

Passing Electoral Laws

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Laws governing electoral issues (hereinafter electoral laws) are vital to representation in a democracy and its existence. This short post outlines why and how electoral laws should be subject to higher approval requirements and heightened judicial review.

The Importance of Electoral Laws

In many jurisdictions, elections are the only opportunity for people to voice concerns and participate in policymaking². Nonetheless, those in power are infamous for limiting and/or manipulating people's voices³. This is as old a story as it gets. An interesting case comes from 18th century England. Several electoral districts in England got depopulated over time and were left with a handful of eligible voters – at times less than 50. Colloquially referred to as “rotten boroughs”, the aforementioned electoral districts were deliberately retained⁴ in their depopulated state to privilege influential landlords. Extant voters in rotten boroughs were tenants of a single landlord who exercised significant control over them. Since elections in those times were conducted via open ballots, the landlord knew who their tenants voted for. As a result, landlords could compel tenants to vote for themselves or their preferred representative. Before the Reform Act 1832, 140 out of 658 parliamentary seats⁵ represented rotten boroughs.

This was the precursor to modern-day gerrymandering, i.e., manipulating electoral districts to create an undue advantage for a party(s). While gerrymandering is primarily associated with the USA⁶, it is a frequent phenomenon⁷ in other

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² Amit Ahuja and Pradeep Chhibber, “Why the Poor Vote in India: ‘If i Don’t Vote, i Am Dead to the State’,” *Studies in Comparative International Development* 47, no. 4 (December 1, 2012): 389-410, <https://doi.org/10.1007/s12116-012-9115-6>.

³ Sarah Birch, “Electoral Malpractice”, *Comparative Politics*, Oxford, 2011, online edn, Oxford Academic, May 24, 2012, <https://doi.org/10.1093/acprof:oso/9780199606160.001.0001>.

⁴ Hillary Burlock, “Rotten Boroughs. ECPPEC,” May 17, 2023, <https://ecppecc.ncl.ac.uk/features/rotten-boroughs/>.

⁵ Britannica, The Editors of Encyclopaedia, “rotten borough”, *Encyclopedia Britannica*, Invalid Date, <https://www.britannica.com/topic/rotten-borough>.

⁶ Julia Kirschenbaum/Michael Li, “Gerrymandering Explained”, *Brennan Center for Justice*, <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained>.

⁷ Ferran Martínez i Coma/Ignacio Lago, “Gerrymandering in Comparative Perspective,” *Party Politics* 24, no. 2 (March 2018): 99-104, <https://doi.org/10.1177/1354068816642806>.

jurisdictions. However, gerrymandering is not the only way to manipulate elections. Today several other sophisticated tactics⁸ are utilized. At the simplest level, it begins with making it difficult for certain sections of the populace to vote. To do so, those in power can complicate obtaining voter IDs, imposing stringent voter eligibility requirements, reducing the number of voting stations, disallowing vote-by-mail, and decreasing voting times. At a more extreme level, entire electoral systems are designed to privilege certain groups at the expense of others.

Tactics such as gerrymandering and voter suppression can damage the legitimacy of a democracy, as those in power do not adequately represent the populace. A lack of representation is one of the primary reasons for the global decline in trust in democratic institutions⁹. Beyond impacting the legitimacy of a democracy, these tactics are also used to subvert democracy. As Cheeseman and Klass state¹⁰, “*The smartest way to rig an election is to do so before the ballots have even been printed.*” Today, democracy is not just a system where everyone merely has the right to vote – even people in North Korea have voting rights¹¹. Instead, what separates a democracy from a non-democracy is the rotation of power (or at least a realistic ability to remove those in power)¹². In the absence of rotation of power, a polity witnesses widespread deterioration¹³.

Leaders in every corner of the world are manipulating elections, making it almost impossible to dislodge them. Hungary is a case many readers of *Verfassungsblog* would be familiar with: Scheppele illustrates¹⁴ that Orbán’s Fidesz party and their coalition partners are regularly able to win elections because of an illiberally disproportionate electoral system aided by a heavily gerrymandered country. Election monitors in the recent 2022 election stated that “*there is a significantly unequal distribution of registered voters amongst the constituencies, with up to 33*

⁸ ACLU, “Block the Vote: How Politicians Are Trying to Block Voters from the Ballot Box”, *American Civil Liberties Union*, August 17, 2021, <https://www.aclu.org/news/civil-liberties/block-the-vote-voter-suppression-in-2020>.

⁹ Jonathan Perry, “Trust in Public Institutions: Trends and Implications for Economic Security”, *UN/DESA Policy Brief #108*, <https://www.un.org/development/desa/dspd/2021/07/trust-public-institutions/>.

¹⁰ Nic Cheeseman/Brian Klaas, “How to Steal an Election in Broad Daylight. Foreign Policy”, May 21, 2018, <https://foreignpolicy.com/2018/05/21/how-to-steal-an-election-in-broad-daylight/>.

¹¹ “North Koreans Vote in ‘No-Choice’ Parliamentary Elections,” *BBC News*, March 10, 2019, <https://www.bbc.com/news/world-asia-47492747>.

¹² Steven Levitsky/Lucan A. Way, “Elections Without Democracy: The Rise of Competitive Authoritarianism”, *Journal of Democracy* 13, no. 2 (2002): 51-65, <https://doi.org/10.1353/jod.2002.0026>.

¹³ Hermann Giliomee/Charles Edward Wickens Simkins, “The Awkward Embrace: One-Party Domination and Democracy”, Taylor & Francis, 1999.

¹⁴ Kim Lane Scheppele, “How Viktor Orbán Wins”, *Journal of Democracy* 33, no. 3 (2022): 45-61, <https://www.journalofdemocracy.org/articles/how-viktor-orban-wins/>.

*percent deviation, at odds with the principle of equal suffrage.*¹⁵ This election rigging makes it highly difficult for voters to dislodge¹⁶ Orban.

Electoral laws are thus vital to both the maintenance and survival of democracy. Nevertheless, electoral laws are problematic because they are designed and implemented by their beneficiaries, politicians. Evidently, politicians are likely to prioritize their interests over democracy and its affiliated values. It would be extremely challenging to argue that non-political actors or independent institutions should design election laws. This would create problems and issues related to democratic defects. However, a case can certainly be made for designing the process of passing electoral laws to facilitate their optimality and democratic computability.

Higher Approval Requirements For Electoral Laws

In more jurisdictions than not, electoral laws can be passed and reformed through a simple majority in the legislature. A significant reason for this is that most constitutions¹⁷ frequently allow ordinary legislation to impact the specifications of electoral systems. This means that unless a polity has a minority government, electoral laws can be passed with little compromise or obstruction. This contrasts significantly with other essential facets of democracy, such as human rights and the powers of the governmental branches, which frequently require constitutional amendments to be altered. While it can be argued that the calibration processes of amendment rules across many jurisdictions require rethinking, in most societies with written constitutions, constitutional amendments require higher legislative approval. This does mandate a degree of compromise with diverse political actors – including often from across political aisles.

Few things can impact ‘the people’s ability to choose their representatives and vote them out’ more than the laws governing elections. Given their democratic significance, why should electoral laws be created the same way as ordinary law? Though it could be argued that written constitutions should cover all election-related matters since then, we can ensure that altering electoral rules would require a constitutional amendment. Frequently that is an impractical option considering how detailed electoral laws are.

¹⁵ OSCE, International Election Observation Mission, Hungary, Parliamentary Elections and Referendum, Statement of Preliminary Findings and Conclusions, April 3, 2022, Page: 6, https://www.osce.org/files/f/documents/4/6/515111_1.pdf.

¹⁶ “A Wild Gerrymander Makes Hungary’s Fidesz Party Hard to Dislodge”, *The Economist*, April 2, 2022, <https://www.economist.com/graphic-detail/2022/04/02/a-wild-gerrymander-makes-hungarys-fidesz-party-hard-to-dislodge>.

¹⁷ “Elections – Constitute”, <https://www.constituteproject.org/topics/elections>.

Nonetheless, some alternative options exist. When it comes to electoral laws, I contend that it should be a *sin quo non* for polities to at least adopt either of these two options: First, designate electoral laws in the category of organic laws¹⁸ or other similar special categories. Organic laws lay down foundational matters of a polity and generally have higher requirements for approval and modification. Second, formally recognize a separate type of law known as “electoral laws”, having stricter approval requirements in legislatures. Although defining the precise contours of what constitutes electoral laws is beyond the scope of this short post, it would be imperative to define its scope – preferably within constitutions – and do so broadly. Electoral laws should include all laws that in any way concern elections, including the regulation and financing of political parties.

Organic laws covering electoral matters and requiring higher approval are seen in civil law jurisdictions like France and Spain¹⁹ and a handful of other systems²⁰ inspired by these jurisdictions. Likewise, special categories of laws with distinct approval requirements also exist. For example, in Belgium, legislation concerning institutional matters and competencies of the communities and regions require qualified majorities²¹ for their passing. Similarly, special categories such as “money bills”²² are present in many common law countries with approval requirements different (albeit lower) from ordinary laws. Hence, though not ubiquitous, the proposal for separate approval requirements for electoral laws is not extremely radical in the grand scheme of things.

Regarding the precise higher requirements for passing electoral laws, at a bare minimum, passing them should require qualified majorities, which could ensure some negotiation and compromise with opposition political parties. Nevertheless, the rise of anti-democratic populist parties in countries like Hungary and Turkey demonstrates that such requirements might not always be sufficient. Temporary spurts in popularity – aided by peculiar existing electoral rules and institutional design – frequently see anti-democratic populist parties obtaining a high number of seats in legislatures. This allows them to bypass the requirements of a qualified majority unilaterally. Conversely, scholars have argued that qualified majorities²³

¹⁸ “Legal Definition of ORGANIC LAW,” <https://www.merriam-webster.com/legal/organic+law>.

¹⁹ Boldizsár Szentgáli-Tóth, „Organic laws and the principle of democracy in France and Spain”, <https://core.ac.uk/download/pdf/323469923.pdf>.

²⁰ Read about “Organic Laws” on Constitute, <https://www.constituteproject.org/constitutions?key=orglaw>.

²¹ Special Law, Encyclopedia, Science News & Research Reviews, <https://academic-accelerator.com/encyclopedia/special-law>.

²² UK Parliament, Glossary “Money bills”, <https://www.parliament.uk/site-information/glossary/money-bills/>.

²³ Adem Abebe, “The (Il)legitimacy of Constitutional Amendments in Africa and Democratic Backsliding”, in: Richard Albert/Jaclyn L Neo/Kevin YL Tan, “Constitutional Amendment and Legitimacy” (Forthcoming), January 13, 2022, <https://papers.ssrn.com/abstract=4008355>.

are often insufficient to prevent misuse. A better alternative option might be utilizing comparable approval procedures for electoral laws that Thailand uses for constitutional amendments²⁴. For an amendment to be approved in Thailand, it requires at least 20 percent votes from legislators not part of the governing coalition. Such provisions guarantee that even if a coalition – for whatever reason – crosses a qualified majority threshold, they still need to negotiate with a certain number of opposition actors. Several similar creative solutions can be considered to ensure greater inclusion and compromise.

While not wholly eliminating misuse of electoral laws, such requirements can reduce their frequency. At the bare minimum, these requirements might prevent a ruling coalition from unilaterally remaking the democratic process to suit their ambitions for power at the expense of other parties and the democratic process. Moreover, there is anecdotal empirical evidence from general constitution-making processes, as seen here²⁵, here²⁶, and here²⁷, concerning how group inclusion and compromise can enhance democratic features in a polity and how a lack of the same diminishes results in opposite outcomes.

Although the proposed solutions will make updating electoral systems more arduous, I believe that it is a justifiable cost considering the importance of a free and fair electoral process.

A Heightened Role For Courts

When laws relating to elections have higher approval requirements, the ruling coalition might likely attempt to pass electoral laws by selectively including electoral topics in other, more mundane bills. In a very different context, we already have examples of the same. In India, the ruling BJP government does not have enough seats in the upper house of the parliament to pass legislation without multi-partisan support. Therefore, they changed the campaign finance provisions

²⁴ “Thailand’s Constitution of 2017”, [constituteproject.org](https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/103607/132859/F-1348511433/THA103607%202019.pdf), January 29, 2019, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/103607/132859/F-1348511433/THA103607%202019.pdf>.

²⁵ Ana María Bejarano/Renata Segura, “The Difference Power Diffusion Makes: Explaining Divergent Outcomes in Colombia (1990–1991) and Venezuela (1998–1999)”, in: G. Negretto (Ed.), “Redrafting Constitutions in Democratic Regimes: Theoretical and Comparative Perspectives”, August 29, 2020: 131-54, <https://doi.org/10.1017/9781108885287.008>.

²⁶ Gabriel L. Negretto/Mariano Sánchez-Talanquer, “Constitutional Origins and Liberal Democracy: A Global Analysis, 1900–2015”, *American Political Science Review* 115, no. 2 (May 2021): 522-36, <https://doi.org/10.1017/S0003055420001069>.

²⁷ Todd A. Eisenstadt/Tofigh Maboudi, “Being There Is Half the Battle: Group Inclusion, Constitution-Writing, and Democracy”, *Comparative Political Studies* 52, no. 13 (November 2019): 2135-70, <https://doi.org/10.1177/0010414019830739>.

by sneaking new legislation into the finance act²⁸ – an act that can be passed as a money bill. In India, money bills are not required to go through both houses of the legislature as opposed to other bills, which are subject to bicameralism’s constraints. Similar cases are bound to arise in the regime proposed above. Today’s autocrats have mastered the art of wielding the law in abusive ways²⁹ to forward their agendas. Therefore, some external oversight is necessary. Arguably, this is where courts can step in.

At the outset, I acknowledge that courts have proved to be an inefficient check on would-be-autocrats – mainly due to the realities of the institutional politics of actors without the powers of the purse and sword³⁰. In the case of India mentioned above, the Supreme Court frequently allowed the BJP government to pass ostensibly non-monetary bills as money bills³¹. Nonetheless, this certainly does not mean we should give up on courts – at least theoretically. Therefore, courts could (and should) have a role in ensuring that all electoral issues are passed with higher approval requirements. In doing so, they should resolve any doubts in favor of requiring a higher approval threshold. Generally, I have cautioned against over-reliance on courts³², but providing courts with a veto over passing electoral laws could be a desirable use of judicial oversight. Even if courts have not demonstrated effectiveness, allowing them to police electoral laws at least gives them a fighting chance. They might be able to step in during the early stages of a polity’s democratic decline before authoritarian restrictions curtail them.

Beyond procedural matters, courts also have a role in substantive issues. At times, larger democratic parties work together to decrease the representativeness of politics. For example, large status-quo parties can collaborate to increase their hegemony at smaller parties’ expense or make it difficult for new parties to emerge. In an advanced democracy like Germany, some of these issues have recently occupied the headlines and caught the attention of legal scholars³³. This is

²⁸ Tarunabh Khaitan, “Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-State Fusion in India”, *Law & Ethics of Human Rights* 14, no. 1 (May 1, 2020): 49-95, <https://doi.org/10.1515/lehr-2020-2009>.

²⁹ Kim Lane Scheppele, “Autocratic Legalism”, *The University of Chicago Law Review*, <https://lawreview.uchicago.edu/print-archive/autocratic-legalism>.

³⁰ Georg Vanberg, “Constitutional Courts in Comparative Perspective: A Theoretical Assessment”, *Annual Review of Political Science* 18, no. 1 (May 11, 2015): 167-85, <https://doi.org/10.1146/annurev-polisci-040113-161150>.

³¹ Rohan Venkataramakrishnan, “Aadhaar Judgment: Why the Supreme Court Has Once Again Opened up the ‘Money Bill’ Question”, Scroll.in, November 14, 2019, <https://scroll.in/article/943680/aadhaar-judgment-why-the-supreme-court-has-once-again-opened-up-the-money-bill-question>.

³² Amal Sethi, “Taking the Constitution Away from the Supreme Court of India”, *National Law School of India Review* 33, no. 1 (January 1, 2021), <https://repository.nls.ac.in/nlsir/vol33/iss1/1>.

³³ Uwe Volkmann, “Wahlrechtsänderung mit einfacher Mehrheit?”, *Verfassungsblog*, January 16, 2023, <https://doi.org/10.17176/20230117-001548-0>.

another area where judicial intervention could be supported. Moreover, the theorization of the American law professor, John Hart Ely³⁴, might be relevant in such areas. Ely envisions a vital role for courts in ensuring that the channels of political participation remain open and protecting minorities that the ordinary political process might neglect. Today, Ely's views have migrated beyond America's borders³⁵. It might be prudent for courts to examine electoral laws with an Elyian lens and ensure that these laws do not prevent political participation or discriminate against minorities. In doing so, a case can also be made that in evaluating electoral laws, courts should always apply strict standards of scrutiny and demand that elected branches explain why passing specific electoral laws are necessary and would not result in negative democratic consequences.

Lastly, relating to courts, it could be contended that, akin to France³⁶, any law relating to elections be referred to and approved by the respective court before they are promulgated. While entirely not against it, in the age of 'judicialization of mega-politics'³⁷, I would caution against adopting pre-enactment review as a universal requirement. In jurisdictions with extremely powerful courts, this could result in over-judicializing election issues in a manner that is not desirable in a democracy and/or over-exacerbating the tensions between the judicial and elected branches.

The Way Forward

While the suggestions throughout this article would not wholly prevent the manipulation of electoral processes, they could certainly strengthen democratic safeguards.

Moreover, while this short post considered electoral laws, other related areas might also require attention. Arguably, the most important of these areas is the conduct of elections. Although, as stated above, electoral manipulation often happens far before the actual elections. However, election-day misconduct is too commonplace³⁸ to ignore entirely. While arguing for non-political actors to design electoral laws would likely be too radical, there is a strong case for

³⁴ "Democracy and Distrust – A Theory of Judicial Review", 1981.

³⁵ Rosalind Dixon/Michaela Hailbronner, "Ely in the world: The global legacy of Democracy and Distrust forty years on", *International Journal of Constitutional Law*, Volume 19, Issue 2, April 2021: 427-438, <https://doi.org/10.1093/icon/moab041>.

³⁶ Boldizsár Szentgáli-Tóth, „Organic laws and the principle of democracy in France and Spain”, <https://core.ac.uk/download/pdf/323469923.pdf>

³⁷ Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts", *Annual Review of Political Science* 11, no. 1 (June 1, 2008): 93-118, <https://doi.org/10.1146/annurev.polisci.11.053006.183906>.

³⁸ Patrick Gathara, "Electoral Fraud and Fake Democracies Are a Global Problem", *Financial Times*, January 27, 2019.

independent election commissions overseeing the electoral process. Such cases are frequently made³⁹ and have even had a significant impact on real-world practice. Nevertheless, many electoral oversight institutions have not necessarily made⁴⁰ it harder to manipulate elections. Therefore, perhaps the design of independent election commissions is a pressing question that should also be examined in detail.

In conclusion, I hope all stakeholders investigate and uncover the best ways to make our election processes democratic and resilient.

³⁹ Mark Tushnet, “Institutions for Protecting Constitutional Democracy: An Analytic Framework, with Special Reference to Electoral Management Bodies”, *Asian Journal of Comparative Law* 16(S1) (December 2021): S10-S22, <https://doi.org/10.1017/asjcl.2021.27>.

⁴⁰ Nic Cheeseman/Jørgen Elklit, “Understanding and Assessing Electoral Commission Independence: a New Framework”, WFD (September 2020), https://www.wfd.org/sites/default/files/2022-01/WFD_A-new-framework-for-understanding-and-assessing-electoral-comission-independence.pdf.