
Volume 60
Issue 1 *Twenty Years of South African
Constitutionalism: Constitutional Rights,
Judicial Independence and the Transition to
Democracy*

Article 6

January 2016

Preserving Judicial Independence in Dominant Party States

MARK TUSHNET

William Nelson Cromwell Professor of Law at Harvard Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review



Part of the [Constitutional Law Commons](#)

Recommended Citation

MARK TUSHNET, *Preserving Judicial Independence in Dominant Party States*, 60 N.Y.L. SCH. L. REV. (2015-2016).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

MARK TUSHNET

Preserving Judicial Independence in Dominant Party States

60 N.Y.L. SCH. L. REV. 107 (2015–2016)

ABOUT THE AUTHOR: Mark Tushnet is William Nelson Cromwell Professor of Law at Harvard Law School. The author thanks Joshua Whitaker for excellent research assistance under an extremely tight deadline.

I. INTRODUCTION

Recent scholarship in comparative constitutional law has brought into question one aspect of the post-war paradigm of constitutional law: that relatively strong versions of constitutional review and the finality of judicial interpretations of the constitution are necessary components of a well-functioning system of government under law (which is to say, of a well-functioning constitutionalism).¹ Weaker constitutional courts, legislative overrides, and easy amendment rules are all compatible with government under law, but independent judiciaries are still considered necessary for well-functioning constitutionalism.²

The values associated with judicial independence are widely known, and I do not intend to canvass them here. Nor will I have much to say about the details of judicial independence—whether, for example, judicial independence requires control by the judiciary over key components of its own budget. Further, my focus here is on *institutional* independence—the independence of the judiciary considered as an institution rather than the independence of each individual judge.³ This essay examines problems that can arise when judiciaries are located within a political system dominated by a single party.

Dominance is a matter of both size and time. The dominant party has more than a mere majority, so that the party's leaders need not worry much about defections that would destroy their majority.⁴ The party's large majority persists over a reasonably long period so that the party's leaders can take a long view of developing and implementing their program—and need not worry about losing office to a party with a quite different policy agenda. A party's dominant position allows it to implement policies that undermine judicial independence without being blocked either by the opposition in the political branches or, sometimes, by the judges themselves. The African National Congress (ANC) has been South Africa's dominant party for nearly two decades, making the concerns I raise here salient for South Africa.

-
1. I take the term “post-war paradigm” from Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84 (Sujit Choudhry ed., 2006).
 2. On this view, strong constitutional review is a species of the more general category of judicial independence.
 3. To use the typical example, I am unconcerned here with either the ability of higher-level judges to discipline lower-level ones (except to the extent that the higher-level judges might be more susceptible to pressure from the dominant party than lower-level ones), or with bureaucratic discipline within the judiciary, including discipline by councils composed entirely of judges.
 4. The existence and size of persistent factions within a dominant party may affect the possibility that defections would lead the party to lose a majority. See generally Raymond Suttner, *Party Dominance Theory: Of What Value?*, 33 *POLITIKON* 277 (2006); Peter Van Roozendaal, *Government Survival in Western Multi-party Democracies: The Effect of Credible Exit Threats Via Dominance*, 32 *EUR. J. POL. RES.* 71 (1997).

II. JUDICIAL INDEPENDENCE IN DOMINANT PARTY STATES

Constitutional review by independent judges is sometimes thought to be in tension with democratic or, more generally, political accountability.⁵ Numerous solutions are offered to reduce or dissolve the normative tension, and these too are outside the scope of my concern here. Rather, I am interested in the tension between judicial independence and the rest of the political system considered in political, not normative, terms. In those terms, constitutional review is indisputably an institution that creates this sort of political tension, at least when constitutional review is reasonably effective.⁶ Reasonably effective constitutional review is a practice in which judges invoke the constitution, with some regularity, to set aside policy initiatives thought important by a significant portion of the nation's political elites.⁷ One can expect those elites to attempt to reduce judicial independence to enable them to implement their policies. Decent accounts exist of why such attempts might fail—primarily, when the policies that trigger these attempts are opposed not only by the judges but also by a significant segment of the polity.⁸

Such accounts, though, also suggest why it would be difficult to preserve judicial independence in a dominant party state,⁹ where the dominant party has the political

-
5. For my examination of that tension, see Mark Tushnet, *Judicial Accountability in Comparative Perspective*, in ACCOUNTABILITY IN THE CONTEMPORARY CONSTITUTION 57 (Nicholas Bamforth & Peter Leyland eds., 2013).
 6. Issues of judicial independence might differ in connection with judges who are not authorized to engage in constitutional review, as with judges on ordinary courts in systems with centralized constitutional review. Still, I would not draw the distinction too sharply because judges on ordinary courts can exercise various forms of sub-constitutional review that might lead political elites to retaliate. For a version of this point, see Mark Tushnet & Rosalind Dixon, *Weak-form Review and its Constitutional Relatives: An Asian Perspective*, in COMPARATIVE CONSTITUTIONAL LAW IN ASIA 102 (Rosalind Dixon & Tom Ginsburg eds., 2014).
 7. Judiciaries that simply rubber-stamp the products of the other branches are, in my view, interesting only to the extent that they illuminate some of the interactions between courts and the other branches. I have heard others say that occasional invalidations provide legitimacy to all the other actions challenged and upheld, but it is not clear to me why many people would think that occasional invalidations show that far more frequent upholdings result from a detached, neutral, purely legal, or otherwise apolitical consideration of the challenges' merits.
 8. The standard story puts this in terms of a competitive party system: The "opposition" party objects to the majority party's policies and supports the judiciary when it obstructs the implementation of those policies, not because of a free-standing commitment to judicial independence but because the courts are "on their side" in this particular dispute. Generalized, though, the story supports the view that judicial independence will be robust in competitive party systems because each party understands that the courts will be on its side or may be opposed to its opponents from time to time. For a formal version of this argument, see Matthew C. Stephenson, "When the Devil Turns . . .": *The Political Foundations of Independent Judicial Review*, 32 J. LEG. STUD. 59 (2003).
 9. I put to one side the literature that claims that independent judiciaries benefit dominant party or authoritarian regimes. See, e.g., RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (Tom Ginsburg & Tamir Moustaafa eds., 2008) [hereinafter RULE BY LAW] (describing the ways in which courts can be instruments of such regimes). In my view precisely because the courts are instruments of the regimes, they should not be described as independent. See Mark Tushnet, *Authoritarian Constitutionalism*, 100 CORNELL L. REV. 391, 421–31 (2015).

PRESERVING JUDICIAL INDEPENDENCE IN DOMINANT PARTY STATES

resources to retaliate against judges who demonstrate “too much” independence by the party’s own metric.¹⁰ Anticipating the possibility of retaliation, the judges will rein themselves in, never (or quite rarely) finding unconstitutional the dominant party’s important policies.¹¹ That, in short, is the basic story,¹² but there are many qualifications and caveats.

Suppose, for example, that the nation’s constitution provided reasonably robust protections for judicial independence, for example by giving judges reasonably long terms and limiting the grounds on which they can be removed from office. Then we would want to distinguish between (1) a party that is dominant in the sense that over an extended period, it holds sufficient seats in the legislature to guarantee the adoption of any legislation supported by the party leadership without having to compromise with members of opposition parties, and (2) a party that has sufficient seats to guarantee adoption of any constitutional amendment supported by the party’s leadership.¹³

Judicial independence may be preserved in a dominant party system of the first type because the dominant party may be unable to take retaliatory actions that would survive constitutional review. Where the dominant party has the power to amend the constitution, the picture might be different; such a party can pursue several courses of action. Faced with judicial rejection of an important policy initiative, it can simply amend the constitution to authorize the action.¹⁴ Alternatively (or in addition), it can amend the constitutional provisions guaranteeing judicial independence. It can shorten the judges’ terms, restrict their jurisdiction, or pack the constitutional court.¹⁵ I know of no systematic analyses of why a dominant party might choose the second rather than the first course of action. But in either case, the

10. See generally Tushnet, *supra* note 9.

11. Because judges can act preemptively to forestall retaliation, we need not observe retaliation itself to describe the judiciary as lacking independence. See Tom Ginsburg & Tamir Moustafo, *Introduction to RULE BY LAW*, *supra* note 9, at 14–15. My sense, though, is that judges often enough either fail to anticipate retaliation or do not care about it, so that in most nations without an independent judiciary, we actually do observe retaliation against judges who are too independent.

12. In Samuel Issacharoff, *Constitutional Courts and Consolidated Power*, 62 AM. J. COMP. L. 585 (2014), Issacharoff concludes his examination of three constitutional courts in dominant party states (Colombia, South Africa, and Thailand) with the observation that “[t]he three national settings . . . illustrate the problem rather than prescribe the remedy,” *id.* at 611. This essay is concerned as well with examining the problem and is skeptical that there can be a remedy.

13. The distinction drawn in the constitutional text turns on the precise content of the amendment rule. If the amendment rule is easy, such as one merely requiring adoption by two successive legislatures, a dominant party in the first sense will almost certainly be dominant in the second as well. But—relevant for South Africa—it is easy to imagine a nation with an amendment rule requiring a two-thirds legislative majority to amend the constitution, and a party so dominant that it regularly obtains sixty-five per cent of the legislature’s seats, but no more. Such a party is dominant in the first sense but not the second.

14. That appears to be the best description, in this context, of practice under the Indian Constitution. See generally Gary Jeffrey Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460 (2006) (discussing the constitutional amendment processes of India and Ireland).

15. All three of these actions were recently taken by the Hungarian government. See Kim Lane Scheppele, *Constitutional Coups and Judicial Review: How Transnational Institutions can Strengthen Peak Courts at*

outcome is functionally the same: a judiciary that does not exercise effective constitutional review either because its important decisions are always overturned or because it lacks formal independence.

My description of the dominant party suggests the need for an additional qualification. So far, I have treated the dominant party as a single entity with a unified leadership. Sometimes, though, dominant parties are coalitions of factions, some centered around personalities, some centered around more enduring policy disagreements that are resolved within the dominant party rather than through competition in general elections.¹⁶ A factionalized dominant party may be similar to a multiparty system, and factions within the party might protect judicial independence in the same way that opposition parties do in competitive party systems. Indeed, the question of judicial independence might be one of the issues that divide the factions. I suspect, though again without systematic evidence, that factional competition is less likely to produce judicial independence when party factions center on personalities and more likely to do so when conflict is policy-based.

It will likely be difficult to sustain judicial independence over the middle to long term in dominant party states. I turn now to describing in more detail some mechanisms by which the dominant party can undermine judicial independence.

III. MECHANISMS FOR REDUCING JUDICIAL INDEPENDENCE

How can a dominant party reduce or eliminate judicial independence? The mechanisms are reasonably well known: by controlling appointments or amending the constitution.

A. Appointments

Dominant parties can control appointments both before and after the constitutional court obstructs key policies. Post hoc action varies in its strength.

1. Post Hoc Control Mechanisms

Politically-motivated removal from office is the strongest possible post hoc action. In 2013, for example, the President of Sri Lanka removed the Supreme Court's Chief Justice from office,¹⁷ even after the Court held the removal process

Times of Crisis (With Special Reference to Hungary), 23 *TRANSNAT'L L. & CONTEMP. PROBS.* 51, 71–75 (2014).

16. For example, I have heard others describe the Chinese Communist Party as divided between “hardline” and “moderate” factions, differing on questions of policy, and the Congress Party in India, during its period of dominance, as divided between factions centered on individuals.

17. The Sri Lankan Parliament, dominated by the President's supporters, voted to impeach the Chief Justice on corruption charges. *Sri Lanka Chief Justice Shirani Bandaranayake is Impeached*, BBC NEWS (Jan. 11, 2013), <http://www.bbc.com/news/world-asia-20982990>. The President then signed an order effecting her removal. Andrew Buncombe, *Sri Lanka Faces Constitutional Crisis as President Sacks Chief Justice*, THE INDEPENDENT (Jan. 13, 2013), <http://www.independent.co.uk/news/world/asia/sri-lanka-faces-constitutional-crisis-as-president-sacks-chief-justice-8449549.html>.

illegal.¹⁸ Many viewed the ousting as a response to the Chief Justice's blocking the President's policies.¹⁹ The President then filled the position with a close political ally.²⁰

It is not always clear, however, when such removals are politically motivated. For instance, in 2013, anti-corruption investigators arrested the Chief Justice of Indonesia's Constitutional Court.²¹ Evidence supported corruption charges, and the Chief Justice received a life sentence.²² It is possible that the removal was politically motivated—after all, the Chief Justice had presided over a local election dispute earlier that year²³ and the then-President of Indonesia had previously won the election partly on an anti-corruption platform.²⁴

Weaker post hoc actions include departures from informal but previously followed norms regarding judicial promotion. For example, both India and South Africa had a norm to the effect that the constitutional court's Chief Justice would be succeeded by the most senior associate justice.²⁵ In each nation, the dominant party departed from that norm to signal displeasure with its constitutional court's actions.

In 1973, the Prime Minister of India appointed as Chief Justice the fourth most senior associate justice, who had dissented, against the views of three more senior justices, in a case limiting Parliament's (and thus the Prime Minister's) power to

-
18. Ranga Sirilal & Shihar Aneez, *Sri Lanka Chief Justice Impeachment Illegal: Supreme Court*, REUTERS (Jan. 3, 2013, 8:16 AM), <http://www.reuters.com/article/2013/01/03/us-srilanka-impeachment-idUSBRE90209D20130103>.
19. Buncombe, *supra* note 17. In particular, the Chief Justice had deemed unconstitutional legislation that would have transferred political and financial power to the President's brother, the Economic Development Minister. *Id.*
20. Shihar Aneez & Ranga Sirilal, *Sri Lanka President Picks Ally as Chief Justice, Lawyers Protest*, REUTERS (Jan. 15, 2013, 6:56 AM), <http://www.reuters.com/article/2013/01/15/us-srilanka-impeachment-idUSBRE90E0FO20130115>. The removed Chief Justice was reinstated after a new President took office. *Sri Lanka Reinstates Chief Justice Shirani Bandaranayake*, BBC NEWS (Jan. 28, 2015), <http://www.bbc.com/news/world-asia-31021540>.
21. Joe Cochrane, *Top Indonesian Judge Held in Corruption Case*, N.Y. TIMES, Oct. 4, 2013, at A11.
22. *Life Sentence for Indonesia Constitutional Court Judge Akil Mochtar*, DEUTSCHE WELLE (June 30, 2014), <http://www.dw.de/life-sentence-for-indonesia-constitutional-court-judge-akil-mochtar/a-17747697> [hereinafter *Life Sentence for Indonesia Constitutional Court Judge*]. For starters, the evidence included a bag of \$232,000 in Singaporean and American currency found at the Chief Justice's house. Cochrane, *supra* note 21.
23. See Yenni Kwok, *Top Indonesian 'Anticorruption' Judge is Arrested for Graft*, TIME (Oct. 4, 2013), <http://world.time.com/2013/10/04/arrest-of-antigraft-judge-shows-depth-of-indonesias-corruption-crisis/>.
24. See *Life Sentence for Indonesia Constitutional Court Judge*, *supra* note 22.
25. See Edwin Cameron, *Legal Chauvinism, Executive-Mindedness and Justice—L. C. Steyn's Impact on South African Law*, 99 SALJ 38, 42 (1982) (noting the long-standing "convention" in South Africa that "the senior appellate judge should succeed the retiring Chief Justice"); Jayanth K. Krishnan, *Scholarly Discourse and the Cementing of Norms: The Case of the Indian Supreme Court—And a Plea for Research*, 9 J. APP. PRAC. & PROCESS 255, 268 (2007) (noting the "unwritten rule" in India that "the Chief Justice will be the person who has the most number of years on the Court").

amend the constitution.²⁶ In 1977, the Prime Minister again defied convention by appointing as Chief Justice the second most senior associate justice, who had also given a judgment thought favorable to the executive.²⁷

Similarly, in 1959, the Nationalist administration in South Africa appointed as Chief Justice the third most senior associate justice.²⁸ The Nationalist Party, representing South African whites who favored strict separation of the races and the creation of a South African republic unaffiliated with the British Commonwealth, took office in 1948 and began to implement the policies that came to be known as apartheid.²⁹ The new Chief Justice was unmistakably Nationalist, having published a book seeking to dissociate English legal concepts from the South African legal system.³⁰ The most senior associate justice, by contrast, had frequently condemned actions favored by Nationalists.³¹ Controversy arose again in 2011 when the President nominated as Chief Justice a junior associate justice.³² Some viewed the nomination as a political move because the nominee was seen as a relatively undistinguished and compliant jurist in contrast to the senior associate justice, who was well-regarded and thought to be quite independent-minded.³³

2. *Ex Ante Control Mechanisms*

Dominant parties can control appointments before they occur as well, although making appointments for the purpose of reducing judicial independence involves predictive judgments that the appointees will be “reliable” once in office, and those judgments can sometimes be wrong. Constitutions ordinarily grant the political branches a role in appointments to courts that exercise constitutional review. They do so for reasons of both practical politics and political theory.

As a practical matter, constitution designers now understand that constitutional review creates a risk of destabilizing tension between the courts and the political branches. One way to reduce that risk is to give the political branches a role in judicial selection. As a matter of political theory, constitution designers understand that constitutional review involves a degree of policy discretion sufficient to require that decisions by constitutional courts have some reasonably proximate connection to the

26. Krishnan, *supra* note 25, at 267–69.

27. M. P. Singh, *Securing the Independence of the Judiciary—The Indian Experience*, 10 *IND. INT’L & COMP. L. REV.* 245, 266 (2000). Since then, however, the convention has been followed. *See id.*

28. *See* Cameron, *supra* note 25, at 39–40.

29. *See id.* at 40.

30. *See id.* at 40–41.

31. *See id.* at 41. For example, he sentenced a man to death for treason whom the Nationalist administration subsequently released from prison. *Id.* & n.14.

32. Press Release, Ctr. for Human Rights: Univ. of Pretoria, Centre Expresses Surprise at Nomination of Justice Mogoeng as Chief Justice, (Aug. 17, 2011), http://www.chr.up.ac.za/images/files/news/press/press_release_mogoeng_as_chief_justice._17aug2011pdf.pdf.

33. *See* Xolani Mbanjwa, *Outrage Over New Chief Justice*, *THE NEW AGE* (Aug. 17, 2011, 7:25 AM), http://www.thenewage.co.za/25985-1007-53-Outrage_over_new_chief_justice.

nation's democratic pretensions.³⁴ Institutional mechanisms that allow this connection include U.S.-style nomination and confirmation by the political branches and judicial nominating commissions with substantial representation of the political branches.

3. *Preserving Judicial Independence Through Norms and Judicial Resistance*

We should not assume that these mechanisms work perfectly to ensure that the dominant party will effectively limit judicial independence. Some countervailing mechanisms can operate to offset some of the dominant party's pressures on judicial independence. These countervailing mechanisms, however, are quite contingent on personalities, preferences, and circumstances, in contrast to the reasonably systematic mechanisms through which the dominant party undermines judicial independence.

Importantly, sometimes difficult-to-change norms will govern the institutions. Judicial nominating commissions, for example, typically include judges and representatives of civil society as well as representatives of the political branches; sometimes, the former are a majority of the commission, and bloc voting can develop into a norm.³⁵ Even when appointment power is located within the political branches, norms sometimes matter. The most important of those norms relate to a nominee's prior experience, usually as a judge on a high court, and her support from the organized bar, which might not be under the dominant party's control.³⁶

Judges themselves can sometimes sustain judicial independence, or at least slow the rate at which it is diminished. After a transformation that produces a dominant

34. By "reasonably proximate" I mean that it is insufficient for constitutional court judges to assert that their democratic legitimacy is founded on the institutional and substantive decisions made by the constitution's framers and ratifiers; they must legitimate their actions by some reference to reasonably contemporary majorities (that is, those existing when they were nominated). For an explication of this account with reference to the United States, see generally TERRI JENNINGS PERETTI, *IN DEFENSE OF A POLITICAL COURT* (1999).

35. In Israel, for example, judicial appointments are made by a nine-member committee. Eli M. Salzberger, *Judicial Appointments and Promotions in Israel: Constitution, Law, and Politics*, in *APPOINTING JUDGES IN AN AGE OF JUDICIAL POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 241, 248–49 (Kate Malleson & Peter H. Russell eds., 2006). Three of those members are Supreme Court justices, who have "almost always voted en bloc after consultation" with each other. *Id.* at 249–50. As a result, these judges have dominated the selection process. See Nuno Garoupa & Tom Ginsburg, *The Comparative Law and Economics of Judicial Councils*, 27 *BERKELEY J. INT'L L.* 53, 72 (2009) (observing that "a new justice has never been chosen over the objection of sitting justices" on the committee).

36. Reasonably strong norms restrict the Prime Minister's range of choice in Australia and Canada, for example. In Australia, the Attorney-General recommends High Court appointees to the Governor-General based on "merit," which includes professional skills and personal qualities, and "informal discussions" with certain people and groups, such as the Chief Justice, state governments, the Law Council of Australia, and other judges. George Williams, *High Court Appointments: The Need for Reform*, 30 *SYDNEY L. REV.* 161, 162–63 (2008) (quoting a former and a current Attorney-General). In Canada, Ministers of Justice have promised to appoint to the federal bench only candidates recommended by provincial and territorial screening committees. See Troy Riddell et al., *Federal Judicial Appointments: A Look at Patronage in Federal Appointments Since 1988*, 58 *U. TORONTO L.J.* 39, 45–47 (2008). The committees evaluate candidates based on professional experience, personal characteristics, potential impediments to appointment, and consultations with others inside and outside the legal community. *Id.* at 46.

party regime, there will still be some “legacy” members of the constitutional court, that is, those with affiliations to the prior regime. Of course, legacy members will disappear over time as their terms end or they retire or die, but some of them may remain long enough to create a reasonably strong culture of judicial independence, manifested by the socialization of new members—appointed by the dominant party—into norms of judicial independence. Sometimes, the judges will seize control over the appointment process.

The Supreme Court of India, for example, interpreted the Constitution to pare down the number of candidates eligible for nomination as Chief Justice essentially to one person named by the judges themselves.³⁷ In Israel, the judges on the Judicial Selection Committee apparently agreed to present a unified front strong enough to block some nominations and often strong enough to ensure that the judges’ preferred candidate would be nominated with the support of one or two Committee members representing civil society.³⁸

4. Responses by the Dominant Party to Resistance

Of course, a dominant party can respond to these “failures” (from its point of view) of the nomination process. When the failures result from the operation of judicial nominating commissions, the dominant party can change the commission’s composition. In Israel (not a dominant party state), for example, the government has regularly proposed adding more government representatives to the nominating

37. Under the Indian Constitution, the President must “consult” the Chief Justice, among others, before appointing a judge to a High Court or a justice to the Supreme Court. See INDIA CONST. art. 217, § 1; *id.* art. 124, § 2. In 1981, the Supreme Court interpreted this requirement as allowing the President to override the Chief Justice’s opinion if the decision was made in good faith and based on relevant considerations. *S. P. Gupta v. Union of India (First Judges Case)*, (1982) 2 SCR 365 (India). In 1993, the Court reversed course, holding that the opinion of the Chief Justice, offered after consultation with others on the bench, should have “primacy” over the executive’s opinion in the appointment decision. *Supreme Court Advocates-on-Record Ass’n v. Union of India (Second Judges Case)*, AIR 1994 SC 268 (India). In 1998, the Court specified that the Chief Justice must consult with the four most senior associate justices before a Supreme Court appointment, and with the two most senior associate judges before a High Court appointment, thus defining a “collegium” system. *Supreme Court of India (In Re: Appointment & Transfer of Judges) v. Civil Advisory (Third Judges Case)*, AIR 1999 SC 1 (India). This system governed judicial appointments until the end of 2014, when the Indian Parliament replaced it with an appointments committee consisting of judges and non-judges. See *New Judicial Panel gets President’s Nod, Collegium System Ends*, THE TIMES OF INDIA (Dec. 31, 2014, 3:41 PM), <http://timesofindia.indiatimes.com/india/New-judicial-panel-gets-Presidents-nod-collegium-system-ends/articleshow/45703254.cms> [hereinafter *Collegium System Ends*].

38. The most well-known example of judicial domination of the nominating process was the defeat of Ruth Gavison’s nomination. All three justices on the appointment committee opposed Gavison; one of them vowed to keep her judicial restraint “agenda” off the court. Scott Shiloh, *Gavison’s Nomination for Supreme Court All But Doomed*, ARUTZ SHEVA (Dec. 7, 2005, 2:10 PM), <http://www.israelnationalnews.com/News/News.aspx/94324>. This behavior is typical, since the justices on the committee “consistently follow” the lead of the Court President. See Evelyn Gordon, *Judicial Power Grab*, THE JERUSALEM POST (May 17, 2006), <http://www.jpost.com/israel/judicial-power-grab>. The other members of the committee, though more numerous than the justices, are often “divided,” or “reluctant” to contravene the justices’ wishes. *Id.* As a result, as of mid-2006 “never ha[d] a new justice been chosen over the sitting justices’ objections, and only rarely ha[d] the justices’ candidates been rejected.” *Id.*

PRESERVING JUDICIAL INDEPENDENCE IN DOMINANT PARTY STATES

commission and preventing bloc voting.³⁹ The recently-elected government in India has proposed a constitutional amendment to eliminate judicial control over nominations.⁴⁰

The availability of these strategies may depend on what sort of dominant party regime is in place. Where the judicial nominating commission's composition is specified by statute, a dominant party with a strong majority (the first type described earlier) can change the commission's composition by ordinary statute, but where, as in India, dominant party control over nominations is limited by the constitution, only a dominant party of the second type can change the composition because only such a party has enough votes to change the constitution.⁴¹

Another phenomenon is worth mentioning—learning by the dominant party's leaders. Early in their period of control, those leaders might accept judicial independence as largely inconsequential to their important policies, but with what has been called the global rise in judicial power,⁴² dominant parties now know that they must pay attention to courts to accomplish their ends. For example, the program of constitutional revision advanced by the dominant party in Hungary after 2011 included substantial changes in judicial tenure and the Constitutional Court's

-
39. See Gideon Allon et al., *Government Set to Fast-track Changes to Judicial Selection Committee*, ISRAEL HAYOM (Nov. 14, 2011), http://www.israelhayom.com/site/newsletter_article.php?id=1831 (describing a bill that would require Supreme Court nominees to undergo a legislative confirmation hearing before consideration by selection committee); Lazar Berman, *Bills Aimed at Checking Judicial Power Head to Knesset*, THE TIMES OF ISRAEL (Oct. 20, 2013, 2:30 PM), <http://www.timesofisrael.com/bills-aimed-at-checking-judicial-power-head-to-knesset/> (describing a bill that would remove two of the three judges from the selection committee); Tomer Zarchin, *New Move Afoot to Change Judicial Selection C'tee*, HAARETZ (May 28, 2008, 12:00 AM), <http://www.haaretz.com/print-edition/news/new-move-afout-to-change-judicial-selection-c-tee-1.246768> (describing a bill that would add a legislator and a professor to the selection committee). Although most such proposals fail, in 2008 the legislature successfully amended the law to require that appointees to the Supreme Court receive seven out of nine committee votes rather than a simple majority of five. See Malvina Halberstam, *Judicial Review, A Comparative Perspective: Israel, Canada, and The United States*, 31 CARDOZO L. REV. 2393, 2396 (2010) (noting a legislator's comment that the amendment could give other blocs on the committee negotiating power against the judges' bloc).
40. The amendment sets up the National Judicial Appointments Commission, consisting of three Supreme Court justices and three non-judges. *Collegium System Ends*, *supra* note 37. In 2014, Parliament passed the amendment, more than half of the states ratified it, and the President signed it into law. *Id.* The Supreme Court of India ruled the new system unconstitutional in 2015. Nivedita Dash, *Supreme Court Says Government Can't Appoint Judges*, INDIA TODAY (Oct. 16, 2015), <http://indiatoday.intoday.in/story/supreme-court-declares-njac-unconstitutional-rejects-centres-say-in-appointing-judges/1/500177.html>.
41. I note that the statutory strategy might fail were the constitutional court to hold the change in the commission's composition unconstitutional, and that the constitutional-amendment strategy might fail were the constitutional court to invoke the "unconstitutional constitutional amendment" doctrine pioneered by the Indian Supreme Court. See generally Jacobsohn, *supra* note 14 (discussing India's unconstitutional constitutional amendment doctrine). With respect to the latter, my sense is that the doctrine has not been invoked in dominant-party states (with respect to important policies).
42. See generally THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

jurisdiction.⁴³ Additionally, the Hungarian dominant party's leaders presented their constitutional revisions as the promulgation of a new constitution to replace the Soviet-era constitution under which the nation had been governed until 2010.⁴⁴ We can see this as an example of how knowledge about the risks posed by judicial independence to a dominant party regime can affect constitutional design at its initial stages.⁴⁵

B. Amendments

Judges can be nominally independent—in the sense that no one tells them what to do or punishes them for what they have done—without contributing much to good governance in a dominant party state. The dominant party can simply ignore the judges, not by defying judicial orders but by complying with every order and then amending the statutes or constitutional provisions on which those orders were based.⁴⁶ The judges might respond by giving up on the game as futile,⁴⁷ but they also might issue occasional orders that the dominant party complies with but objects to, with the essentially random effect of benefiting a single litigant who happened to obtain the ruling. Here too, the difference between the two types of dominant party systems matters: a dominant party without enough votes to amend a constitution will be able to respond to statutory but not constitutional rulings with which it disagrees.

An important collateral effect of regular amendments in response to judicial rulings is that it might discourage efforts by civil society to use the judiciary as a bulwark against the dominant party. In such cases, the regime might derive an ironic benefit: It can say to critics, particularly from the international community, that it has an independent judiciary—no judges are ever punished for their rulings—and rigidly honors the rule of law by complying with judicial orders and following lawfully-prescribed procedures for changing the law. Of course, the state experiences none of the benefits said to flow from judicial independence.

43. Among a large number of important constitutional changes were several dealing with the courts. One “lowered the retirement age for . . . judges from seventy to sixty-two,” resulting in the abrupt removal of twenty-five per cent of the Supreme Court justices and many lower court judges. See Scheppele, *supra* note 15, at 75–76. The government also sharply restricted the Supreme Court’s jurisdiction to review laws with an impact on fiscal or tax policy, and removed entirely its *actio popularis* jurisdiction under which an individual without legal standing could challenge a law’s constitutionality. See *id.* at 73–75.

44. See Joseph K. Grieboski, *From Dictatorship to Democracy: Hungarians Unite in Drafting Constitution*, THE HUFFINGTON POST: THE WORLD POST (Apr. 11, 2011), http://www.huffingtonpost.com/joseph-k-grieboski/from-dictatorship-to-demo_b_842820.html.

45. This is subject to questions about international legitimacy discussed below.

46. Moreover, anticipating the judicial action, the dominant party can preemptively amend the statutes or provisions. For example, one reason why the Indian Constitution has been amended so often is that India’s National Congress Party adopted this approach during its dominance. See generally Burt Neuborne, *The Supreme Court of India*, 3 INT’L J. CONST. L. 476 (2003).

47. One might characterize the situation in Singapore in these terms: no interference with judicial independence, but no judicial actions challenging the dominant party because the judges know that such challenges would be futile. See generally Tushnet, *supra* note 9.

PRESERVING JUDICIAL INDEPENDENCE IN DOMINANT PARTY STATES

So far, I have discussed the ways in which dominant party states can reduce or eliminate judicial independence. The picture is not entirely bleak, though. As noted earlier, once the dominant party begins to implement a program to weaken judicial independence, norm-based resistance and resistance by judges themselves might occur. In addition, as I discuss next, there may be ways to keep the dominant party from weakening judicial independence.

IV. MECHANISMS FOR MAINTAINING JUDICIAL INDEPENDENCE IN DOMINANT PARTY SYSTEMS

Dominant parties need not be *unified* parties. As I noted earlier, they may be composed of factions and function as multiparty systems. Drawing on scholarship about sustaining judicial independence in multiparty systems, we might find that factions within a dominant party have an interest in judicial independence if not a normative commitment. Consider, for example, the possibility that leaders of one faction will use charges of corruption to weaken a rival faction. All the factions might find it valuable to have independent judges evaluate those charges to insure against the risk that the tables might turn when the faction currently in charge loses out in intra-party competition.

A. The Role of Civil Society

Judges can gain some support from civil society outside the party system. Extra-party organizations can mobilize against a dominant party that attempts to limit judicial independence. For example, the Lawyers' Movement in Pakistan effectively challenged an authoritarian leader who sought to remove the nation's Chief Justice from his position.⁴⁸

Whether civil society can actually defend judicial independence against a dominant party depends on many elements. For example, sometimes a party's dominance is stabilized by civil society organizations that absorb some social tensions that would otherwise have to be resolved within or by the dominant party. In such cases, civil society's support is important to the dominant party, and a civil society mobilization for judicial independence might make a difference in outcomes.

Perhaps more important, some civil society organizations have transnational links to groups outside the nation—and some of those external groups can be committed to judicial independence as a general principle of good governance everywhere in the world.⁴⁹ A dominant party's effort to limit judicial independence might then lead to substantial external criticism. Some dominant parties rely in part on being regarded by the international community as legitimate democratic rulers

48. For a good account and interpretation of the events, see Shoaib A. Ghias, *Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan Under Musharraf*, 35 *LAW & SOC. INQUIRY* 985 (2010).

49. Human Rights Watch is an example of such an organization. HUMAN RIGHTS WATCH, <http://www.hrw.org/about> (last visited Feb. 15, 2016).

(rather than authoritarians) to justify their dominance domestically.⁵⁰ If so, external criticism prodded by civil society organizations can, once again, be effective.⁵¹

B. Preventing Consolidation or Accelerating its Demise

Under special circumstances, the judiciary can defend itself. Samuel Issacharoff has discussed two stages when this might occur.⁵² The first stage involves preventing a party from *becoming* dominant where it is well-positioned to achieve dominance.⁵³ The second stage involves preventing a party that has made some initial efforts to become dominant from consolidating its dominance.⁵⁴ There is in addition a third stage, which occurs when the party's dominance is visibly in decline and the courts can strategically act to help accelerate its transformation into an ordinary, non-dominant party.⁵⁵

1. Preventing a Party from Becoming Dominant

Judges might spot a situation in which a party is on the verge of becoming dominant or transforming itself from a dominant party of the first type, with a legislative majority, into one of the second type, with a majority sufficient to amend the constitution. The courts might take steps to prevent the transformation by blocking the party from enacting legislation that would help it become dominant. This legislation might not itself be directed at judicial independence. A classic example is a rule allowing or barring "floor crossing," which occurs when a member of Parliament elected as a member of one party shifts allegiance to another party during the member's term of office without resigning to seek an electoral mandate as a member of the newly-adopted party.⁵⁶ A near-dominant party can make floor crossing extremely attractive by offering potential new members benefits that accrue to members of a dominant party.

In South Africa, when it had the chance, the Constitutional Court did not strike down a policy that increased the dominant party's majority through floor crossing.⁵⁷ The story is complex. The Constitution provides that the electoral system should

50. This appears to be the case, for example, of the People's Action Party in Singapore. *See generally* DIANE K. MAUZY & R.S. MILNE, *SINGAPORE POLITICS UNDER THE PEOPLE'S ACTION PARTY* (2002).

51. Obviously, though, not all dominant party regimes are sensitive to international criticism. The governing party in Hungary today, for example, has sought the imprimatur of some non-Hungarian scholars for its restrictions on judicial independence, but on the whole seems largely indifferent to external criticism. *See generally* Scheppele, *supra* note 15.

52. Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

53. *See generally id.*

54. *See generally id.*

55. *See generally id.*

56. Maja Tjernström & Linda Ederberg, *THE ACE ENCYCLOPEDIA: PARTIES AND CANDIDATES* 100–02 (Ray Kennedy ed., 2d ed. rev. 2012).

57. *United Democratic Movement v. President of the Republic of S. Afr.* 2003 (1) SA 495 (CC).

“result[], in general, in proportional representation.”⁵⁸ Floor crossing, however, undermines proportionality. For example, assume that the voters give sixty per cent of their votes to one party and forty per cent to another in electing members of a ten-person legislature. Proportionality yields six members of one party and four of the other. If a member of the majority party crosses the floor to join the minority, we now have a fifty-fifty legislature, no longer proportional to the voters’ choice.⁵⁹ The Constitution bolstered the proportionality rule with a provision stating that a member “loses membership . . . if that person . . . ceases to be a member of the party that nominated that person” to Parliament.⁶⁰

In 2002, the ANC-dominated Parliament enacted a package of statutes and constitutional amendments that effectively allowed floor crossing.⁶¹ The United Democratic Movement challenged the package as inconsistent with the Constitution’s proportionality requirement.⁶² The Constitutional Court upheld the floor crossing package in general but also held that Parliament had used a procedurally-defective method for enacting the floor crossing rule.⁶³ Parliament responded by readopting the provision in a procedurally-adequate way, opening the door to floor crossing.⁶⁴ Divisions within the ANC changed the party’s views about floor crossing, and in 2009 another set of constitutional amendments restored the constitutional ban on floor crossing.⁶⁵ Even though the Constitutional Court did not stand in the ANC’s way, we can see how ruling that floor crossing was unconstitutional might have slowed the ANC’s move toward true dominance.⁶⁶

2. *Preventing a Party from Consolidating its Dominance*

Dominant parties achieve dominance. Shortly after they have done so, it might be possible to undo their accomplishment (and thereby leave judicial independence where it is in a non-dominant party nation). Courts may play a role in this process,

58. S. AFR. CONST., 1996, § 46(1)(d).

59. Obviously the effect of floor crossing on proportionality will be smaller as legislatures get larger, but its effect will increase if groups of members cross the floor simultaneously.

60. S. AFR. CONST., 1996, § 47(3)(c).

61. *United Democratic Movement*, 2003 (1) SA 495 at paras. 3–7.

62. *See id.* at paras. 8, 14.

63. *See id.* at paras. 75, 114, 121.

64. Janis Van Der Westhuizen, *South Africa (Republic of South Africa)*, in HANDBOOK OF FEDERAL COUNTRIES, 2005, at 310, 317 (Ann L. Griffiths ed., 2005).

65. S. AFR. CONST., Fourteenth Amendment Act of 2008; *id.* Fifteenth Amendment Act of 2008.

66. For competing views of the Constitutional Court’s performance, see THEUNIS ROUX, *THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995–2005*, at 351–62 (offering a critical view of the *United Democratic Movement* decision) and JAMES FOWKES, *BUILDING THE CONSTITUTION: THE PRACTICE OF CONSTITUTIONAL INTERPRETATION IN POST-APARTHEID SOUTH AFRICA* (Yale JSD thesis, 2014) (offering a generally supportive view of the decision).

particularly if staffed by “legacy judges,” those who took office before the now-dominant party achieved its dominant position.⁶⁷

Legacy judges’ ability to do so, though, is limited by the dominant party leaders’ “learning” or, equivalently, by their anticipation that they might be thwarted by legacy judges.⁶⁸ Mindful of that possibility, the party’s leaders can move against judicial independence immediately after achieving dominance using all the tools at hand. Of course, the leaders might fail to work out precisely how to use those tools in time to prevent the courts from blocking the dominant party’s ability to consolidate its power. I think, however, that the Hungarian experience suggests that miscalculation, when it occurs, might not matter a great deal.⁶⁹

3. *Pushing the Dominant Party Out the Door*

Finally, judges might sense or guess that the dominant party is about to lose its dominant position. Seeking to preserve their position after the anticipated transition occurs, the judges can start to act independently, thereby presenting themselves as servants of the law, not of the (soon to be gone) dominant party.⁷⁰ Here, the judges do not so much preserve independence as create it in a world where they had previously been arms of the regime.⁷¹

C. *The Dominant Party’s Normative Commitments*

To this point, I have not considered the value of judicial independence as a constraint on a dominant party. Sometimes, however, the dominant party’s leaders are themselves committed to judicial independence on purely normative grounds, not merely because they find political benefit in judicial independence. Nelson Mandela provided the canonical example of such a normative commitment to judicial independence.

The end of apartheid required transitions at all levels of government. A statute enacted shortly before the South African Constitution went into effect provided the mechanism for shifting local government “from a racially based system . . . to a non-racial system.”⁷² Political difficulties arose in arranging the transition on the Western

67. See discussion *supra* Section III.A.3.

68. See discussion *supra* Section III.A.4.

69. Hungary’s new regime initially adopted a court-packing strategy that involved shortening some judicial terms. The Constitutional Court of Hungary held unconstitutional the specific method of court-packing the regime used, but in the end the regime did effectively pack the courts. See Scheppele, *supra* note 15, at 71–75.

70. See generally COURTS IN LATIN AMERICA (Gretchen Helmke & Julio Ríos-Figueroa eds., 2011); LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007).

71. The cases of judges in Latin America are regularly offered as examples of this. See COURTS IN LATIN AMERICA, *supra* note 70; HILBINK, *supra* note 70.

72. *Exec. Council of the W. Cape Legislature v. President of the Republic of S. Afr.* 1995 (4) SA 877 (CC) at para. 6.

PRESERVING JUDICIAL INDEPENDENCE IN DOMINANT PARTY STATES

Cape province.⁷³ In response, the national government authorized President Mandela to invoke a provision of the transition statute allowing him to intervene in some aspects of local government by executive proclamation.⁷⁴ Mandela's actions in pursuit of the policy adopted by the ANC-dominated government were challenged by officials displaced by his order.⁷⁵ The Constitutional Court held that Mandela's actions, and the statute that authorized them, violated the Constitution.⁷⁶ Then, in Theunis Roux's words:

In an act that has since become part of South African constitutional folklore . . . Mandela[] immediately announced his acceptance of the decision, saying that it was “not the first nor will it be the last, in which the Constitutional Court assists both the government and society to ensure constitutionality and effective governance.”⁷⁷

Mandela's statement reflected his normative commitment to ensuring judicial independence by accepting decisions contrary to his and his party's political program. His moral-constitutional stature is the reason that the statement became “part of South African constitutional folklore.” The ANC, which he then led, had a similar normative commitment. Whether that commitment could be sustained over time is, of course, a separate question. Nothing in principle, though, precludes a dominant party from having a genuine and long-term commitment to judicial independence.

Still, such a commitment, no matter how deep, will be only one among many for the dominant party. Sometimes, a commitment to judicial independence will conflict with the accomplishment of other policy goals, as when the independent courts find unconstitutional statutes that seek to accomplish some of the dominant party's other goals. The government might be able to work around the courts' objections, perhaps by tinkering with the statute or otherwise modulating its effect to achieve the policy goal. A purely normative commitment, however, may well come under substantial pressure when independent courts regularly exercise their powers in ways that interfere with central policy initiatives of a dominant party. Even so, those commitments might sometimes be strong enough to allow courts to “get away with” such obstruction, at least on occasion. Further, prudent judges can keep their powder dry, so to speak, by intervening only occasionally against important policy initiatives while more routinely finding minor or peripheral policies unconstitutional.⁷⁸ This is not everything one might seek of an independent judiciary, but it is not nothing either. By retaining the notion that judges can (sometimes) be independent even of a

73. *See id.* at para. 2.

74. *See id.* at para. 10.

75. *See id.* at paras. 12–14.

76. *Id.* at para. 101 (summarizing the Court's holding).

77. ROUX, *supra* note 66, at 33–34 (citing HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION* 150 (2000)).

78. That the South African Constitutional Court in its first decade behaved in this way is one theme in ROUX, *supra* note 66.

dominant party, prudent judges might sustain the idea of judicial independence until the day that the party's dominance declines and multiparty democracy arises.

V. CONCLUSION

It is never easy to sustain judicial independence in a dominant party political system. My aim in this essay is partly substantive, partly methodological. Substantively, I have outlined the ways in which judicial independence is likely to be undermined and the ways in which it might be preserved in a dominant party state. Methodologically, the very framing of the topic illustrates an approach for integrating a political analysis into comparative constitutional law: an examination of the ways in which power and law, political parties and courts, interact with ideas about normative constitutionalism. My view, at present, is that such an approach is likely to be quite important as the field of comparative constitutional law continues to develop.⁷⁹

79. I note, for example, that my own work on “weak courts” did take one feature of politics into account—the relation between judicial weakness or strength and the constitution’s amendment rule—but would have benefited from attention to the relation between judicial weakness or strength and the nature of the party system. *See generally* MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008).