the prevailing view in comparative politics.[50]

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 groups are directly represented in government.[51] More recently, Kanchan Chandra has argued that ethnic parties can sustain a democracy if the political institutions are appropriately devised—for example, to ensure variation of ethnic identities across public policy contexts and levels of government.[52] Others involved more directly in democracy promotion in multiethnic countries argue similarly that ethnic parties are in some cases inevitable. On making party law in contemporary Iraq, Morton Abramowitz writes:

> 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.[53]

These considerations on the articulative functions of political parties should lead one at least to reexamine the tendency to view the prevention of ethnic parties (as in the Nigerian constitution, cited in Box 12 on page 17) as an unalloyed good.

Parties and Presidents: Are They Incompatible?

The powers of presidential office vary greatly across nations. In some, as in the United States, the president is both head of government and head of state. In others, 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 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, one might be surprised to find that presidents were prohibited from engaging in party activities in about 20 national constitutions. The wording in constitutions for 11 countries—Albania (1998), Belarus (1996), Bulgaria (amended 2003), Chad (1996), Estonia (1992), Kazakhstan (amended 1998), Kyrgyzstan (amended 2003), Lithuania (1992), Niger (1999), Turkey (amended 2002), and Uruguay (amended 1996)—is given in **Box 14**, on the following page. All contain nearly blanket prohibitions against leading a party in government. (The 1996 Bangladesh constitution [not shown] offers a different twist, stating that the president must appoint advisors from among those who are "not members of any political party or of any organisation associated with or affiliated to any political party."[54])

As yet, there is no comprehensive analysis of constitutional 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 14. It is more likely, instead, that nullifying any party role for the president reflects a romantic attempt to portray the president as "above" party politics.[55] (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?

Parties operate differently in parliamentary and presidential systems. This contextual distinction needs to be considered when thinking about shaping parties through party law. More than 50 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.[56] 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.[57]

Moreover, many emerging democracies have adopted presidential forms of government. Long characteristic of Latin America, presidentialism has become common in post-communist 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 post-communist 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."[58] Other studies have shown the distorting

Box 14: 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, Article 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.

Kyrgyzstan, 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;

effect of strong presidents on party politics in Latin America and Africa.[59]

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 disciple matter in the daily running of parliaments. The maintenance of a cohesive voting bloc inside a legislative body is a crucially important feature of parliamentary life."[60] This brings us to the matter of intra-party democracy.

Political Parties and Democracy: Inter- or Intra-?

A 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. Of course, these two are not necessarily incompatible, but the tension between them may be great, even critical, based on gaps among what other parties are offering to voters, the centrifugal demands of social and political development, and the limited speed in adaptability of party organizations. Should laws be drafted that promote intra-party democracy as well as inter-party competition?

Party scholars make a distinction between discrete reforms adopted due to problems in party development which may promote diversity and decentralize power, on one hand, and external requirements for specific forms of intra-party democracy, on the other. To the extent that practitioners want party law to require and prescribe how parties should organize themselves, they may be going against what party scholars understand to be the connection between political parties and democracy—and risk damaging the ability of parties to adapt.

Conclusion

This paper began with a question: "How closely should nations regulate political parties"? Or, in the terms of the Goldilocks fable: "How much party law is just right"?[61] 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.
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 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 in statutes, detailed party law prescribing how parties should operate may have a chilling effect on the formation and functioning of 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 that are created.
9. By enacting "too little" party law under the "permissive" model, nations can suffer having a surfeit of minor parties in a chaotic government.
10. However, having "too little" party law tends to be a temporary condition soon corrected by legislation backed by the government and 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.

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 this account, the major parties need substantial autonomy from regulation.[62]

Magarian favors a public-rights theory of regulation that elevates group (public) rights over individual (private) rights. He would permit regulating campaign finance more aggressively and ending the U.S. party duopoly with multiparty politics. Magarian's 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.[63]

Empirical theory, which predicts how party law will affect party politics, is also problematic. Reviewing attempts at the "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."[64] Party law often has unintended, if not perverse, effects. Accordingly, attempts to advance democracy through party politics should not be abandoned, but they should be cautiously approached and carefully interrogated. Above all, such attempts should respect Hippocrates' advice on healing: "Declare the past, diagnose the present, foretell the future.… As to diseases, make a habit of two things—to help, or at least to do no harm."[65]

Appendix: Database of Party Laws

The 1,101 laws in the searchable database created for this study were identified by governmental *origin* and intended *target.* These laws were entered into the database using the widely used commercial program, FileMaker Pro 7.[66] **Figure A**, below, provides a screenshot of one of the database's 1,101 pages.

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

NDI National Democratic Institute for International Affairs

Janda's Party Laws — Updated 02/17/05

Government regulations of political parties and party politics across nations

Nation Cambodia — **Origin of National Rule** Special Party Law

Subnational unit — **Subnational Origin**

Political parties | **Political groups** | **Elections** | **Campaigns** | **Candidates** | **Voters** | **Government**

Definition

Rule

Article 2:

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.

Source

Kingdom of Cambodia, The Law on Political Party, n° 1197/07, dated 18 November, 1997.

The boxes in the figure hold pull-down menus that, when clicked, 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* returns 37 laws out of 1,101 entries. The entry shown in Figure A is the definition of a political party as contained in the 1997 Party Law for Cambodia. **Box A**, below, lists the full set of search options hidden in each of the topical boxes.

Box A: Search Options Offered in Computer Database Menus

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

Contents of the Database

The database is comprehensive, covering polities from around the world. **Table A**, on the opposite page, reports the distribution of party laws by world regions. 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. An alphabetical listing of the polities in the database is provided in **Table B**, below.

The laws came from material at hand, primarily books and Internet sources. 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.[67] All of the most recent constitutions were electronically searched for references to "political" or "party" or "parties." (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 used "party" in the more legal sense of "affected party," which meant that most hits in the search of more than 100 constitutions were irrelevant.)

A smaller but still large group of party laws (198) originates in general legislative statutes, and nearly as many (117) come from special Party Laws. Another large group (126) is of "unspecified" origin, with smaller groups having "other" sources (12) or "none" (15). Fewer than 100 come from other governmental sources.

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 this database precludes definitive statements about party law across nations. Nevertheless, it does contain a large number of party laws, which permits illustrative if not definitive observations.

Table B: Alphabetical List of Polities in the Party Law Database

Afghanistan	Cambodia	Gambia	Kiribati	Namibia	Slovakia
Albania	Cameroon	Georgia	Korea, North	Nepal	Slovenia
Algeria	Canada	Germany	Korea, South	Netherlands	Somalia
Andorra	Central African Republic	Ghana	Kyrgyzstan	New Zealand	South Africa
Angola	Chad	Greece	Laos	Nicaragua	Spain
Antigua/Barbuda	Chile	Grenada	Latvia	Niger	Sri Lanka
Argentina	China	Guatemala	Lebanon	Nigeria	St. Kitts
Armenia	Colombia	Guinea	Lesotho	Norway	St. Lucia
Australia	Republic of Congo (Brazzaville)	Guinea-Bissau	Liberia	Oman	St. Vincent
Austria	Costa Rica	Guyana	Liechtenstein	Pakistan	Sudan
Azerbaijan	Cote d'Ivoire	Haiti	Lithuania	Panama	Suriname
Bahamas	Croatia	Honduras	Luxembourg	Papua New Guinea	Swaziland
Bangladesh	Cyprus	Hungary	Macedonia	Paraguay	Sweden
Barbados	Czech Republic	Iceland	Madagascar	Peru	Switzerland
Belarus	Denmark	India	Malawi	Philippines	Syria
Belgium	Djibouti	Indonesia	Malaysia	Poland	Taiwan
Belize	Dominican Republic	Iran	Maldives	Portugal	Tajikistan
Benin	Ecuador	Iraq	Mali	Qatar	Tanzania
Bolivia	Egypt	Ireland	Malta	Romania	Thailand
Bosnia-Herzegovina	El Salvador	Israel	Mauritania	Russia	Togo
Botswana	Estonia	Italy	Mauritius	Rwanda	Tonga
Brazil	Ethiopia	Jamaica	Mexico	Samoa	Trinidad
Bulgaria	Fiji	Japan	Moldova	Senegal	
Burkina Faso	Finland	Jordan	Mongolia	Seychelles	
Burma	France	Kazakhstan	Morocco	Sierra Leone	
Burundi	Gabon	Kenya	Mozambique	Singapore	

Table A: Distribution of Party Law Origins by Region of the World

	Most Common (Modal) Category Shaded						
Origin of Party Law Provision	*Western Europe Anglo-America*	*Latin America Caribbean*	*Asia Far East*	*Middle East*	*Africa*	*Central Europe (and Former Soviet Union)*	*Oceana*
Constitution or Constitutional Law	25%	71%	45%	40%	80%	54%	52%
General Legislative Statutes and Laws	32%	7%	29%	20%	3%	20%	
Special Party Law	8%	6%	18%	35%	5%	10%	
Electoral Law	8%					6%	
Court Law	3%						
Parliamentary Rule	2%						
Referendum	8%						
None, Unspecified, or Other	22%	16%	7%	4%	12%	10%	48%
Number of Laws Identified	247	188	154	74	221	196	21
Average Total Number of Laws per Country	9.5	5.9	7.3	4.6	4.8	7.5	2.3
Average Number of Party Laws Based in Constitutional Origins per Country	2.4	4.2	3.3	1.9	3.8	4.1	1.2

Box B: 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.

Western European and Anglo-American countries have more identified "party laws" overall compared with other regions of the world: More than one in five of the party laws in this study (22 percent) are found in older democracies—likewise with the "average" number of laws per country. Older European and Anglo-American democracies have an average of 9.5 party laws per country. Only countries located in Central Europe (7.5 laws per country) and Asia (7.3 laws per country) come close to this level of party regulation.

There are also differences in the origin of identified party laws by region of the world. Older democracies tend to have more diverse sources and to be the least likely to use constitutional authorities as the dominant means of defining political parties. Only 25 percent of party laws in Western European and Anglo-American countries come from constitutional sources. Western European and Anglo-American countries tend to have a low average number of constitutional provisions per country (2.4), as do countries in Oceana (1.2 constitutional provisions per country) and the Middle East (1.9 constitutional provisions per country).

Readers should also 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 A on page 25 displays the definition of a political party from the Cambodian Party Law of 1997. Compare that brief entry from the Cambodian law with the lengthy entry in **Box B**, above, from the Jordanian Party Law of 1992, which also counts as only one entry in the database under the same heading, *political parties / definitions.*

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 this paper, the vague Cambodian definition of a political party is *permissive,* while the detailed Jordanian definition *prescribes* what a party should be.

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