ABHANDLUNGEN / ARTICLES

Conceptualising a Framework for Inclusive, Fair and Robust Multiparty Democracy in Africa: The Constitutionalisation of the Rights of Political Parties

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Abstract: *Democracy flourishes best where free and vibrant political parties are permitted to openly compete for political power. The conditions must be such that the party in power will not be able to manipulate the rules in order to reduce the competitive pressures from other parties and entrench itself in power. The expansion of political rights in Africa in the 1990s which saw the re-introduction of multi-partyism was supposed to have ushered in a new era of competitive politics that many thought would relegate the one-party system to the dustbin of history. This does not appear to have happened. This paper considers why this is the case and what can be done to reverse the situation.*

This paper starts by briefly reviewing the evolution of the rights of political parties in Africa from independence to the 1990s. The paper then examines the changes that have taken place since the present wave of constitutional reforms started in the 1990s to see to what extent these provide a firm basis for the establishment of a free and fair competitive political system. It is shown that in most African countries, multipartyism as now practised, has progressively led to the replacement of the one-party system with the dominant party system in which the latter under the charade of democracy have continued to perpetuate all the authoritarian practices of the former.

The paper argues that the constitution-builders did not adequately learn from the mistakes of the pre-1990 era. It suggests a number of elements designed to entrench the constitutional rights of political parties to facilitate meaningful, genuine, and effective competition that could substantially reduce the scope for incumbent par-

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ties manipulating the political system in order to entrench themselves or their leaders in power.

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A. INTRODUCTION

A fundamental requirement for the existence of a genuine multiparty constitutional democracy is the presence of free and vibrant political parties which are allowed to openly compete for political power. The institutions, structures, organisations and legal frameworks necessary for this to happen are crucial because incumbent political parties in control of governmental powers can hardly ever resist the temptation to close the avenues for effective competition in order to entrench themselves in power. Of critical importance therefore is the need to design and entrench a solid constitutional framework which not only empowers political parties to compete (what some have referred to as positive constitutionalism) but also protects them against partisan manipulation aimed at preventing fair competition (negative constitutionalism).[1]

The last two decades in Africa, particularly after the 1990 wave of constitutional reforms, saw the expansion of political rights and the re-introduction of multipartyism. The assumption was that the dark era of one-party authoritarian dictatorships was over. After a brief interlude of genuine competitive multiparty elections in the 1990s,[2] the tide seems to have turned. Many multiparty elections have now become a façade behind which the former single parties which have now metamorphosed into dominant parties regularly make a charade of democracy and political rights by staging sham elections. It is contended that the constitutional reforms, especially those which provided the foundation for the re-introduction of political pluralism, left too many gaps and other weaknesses which are now being regularly exploited by both the former single parties and some of the opposition parties that won the early multiparty elections. It is therefore no surprise that the transition towards a genuinely competitive constitutional democracy remains fragile as ominous signs of an authoritarian reversal progressively increase. The critical question that this paper seeks to address is how the constitutional rights of political parties can be enhanced and entrenched in a manner that will limit the scope for the partisan manipulation that prevents genuine competition and facilitates the political dominance of one party. However, the major challenge in Africa is not that of dominant parties *per se* but rather how ruling parties with governing majorities are able to operate and abuse their positions, with little checks and constraints. The paper proposes a principled framework, informed by past experiences and present chal-

1 See *Richard Pildes*, Political Parties and Constitutionalism, in: Tom Ginsburg / Rosalind Dixon (eds.), Comparative Constitutional Law, Cheltenham 2011,,p. 254.

2 For a discussion of what is often referred to as the transitional or founding elections, see, *Michael Bratton / Nicholas Van De Walle*, Democratic Experiments in Africa: Regime Transitions in Comparative Perspectives, Cambridge 1997.

lenges for ensuring that political parties can play the crucial role they need to play to make constitutionalism and democracy in Africa meaningful and effective. Whilst acknowledging that the expansion of the scope of political party constitutionalisation, in accordance with developments in advanced democracies is not a magic wand that will solve all problems, it is nevertheless an essential starting point.

The paper shows in section two, how the independence constitutions prepared the foundation for the one-party system to develop. Section three reviews the reforms that have taken place since the 1990s constitutional rights revolution. It is shown that the reforms were not deep enough to exorcise the ghost of the one-party system and as a result, it is increasingly returning in the form of a dominant party system which has the same authoritarian propensities as the one-party system. Section four suggests a constitutional framework for entrenching the rights of political parties in a manner that should reduce the risk for partisan manipulation of the political processes and enhance the prospects for democracy and constitutionalism to take root and function efficiently. All constitutional democracies face the risk that those in power often try to introduce laws that will preserve and keep them in power whilst weakening the opposition. The major contention of this paper is that, whilst this risk can never be entirely eliminated, carefully crafted constitutional rules and principles can limit such risk. In order to appreciate the nature and complexity of the problem, it is necessary to briefly review the historical context and evolution of the tenacious one party phenomenon.

B. INDEPENDENCE CONSTITUTIONS AS A FOUNDATION FOR THE ONE-PARTY SYSTEM

Before the 1990s, the history of political parties in Africa was a chequered one. In some respects, whilst the early roots of one-partyism can be traced to the West, its modern foundation has its basis firmly in the post-independence period. We will briefly review some of the elements of Western constitutionalism that made this possible before discussing how it emerged in Africa.

I. The party system in Western constitutionalism

Historically, because of a normative conceptualisation of democracy in its early days, most of the constitutions of Western liberal democracies neither mentioned political parties nor said anything about their role in governance.[3] This was premised on the then prevailing small-scale attitude towards democracy which saw democracy as mainly involving direct forms of participation by all in the decision-making process. From this perspective, the mobilisation of partisan interests through political parties was seen as a threat to a process that was supposed to be neutral and for the common good of all. It is thus not surprising that the

3 See *Ingrid Van Biezen*, Constitutionalizing Party Democracy: The Constitutive Codification of Political Parties in Post-war Europe, British Journal of Political Science 42 (2012), p. 187.

phenomenon of political parties as conceived today was then perceived to be incompatible with the democratic traditions espoused in the liberal philosophies of influential thinkers like John Locke and Rousseau. Anti-partyism thus had deep roots in Europe where political parties were seen as sectarian, partisan and divisive.[4]

Because of the early attitude towards political parties, it is not surprising that fewer than 10% of the constitutions in force in 1875 mentioned political parties.[5] Even the oldest constitution today, the US Constitution of 1787, does not mention political parties. The framers of the US Constitution did not only fail to anticipate the rise of political parties but were actually hostile to it. James Madison, in defending the US constitutional design from this perspective, decried political parties as the quintessential source of factions.[6]

The constitutionalisation of the rights and role of political parties is essentially a post-Second World War phenomenon. As will shortly be seen, the constitutionalisation process has since then been closely connected to the different waves of constitution-making and democratisation that have taken place. But before examining this, we shall briefly consider how these elements of anti-partyism influenced developments in Africa in the post-independence period.

II. The rise of the one-party system in African constitutional practice

Unlike most regions of the world, Africa does not have a long history of political parties. For most of the colonial period, the issue of parties did not arise. This was inevitable because colonial rule was neither democratic nor constitutional. However, party pluralism emerged in Africa on the eve of independence in the late 1950s and 1960s. Although the first political party on the continent is the True Whig Party that was set up in Liberia in 1860, the first serious parties that were to dominate the political scene until independence started appearing after 1945.[7] These early political parties were essentially liberation movements that had been set up by small groups of African elites as vehicles for demanding reforms of the colonial system, gaining access to and influencing the policies of the colonial governments and ultimately mobilising the population in the struggle for independence. The serious proliferation of political parties took place just before and for a short while after independence.

At independence, almost all African constitutions expressly or implicitly contained a provision which allowed for multipartyism or at least did not expressly or implicitly exclude it. This was often expressly stated in most Francophone African constitutions in provisions which provided in effect that "parties and political formations participate in the

4 See *Nancy L. Rosenblum*, On the Side of the Angels: An Appreciation of Parties and Partisanship, Princeton, NJ 2008, pp. 25-165.

5 See *Zachary Elkins / Tom Ginsburg, / James Melton*, The Endurance of National Constitutions, Cambridge 2009, p. 19.

6 See *Pildes*, note 1, p. 255.

7 See *Shaheen Mozaffar*, Introduction, *Party Politics* 11 (2005), p. 395.

electoral process; they are created and they exercise their activities in conformity with the law; they must respect the principles of democracy, sovereignty and national unity."[8] In Anglophone African constitutions, this was often inferred from the provisions which allowed citizens to assemble freely and associate with other persons to form or belong to trade unions and other associations for the protection of their interests.[9] The assumptions at independence therefore was that the diverse parties that had openly competed against each other in the first independence elections were to continue to operate in the newly independent African countries.

By 1966, the situation all over the continent, especially in Sub-Saharan Africa, had changed dramatically. In many countries, constitutional amendments had institutionalised a one-party system whilst in others, either military regimes had overthrown the constitutional government or a *de facto* one-party system came into existence after state repression had forced opposition parties either to join the ruling party or to go underground.[10] With the exception of Botswana, Mauritius and for a certain period, Gambia, it can be said that by 1990 the one-party system had become the norm. There was an attempt in the mid-1970s by some countries such as Senegal from 1976, Burkina Faso in 1977, and Central African Republic in 1981 to re-introduce some form of multipartyism. With the exception of Senegal, all these attempts were short-lived. Zimbabwe, from independence in 1980 also operated a multiparty system. However, one common feature of all the pre-1990 multiparty regimes was that they were all effectively dominated by one party.

There is a voluminous amount of literature written from the 1960s to justify the introduction of the one-party system in Africa. There is no need to repeat or review these justifications here.[11] Nevertheless, it is interesting to note that some of these arguments are fairly similar to those made against the recognition of political parties in the West before the wave of political party constitutionalisation that emerged there from the 1940s. But be that as it may, the one-party system hardly delivered on any of its main goals, viz. national unity

8 See for example, article 3 of the Cameroon Constitution of 1961 and article 3 of Senegalese Constitution of 1961.

9 In Anglophone Africa, the practise varied. For example, section 25 (1) of the Nigerian Constitution of 1960 implicitly recognised the right to form political parties when it stated the following: "Provided that every person shall be entitled to assemble freely and associate with other persons and in particular he may form or belong

to trade unions and other associations for the protection of his interests." See language to the same effect in section 13(1) of Botswana's Constitution of 1966.

10 Some commentators have suggested that the True Whig Party of Liberia is the founder of the one-party system, which ─ despite the fact that opposition parties were never outlawed ─ completely dominated Liberian politics from 1878 until 1980, when it was overthrown in a military coup led by Samuel Doe. See the following country study on Liberia: GlobalSecurity.org, The True Whig Ascendancy, http://www.globalsecurity.org/military/library/report/1985/liberia_1_truewhigascend.htm (last accessed in October 2014).

11 See for example, *Kiven Tuteng*, Towards a Theory of One-Party Government in Africa, Cahiers d'Etudes Africaines 13 (1973), pp. 649-663; and *Peter Anyang' Nyong'o*, Africa: The Failure of One Party Rule, Journal of Democracy 3 (1992), pp. 90-96.

and integration, political stability and economic development. By the 1990s, this system of governance had not only bred some of the worst dictators and repressive and authoritarian regimes that the continent has ever seen[12] but had led to political instability, severe economic crisis, unemployment, civil wars, famine and other ills from which Africa is yet to recover. There was a need to re-think the whole governance system and this led to what is clearly becoming an epidemic of making, remaking and unmaking of African constitutions in which one of the main goals was to change the nature and role of political parties in the system of governance.

C. THE NEW CONSTITUTIONAL ORDER AND THE CHALLENGES TO GENUINE MULTI-PARTYISM

The constitutionalisation of the role of political parties is a fairly recent development which can be traced back to the post-Second World War period and has been closely connected to the different waves of democratisation[13] and constitution-making that have been taking place. The focus here, however, is on the post-1990 constitutions. The first part of this section will look at the attempts that have been made to constitutionalise the role of political parties since the 1990s and the second part will identify some of the weaknesses that make further reforms imperative.

I. Tentative steps towards constitutionalising the rights of political parties in the 1990s

Although the process of constitutionalisation of political parties has now become a normal aspect of constitution-making in Western democracies, with perhaps the exception of Germany, not many studies on the legal implication of these processes have been carried out.[14] It is therefore no surprise that there is no generally agreed analytical framework for analysing constitutions to see the nature and extent of the way they entrench the rights of political parties.[15] A possible analytical framework for examining and appreciating the level of constitutionalisation of political parties in African constitutions is by using a threefold classification.[16] It is not a rigid classification but nevertheless provides some indication of the extent to which the rights and duties of political parties are recognised and protected in

12 For example, Idi Dada Amin of Uganda, Emperor Jean Bedel Bokassa of Central African Empire (Central African Republic) and Mobutu Sese Seko of Zaire (today DR Congo).

13 See *Samuel P. Huntington*, The Third Wave: Democratization in the Late Twentieth Century, Oklahoma Press 1991.

14 See *Van Biezen*, note 3, p. 188.

15 *Günter Frankenberg*, Comparing Constitutions: Ideas, Ideals, and Ideology – Toward a Layered Narrative, International Journal of Constitutional Law 4 (2006), pp. 439-459, who also has suggested an analytical framework.

16 This was developed in *Charles Manga Fombad*, Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa, American Journal of Comparative Law 55 (2007), p.25.

the constitution. The threefold analytical framework classifies constitutional provisions into first, status provisions, second, ancillary rights provisions and third, political processes provisions. Status provisions look at those provisions which explicitly or implicitly recognise political pluralism. This basically covers those provisions which sanction multipartyism. Ancillary rights provisions deal with provisions which define the scope of the rights and duties imposed on political parties. This involves provisions which recognise opposition parties as an essential aspect of constitutional governance and provide for, amongst other things, a right to fair and equal treatment. On the other hand, political process provisions are those which regulate the different processes that political parties are involved in. This consists of provisions which deal with electoral management boards (EMBs), electoral boundaries commissions (EBCs), electoral codes or legislation and the funding of political parties.

In order to provide a general overview of the political party constitutionalisation processes in African constitutions, the constitutions of 20 countries were selected and studied. Although the focus was on the post-1990 constitutions, with particular emphasis on the most recent constitutions, it was also considered important to look at one of the oldest African constitutions in force today, the 1966 Constitution of Botswana. The constitutions examined included those from Anglophone, Francophone, Lusophone and Arabophone African countries.[17] A number of general observations can be made with respect to the nature and scope of political rights recognised in these constitutions.

The first point deals with status provisions. Botswana, one of the few countries that is still governed under an independence constitution, like most Anglophone constitutions of the immediate post-colonial era, recognises political pluralism in an indirect manner in section 3(b) which recognises the freedom of assembly and association. Unlike the constitutions of Cameroon, Ethiopia and Senegal which are equally brief and hardly go beyond allowing for the existence of other parties, the Botswana Constitution also provides for a Delimitation Commission as well as an Independent Electoral Commission.[18] By way of contrast, the constitutions with the most elaborate provisions regulating political parties are Burundi (27 provisions), Angola (16 provisions), Kenya (14 provisions), Uganda (9 provisions) and Morocco (8 provisions). It would seem from the 20 constitutions examined that the most recent constitutions tend not only to be longer but have more provisions covering political parties. However, it would also appear that the provisions on political parties in Francophone African constitutions tend to be shorter and often barely go beyond recognising political pluralism. In other words, most of them mainly contain status provisions that allow for the existence of several parties. Two points are worth noting here. One is that the

17 The countries examined (with the year of their respective constitutions indicated in brackets) are: Angola (2010), Botswana (1966), Burundi (2005), Cameroon (1996), Congo DR(2005), Ethiopia (1995), Gabon (1991), Ghana (1992), Kenya (2010), Nigeria (1999), Mauritius (1968), Morocco (2012), Namibia (1990), Senegal (2001), South Africa (1996), Swaziland (2005), Tanzania (2014 draft), Tunisia (2014), Uganda (1995) and Zimbabwe (2013).

18 See sections 64 and 65A of the Botswana Constitution of 1966.

hard-won right to political pluralism – hard-won because thousands of people lost their lives in the early 1990s during violent and often bloody street campaigns for a return to multipartyism – is not available to all Africans. The Kingdom of Swaziland remains a unique exception. The 2005 Constitution implicitly prohibits multipartyism in favour of a so-called "democratic, participatory, *tinkhundla* based system which emphasises devolution of state power from central government to *tinkhundla* areas and individual merit as a basis for election or appointment to public office."[19] The other point is that whilst multipartyism is prohibited in Swaziland, the one-party system is expressly prohibited in a number of the constitutions examined in this study.[20]

Most constitution-builders and those who agitated for the return to multipartyism in the 1990s seemed to have been content with provisions which allowed for the existence of opposition parties. Little thought was given to recognising and protecting the rights of political parties or ensuring that the rules regulating the political processes were shielded from political manipulation. Insofar as the provisions regulating the political rights of political parties are concerned, very few of the 20 constitutions deal with this. A number of these constitutions contain provisions which lay down the basic principles that will guide the setting up and functioning of political parties or subject this to future legislation. What is however significant is the introduction in some constitutions, of provisions that purport to define the rights and duties of political parties in a manner which clearly indicates that they are no longer simply private associations subject to the ordinary private law but quasi-public institutions. Thus provisions on political rights generally and the political rights of opposition parties appear in the constitutions of Angola (article 17), Burundi (article 173), Ghana (article 25), Kenya (article 38), Mauritius (section 73), Morocco (article 10), South Africa (section 19), Tunisia (article 60) and Zimbabwe (section 67). Particularly significant in some of these constitutions are provisions which provide for equality treatment of all political parties either generally or with respect to certain matters, such as access to the public service media. This comes through very strongly in the constitutions of Angola (articles 17(4) and 45), Gabon (article 95), Ghana (article 55(11) and South Africa (section 197).

If political parties are to play an effective role then the constitution needs to lay down the framework that will ensure that the political process is free and fair. The key elements of this process are the rules governing the constitution and operation of the EMB and EBC, the content of the electoral code or electoral legislation in general and the funding of political parties. Again, it will be noted that some constitutions, such as those of Cameroon, Congo DR, Ethiopia, Gabon, Senegal and Swaziland hardly have any provisions dealing with these matters or address them in a very superficial manner. Other constitutions mention these in diverse ways with different degrees of effectiveness. Many of the other constitu-

19 See section 79 and more generally, sections 80-90 of the Swaziland Constitution of 2005.

20 See, for example, article 7 of the Constitution of Congo DR of 2005, article 7 of the Constitution of Morocco of 2012; and in the case of Uganda see article 75 of the Constitution of 1995 prohibiting the enactment by Parliament of a law instituting a one party state.

tions provide for EMBs and EBCs.[21] Although described as independent, the way in which these provisions are couched has often made it easy for the incumbent government to control and manipulate these bodies in a manner prejudicial to opposition parties. The only exception to this is the South African Constitution, where the relevant provisions, as we will see below, have been carefully and thoughtfully crafted to considerably limit the scope for executive interference.[22] It is the unbridled right which ruling parties usually have to tailor electoral legislation in a manner that will favour them that has made alternation of power increasingly rare in Africa. Whilst all the constitutions make provision for future legislation to lay out detailed rules to regulate the different aspects of the electoral process, three different approaches have been adopted. The first one, adopted in the Francophone constitutions and the Constitution of Ethiopia, goes no further than leave all details to subsequent legislation. A second approach is where there is some indication of some of the factors that will guide the enactment of such legislation. For example, article 92(1) of the Kenyan Constitution in stating that Parliament shall enact legislation for the allocation of airtime on state-owned and other broadcast media, specifies that this must be "reasonable and equitable." It lays down in article 81 the general principles for the electoral system but these principles do not go far enough to check against opportunistic legislation introduced to favour the ruling party. The third approach is that found in section 155 of the Constitution of Zimbabwe which lays down a number of fundamental principles which are supposed to guide Parliament in enacting electoral laws and any other legislation regulating the electoral process. For instance, a law that is biased against the opposition parties can be challenged on the grounds that it violates the principle in section 155(1)(d), which requires Parliament to ensure that it does not enact legislation which can provoke "violence and other electoral malpractices." Besides the EMBs and EBCs, the availability of public funding is crucial because of the widespread poverty caused by decades of mismanagement of state resources, corruption and the continuous financial crisis. Some constitutions, for example Burundi (article 84), Congo DR (article 6), Nigeria (section 228(c), South Africa (section 236) and Zimbabwe (section 67(4), expressly or implicitly provide for state funding of political parties. There are others which ban foreign funding of political parties.[23]

Two things need to be made clear by way of conclusion of this section. First, the absence of a constitutional provision providing for public funding of political parties does not necessarily mean that political parties do not get any financial support from the state. It merely means that this is not a constitutionally entrenched right and therefore if it is regulated by ordinary legislation, then it is a matter that is vulnerable to the whimsies and

21 See, for example, articles 89-91 of the Burundi Constitution of 2005, section 65A of the Botswana Constitution of 1961, article 88 of the Kenyan Constitution of 2010, article 104 of the Constitution of Namibia of 1990 and section 153 (f) and Third Schedule, Part I F (14) of the Constitution of Nigeria of 1999.

22 See sections 181, 190 and 191of the South African Constitution of 1996.

23 See, for example, article 17(2)(h) of the Constitution of Angola of 2010, article 82 of the Constitution of Burundi of 2005 and section 235(3) of the Constitution of Nigeria of 1999.

caprices of the incumbent regime. Second, this overview has done no more than provide an indication of how political parties are now regulated in contemporary African constitutions. We shall now see whether this has now made multipartyism a reality and eradicated the one-party system which in many respects contributed to the economic, social and political crisis that has afflicted the continent since independence.

II. Nature and consequences of the weak legal framework for genuine multipartyism

Since 1990, the regular holding of multiparty elections has become the norm in almost all African countries with perhaps the exception of Swaziland, which is still trapped in an archaic and repressive absolute monarchy. The willingness to hold multiparty elections is therefore no longer an issue; the real issue is the extent to which these elections fully reflect the concretisation of the right to political freedom and allow citizens freedom to choose their own leaders.

It is the major contention of this paper that whilst multipartyism has certainly taken root in Africa, the legal framework, institutions, structures and other important conditions that make the outcome of multiparty elections acceptable and meaningful remain elusive. For example, a recent study has shown that at least 25% of the elections that took place in Africa between 2000 and 2012 ended in violence.[24] Although there has recently been nothing like the scale of the violence, loss of life and destruction of property that took place after elections in Kenya and Zimbabwe in 2008 and Côte d'Ivoire in 2010, the potential for violence remains great. In the last few years, the spectre of military coups has returned with two presidential election campaigns being interrupted by military coups in Mali and Guinea Bissau in 2012. Other military coups have taken place in Egypt, Mauritania and Niger. Elections in Africa, far from providing a basis for consolidating democracy, respect for the rule of law and constitutionalism, have become the trigger in many instances of violence, tensions and divisions and often compromise the hard-won political rights. Before considering in the next section what constitutional measures are necessary to make political rights more effective, it is necessary here to highlight some of the main problems that the present weak legal framework has provoked. These include the transformation of elections into an exercise in participation rather than competition, the rise of dominant parties similar to the single parties of yesteryears and a number of other such as the non-protection of opposition parties and lack of internal democracy within parties.

1. The transformation of elections into an exercise of participation rather than competition

The regular holding of multiparty elections in Africa since the 1990s has been the main manifestation of the recognition of individual political rights, especially the right to form or

24 See *African Economic Outlook*, Elections in Africa, http://www.africaneconomicoutlook.org/en/outlook/governance/elections-in-africa/ (last accessed in October 2014).

join a party of one's choice. However, these so-called multiparty elections have turned out to be the main instance when political rights have been regularly abused. Apart from the early founding elections or transition elections from 1989 to about 1996 when a good number of incumbents lost, the prospects of opposition candidates or parties winning elections have progressively diminished.[25]Reports on African elections are usually replete with accounts of electoral manipulation, fraud and numerous other irregularities. As incumbents have constantly developed more sophisticated means to rig elections and perpetuate themselves or their parties in power, multipartyism has been transformed into a process where the opposition parties and their candidates are given an opportunity to participate in a process with a predictable outcome rather than compete in a process with an uncertain outcome.

An indication of the state of electoral democracy on the continent can be gleaned from Freedom House´s latest Freedom in the World 2013 report, based on a survey carried out in 2012. According to this, of the 54 African countries surveyed,[26] 21 (39%) countries are classified as "not free," 22 (41%) as "partly free" and only 11 (20%) classified as "free."[27] Staffan Lindberg, using the Freedom House surveys for 2003 and earlier periods in his "analysis of more than two hundred third-wave elections in Africa," argues that the "uninterrupted series of competitive elections imbues society with certain democratic qualities." He concludes that "repeated elections – regardless of their relative freeness or fairness – appear to have a positive impact on human freedom and democratic values."[28] He ends his surprisingly optimistic analysis by stating that "many of Africa's democratic transitions have stretched across decades, with repeated *free and fair* elections playing a key role."[29] Although there is no study which can prove empirically whether or not the majority of post-1990 elections that have taken place in Africa can be termed "free and fair," the Freedom House 2013 survey results can help give some indication of this. The report identifies the number of African countries that could be termed "electoral democracies". From the list of electoral democracies it excludes countries in which their last elections were not sufficiently free or fair or changes in the law significantly eroded the public's opportunity for electoral choice.[30] On this basis, it concludes that 33 (61%) of African countries are not electoral democracies. This includes all the countries in the "not free" category and some

25 See generally *Andreas Schedler*, The Menu of Manipulation, Journal of Democracy 13 (2002), pp. 36 and *Bratton / Van De Walle*, note 2.

26 This includes South Sudan and Western Sahara, although the latter is categorised in the report under "disputed territories." See generally *Freedom House*, Freedom in the World 2013: Democratic Breakthroughs in the Balance, http://www.freedomhouse.org/report/freedom-world/freedom-world-2013#.UzPfgM5Mfcc (last accessed in May 2014).

27 For an explanation of the methodology scoring, see *Freedom House*, note 26, p. 32.

28 *Staffan I. Lindberg*, The Surprising Significance of African Elections, Journal of Democracy 17 (2006), p. 139.

29 *Lindberg.* note 28, p. 149 (emphasis added).

30 See *Freedom House*, note 26, p. 29.

which are in the "partly free" category. Even with the caveat that Staffan Lindberg's conclusions were based on 2003 surveys, there is no basis for the assertion that repeated elections, regardless of their "relative freeness or fairness" can enhance democratic values in any polity. The weak legal framework has not only made effective multi-party competition an illusion but also opened the way for one party dominant systems to emerge.

2. The rise of dominant party systems

One of the critical aspects of genuine pluralism is not only competition but also the possibility of alternation of power. It is a possibility that, as pointed out above, has receded progressively with each election in Africa. In a comparative study of legislatures across the major regions of the world, Daniel Young in a 2004 study shows that the winning parties in Africa not only control a much greater share of the legislative seats than do winning parties in either Latin America or Eastern Europe by approximately 25 % seats but more importantly, they almost always command a majority, quite often exceeding 2/3 of the lower house.[31] Van De Walle has also shown that most of the "parties that won founding elections are almost invariably still in power."[32] But what is increasingly worrying for the future is the fact that on those rare occasions when a new opposition party makes a breakthrough, it starts another endless cycle of winning. The dominant party system has now emerged as a new form of one party rule with the only difference being that it professes to have democratic credentials.

There is no intention to go into the extensive literature on dominant parties in Africa.[33] Varied criteria have been used by different authors to identify the complex and diverse forms in which the phenomenon of dominant party manifests itself in Africa.[34] For the purposes of this discussion, the idea of dominant party is limited to those situations where a party has won at least two or more consecutive elections.[35] Because of the defective regulatory framework, it has often been easy for ruling parties to exploit to the fullest the benefits of incumbency and use diverse tactics such as electoral laws that favour them, electoral fraud, repression and intimidation of opposition party leaders and their members and limited access to the press to prevent any meaningful competition.

31 In *Daniel Young*, Party Dominance in Africa's Multiparty Elections, www.sscnet.ucla.edu/polisci/wgape/papers/6_Young.doc (last accessed in October 2014).

32 In *Nicolas van de Walle*, Presidentialism and Clientelism in Africa's Emerging Party Systems, Journal of Modern African Studies 41 (2003), p.1.

33 For details of this see *Nicola de Jager / Pierre du Toit*, Friend or Foe? Dominant Party Systems in Southern Africa: Insights from the Developing World, Tokyo 2013, p. 5; also *Raymond Suttner*, Party Dominance 'Theory': Of What Value, Politikon 33 (2006), pp. 277-297.

34 *Jager / du Toit*, note 33, p. 5.

35 For a deeper discussion on this, see *Giovanni Carbone*, Political Parties and Party Systems in Africa: Themes and Research Perspectives, *World Political Science Review* 3 (2007), pp.1-29.

A review of the political party configurations on the continent suggests that as many as 29 (54%) of the countries on the continent are ruled by dominant parties. This in many respects confirms Freedom House's analysis based on its 2012 survey which suggests that 61% of the countries are not electoral democracies. Another remarkable indication of the failure of the legal framework to promote alternation of power is the high level of leadership incumbency. At present 14 (26%) of African leaders have served for more than 10 years with more than 86% of this number having served for more than 20 years.[36]With presidents like this, many of whom have repealed the two term limits in their constitutions in order to hang on to power, it is not surprising that the dominant party phenomenon is slowly taking root today much as the single party system did in the early 1960s.

3. Other abuses resulting from the weak regulatory framework

In most political systems, the incumbent has some inherent advantages. However, the regular and extensive abuse of incumbency in Africa, largely due to the permissive nature of the laws regulating political activities has made fair play enormously difficult.[37] One of the problems that have generally been associated with dominant party systems is that of unequal access to resources that gives these parties an unfair advantage over all other parties.[38] In fact, the continuous ability of ruling parties to use their dominance to capture the whole apparatus of the state with unlimited access to state resources and often monopolisation of the official public media and often denying the same to opposition parties makes the playing field very uneven.[39] It is often during elections that most African governments bla-

36 The longest serving rulers on the continent and their length of stay in office are: Teodoro Obiang Nguema Mbasogo of Equatorial Guinea (35 years), Jose Eduardo dos Santos of Angola (35 years), Robert Mugabe of Zimbabwe (34 years), Paul Biya of Cameroon (32 years), King Mswati III of Swaziland (28 years), Yoweri Museveni of Uganda (28 years), Blaise Campoare of Burkina Faso (27 years), Omar Hassan al-Bashir of Sudan (25 years), Denise Sassou Nguesso of Congo Rep. (22 years), Idriss Déby of Chad (22 years) Isaias Afwerki of Eritrea (21 years), Yahya Jammeh of Gambia (20 years),Paul Kagame of Rwanda (14 years) and Joseph Kabila of Congo DR (13 years).

37 See, for example, *Jaja Nwanegbo / Ikenna Alumona*, Incumbency Factor and Democratic Consolidation in Nigeria's Fourth Republic, Social Science 6 (2011), pp. 125-130; *Jibrin Ibrahim*, Nigeria: Opposition Politics Versus the Abuse of Incumbency, http://allafrica.com/stories/201301211105.html (last accessed in October 2014); and *Sulaiman B. Kura*, African Ruling Political Parties and the Making of 'Authoritarian' Democracies: Extending the Frontiers of Social Justice in Nigeria, http://mercury.ethz.ch/serviceengine/Files/ISN/98431/ichaptersection_singledocument/6695e5dc-9f60-47e3-9f54-910ccdb631bc/en/Chapter4.pdf (last accessed in October 2014).

38 See, *Steven Levitsky / Lucan A. Way,* Why Democracy Needs a Level Playing Field, *Journal of Democracy 21* (2002), p. 57.

39 See *Seid Hassan / Berhanu Mengistu*, State Capture in Sub-Saharan Africa, with Special Emphasis on Ethiopia: A Comparative Approach, SSRN: http://ssrn.com/abstract=2221446 (last accessed in October 2014).

tantly use state resources, such as government vehicles and the state broadcaster for partisan purposes.[40]

Another effect of political party dominance and of the capturing of state apparatus that has serious implications for free and fair political competition is the control over the security services and the use of the secret information which the state regularly gathers. Apart from the South African Constitution,[41] the issue of privacy and national security has surprisingly escaped the attention of modern African constitutional designers. Since the September 11, 2001 attacks in the US, national security and the war against terrorism has become an overriding concern not only of Western countries but also of African countries acting under pressure from the West. As a result, most African countries have, with financial support from Western governments, especially the United States, increased the powers and widened the role of the police and security services in information gathering. However, it is the abusive use of intelligence information to unfairly skew the political playing field that has become a cause of concern. In fact, the use of intelligence information in fighting political battles had already surfaced in South Africa in 2009.[42] Many African governments, under the pretext of fighting crime and terrorism routinely access citizens' private SMS, phone and email conversations, often illegally. The activities of opposition parties, especially phone calls and email messages of opposition leaders are regularly monitored by security personnel close to the ruling party. Even in South Africa, where the Constitution has tried to regulate the use of surveillance systems to gather information, there have been abuses.[43] The ability of ruling parties in Africa to easily monitor telephone calls, email messages and even to collect and retain metadata on their opponents makes it easy for the former to neutralise the latter and perpetuate their dominance.[44]

For multipartyism to work, politicians must not only accept the fact that their opponents will always be there and are an essential part of the game but they must respect them as adversaries not enemies. In spite of the legalisation of political opposition, multipartyism is

40 For recent examples see *N.N.*, Frelimo Turns the Screws, Africa Confidential, 24 September 2014, which discusses how the *Frente de Libertacao de Mocambique*, Frelimo, extensively used state property and resources as well as civil servants in the run-up to the presidential and parliamentary elections of 15 October 2014.

41 See section 197(7) of the South African Constitution of 1996.

42 See *Heidi Swart*, Secret State: How the Government Spies on you, http://mg.co.za/article/2011-10-14-secret-state/ (last accessed in October 2014). Based on the leaking of recordings of information collected by the head of the National Intelligence Agency to Jacob Zuma's lawyers, suggesting political interference, over 700 corruption charges against Zuma were dropped by the National Prosecution Authority and this cleared the way for him to become president.

43 See *Jan-Jan Joubert*, Illegal Conduct, Abuse by Secret Service Exposed, Sunday Times, March 9, 2014, p.2.

44 See *N.N.*, Uganda: Putting US Aid to other Uses, Africa Confidential, 22 September 2014, which discusses how US military aid and training in surveillance techniques offered to President Museveni of Uganda to enable him fight the terrorist group, Al Shabaab, is now being used eavesdrop and keep track of the conversations and plans of opposition parties.

struggling to operate with politicians still imbued with the one party mentality which consider anybody opposed to the party as an enemy. This is so, not only in countries that are still firmly in the grip of old fashion dictators masquerading as democrats but also countries with fairly impressive democratic credentials.

For example, in Cameroon, Paul Biya after 20 years of "democracy" barely tolerates the opposition parties who have resisted the temptation to join in sharing the spoils of power. He has regularly referred to the leader of the main opposition party, John Fru Ndi, whose name he could hardly bring himself to call in public, as a "thug", "outlaw", "hooligan," "unpatriotic", "self-seeking political opportunist" and "merchant of illusion," who has nothing to offer to the Cameroonians.[45] Besides using language that shows contempt for the opposition, some ruling parties not only try to scare voters away from the opposition parties but use strong language which suggests that their victory is a foregone conclusion. After 20 years of democracy, President Zuma's ANC is struggling to accept the fact that opposition parties have a place in the new democracy. On numerous occasions, President Zuma has declared that the ANC will rule South Africa "forever" or "until Jesus Christ returns". And recently, he warned disgruntled ANC members against leaving the party saying: "The ancestors will turn their backs against you and you will have bad luck forever…"[46] In a country where superstition is still very rife, this sort of scare tactic works in many traditional communities. Some other leaders, such as Jerry Rawlings in Ghana, Moi in Kenya, Banda in Malawi and Kaunda in Zambia used warnings of post-elections violence to induce voters into casting stability votes.[47] Multi-partyism can hardly grow and flourish in an environment which is hostile to any form of political opposition. The post-1990 legal framework inadvertently allowed those with a lust for unbridled power to capture the political process and use it in both legal and illegal ways to neutralise their actual and potential opponents.

The emergence of the dominant party system was also facilitated by the absence of rules which promoted internal democracy and hence accountability within political parties. This has made it easy for party leaders and their allies to build strong party machines controlled by them, which use the party to promote and protect their selfish interests. An excellent example of this is the list system which could easily be transformed into an instrument for the subversion of democracy because it leaves unbridled powers in the hands of party bosses who can use it to reward sycophancy rather than performance, competence and talent. For instance, the 2014 national parliamentary list for the ANC has been described as "something of a rogue's gallery," because it "ha[d] high on the list a number of individuals who have been investigated and found guilty of fraud and corruption".[48]

45 See *Charles Manga Fombad / Jonie B. Fonyam*, The Social Democratic Front, the Opposition, and Political Transition in Cameroon, in: John Mukum Mbaku / Joseph Takougang (eds.), The Leadership Challenge in Africa. Cameroon under Paul Biya, Trenton NJ (2004), p. 473.

46 See *Asanda Nini*, Zuma Stirs up Ghosts at ANC Poll-rouser, The Times, January 27, 2014, p. 2.

47 See *Young*, note 31, p.13.

48 See *Barney Mthombothi*, Party-list iniquity the unfinished business of our democracy, Sunday Times, March 16, 2014, p.21.

A number of constitutions examined in this study expressly provide that the organisation and functioning of political parties should be in accordance with democratic principles.[49] Some actually go further to provide that their internal organisation must conform to democratic principles.[50] Although most constitutions provide that candidates with criminal records do not qualify for election to political positions, this is often not enough to prevent people with dubious characters from assuming office.

From these examples, it is clear that although there has since 1990 been some progress in improving the ability of political parties to exercise their rights freely and effectively, this has not gone far enough to check against many of the abuses that facilitated the demise of multipartyism in the 1960s and the advent of the one-party system. It is now necessary to see how the legal framework can be strengthened to facilitate the establishment of the genuine multiparty systems that are crucial to sustaining Africa's fledgling democratic transition. In this respect, I strongly disagree with the view of some Western scholars that more elections alone without further constitutional reforms will enhance the chances of democracy and good governance in an incremental manner.[51]

D. ELEMENTS OF A FRAMEWORK FOR CONSTITUTIONALISING THE RIGHTS OF POLITICAL PARTIES

From the preceding discussion, it is clear that the political playing field in Africa needs to be levelled in order for multipartyism to be meaningful and effective. Political freedoms and multipartyism entail providing an open market place where different ideas on how to govern the state are freely ventilated and compete for acceptance by the electorate. Constitutionalising the rights of political parties, as has been done in many advanced democracies since the 1940s, is potentially the most effective means to ensure that all political parties are able to compete on equal terms.

As we have seen, almost all African countries now recognise the political rights of their citizens. This however, is limited to and has not often gone beyond the right to vote or be voted for political office and the right to join or form parties and participate in the electoral process. Very few have actually gone further to ensure that there is free and fair competition between the different political parties. Although some effort has been made in some recent constitutions to expand the political rights of political parties, the frequent allegations of electoral irregularities that follow almost all recent elections in Africa clearly suggests that there is still no free and fair competition. The purpose of this section is to suggest

49 See article 17(2)(f) of the Constitution of Angola of 2010; and article 78 of the Constitution of Burundi of 2005.

50 See article 55(5) of the Constitution of Ghana of 1992 and article 71(1)(c) of the Constitution of Uganda of 1995. Also see section 223 of the Constitution of Nigeria of 1999 which goes even further to provide that the constitution and rule of political parties must provide for periodical elections on a democratic basis of the principal officers of a party at intervals not exceeding four years.

51 See generally *Lindberg*, note 28, p. 149.

some of the key principles which must be constitutionalised to promote free, fair, and genuine competition between the different political parties. References will be made to some of the present African Constitutions which contain some aspects of these principles and where possible, case law, especially from some of the advanced countries where the rights of political parties have been constitutionalised. These key principles deal with the following main issues: the right to vote, the right to fair competition and equality of treatment, the right to financial assistance, the rights of opposition parties, the establishment of EMBs and EBCs, the duty to practise internal democracy, the sanctions for electoral fraud and the right to administrative justice.

Three important preliminary points must be made before examining each of these elements. First, there is an assumption here that other equally important rights which are essential to the full enjoyment of political rights, such as freedom of expression, freedom of association, right to privacy and the right to own property are recognised and protected. Second, there is also an assumption that the judiciary is independent and can operate without undue interference from the other branches of government. It is an assumption that should not be easily or hastily made. For example, the provisions on political rights in the Cameroonian Constitution of 1996 are quite sketchy but this doesn't matter much because ordinary courts have no jurisdiction to deal with disputes concerning the interpretation or application of its provisions. On the other hand, although the Angolan Constitution of 2010 has extensive provisions regulating political rights and is thus fairly promising. However, the effectiveness of these provisions are called into question by the considerable scope it allows for partisan manipulation.[52] Finally, although the suggested principles ─ if constitutionally entrenched and enforced ─ will certainly make a difference, this will depend on political will. Of the 20 countries examined in this study, Burundi has the most elaborate and possibly comprehensive provisions regulating political rights and the rights of opposition party. However, these constitutional provisions are regularly violated and opposition leaders harassed and the rigging of elections have often led the opposition to boycott elections.[53] The key elements discussed below are therefore subject to these caveats.

The right to vote, as presently provided for under most African constitutions, is meaningless without constitutional safeguards being provided to ensure that the vote actually counts. This will only be so if all the votes are equal. For an electoral system based on "first past the post," this might not necessarily be so unless the courts have the powers to check against "gerrymandering."[54] By contrast, a system of proportional representation, in princi-

52 For example article 180(2)(b) limits the role of the Constitutional Court to "prior review of constitutionality of laws of parliament." Paragraph c of this provision, which provides that the Constitutional Court shall also exercise jurisdiction in other "legal and constitutional, electoral and party political matters, under the terms of the Constitution and the Law," does not help because this effectively relegates such matters to ordinary laws and the dictates of the majority party.

53 See *N.N.*, Burundi: Nkurunziza Nobbles Opposition, Africa Confidential, 21 February 2014, p. 10.

54 Gerrymandering is the delimiting of constituency boundaries in such a way that it dilutes and disperses thinly the support for a particular political party, cultural or ethnic group.

ple, comes closest to ensuring an equality of votes. The most comprehensive constitutional provisions regulating the right to free, fair and regular elections appear in articles 53(2) of the Constitution of Angola, article 38(1) of the Constitution of Kenya and article 67 of the Zimbabwe Constitution. In the case of the Zimbabwean Constitution, the scope covers the right to make political choices freely, to form, join and participate in political activities, to campaign freely and peacefully and to participate individually or in groups to support, challenge or influence a political cause. A source of frequent disputes arises from the grounds used for excluding some citizens from exercising their right to vote. There seems to be general agreement that mentally disabled persons and mental health detainees should be excluded from voting. However, it is important to ensure that provisions dealing with these are not too broad and must only apply to those who a medically certified to be suffering from a mental condition that prevents them from fully exercising their right to vote in an informed manner. There are two other categories of persons who are still excluded in some countries. First, there are citizens living abroad. There are no legitimate reasons for denying citizens living abroad the right to vote, especially where their home country benefits substantially from the remittances made by these citizens to their dependents living at home. As the South African Constitutional Court pointed out in *Richter v Minister of Home Affairs*,[55] in the globalised world of today, the desire of a citizen living abroad to participate in an election is an expression of patriotism and strong commitment to the country as well as a strong sense of civic-mindedness, which can do no more than strengthen democracy. Equally problematic in some countries has been the question of prisoners voting. In the South African case of *August v Electoral Commission*[56], the Commission's disenfranchisement of prisoners was challenged. The Constitutional Court held that in the absence of legislation to the contrary, the Commission had no right to indirectly disenfranchise prisoners by failing to take reasonable steps to enable eligible prisoners to register and vote.[57] And subsequently, when the South African Parliament amended the Electoral Laws to effectively disenfranchise certain categories of prisoners[58] from registering as voters and voting while in prison, the constitutionality of this law was challenged in *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO)*.[59] The Constitutional Court rejected the two justifications that the state put forward: first, a cost argument suggesting that logistics and special arrangements for voting were too expen-

55 2009 (3) SA 615 (CC).

56 1999 (3) SA 1 (CC) 17.

57 A similar conclusion was arrived at by the Kenyan Courts in *Kituo Cha Sheria v Independent Electoral and Boundaries Commission & Attorney-General* Petition 754 of 2012, High Court, Nairobi (Unreported) where the Court, in language similar to that in *Richter*'s case, held that the state's duty to realise prisoners' right to vote was not a passive but an active duty imposed by the Constitution.

58 The law only excluded the category of prisoners serving sentences of imprisonment without the option of a fine.

59 2005 (3) SA 280 (CC) 32.

sive and second, a policy argument that it was a way of government signalling its disapproval of crime. Citing with approval the approach taken in a Canadian case,[60] the Constitutional Court held that there was no justification for a blanket ban like this, which will affect not only prisoners imprisoned for grave or relatively minor offences but also those whose convictions and sentences were under appeal. The right to vote should therefore be broadly defined to be as inclusive as possible and leave no loopholes for restrictions. However, it must be linked to the other rights under discussion.

A second important element in the entrenchment of political rights is the recognition of the principle of fair competition and equality of treatment. Without constitutional provisions that ensure that there is fair competition and equality of treatment of all the parties, the right to vote will be nothing but an illusion. Most electoral disputes in Africa have been caused by the absence of laws which promote fair play and equality of treatment of the parties. Many of the constitutions that were examined in this study in one form or another mention the need for fair play and equality with respect to access to the media, particularly the state media,[61] and some, with respect to regulations dealing with the right to vote and electoral processes.[62] The flaw with most of these provisions is that they are not couched in the form of binding and enforceable obligations. It is necessary to entrench a constitutional principle which states as a general rule that all legislation regulating any aspect of elections would be invalidated by the courts where it fails to promote equal treatment and fair competition between the parties. A possible formulation of such a clause ─ which will also cover some of the further elements to be discussed below ─ will be indicated at the end of this section.

The right to state funding of political parties, whether generally or just for purposes of enabling them to campaign for elections is not, as we have seen, the general norm under all African constitutions. There are a number of good reasons why state funding of political parties is an imperative for meaningful and fair competition. First, the average political activist in Africa today is too pre-occupied with the struggle to put bread on the table to afford contributing the extra funds needed in any meaningful manner to keep a political party competitive. Second, although many constitutions prohibit external funding of political parties, it is a reality that many of them depend on such external funding. These external donors inevitably influence the political agenda of the party. Even in the absence of rich foreign donors, the ruling parties often coerce the business community to make large donations to them against tax concessions, sometimes of an irregular nature. Perhaps the most serious problem is that ruling parties abuse their incumbency by directly and indirectly util-

60 See, *Sauvé v Canada (Attorney General)* 1993 (2) SCR 438. In this case, the Supreme Court of Canada rejected the government's argument that such disenfranchisement served the objective of enhancing civic responsibility and respect for the rule of law.

61 See for example, articles 17(4) and 45 of the Angola Constitution of 2010; article 55(11) and 912) of the Constitution of Ghana of 1992; article 93 of the Constitution of Kenya of 2010 and article 155(2)(d) of the Constitution of Zimbabwe of 2013.

62 See article 92 of the Constitution of Kenya of 2010.

ising state resources to run their campaigns. To limit the potential for political parties not having enough funds to compete on an equal basis or, in the case of ruling parties, exploiting the states' resources for party political ends, it is necessary for constitutional provisions to provide for state funding of political parties. Because of the risks of external interference that accompanies foreign donations to political parties, this source of support must be prohibited, whilst state funding of political parties must be backed by strict rules requiring accountability and auditing of their accounts.[63] The manner in which state funds will be distributed between political parties is probably one of the most difficult issues to regulate.[64] Nevertheless, the governing principle must be that any distribution should be fair and equitable and place no party at an advantage or disadvantage vis-à-vis the others.

The issue of state funding is closely linked to that of the status of political parties and some of the obligations that inhere from their increasingly constitutionalised status as special quasi-state institutions. Although political parties are essentially private associations freely created by their respective members to pursue a political goal, the potentially wide-ranging reach of their activities and the fact that the very raison d'être of their creation is to capture political power and run the country means that they cannot simply be treated like any ordinary association. In short, political parties should no longer be allowed to do their own thing. Most African countries are in crisis today because incompetent and corrupt leaders were hand-picked and imposed undemocratically either by their predecessors or by party bosses.[65] An important concomitant to investing state money in supporting political parties is to ensure that there is internal democracy as an important aspect of accountability. A number of constitutions already contain detailed provisions providing for internal democracy within all political parties.[66] These provisions need to be reinforced in two ways. First, by barring from taking control of political parties individuals who face criminal charges and who could subsequently use their political positions to avoid the wheels of justice taking their normal course. Second, by extending in clear terms the scope of provisions providing for administrative justice to enable them cover the activities of political parties.[67] This is in spite of the fact that Lisa Thornton has argued with respect to the right to administrative

63 See for example, article 55 (14) of the Constitution of Ghana of 1992.

64 For examples of different approaches, see *Augustine Magolowondo / Elin Falguera / Zefanias Matsimbe*, Regulating Political Party Financing. Some Insights from the Praxis, http://www.nimd.org/wp-content/uploads/2013/04/Regulating-political-party-financing-Some-insights-from-the-praxis.pdf (last accessed in October 2014).

65 A few examples of the numerous instances of these will suffice. Malawi, former president Bakili Muluzi single-handedly picked Bingu wa Mtharika as his successor. So did Frederick Chiluba pick Mwanawasa in Zambia and Olosugun Obasanjo in Nigeria pick Umaru Yar'Adua. After the deaths of their fathers, Omar Bongo of Gabon and Gnassingbé Eyadéma of Togo their sons, Ali Bongo and Fauré Eyadéma were virtually imposed by party bosses in these countries.

66 See, for example, article 17(2) of the 2010 Constitution of Angola and article 91(1) of the 2010 Constitution of Kenya.

67 A number of constitutions provide a right to administrative justice. Perhaps the most elaborate today is contained in section 68 of the Zimbabwe Constitution of 2013.

justice in section 33 of the South African Constitution that "political parties are, to the extent that they exercise a public power or perform a public function in terms of legislation, subject to just administrative action…".[68] Political parties should be free to regulate themselves, provided their regulations and the activities of their officials do not violate the constitutional provisions providing for internal democracy, transparency and accountability and the fundamental rules of administrative justice.[69] Without a duty of internal democracy, it is difficult to see how key democratic values such as representation and participation can be realised.[70]

A fifth element and a very important one as such, is the need to spell out in detail the rights and duties of opposition parties. Although a number of constitutions try to do so, the provisions are either vague or do not go far enough. Article 9 of the Constitution of Morocco and sections 57 and 116 of the Constitution of South Africa provide a reasonable indication of the constitutional recognition and protection that opposition parties need. These include the recognition of the status and role of the leader of the main opposition party and the internal parliamentary rights of opposition rights which should not depend on the whims of the majority party in parliament. These latter rights should include the right to introduce laws, the right to participate in all committees and chair at least half of the parliamentary committees, and the right to participate in certain non-parliamentary committees that are designed to ensure transparency and accountability in governance such as the judicial service commission and the civil service commission. Special provisions need to be included to protect some minority parties which represent marginalised minorities such as the Pygmies in central Africa and the San in southern Africa. The Burundi Constitution goes furthest in recognising and protecting the rights of both opposition and minorities in articles 129 and 164 of its 2005 Constitution, which make it mandatory that all political parties are represented in both government and in the legislature.[71]

An essential element of free and fair elections is the existence of independent and competent EMBs and EBCs. Whilst the primary function of the former is to ensure that elections are organised in such a manner that the competition between the parties is fair and the outcome decided in a free and fair manner, the functions of the latter are basically to demar-

68 *Lisa Thornton* "The Constitutional Right to Just Administrative Action? Are Political Parties Bound?" *South African Journal of Human Rights* 15 (1999), p. 370.

69 In the German *Socialist Reich Party* case 2BverfGE 1(1952) the Constitutional Court, in looking at the requirement that there must be internal democracy within political parties, interpreted this to mean that they must be structured from bottom up, that is, that the members must not be excluded from decision-making processes, and that the basic equality of members as well as freedom to join or leave must be guaranteed.

70 See, *Yigal Mersel*, The Dissolution of Political Parties: The Problem of Internal Democracy, International Journal of Constitutional Law 4 (2006), p. 96.

71 Rather curiously, article 173 of this constitution states that a political party with a member in government cannot consider itself to be part of the opposition! But perhaps the main challenge today is that these reasonable and inclusive provisions are regularly ignored by the country's present leadership. See Burundi: Nkurunziza Nobbles Opposition, note 53.

cate the electoral constituencies in a fair manner. Most constitutions provide for these two bodies but the manner in which they are constituted and operate leaves them vulnerable to capture and manipulation by incumbent parties. Two things are necessary to ensure that these bodies are independent and operate without interference. First, the criteria for the appointment of its members must be clearly spelt out to prevent it being dominated by partisan appointees. Second, the modalities of their operation must be specified to limit the scope of external interference with their operation. The best formulation of principles to check against interference with EMBs and EBCs appears in the establishing and governing principles provided to regulate the state institutions supporting constitutional democracy in the South African Constitution.[72] The importance of these governing principles has been underscored in a number of cases that have come before the South African courts. For example, in *Independent Electoral Commission v Langeberg Municipality*,[73]the Constitutional Court pointed out that as a result of the constitutional guarantees of the independence and impartiality of the Independent Electoral Commission (IEC), parliament had a duty in making legislation regulating its activities to ensure its manifest independence and impartiality and that such legislation was justiciable for conformity to the Constitution. Such review will ensure that the enacted legislation is not designed to favour any particular political party. In *New National Party of South Africa v Government of the Republic of South Africa*, [74] although the Constitutional Court found out that the allegations of government interference with the proper functioning of the IEC had not been proven from the facts stated, the Court nevertheless pointed out that its independence had to be jealously protected by the courts.

Three other important issues which need to be covered by constitutional provisions dealing with political parties will be briefly mentioned. First, there is need for severe sanctions to be provided against political parties as well as individuals guilty of involvement in electoral fraud or any practice designed to unfairly give a party or its members an undue advantage.[75]Second, the conditions for non-registration, suspension or dissolution of political parties or sanctions being taken against their members should be clearly defined and must be based on a court decision or subject to judicial review. Generally, banning or ordering the dissolution of political parties is an extreme measure which must only be allowed in

72 The four principles contained in sections 181(2)-(5) state that: i) the institutions are independent and subject only to the Constitution and the law and must act impartially without fear, favour or prejudice; ii) other state organs, must take legislative and other measures to ensure the independence, impartiality, dignity and effectiveness of these institutions; iii) no person or organ of state may interfere with their functioning and iv) that these institutions are accountable only to the National Assembly.

73 2001 (9) BCLR 883 (CC).

74 1999 (3) SA 191.

75 The possibility for this is mentioned in fairly obscure terms in article 63(d) of the Kenyan Constitution of 2010 and article 11 of the Moroccan Constitution of 2012.

exceptional cases.[76] Finally, severe sanctions must be provided for the misuse of government resources or facilities for the benefit of a political party or its candidates. Perhaps one of the greatest threats to political freedoms today is the extensive use of security services by governments to monitor telephone and email communications of their opponents. US President Barack Obama, in the wake of the Snowden controversy admitted that "it is not enough for leaders to say: trust us, we won't abuse the data we collect," especially as he noted, there exist "too many examples when that trust has been breached."[77] So far, only the South African Constitution appears to address this problem. It does this in two ways. First, section 199(7) prohibits the use of the security services in a partisan manner and subsection (8) provides for a multi-party parliamentary commission to provide oversight of all security services. What is missing and needs to be dealt with is a clear provision protecting personal data and other similar information from inappropriate access for political ends.

Ultimately, the constitution can do no more than specify the basic framework of principles and institutions that will enable political rights to be exercised in a free and fair manner. Most of the details will emerge by way of subsidiary legislation such as laws, codes, regulations, directives, orders, rules and guidelines. Whatever forms these subsidiary pieces of legislation may take, it necessary that they should only be considered valid when they satisfy the following minimum standards, viz.;

i) The legislation does not hinder the exercise of political rights in a free and fair manner.
ii) It does not negate the essential content of any of the political rights recognised and protected by the constitution.
iii) The legislation is acceptable as demonstrably justifiable in a free and democratic society.
iv) The legislation protects the interests of all vulnerable minorities in a fair and reasonable manner taking into consideration all circumstances.
v) Any restriction contained in the legislation is justified by the objectives to be attained, and is rationally designed to do no more than is reasonably necessary to meet these objectives.[78]

If flawed electoral laws and EMBs and EBCs vulnerable to partisan control and manipulation can be prevented by reasonably comprehensive constitutional provisions based on the principles suggested above, it is likely that not only the number of post-election conflicts will decrease significantly but also confidence in elections, presently at an all-time low, will return.

76 For example, in the *Socialist Reich Party* Case, note 69, a German Court upheld legislation banning the neo-Nazi party on the grounds that its mission was to overthrow the democratic order in the country.

77 See US President Barack Obama´s speech: Video recording entitled "Obama's Speech on N.S.A Phone Surveillance," http://www.nytimes.com/2014/01/18/us/politics/obamas-speech-on-nsa-phone-surveillance.html?_r=0 (last accessed in October 2014).

78 Also see, *Fombad*, note 16, 42-43.

E. CONCLUDING REMARKS

The increasing moves towards the constitutionalisation of the rights of political parties that started in the 1940s underscore the important role that political parties play in any fully functional modern constitutional democracy. This paper has shown that the attempts to enhance the quality of political rights in Africa after the 1990s through the re-introduction of multipartyism has done nothing more than provide a smokescreen for diverse forms of dominant party governments with similar instincts and tendencies to the one party dictatorships of the immediate post-independence era. It is clear that properly regulated political parties have the potential to act as guiding beacons of stability but left to their own devices they can be, as many have been in the last two decades, a source of violence and political instability.

A framework that facilitates the emergence of unruly dominant parties is just as bad if not worse than one that allows one-party systems to be established. It is worse because scarce resources needed to revive Africa's depressed economies are regularly diverted and squandered in organising sham elections with predictable outcomes; legitimising leaders who have increasingly been as incompetent, repressive and corrupt as the pre-1990 dictators. The main contention of this paper is that African countries need to entrench a number of constitutional principles and institutions which alone are necessary to ensure the basic democratic tenets of freeness, fairness and transparency, which underpin a credible multiparty constitutional democracy.

All democracies face the risk that those in power will always try to introduce laws that will preserve and keep them in power whilst weakening their adversaries. This paper has therefore proposed a framework for constitutionalisation of the rights of political parties based on certain elements that will limit the ability of ruling parties to abuse their incumbency by introducing policies, laws and institutions that will make free and fair electoral competition difficult. The increased constitutionalisation of the rights of political parties in advanced democracies since 1940s and in some of the emerging democracies in Eastern Europe after 1990 shows that this is the way to make multipartyism meaningful and effective. A combination of best practices under the constitutions of some advanced countries, especially Germany, and that of some of the most recent constitutions in Africa, particularly those of Angola, Kenya and South Africa combined with the jurisprudence of some courts interpreting some of these provisions provided the backdrop of some of the reforms suggested in this paper. A constitutional framework built around the elements suggested in the paper will ensure that all laws, regulations, rules, guidelines, policies as well as institutions introduced to enforce political rights will not be vulnerable to partisan manipulation. Nevertheless, it must be emphasised that such reforms contain no magic solution that will solve all ills but remain a critically important first step. There must be a political will to implement the constitution in good faith backed by a competent and independent judiciary that is willing to interpret and apply the law without fear, favour or prejudice. Ultimately, the major benefit of constitutionalising the rights of political parties is that it removes all issues

concerning their rights and duties as well as the electoral process from ordinary politics and the whimsies and caprices of transient majorities.