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978-1-107-03870-7 - Fragile Democracies: Contested Power in the Era of Constitutional Courts

Samuel Issacharoff

Excerpt

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## Introduction: The Burden of Modern Democracy

A quarter century has passed since the fall of the Berlin Wall. The initial throes of the twentieth-century defeat of communism and fascism invited the triumphant claim that the sweep of democracy was indeed upon us. As even the Arab protesters from Cairo to Tunis would show, seemingly impervious autocratic regimes could succumb to long nascent aspirations for popular governance. The wave of embryonic democratic transitions that began with the fall of the Soviet Union was indeed a heady time. History may not have ended with the fall of democracy's ideological rivals. But the arc of history appeared decisively tilted toward democracy.

Today the assessment is more mixed. Democracy turns out to require more than just holding an initial election for head of state. The rule of law cannot be commanded by a text but needs institutional guarantors. Political parties need to learn the give and take of electoral coalitions and the difficult translation of a party platform into a program for governance. There must be confidence that the rules of the game are relatively fair and that the losers of today can emerge as the potential winners of tomorrow. Perhaps most of all, there has to be some assurance that there will be a chance to reconsider tomorrow, that the winners of today will be willing to surrender office tomorrow as the tides of public opinion and electoral support may shift.

To look around twenty-five years after the end of the Soviet Union is sobering. The initial flirtations with democracy in the former Soviet republics of Central Asia collapsed into autocratic rule. The Green Revolution in Iran was suppressed, as was the Bahraini uprising. The civil war in Syria, at the time of this writing, rages on. In Egypt mass protests, street violence, ethnic conflict, and political instability continue, with the military now once again in power. Libya remains a cauldron of political unrest with even rudimentary public authority deeply contested. Of the inspiring Arab Spring, only Tunisia holds on to its democratic aspirations. Even countries of great democratic

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mobilization, such as Ukraine, spiraled down into an insidious form for strong-man politics and are now a sad recreation of Cold War lines of division.

While the Arab Spring may have sputtered out, the aspirations and practical problems of these democratic movements have followed closely upon the explosive opening of what has been appropriately termed the Third Wave of democratization.<sup>1</sup> We can confidently say that with the fall of the Soviet Union, the world embarked on a far-flung experiment in democracy. Newly minted governments tried their hands at the uncertain project of letting the people select their governors through elections. These unlikely democracies are now found not only in the former reaches of the Soviet empire, but in postapartheid South Africa, pluralist Mexico, and post-authoritarian South Korea. The past quarter century has yielded the largest surge of new constitutional democracies since the end of the colonial period after the two world wars. As with any sudden development, it comes as no surprise that the results have been mixed, the machineries of voting frequently imperfect, the commitment to accompanying liberal values problematic. Yet it seems that no new country can avoid some aspect of democracy if it is to claim a place at the table of legitimate governments.

What renders these efforts at democracy truly an experiment is the difficult national contexts in which they emerge. The demise of an authoritarian regime highlights the frailty of the very idea of a nation. Many, if not all, of these societies face the problems of religious and ethnic fracture. Without an established sense of nationhood, the form of governance would appear a secondary consideration. Peculiarly, the process of consolidating a nation and the efforts at creating the institutions for democratic governance arise together, particularly in the post-Soviet world. Much historic uncertainty attaches to the question of whether elections, the indispensable touchstone for democratic rule, actually further the accompanying aims of securing a manageable nation.

The problem of creating democratic institutions and culture out of the ashes of authoritarianism, and in a fractured society, is that fragile democracies must navigate a dilemma at the heart of all successful liberal democracies: they must enable majority rule while also institutionally limiting it. The mechanism of enabling majority rule is invariably elections. An autocrat falls, and the cry for elections is heard all around. Elections have become the hallmark of democratic transitions. But they are hardly sufficient. Elections

<sup>1</sup> SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE 20TH CENTURY* 3–6 (Norman: University of Oklahoma Press, 1991) (defining the “Third Wave” as democratization between 1974 and 1990).

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alone do not foster political stability across time, protect vulnerable minorities against politically powerful majorities, address historic ethnic grievances, ensure tolerance, or even guarantee political legitimacy.

A successful democracy requires the capacity to win and to lose, the ability of the losers of today to reorganize and press for gains in elections tomorrow. The experience in postcolonial Africa, for example, shows that it was far easier to hold the first election than the second. The history of failed democracies fleshes out the intuition that stable democracy requires more than just rushing to hold an election. Too often the holding of an election becomes the forum for the attempt to cement power in the hands of a dominant majority followed by a demoralizing descent into one-party rule and show elections.<sup>2</sup> To the words of the cynical and oftentimes culpable ex-colonialists, this was one-man, one-vote, one-time.<sup>3</sup>

Moreover, elections alone often serve to recreate and rekindle ethnic conflict. Imagine a society historically divided between groups of peoples, each of whom has perpetrated grave violence on the other over centuries of tumult. Take as an example a poor country such as Moldova, a country locked in Eastern Europe and having just emerged from decades of Soviet oppression. Its peoples share neither a language nor an intuitive sense of a common national enterprise. Now, suddenly, the Soviet behemoth collapses and the country is thrust into political uncertainty. In such conditions of instability, with claims of historic injustices reasserted and with the risks of communal violence reemerging, what possible chance could there be for a tolerant democratic culture to emerge through elections alone? What guarantee is there that a momentary claim to being a democracy will not be merely a chance for the dominant ethnic group to capture the state apparatus through the apparent legitimating process of an election, treat itself preferentially, and force a minority group to submit to its will?

Take South Africa, where the first elections held after apartheid would no doubt permit the black majority to wield power. What confidence should the newly politically powerless white minority have that the historic need to redress injustice will not lead to outright expropriation and oppression

<sup>2</sup> See DONALD L. HOROWITZ, *A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* 97 (Berkeley and Los Angeles: University of California Press, 1991) (providing examples of “polarizing elections” leading to authoritarian regimes).

<sup>3</sup> This unfortunate pattern prompted the phrase “one man, one vote, one time,” attributed to former Assistant Secretary of State and U.S. Ambassador to Syria and Egypt Edward Djerejian. See, e.g., Ali Kahn, *A Theory of Universal Democracy*, 16 WIS. INT’L L.J. 106 n.130 (1997). Djerejian’s cynicism was founded in fact: between 1967 and 1991, for example, no country in Africa experienced power passing from one elected government to another.

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of the former apartheid rulers? Or imagine India, where the awakening of political extremism amid the dominant Hindu majority leads with distressing frequency to assaults on the Muslim minority. There too, what confidence should the minority population have when the exponents of Hindu triumphalism emerge as the dominant political party after national elections?

In all of these circumstances, the basic question returns: What possible reason is there to trust the future leadership of the country to the outcome of an election? Is it not perfectly predictable that an election, even if fair, would be a referendum on which group would hold power to the possible detriment and exclusion of others? The fact of being a majority in a fair election, or even just getting more votes than anyone else, cannot possibly legitimate the settling of historical scores, even if the redrawing of the historic balance sheet takes advantage of duly enacted laws used to exploit historic adversaries. To rekindle historic grievances, the laws of a fractured society need not build on the overt racialism and menace of apartheid or, even worse, the Nuremberg laws of Nazi Germany – which, it must be recalled, were also duly enacted through the operation of compromised democracies. We need not invoke cataclysmic events to address the fears that minorities must have in any context where a well-defined majority has power. There are far too many simpler mechanisms, some seemingly quite innocuous, that may prove capable of representing communal oppression, including designating the national language of government, decreeing the materials for instruction in the public schools, or even deciding where to locate a capital.<sup>4</sup>

Democracy may forge a collective, national identity, but it may also have just the opposite effect. There is in fact reason to believe that elections inflame ethnic conflict as politicians seek to mobilize their constituents by appealing to their partisan ardor. New democratic orders need to channel popular passions into democratic engagement. But the attendant risk is that the freedoms and ambitions unleashed by popular sovereignty will “intensely politicize all areas of organized collective existence,” as Pratap Mehta duly cautions in his wonderful work on Indian democracy, from which this introductory title borrows its theme.<sup>5</sup> The lead-up to an election is a jolt of adrenaline to the political passions of a society. As with any disabled or diseased individual, the exercise that keeps the vibrant strong may prove fatal to the weak. The weaker

<sup>4</sup> The commanding study of the relationship between linguistic claims and allocations of governmental benefits is: Sujit Choudhry, *Managing Linguistic Nationalism Through Constitutional Design: Lessons from South Asia*, 7 INT’L J. CON. LAW 577 (2009).

<sup>5</sup> PRATAP BHANU MEHTA, *THE BURDEN OF DEMOCRACY* 6 (New Delhi: Penguin Books, 2003).

the institutions of democracy and the more fixed the societal divisions, the more likely it is that the lines of partisan dispute will reproduce the historic fault lines of the society. Under such circumstances, the reality of democratic “choice” is likely to be the retribution of victor’s justice against the defeated minority. Elections are the shorthand for other factors that we think characterize democratic life, but they are unfortunately not always the pathway to a more tolerant society. Just as likely, elections in a fractured society will serve as the rallying point for intolerance.

The formal mechanisms of democracy by themselves ensure neither tolerance nor legitimacy. Elections simply tally up who is the majority and who is the minority. By themselves they neither guarantee civility nor the subsequent accountability of the victors to their subjects. In country after country – be it with the beleaguered Turkish minority in Bulgaria, or the Bosniaks in Bosnia-Herzegovina, or the formerly dominant whites in postapartheid South Africa, or even black citizens in the United States – no election is really needed to distinguish historic minorities from the majority population. An election does not quell the sense of injustice of a minority subjected to such perceived majoritarian tyranny by speciously legitimating majority rule. An election all too often lends a fictitious air of legitimacy to what is merely, in the words memorialized by Alexis de Tocqueville from the American founders, the “tyranny of the majority.”

A brief tour of political thinking reveals just how extraordinary is the idea that democracy, elections, or political contests would ever emerge as a way of managing core conflicts in a society. Elections historically were thought to presuppose a settled form of governance, and that in turn presupposed a culturally defined *demos*. The idea of democracy without a *demos*, to borrow from Joseph Weiler’s account of the European Union, is a concept without resonance in historic liberal thought. Indeed, and pushing the idea more deeply, the notion that democracy cannot exist without cultural homogeneity has deep roots in republican political thought, from the small city-state lauded in Rousseau’s *Social Contract* to the rural, homogeneous, agrarian regime trumpeted by the Anti-Federalists.<sup>6</sup> Even classical liberals expressed skepticism that democratic government was possible in a fractured society. John

<sup>6</sup> See Brutus, No. 1, 18 Oct. 1787 (“In a republic, the manners, sentiments, and interests of the people should be similar.”). For a discussion of the dominance in the history of political thought of cultural and political unity as the bedrock of the free or good regime, see NANCY ROSENBLUM, *ON THE SIDE OF THE ANGELS: AN APPRECIATION OF PARTIES AND PARTISANSHIP* (Princeton, NJ: Princeton University Press, 2008).

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Stuart Mill, the central proponent of liberty as the desired end state of human affairs, thought that:

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion, necessary to the working of representative government, cannot exist.<sup>7</sup>

Alexis de Tocqueville, Mill's correspondent and another champion of nineteenth-century liberalism, echoes Mill's doubt that a society of diverse languages, ethnicities, and cultures can maintain the proper political culture required for liberalism.<sup>8</sup> Even in an age of pluralism and multiculturalism, prominent political thinkers still wonder whether democracy is possible in societies riven by core division over identity.<sup>9</sup>

Yet the democratic experiment of the modern period turns time and again to the mechanism of election to augur in an era of stability following wars, conflicts, or the demise of authoritarian rule – or at least to attempt to do so. Clearly elections serve as a shorthand, a code for a more robust political agenda. Elections are the *sine qua non* of democracy, but as with all conditions that are necessary but not sufficient to ensure a desired end, there are a host of institutional and cultural factors that define democratic life, independent of the ultimate act of casting a ballot. We cannot conceive of democracy without political party rivalry, robust public debate, and the heat of dispute all culminating in a decisive election contest. But elections alone are insufficient.

Fragile democracies also need limitations on majoritarian power. Societies with chronic fractures along religious or ethnic lines need a commitment to pluralist power that might temper the divisions. As efforts at democratic governance spread to the former colonies, state planners and political scientists turned to the national experiences in European countries such as Austria, Belgium, the Netherlands, and Switzerland to find models that would reconcile democracy with a divided society. From these examples came the claim that democracy should be limited by formal power sharing that would make all the rival groups stakeholders in shared governance. Under the rather cumbersome term “consociational structures” emerged the belief that divided societies could forge a national integration of rival elites that would in turn yield a politically stable democracy before the divisive process of voting was

<sup>7</sup> JOHN STUART MILL, *ON LIBERTY, AND, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 292 (New York: MacMillan Co., 1947).

<sup>8</sup> See, e.g., 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 27–44 (Harvey C. Mansfield & Delba Winthrop, eds., trans., Chicago, IL: University of Chicago Press, 2000) (1835).

<sup>9</sup> SAMUEL HUNTINGTON, *WHO ARE WE?: THE CHALLENGES TO AMERICA'S NATIONAL IDENTITY* (New York: Simon and Schuster, 2005).

engaged.<sup>10</sup> Arend Lijphart authored the pathbreaking study that identified the critical elements of the consociational experiment:

- (1) government by a grand coalition of all significant segments;
- (2) a mutual veto or concurrent-majority voting rule for some or all issues;
- (3) proportionality as the principle for allocating political representation, public funds, and civil service positions;
- (4) considerable autonomy for various segments of the society to govern their internal affairs.<sup>11</sup>

The key to the consociational model was that power would be allocated across competing interests in the society independent of the political process. Thus, elections in consociational democracies can decide which among the candidates of a particular ethnic or racial group will hold an office that was predetermined to be assigned to that particular group; whether a particular group or interest should hold office is decided outside the electoral process through the formation of what Lijphart terms the “grand coalition.”

Strikingly, despite the fact that new democracies almost invariably fit the pattern of fractured societies, the democracies of recent vintage rejected the simpler model of formally dividing power, as with reserving half the seats in the Lebanese national parliament for the Maronite Christians and half for the Muslims, to use the old Lebanese power-sharing arrangement as an example. In part, the disappearance of formal power sharing as the preferred conflict-management model reflects a recognition of how much more sophisticated the world has become since the simple consociational models that were supposed to yield stability in Lebanon<sup>12</sup> or Sri Lanka<sup>13</sup> or Cyprus<sup>14</sup> or the Ivory Coast.<sup>15</sup> In larger part, the reason

<sup>10</sup> See AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 1 (New Haven, CT: Yale University Press, 1977) (discussing how consociational democracy explains the “political stability” of Austria, Belgium, the Netherlands, and Switzerland).

<sup>11</sup> *Id.* at 25.

<sup>12</sup> See, e.g., Richard H. Dekmejian, *Consociational Democracy in Crisis: The Case of Lebanon*, 10 *COMP. POL.* 254 (1978) (describing how the 1926 constitution and National Pact of 1945 provided for a six to five ratio of Christians to Muslims in the Chamber and an even division in the cabinet); ANTOINE N. MESSARRA, *THÉORIE GÉNÉRALE DU SYSTÈME POLITIQUE LIBANAIS* (Paris: éditions Cariscript, 1994).

<sup>13</sup> See H. E. Chehabi, *The Absence of Consociationalism in Sri Lanka*, 11 *PLURAL SOCIETIES* 55 (1980) (accounting for the lack of consociationalism in Sri Lanka).

<sup>14</sup> Lijphart, *supra* note 10, at 158–61 (discussing the failure of consociationalism in Cyprus); AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 184 (New Haven, CT: Yale University Press, 1984) (noting that the 1960 constitution of Cyprus provided for separately elected communal chambers for the Greek majority and Turkish minority).

<sup>15</sup> See, e.g., Connie de la Vega, *The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?*, 11 *HARV. BLACKLETTER L.J.* 49 (1994) (discussing Ivory Coast’s equal protection guarantees).

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that new democracies have turned away from formal power-sharing accords is the tragic fact that each of the early signature claims for consociational success soon descended into fratricidal civil war. Invariably, the new democracies had to look elsewhere.

The rejection of formal consociationalism in most democracies of recent vintage is a sad recognition of the stakes in truly fractured societies. The unfortunate lesson of history is that stable civilian governance is most likely to emerge from post-conflict societies when one ethnic group has accomplished clear dominance over or destruction of the other.<sup>16</sup> Even with the introduction of more aggressive international peacekeeping, the key issue in nation building remains the creation of an integrated political authority claiming legitimacy beyond an ethnic or racial or sectarian religious base.<sup>17</sup>

In place of the formal limitations associated with consociationalism, the latest waves of democratizations have turned to an assertive form of constitutional democracy. Consociationalism sought to constrain democracy by removing the ultimate issue of power allocation from competitive democratic elections. Constitutionalism of the modern sort is also a system of constrained democracy, only now the system of broader democratic choice is constrained by constitutional limitations on what political majorities may do rather than how they are formed. Much as the terms “constitutional” and “democracy” are linked in the definitions of a just, liberal society, the two embody antagonistic impulses in organizing the body politic. Democracy vests decision making in majorities; constitutionalism removes from immediate popular control certain significant realms of politics.

Some aspects of constitutional constraint seem unremarkable. At some level, there must be a set of fixed ground rules for any democratic process. The rules of governance and selection have to be set independently of any particular election, in just the same way that a sports event requires prior acceptance that a soccer goal may not be scored with the hand, or that the bases in baseball are run counterclockwise. In this fashion, constitutionalism may be thought of as a particularly strong form of regulation of the terms of democratic engagement culminating in elections. But, constitutions do more. They impose a normative vision of rights and structural arrangements that resist the

<sup>16</sup> See Roy Licklider, *The Consequences of Negotiated Settlements in Civil Wars, 1945–1993*, 89 AM. POL. SCI. REV. 681 (1995) (finding that in so-called identity civil wars “negotiated settlements are less likely to be stable than military victories”).

<sup>17</sup> See S.C. Res. 1378, U.N. SCOR, 56th Sess., 4415th mtg., at 2, U.N. Doc. S/RES/1378 (2001) (proclaiming that a transitional government in Afghanistan should be “broad-based, multi-ethnic and fully representative of all the Afghan people”).



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intrusion of ordinary political preferences. Even if only aspirationally, they mandate that political power be exercised with an eye toward a higher set of societal obligations.

The tension between political democracy and constitutional constraints requires a mediating institution capable of imposing that restraint. None of the new democracies of the recent period has chosen to follow a Westminster model of ultimate parliamentary sovereignty. Not only have many chosen to divide power between a president and a parliament, but they have further rejected the Westminster model of Parliament itself being the ultimate judge of the limits of parliamentary conduct. The critical question for this book is how those constraints are exercised, and how there can be credible commitments in countries without an established track record of democratic governance.

While political power will always be contested in the elected branches of government, the new democracies of the Third Wave have focused great attention on a new governmental actor to enforce the constraints on the majoritarian political branches. In country after country, the transition to democracy is eased by the creation of a court system specifically tasked with constitutional vigilance over the exercise of political power. All the new democracies have either created constitutional courts or endowed supreme courts with ample power of judicial review to enforce the democratic commands of the constitution. What is striking, and perhaps distinct, about the Third Wave of democratization is the central role assumed by these apex courts in sculpting democratic politics.

Indeed, the signal feature of the constitutional democracies of the modern wave is precisely this creation of a new set of strong constitutional courts. As typically constructed, these are courts that stand aside from the normal chain of command of the national judiciary and instead act as guardians of the democratic order. It is not simply that a constitution serves as a limitation on either antidemocratic groups or self-aggrandizing rulers, it is that a constitution performs this process of limitation through enforceable institutional constraints. The ability of a constitution to impose such limitations in turn presupposes the ability of the designated institutions – the courts – to serve as a credible force either in legitimating the drawing of democratic boundaries or in intervening to constrain the governing powers.

The lodestars of scholarly literature either failed to predict, or severely underestimated, the rise of constitutionalism and independent judiciaries that have been the hallmark of recent waves of democratization. Samuel Huntington's classic *The Third Wave* not only does not discuss at any length constitutionalism and the judiciary as important vehicles of democratic transition and

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consolidation, but this new institutional actor is barely mentioned.<sup>18</sup> Arend Lijphardt, writing well into the latest surge of democracies, only more recently amended his account of the failings of pure majoritarian systems to include the “absence of judicial review.”<sup>19</sup> The implication in Lijphardt’s subsequent writing is that an independent judiciary bearing the constitutional authority to proscribe legislation was a necessary limitation on the risks of untrammelled majoritarianism. That role for the judiciary was conspicuously absent in the earlier accounts of consociationalism, which instead focused on the nature of the grand coalitional bargain among political elites and the corresponding assignment of authority within the political branches. The introduction of a judiciary bearing independent constitutional authority is a significant shift in the thinking over how to stabilize democratic rule in divided societies. However, the stabilizing impact of courts exercising constitutional review remains rather underdeveloped and something of an afterthought in these theories.

This book fills that gap. It is an examination of the challenges that fragile democracies face. While the inquiry as to how democracies are sustained sounds in the methodology of political science, this is a book about legal institutions and the role of law in the structure of constitutional democracy. It is about law and the legal institutions that have emerged as a hallmark of the recent wave of democratizations, and particularly about the contested concept of “constitutional democracy.” The thesis is that the use of constitutionalism, and the accompanying institution of constitutional courts, has emerged as a primary means of managing conflict in the difficult national settings of so many of the world’s democracies and of doing so in the service of state building. This judicial task is undertaken in what are almost invariably deeply fractured societies, meaning societies that are characterized by persistent racial, ethnic, or religious animosities in which cross-racial, ethnic, and religious political institutions are either poorly realized or simply do not exist.

The title of this book invokes the concept of “fragility” to identify constitutional democracies, usually recently enabled, whose political institutions and supporting groups from civil society are insufficient for managing conflict. Such a definition, without more, risks descending into a tautology whereby the problem defines the category, and the category in turn is established by the problem as such. What characterizes the modern fragile democracies is that they typically inherit political authority from the collapse of an authoritarian

<sup>18</sup> Huntington, *supra* note 1, at 270–80.

<sup>19</sup> AREND LIJPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* (New Haven, CT: Yale University Press, 1999).