

Part 1:
Overview and Regional and International Context

Chapter 2 An Overview of Political Party Constitutionalisation under Contemporary African Constitutions

Charles M Fombad

1. Introduction

Recent years in Africa have been marked by a few democratic gains that have been largely neutralised by huge democratic setbacks. During these years, the continent's most autocratic incumbents appear to have been emboldened after getting away with many anti-democratic measures, such as the removal of presidential term limits and the regular rigging of elections. The reintroduction of multipartyism on the continent during the constitutional reforms that began in the 1990s led many to assume that this would bring an end to the dark era of one-party dictatorships and pave the way for an ethos of democracy and constitutionalism to emerge and be sustained.

In this regard, Afrobarometer data from 36 countries surveyed in 2021/2022 shows that two-thirds (66 per cent) of Africans prefer democracy over any other form of government. It also shows that large majorities reject one-man rule (80 per cent), one-party rule (78 per cent), and military rule (67 per cent), but that only 38 per cent express satisfaction with the way in which democracy functions in their countries.¹

There is also strong support by Africans for political parties to compete freely for power.² In fact, in almost all African countries, the rights and duties of political parties have now been constitutionally entrenched, along with certain fundamental principles and institutions designed to ensure that they can compete freely. The overriding objective has been both to

1 See MAA Twum, "Declining Satisfaction Threatens African Democracy, Afrobarometer CEO Reveals", *Afrobarometer*, 18 July 2023, <https://www.afrobarometer.org/articles/declining-satisfaction-threatens-african-democracy-afrobarometer-ceo-reveals/> (accessed April 2024).

2 See Afrobarometer, "PP85: Africans Want More Democracy, But Their Leaders Still Aren't Listening", 19 January 2023, <https://www.afrobarometer.org/publication/pp85-africans-want-more-democracy-but-their-leaders-still-arent-listening/> (accessed April 2024).

empower political parties to compete (or what is referred to as positive constitutionalism) as well as to protect them against partisan manipulative measures (negative constitutionalism).³ As a result of differences in legal traditions, constitutional systems, and political history, the nature, scope, and extent of political-party constitutionalisation varies from country to country.

Today, but for a few aberrations such as Eritrea and Eswatini, multipartyism has become the norm on the continent. The expansion of political space, and the proliferation of political parties that has seen the routinisation of elections, has not, save for a brief interlude in the 1990s, quite led to genuine multipartyism. The ominous signs of authoritarian mobilisation and resurgence, and the growing indications of a global democratic recession in the last five or more years, strongly suggest that the routinisation of multiparty elections has not provided the necessary impetus for democratic governance. This has been particularly the case in Africa, where the promised new dawn of democracy appears to be stalling.⁴

This overview chapter aims mainly to identify the fundamental principles and institutions that have formed the core aspects of political-party constitutionalisation in Africa in the last three decades. It briefly maps out the general trend in the expansion of political space and participation to see how this reflects the present decline in the quality of democracy. The approach adopted is largely theoretical and conceptual; it is the detailed study of how different countries implement them that gives us a practical idea of the impact of these principles.⁵

The discussion continues in section 2 by briefly examining the emergence and evolution of African political parties. Section 3 highlights why the constitutional entrenchment of political parties is an imperative in any country that aspires to establish a genuine multiparty democratic system. This provides the backdrop for an overview of the nature and extent to which African constitutions have entrenched the type of regulatory environment that is conducive to the effective functioning and eventual consolidation of democracy. Section 5 captures the major trends and tendencies in political-party constitutionalisation. In the concluding remarks, it is

3 R Pildes, "Political Parties and Constitutionalism", in T Ginsburg and R Dixon (eds.), *Comparative Constitutional Law*, Cheltenham, Edward Elgar (2011), p 254–264.

4 CM Fombad, "Reversing the Surging Tide Towards Authoritarian Democracy in Africa", in CM Fombad and N Steytler (eds.), *Democracy, Elections, and Constitutionalism in Africa*, Oxford, Oxford University Press (2021), pp 463–517.

5 A matter addressed in the different country case studies in this volume.

noted that the constitutional entrenchment of the basic framework for the functioning of political parties is not an end in itself. The constitutional entrenchment of the framework must be followed by its full implementation.

2. The emergence and evolution of political parties in Africa

It is appropriate to start by saying something about what is meant by “political parties”. This is followed by a brief discussion of how they emerged in Africa and evolved prior to 1990.

2.1 Conceptualisation of political parties

Most definitions of political parties have adopted a functional approach that enables us to generalise about some of the universally accepted functions that parties perform whether they operate in Africa or elsewhere. Whilst this functional approach will be our focus, it is important to note that there is also an alternative conceptualisation of political parties that views them as structures and settings in which political activities take place.⁶

Viewed from the functional perspective, political parties, according to Peter Stearns, “are organised groups working to influence public policies and to place their representatives in positions of public authority”.⁷ He rightly points out that parties are not the only actors that seek to influence public policies in pluralist societies. Others, such as interest groups, political action committees, firms, non-governmental organisations, and civil society organisations also attempt to influence public policies, but only political parties explicitly aim to place their members in public office. As Lowell argues, political parties’ essential function and *raison d’être* is bringing public opinion into focus and framing issues for popular verdict.⁸ They try to consolidate public opinion in advance of an election and use this to

6 See, for example, WR Schonfe, “Political Parties: The Functional Approach and the Structural Alternative”, 15 (1983) *Comparative Politics*, pp 477–499.

7 P Stearns, “Political Parties”, in *The Oxford Encyclopaedia of the Modern World*, Oxford, Oxford University Press (2008), <https://www.oxfordreference.com/display/10.1093/acref/9780195176322.001.0001/acref-9780195176322-e-1259?rskey=3OblyZ&result=3> (accessed 3 March 2024).

8 L Lowell, *Public Opinion and Popular Government*, New York, Longmans, Green and Company (1913), p 70.

capture power. As LaPalombara puts it, a political party is a formal organisation whose self-conscious, primary purpose is to place and maintain in public office persons who will control, alone or in coalition, the machinery of government.⁹

The ACE Project usefully suggests that political parties perform key tasks in a democratic society, such as:

- soliciting and articulating public policy priorities and civic needs and problems as identified by members and supporters;
- socialising and educating voters and citizens in the functioning of the political and electoral system and the generation of general political values;
- balancing opposing demands and converting them into general policies;
- activating and mobilising citizens into participating in political decisions and transforming their opinions into viable policy options;
- channelling public opinion from citizens to government; and
- recruiting and training candidates for public office.¹⁰

Although almost all African constitutions refer directly or indirectly to political parties, few actually define them. One example, which provides a detailed definition of parties, is Article 77 of the Burundi Constitution of 2018, which states:

A political party is defined as an association without a lucrative end and which organizes citizens around a project of democratic society founded on national unity; which has a definite political program of precise objectives; is concerned with serving the general interest; and [seeks] to assure that all citizens thrive.

A number of party types have been discussed in the literature. Stearns, for example, mentions four types, namely, parties grouped according to regime context; parties grouped according to ideology; parties grouped according to voter base; and parties grouped according to whether they are “cadre” or “mass” parties.¹¹ Only the first two of these distinctions are of some relevance in the African context.

9 J LaPalombara, *Politics Within Nations*, Englewood Cliffs, New Jersey, Prentice Hall (1974), p 501.

10 ACE Project, “Roles and Definition of Political Parties”, https://aceproject.org/ace-en/topics/pc/pca/pca01/pca01a/mobile_browsing/onePag (accessed 1 March 2024).

11 See, for example, Stearns, *supra* n. 7.

The first are ideological parties. In the Western context, ideological parties range from the left to the centre and the right, and have different names in the different countries in the West. For example, in the United Kingdom, the ideological party on the right is the Conservative Party; in the centre is the Social Democratic Party, and on the left, the Labour Party. Apart from South Africa, where one can clearly identify the ideology of some of the parties, such as the Democratic Alliance, on the right, the African National Congress (ANC) in the centre, and the Economic Freedom Fighters (EFF) on the left, it is difficult to distinguish the political parties in most African countries based on their political ideology. The second category, dictated by the voter base, which may be ethnic, religious or regional, is more significant. Most African political parties usually start with an ethnic and/or religious base, which progressively expands regionally and, eventually, nationally.

What is increasingly common in Africa are cartel parties, a new category of political parties that was introduced in the literature in 1995 through the writings of Richard Katz and Peter Mair.¹² Their cartel-party thesis is that political parties increasingly function like cartels, employing the resources of the state to limit political competition and ensure their own electoral success. The concept applies to a collection of political parties that basically have different ideologies but, for the achievement of the interests of a group of people, they work together at the expense of public interests. They are usually formed based on the needs of the political elite to gain and maintain their power to minimise the differences of opinion among the party elite.¹³ In many cases, the coalition of political parties that make up the cartel dominate the government and operate in a manner that strives to eliminate or limit competition and therefore hampers genuine multipartyism and democracy in general.

The most common and prevalent form of these cartel parties in Africa today are the so-called “presidential majority” phenomenon in francophone Africa.¹⁴ This form has been extensively used in these countries as a means

12 R Katz and P Mair, “Changing Models of Party Organisation and Party Democracy: The Emergence of the Cartel Party”, 1 (1995) *Party Politics*, pp 5–28; R Katz and P Mair, “The Cartel Party Thesis: A Restatement”, 7 (2009) *Perspectives on Politics*, pp 753–766.

13 YS Lestari, “Cartel Party: An Analysis Study”, *Atlantis Press*, November 2016, <https://www.atlantis-press.com/proceedings/icosop-16/25873519> (accessed 1 March 2024).

14 This refers to a phenomenon in the French system where a group of parties in parliament join the ruling party to support the action of the government. See P

of the ruling party co-opting and neutralising opposition parties that threaten its dominance and thus including them in sharing the spoils of power. In some respects, there is a historical explanation to how these trends developed, a matter to which we will now turn.

2.2 The pre-1990 evolution of African political parties

Unlike in the West, African political parties emerged during the colonial period, in a non-democratic setting, mainly as liberation movements, and this to a large extent influenced the way they operated after independence.¹⁵ On the eve of independence, most of the independence movements declared themselves to be political parties.¹⁶ There was thus a proliferation of parties for a short while after independence. As is shown later, a few of the independence parties have been able to weather the storm of post-independence political instability and are still in power today.

Most of the post-independence constitutions either explicitly or implicitly allowed for multipartyism. In francophone African constitutions, it was often provided thus: “parties and political formations participate in the electoral process; they are created and they exercise their activities in conformity with the law...”¹⁷ The right to form or join political parties could be inferred from the wording of anglophone African constitutions, which explicitly or implicitly allowed citizens to assemble and freely associate with others to form unions and other associations.¹⁸

After independence, what can be termed the multipartyism honeymoon did not last for long. By 1966, the one-party system had been imposed in most countries. This was either *de jure*, through an amendment of the constitution or its suspension by the military after a coup d'état, or *de*

Avril, “Les Chefs de l'État et la Notion de Majorité Présidentielle”, 34 (1984) *Revue Française de Science Politique*, pp 752–765.

15 M Salih, “Introduction: The Evolution of African Political Parties”, in M Salih (ed.), *African Political Parties: Evolution, Institutionalisation and Governance*, London, Pluto Press (2003), pp 1–33.

16 As Salih, *ibid*, p 18, rightly points out, the attempts to transform liberation movements and guerrilla forces into mass movements or democratic political parties have proven to be a big challenge in most African countries.

17 See, for example, Article 3 of the Cameroonian Constitution of 1961 and Article 3 of the Senegalese Constitution of 1961.

18 See, for example, section 25(1) of the Nigerian Constitution of 1960 and section 13(1) of the Botswana Constitution of 1966.

facto, through state repression that forced opposition parties to join the ruling party or go underground. Only in Botswana, Mauritius, and, to some extent, Senegal did multipartyism survive. African leaders gave numerous justifications for the imposition of the one-party system.¹⁹ The main argument was that multipartyism promotes division and tribalism and entails a waste of resources needed to focus on enhancing national unity, political stability, and economic development. The argument was also made that the one-party system better reflected African traditional systems of governance than multipartyism.²⁰

Needless to say, the one-party system never delivered on any of its promised goals. The corrupt, repressive, and inefficient dictators that it protected instead led to economic stagnation, political instability, poverty, civil conflict, and other problems which the continent is still struggling to recover from. This culminated in the protests of the 1990s that forced African leaders to agree to fairly dramatic constitutional reforms that led to the reintroduction of multipartyism. But as we will see, the return to multipartyism has not quite defied the logic that “winners win twice”, in that winning elections affords winners an opportunity to win again. This raises the questions about the regulatory framework, a matter we consider next.

3. Rationalising political-party constitutionalisation

The dire straits of democracy and constitutionalism in Africa today suggest that the advent of multipartyism and the proliferation of political parties has not brought about the genuine democracy and alternation of power that was expected to result from this. As Duverger points out, although political parties originally developed within the framework of liberal democracy in the 19th century, since the 20th century they have been used by

19 K Tuteng, “Towards a Theory of One-party Government in Africa”, 13 (1973) *Cahiers d’Etudes Africaines*, pp 649–663; L Zimba, “The Origins and Spread of the One-party States in Commonwealth Africa, Their Impact on Personal Liberties: A Case Study of the Zambian Model”, in M Ndulo (ed.), *Law in Zambia*, Lusaka, East Africa Publishing House (1984), pp 113–141; PA Nyong’o, “Africa: The Failure of One Party Rule”, 3 (1992) *Journal of Democracy*, pp 90–96.

20 K Robinson, *Autochthony and Transfer of Power*, Oxford, Oxford University Press (1968).

dictators and autocrats for entirely undemocratic purposes.²¹ This raises the question of the need for an effective regulatory framework.

It is beyond doubt that in all political systems, whether democratic or not, there is always the risk that without a satisfactory regulatory framework, those in power will try to exploit their incumbency to introduce laws, policies, and other measures designed to keep them in power whilst limiting the prospects of their adversaries winning.²² To limit the scope for this, since the end of the Second World War many European democracies, with Germany and Italy taking the lead, have progressively entrenched the main principles regulating their political parties in the constitution. It is a regulatory approach with much to offer.

Our main argument here is that the constitutional entrenchment of the framework of political parties would considerably enhance the prospects for genuine, free and fair, competitive multipartyism. “Political-party constitutionalisation” in this context refers to the extent to which the rights and duties of political parties, as well as the basic framework that regulates the relevant institutions and processes needed to ensure that they can discharge their functions efficiently and effectively and compete for power in free and fair elections, is recognised and protected in the constitution itself, and not merely in ordinary legislation.

A number of reasons can be advanced for advocating for constitutionalising the basic framework for regulating political parties.²³ First, a constitutional framework that recognises, promotes, and protects the rights of all political parties will reduce the risk of partisan manipulation of political processes by incumbents. This on its own is no guarantee that there will be no abuses by transient majorities, but it would go some way towards reducing the risk of arbitrary and opportunistic actions, such as changes to electoral laws that violate the principles for free and fair competition laid down in the constitution without amending the constitution itself.

21 M Duverger, “Political Party”, *Encyclopaedia Britannica*, 14 November 2024, <https://www.britannica.com/topic/political-party> (accessed 1 March 2024).

22 This is not necessarily limited to ruling parties. For example, one of the new parties contesting the May 2024 parliamentary elections in South Africa has argued that the new Electoral Amendment Act that radically hiked the number of signatures needed to qualify to contest the elections, from 1,000 to 50,000, was passed in Parliament by both the ruling party and the present opposition parties as an act of self-preservation in order to stymie competition and political choice. See “Legal Threat Over Controversial Election Bill”, 5845 (8 March 2024) *Legalbrief Today*.

23 See G Borz, “Justifying the Constitutional Regulation of Parties”, 38 (2017) *International Political Science Review*, pp 99–113.

Secondly, political-party constitutionalisation, depending on its scope and depth, is a strong indication of a government's commitment to competitive politics. While the same objective or even more could be achieved through the ordinary legislative process, there is no guarantee that this will be so or that, if it happens, it cannot arbitrarily be changed by the ruling party when its position is threatened.

Thirdly, given their nature and status, constitutions are inherently suitable for laying down the basic regulatory framework for political parties. As the constitution is the supreme law of the land and all laws derive their validity from it, any regulatory laws, policies, and practices that are inconsistent with the basic constitutional framework would be declared invalid to the extent of such inconsistency. In view of their special status, constitutions are meant to endure, and are often protected from arbitrary amendments by transient majorities or opportunistic leaders trying to promote a selfish political agenda.²⁴ From this perspective, the advantage of constitutional entrenchment of political-party regulatory principles is that it provides greater durability, certainty, and predictability than is the case with ordinary legislation.

Fourthly, to the extent to which the critical principles and institutions essential for ensuring a level political playing field are given constitutional status, they impose obligations on both the legislature and executive in a manner that limits their scope of action or inaction. This may be reinforced by a positive obligation to act,²⁵ one which does not give them the mere discretion to act when it is convenient to them – discretion opens the door for violation of the constitution where the alleged “violation” consists of a failure to fulfil a constitutional obligation. This may result in a declaration of unconstitutionality for the omission to carry out a constitutional obligation.²⁶ In this way, pressure can be brought to bear on both the legislature

24 CM Fombad, “Some Perspectives on Durability and Change under Modern African Constitutions”, 11 (2013) *International Journal of Constitutional Law*, pp 382–413.

25 An example of such an obligation is found in section 2 of the South African Constitution of 1996, which states that “this constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, *and the obligations imposed by it must be fulfilled*” (emphasis added).

26 For a discussion of this issue, see G Mendes, “Constitutional Jurisdiction in Brazil: The Problem of Unconstitutional Legislative Omission”, *Supremo Tribunal Federal*, 7 October 2008, https://www.stf.jus.br/repositorio/cms/portalStfInternacional/portaStfDiscurso_en_US/anexo/Omisao_Legislativa_v__Ing.pdf (accessed 1 March 2024); P Paczolay, “Experience of the Execution of Constitutional Court’s Decisions Declaring Legislative Omission in Hungary”, *Council of Europe*, 2 September 2008,

and executive to implement provisions that are designed to promote free and fair political competition, such as a requirement that an independent electoral body should be established to manage elections. It would no longer lie within the exclusive and absolute discretion of these two branches of government to decide when or how to act. The courts would have the power to invalidate any legislation that fails to comply with the obligations imposed by the constitution.

Finally, the significance of constitutional entrenchment will depend on, among other factors, the exact nature, the manner of formulation, and the scope of the rights recognised and incorporated in the constitution. Where these are couched in clear language and in a manner that imposes a legal obligation, this is likely to be more effective than where the constitution merely empowers the legislature to enact laws without providing general principles that limit the propensity for this power to be abused through the making of restrictive laws which protect the incumbent rather than fostering the rights concerned.

However, political-party constitutionalisation certainly has its drawbacks.²⁷ First, there is the concern that the rigid and inflexible nature of constitutions and the onerous procedures required to amend them do not provide scope for the regulatory changes that are often needed to ensure that political parties respond to fluctuating political needs. Secondly, the unwieldy nature of constitutional regulations may inhibit the vibrant policy debates that usually take place within and between political parties. Finally, there is the concern that legal regulations in general may drag the courts into political disputes that are not necessarily suitable for adjudication.

In spite of the potential problems posed by political-party constitutionalisation, its advantages are undeniable. Yet it is the manner in which the basic framework for political-party constitutionalisation is recognised and protected that matters, as we shall see below.

<https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU%282008%29029-e> (accessed 29 December 2024).

27 Some of them are discussed in K O'Regan, "Political Parties: The Interface between Law and Politics", Keynote address, Cape Town, 27 August 2010, pp 15–16. The pros and cons of political-party constitutionalisation are also discussed in CM Fombad, "Political Party Constitutionalisation in Africa: Trends and Prospects for Deepening Constitutionalism", in R Dixon, T Ginsburg, and AK Abebe (eds.), *Comparative Constitutional Law in Africa*, Cheltenham, Edward Elgar (2022), pp 109–135.

4. Manner and scope of political-party constitutionalisation

As the preceding discussion has shown, the advantages of political-party constitutionalisation surpass its disadvantages. However, capitalising on these advantages depends not only on the manner, depth, and scope of the entrenchment of this basic framework, but also on the implementation mechanism in place for ensuring that the regulatory framework is enforced. The starting-point is the nature of the general regulatory framework.

4.1 General regulatory framework

Even though scholars acknowledge the importance of political-party constitutionalisation, there is no general agreement on the nature, depth, and scope of what this should involve.²⁸ There are good reasons for this too: it will depend on, and should be influenced by, the history of the country, the challenges it has faced, and its level of constitutional and democratic maturity. It must also be assumed that the designers of African constitutions are mindful of Cass Sunstein's pertinent observation that constitutions should be designed to protect a country "against the most likely problems in the usual political processes", particularly those aspects of the "country's culture and traditions", as well as its history, "that will predictably produce harm through the country's ordinary politics", or its "most threatening tendencies".²⁹

Thus, although there is no generally agreed framework of constitutional norms or institutions that need to be entrenched to enhance the prospects for a healthy political-party system, it can be said that, going by the African struggle with effective multipartyism, at least eight principles could provide the foundation for an effective constitutional regulatory framework:

- formal recognition of multipartyism;
- a framework for defining the scope of rights and duties of political parties;
- a framework for free and fair political participation;

28 See, for example, T Khaitan, "Political Parties in Constitutional Theory", in T Ginsburg, A Huq, and T Khaitan (eds.), *The Constitutional Design of Elections and Parties*, Cambridge, Cambridge University Press (2024); Borz, *supra* n. 23, pp 100–102.

29 C Sunstein, "Against Positive Rights", in A Sajó (ed.), *Western Rights? Post-Communist Application*, Netherlands, Kluwer Law International (1996), pp 225–232, 226–227.

- the principle of internal democracy;
- a framework for bans and regulatory restrictions;
- a mechanism for political-party funding;
- the principle of the separation of state and party; and
- ensuring compliance with democratic values and principles.³⁰

These principles, if fully entrenched in constitutions, would enhance and deepen democratic governance. There is no African constitution that has fully incorporated all of them. Moreover, it is important to note that there is no rigid separation between the different principles, which in practice often overlap in such a manner that they mutually reinforce each other.

4.2 Formal recognition of multipartyism

Whilst almost all constitutions formally recognise multipartyism, the constitutions of Botswana (1966) and Eswatini (2005) do so only indirectly. The right to form political parties in either of these countries can only be inferred from the constitutional provisions recognising freedom of association.³¹ A slightly better approach has been adopted in some constitutions (mainly those of francophone African countries) that have a single provision recognising multipartyism and leave the details as to how this is to be regulated to ordinary legislation.³²

Both approaches are unsatisfactory. This is because such open-ended legislative powers might, without further constraints on their scope, be taken by a ruling party with a simple parliamentary majority, as a blank cheque to enact laws that will favour it.³³ In other words, the ability of

30 See Fombad, *supra* n. 27.

31 See section 3(b) of the Botswana Constitution and section 25 of the Eswatini Constitution.

32 See, for example, Article 5 and Article 3 of the 1990 and 1996 constitutions of Benin and Cameroon, respectively. Article 19(6) of the 1997 Constitution of Eritrea has a similar effect.

33 For example, in the Democratic Republic of the Congo (DR Congo), former President Joseph Kabila passed a new electoral law in 2017 that introduced electoral thresholds for parties to qualify for parliamentary seats, quadrupled the non-reimbursable deposit for national assembly candidates to USD 1,000, and almost doubled the deposit for presidential candidates to USD 100,000. See International Crisis Group, “Electoral Poker in DR Congo”, 4 April 2018, <https://www.crisisgroup.org/africa/central-africa/democratic-republic-congo/259-electoral-poker-dr-congo> (accessed 1 March 2024).

such laws to promote free and fair competition among the different political parties depends on the goodwill of the ruling party due to the absence of any constitutional constraints that could temper its ability to legislate in a self-interested manner.

Some constitutions go further to protect the principle of multipartyism. The best formulation of this appears in Article 77(a) of the Constitution of Liberia of 1986 which states as follows:

Since the essence of democracy is free competition of ideas expressed by political parties and political groups as well as by individuals, parties may freely be established to advocate the political opinions of the people. Laws, regulations, decrees or measures which might have the effect of creating a one-party state shall be declared unconstitutional.

In fact, a number of constitutions expressly ban the establishment of the one-party system.³⁴

4.3 Framework for defining the scope of parties' rights and duties

Multipartyism has been stifled not simply by banning opposition parties but, in most cases, by treating them in ways that make it impossible for them to operate (with these methods including the persecution of their leaders). For multipartyism to play a role in enhancing democracy, what has to be recognised is the role that the different parties, especially those in the opposition, play in holding the government to account. Although political parties remain associations of private individuals ordinarily subject to private law, the fact that their primary objective is to contest elections and win power makes them quasi-public institutions. To enhance their effectiveness, a number of African constitutions have conferred rights and duties to them, especially so to opposition parties, which are often vulnerable to persecution by the ruling party. In general, whilst about 21 African constitutions explicitly refer to opposition parties, the exact scope of the rights and duties that are recognised varies considerably. A few examples will suffice.

34 See similar prohibitions in section 100(2)(a) of the Gambian Constitution of 1996; Article 3(1) of the Ghanaian Constitution of 1992; Article 7 of the Moroccan Constitution of 2011; and Article 75 of the Ugandan Constitution of 1995.

The first, and, in many respects, most important, innovation in constitutional design is the formal recognition and protection of the role of political parties. There are those constitutions which specify parties' rights and duties,³⁵ and which in some cases explicitly provide that they chair certain parliamentary committees. An elaborate example of this appears in Article 60 of the 2014 Tunisian Constitution:

The opposition is an essential component of the Assembly of the Representatives of the People. It shall enjoy the rights that enable it to undertake its parliamentary duties and is guaranteed an adequate and effective representation in all bodies of the Assembly, as well as in its internal and external activities. The opposition is assigned the chair of the Finance Committee, and rapporteur of the External Relations Committee. It has the right to establish and head a committee of enquiry annually. The opposition's duties include active and constructive participation in parliamentary work.³⁶

Besides recognising opposition parties' roles in parliamentary committees, some constitutions, such as those of Madagascar (2010),³⁷ Mauritius (1966),³⁸ South Africa (1996),³⁹ Seychelles (1993),⁴⁰ South Sudan (2011),⁴¹ and Uganda (1995),⁴² recognise the status of the leader of the opposition as an official position. Some go further, such as Article 71(2)(a) of the South Sudan Constitution, which ranks the minority leader as the "fourth in protocol after the President, the Vice President and the Speaker". Furthermore, the protection of the opposition is treated as a fundamental principle by certain African constitutions. Thus, the Cape Verde Constitution of 1992 prohibits any amendment to the rights of the opposition, be it through

35 See, for example, Article 58 of Senegal's Constitution of 2019, which states: "The Constitution guarantees to the political parties which are opposed to the policy of the Government the right to oppose it. The Constitution guarantees to the opposition a status that permits it to acquit its missions. The law defines this status and establishes the rights and duties accruing to them as well as to the Head of the opposition." See also Article 14 of the Madagascar Constitution of 2010.

36 See also Article 10 of Morocco's Constitution of 2011 and Article 178 of Burundi's Constitution of 2018.

37 See Article 14 of Senegal's Constitution of 2019.

38 See section 73.

39 See section 57(2)(d).

40 See Article 81.

41 See Article 71.

42 See Article 82A.

popular referendum⁴³ or revision of the constitution.⁴⁴ Another example of this is Article 186(3) of the 2018 Mozambican Constitution, which states that matters relating to the status of the opposition may be changed only by a majority of two-thirds of the votes of the deputies.

Another example comes from constitutions that provide for equality of treatment of all parties, sometimes specifically with respect to matters such as access to public media. For instance, Article 17(4) of the 2010 Constitution of Angola states: “Political parties shall be entitled to equal treatment by entities exercising political power, impartial treatment by the state press and the right to exercise democratic opposition, under the terms of the Constitution and the law”.

Finally, a number of constitutions impose certain obligations on political parties. For example, Article 75(3) of the 2010 Constitution of Mozambique requires political parties to “contribute towards peace and stability in the country through the political and civic education of citizens”. Article 91(g) of the 2010 Constitution of Ghana requires them to “promote the objects and principles of [the] Constitution and the rule of law”. Some constitutions provide for consociational arrangements which require that certain positions must be shared between the different parties, taking due account of their electoral support, and that the leadership of the parties should reflect the national character of the population.⁴⁵

4.4 The framework for free and fair political participation

Ruling parties can hardly resist the temptation to enact laws regulating the electoral process, as well as ones establishing institutions such as the courts, electoral management bodies (EMBs), and election boundaries commissions (EBCs), in a manner that will favour them. The principle of free and fair political participation, or what could also be referred to as the political-process principle, aims to ensure that all such laws are designed in a way that promotes free and fair competition between all the parties and

43 See Article 108(3).

44 See Article 313 (1)(g).

45 See, for example, Article 124 of the Burundi Constitution of 2018. This requires that the President of the Republic and the Vice President belong to different ethnic groups, political parties, and coalitions of political parties, or to be independents of different ethnicities.

which is not biased in favour of the incumbent. Two general observations can be made about how African constitutions incorporate this principle.

First, almost all African constitutions have provisions that provide for a separation of powers and guarantee judicial independence. However, in reality, whilst the constitutions of most anglophone countries have gone to considerable lengths to ensure that their judiciaries are reasonably independent, the scope for judicial independence in francophone, lusophone, and hispanophone Africa is limited. The latter is particularly true when it comes to courts that have been given exclusive rights to deal with electoral disputes.⁴⁶

Secondly, a number of African constitutions entrench EMBs and EBCs. This has, however, not been done in a manner which ensures that they can operate independently without manipulation or interference by the ruling party.⁴⁷ So far, only the constitutions of Kenya, South Africa, and Zimbabwe have entrenched these institutions with an explicit mandate to support constitutional democracy and in a way that enhances their prospects for ensuring reasonably free, fair, and competitive elections.⁴⁸ Nevertheless, as all the post-2010 elections in Zimbabwe have shown, entrenching such institutions is no guarantee against electoral malpractices under an authoritarian regime with little respect for the rule of law.⁴⁹

What is increasingly clear is that EMBs, EBCs, and “fourth-branch institutions” are now needed to ensure, inter alia, that elections are free and fair, that there is free and fair access to public media, that there is transparency and fairness in determining electoral boundaries, and that public

46 CM Fombad, “A Preliminary Assessment of the Prospects for Judicial Independence in Post-1990 Africa Constitutions”, 2 (2007) *Public Law*, pp 233–257; CM Fombad, “The Struggle to Defend the Independence of the Judiciary in Africa”, in S Shetreet, H Chodesh, and E Helland (eds.), *Challenged Justice: In Pursuit of Judicial Independence*, Leiden, Brill Nijhoff (2021), pp 223–248.

47 See, for example, CM Fombad, “Election Management Bodies (EMBs) in Eastern and Southern Africa: Some Reflections on their Legal Framework”, 15 (2016) *African and Asian Studies*, pp 289–335.

48 CM Fombad, “The Diffusion of South African-Style Institutions? A Study of Comparative Constitutionalism”, in R Dixon and T Roux (eds.), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution’s Local and International Influence*, Cambridge, Cambridge University Press (2018), pp 359–387.

49 G Mwonzora and E Mandikwaza, “The Menu of Electoral Manipulation in Zimbabwe: Food Handouts, Violence, Memory, and Fear – Case of Mwenezi East and Bikita West 2017 By-elections”, 54 (2019) *Journal of Asian and African Studies*, pp 1128–1144.

funding is shared amongst political parties in a fair manner. Although the Kenyan, South African, and Zimbabwean entrenchment of a number of fourth-branch institutions is an innovation with strong potential to enhance democracy and constitutionalism, these institutions could do much more with some improvement and political goodwill.⁵⁰

4.5 The principle of internal democracy

At first sight, the principle of internal democracy appears to be in conflict with the private nature of political parties: ideally, the internal functions and processes of political parties should be free from state interference. However, political parties' hybrid, quasi-public nature, which often qualifies them to receive financial support from the government, suggests that they should not be allowed to operate without some restrictions. Perhaps more pertinent is the fact that a party which practices no internal democracy and is controlled by party barons to suit their own selfish interests is unlikely to practice democracy when it comes to power.⁵¹ Furthermore, the internal functioning of political parties may sometimes inevitably be influenced by forces that are external to the party, such as the electoral system, political culture, and legal regulations. Whilst a number of constitutions advocate in one way or another for internal democracy, the most elaborate formulation of this appears in Article 91(1) of the 2010 Kenyan Constitution:

Every political party shall;

50 For ways of enhancing their effectiveness, see Fombad, *supra* n. 48.

51 Whilst undemocratic practices within political parties in Africa are commonplace in countries led by autocrats, the same occurs in some of the continent's best-performing democracies. For example, in South Africa, the two largest party opposition parties, the uMkhonto weSizwe (MK) and the Economic Freedom Fighters (EFF), have on several occasions removed sitting Members of Parliament (MP) without any formal process and replaced them with people who have just recently joined the party. An example is the "appointment" of Busisiwe Mkhwebane, who was impeached as the country's Public Protector (a position in which she was supposed to be apolitical). Shortly after this, she applied to be a member of the EFF and, a week later, an innocent EFF MP was removed for Mkhwebane to be sworn in instead as an MP. She later resigned and joined the MK. For its part, since the May 2024 parliamentary elections in which the MK participated for the first time and won 58 parliamentary seats, more than 20 of its members who were sworn in as MPs have been arbitrarily replaced by others. It is thus the party barons who decide who will be an MP, and not the ordinary members or even the voting public.

- a) have a national character as prescribed by an Act of Parliament;
- b) have a democratically elected governing body;
- c) promote and uphold national unity;
- d) abide by the democratic principles of good governance, promote and practise democracy through regular, fair and free elections within the party;
- e) respect the right of all persons to participate in the political process, including minorities and marginalised groups;
- f) respect and promote human rights and fundamental freedoms, and gender equality and equity;
- g) promote the objects and principles of this Constitution and the rule of law; and
- h) subscribe to and observe the code of conduct for political parties.⁵²

Whilst some legal regulation of internal party processes is necessary, this must be kept to a minimum so that it does not unduly impair parties' autonomy or interfere with their rights as free associations.

4.6 Framework for bans and regulatory restrictions

This regulatory framework strives to balance two considerations. The first is that, without constraints on how governments use bans or other restrictions to regulate political parties, ruling parties can wield this power to frustrate their opponents. The other is that, without some restrictions, political parties can use the freedom to associate to create groups that could sow division or in one way or another threaten the unity and existence of the state. Constraints on the use of bans and other regulatory restrictions therefore aim to reconcile these two risks.

Generally, most constitutions prohibit the establishment of parties that are organised along regional, religious, tribal, ethnic, or racial lines, that incite and practice violence, or that promote tribalism, racism, dictatorship,

52 See also the Constitution of Nigeria of 1999, which in section 223 states: "(1) The constitution and rules of a political party shall – (a) provide for the periodical election on a democratic basis of the principal officers and members of the executive committee or other governing body of the political party; and (b) ensure that the members of the executive committee or other governing body of the political party reflect the federal character of Nigeria."

or xenophobia.⁵³ Given the challenges posed by the heterogeneous nature of African states, it is no surprise that restrictions are imposed for the sake of promoting diversity and inclusivity.⁵⁴ However, democracy thrives on the free exchange of ideas no matter how unfavourable, unpopular, or offensive they may be. It is therefore difficult to justify prohibiting or dissolving a party merely because it is regional, religious, or minority-based as long as it does not use, or call for, violence or threaten civil peace or fundamental democratic principles.⁵⁵ At the same time, whilst a one-party system is not good for democracy, the proliferation of parties does no good either. Regulatory constraints must be such that, on the one hand, they do not make the costs of political participation so low that they allow fake or frivolous parties to proliferate, and, on the other hand, make the cost to enter or compete so high that they lock out new or opposition parties.

4.7 Mechanisms for political-party funding

The burden of the economic cost of political participation can be a severe impediment to the right to establish, or become an active member of a political party. Although political parties, as private associations, should in principle depend on membership contributions, the reality is that, given high levels of poverty, ordinary Africans, after struggling to put meat on the table, have hardly anything to spare for contributing in a regular and meaningful way to sustaining the activities of a political party. Without public funding, there is bound to be a problem because most African ruling

53 See, for example, Article 6 of the Djibouti Constitution of 2010, which forbids parties from aligning themselves “to a race, to an ethnicity, to a sex, to a religion, to a language or to a region”. Article 79(d) of the Liberian Constitution of 1986 requires that “the name, objective, emblem or motto of the association or of the independent candidate and his organization is free from any religious connotations or divisive ethnic implications ...”.

54 See, for example, OT Afisi and AO Oyekan, “Multiculturalism and the Challenges of Heterogeneity in Postcolonial Africa”, 8 (2020) *LASU Journal of African Studies*, pp 148–158.

55 A number of cases decided by the European Court of Human Rights take this position. See, for example, *Stankov and the United Macedonian Organisation Ilinden v Bulgaria*, application nos. 29221/95 and 29225/95 [2001], para 89; *United Communist Party of Turkey and Others v. Turkey* [GC], application no. 19392/92 [1998], para 43; *Socialist Party and Others v. Turkey* [GC], application no. 21237/93 [1998], para 45; *Herri Batasuna and Batasuna v. Spain*, application nos. 25803/04 and 25817/04 [2009], para 79.

parties exploit their incumbency and access to state resources to fund their parties. To ensure a level playing field, public funding of political parties is important. A number of constitutions explicitly provide for the funding of political parties, although the details of this are usually left to be determined through legislation.⁵⁶

However, whilst some constitutions are silent on the issue of political-party funding, others, such as the Egyptian Constitution of 2014, actually prohibit it.⁵⁷ What is usually prohibited by constitutions, though, is external funding of political parties. There are often good reasons for this: the concern is that external donors may use their funding as a means to influence the agenda of the party once it wins elections. To deal with this, section 225(4) of the 1999 Constitution of Nigeria states that any funds or assets which a political party receives from abroad must be paid to or transferred to the Independent National Electoral Commission within 21 days.

4.8 The principle of separating state and party

The separation of state and party is without a doubt one of the most frequently abused principles in African political life.⁵⁸ The mutual absorption of the party by the state, and the state by the party, in the case of many a ruling party means that it is often difficult to distinguish between them.⁵⁹ The control by ruling parties of the state not only gives them unhindered access to state resources, but also enables them to manipulate official public media.

A number of constitutions have tried to entrench measures to prevent a conflict of interest between the ruling party and the state and in this way address some of the harmful effects of political-party capture and control of the state apparatus. This calls for a non-partisan public service comprising

56 See, for example, Article 57(a) of the Cape Verde Constitution of 2010; section 40(2) of the Malawi Constitution of 1994; Article 54 of the Constitution of Rwanda of 2015; and section 236 of the Constitution of South Africa of 1996.

57 Article 87 of the 2014 Constitution states, *inter alia*, that “[t]he use of public funds, government agencies, public facilities, places of worship, business sector establishments and non-governmental organisations and institutions for political purposes and electioneering is forbidden”.

58 Fombad, *supra* n. 27, pp 118–119 and 127.

59 R Miller, “The Party-State and Bureaucratic/Political Relations in Africa”, 8 (1975) *Comparative Political Studies*, pp 293–317.

the bureaucracy, the judiciary, the prosecution authorities, and any special institutions set up under the constitution, such as the Chapter 9 institutions under the 1996 South African Constitution. Some constitutions go a step further. For example, they expressly prohibit certain public officials from joining parties, or exclude persons who are actively involved in political activities, or have been so involved (for example, for five years preceding an advertised position), from being appointed.⁶⁰

Several other measures also seek to separate the state from the party, but their effectiveness is doubtful. For instance, the constitution of many a francophone African country states that the mandate of the President of the Republic is incompatible with any responsibility within a political party.⁶¹ It is difficult to see how a president who has been elected on a party-political platform can be expected to suddenly distance himself from the party and be apolitical.

4.9 Ensuring compliance with democratic values and principles

A broadly worded constitutional provision which seeks to promote democratic values and principles that enhance free and fair competition can be said to have as its primary objective to internalise democracy as a permanent value in itself and not merely as an instrumental tactic. These democratic values and principles ensure that the broad powers usually given to parliament are constrained. Whilst some constitutions spell out what these principles and values are, certain fundamental rights such as the right to equality of treatment and non-discrimination could be invoked to challenge electoral, media, and broadcasting laws that stifle free and fair competition between political parties.

However, three constitutions entrench robust democratic values and principles that could go a long way to ensure transparency and fairness in elections and electoral practices. The most articulately formulated instance

60 See examples of this in sections 64(4) and (5) and 109 (3) and (4) of the Botswana Constitution of 1966; articles 60, 82, and 250 of the Burundi Constitution of 2015; articles 166(3) and 194 of the Constitution of Ghana of 1992; articles 77(3) and 92(h) of the Constitution of Kenya of 2010; articles 11 and 155 of the Constitution of Morocco of 2011; sections 197(3) and 199(7) of the Constitution of South Africa of 1996; and sections 200(5) and 240 of the Constitution of Zimbabwe of 2011.

61 See Article 96 of the Constitution of DR Congo of 2005; Article 49 of the Madagascar Constitution of 2010; Article 27 of the Constitution of Mauritania of 1991; and Article 65 of the Constitution of Somalia of 2012.

of this is in Article 10 of the 2010 Kenyan Constitution, which deals with “national values and principles of governance.” Article 10(1) states as follows:

1. The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them
 - a. *applies or interprets this Constitution*;
 - b. *enacts, applies or interprets any law*; or
 - c. makes or implements public policy decisions.⁶²

Other provisions in the Kenyan Constitution are more specific. For example, Article 92(1), 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.⁶³ A similar approach is provided for in section 155 of the Constitution of Zimbabwe sets out a number of fundamental principles which are supposed to guide Parliament in enacting electoral laws and any other legislation regulating the electoral process.

Similar provisions that impose a duty on the government, when regulating political parties, to comply with the fundamental principles and values of good governance, transparency, democracy, and fairness can be inferred from the 2013 Constitution of Zimbabwe.⁶⁴ Moreover, a law which is biased against 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 that can provoke “violence and other electoral malpractices”. The other equally value-laden constitution is the South African one: the broad manner in which the courts are required to interpret it and the formulation of the equality provisions gives judges considerable leeway to ensure that self-serving legislation and policies are invalidated by the courts.⁶⁵

Apart from a few other anglophone countries, hardly any arabophone, francophone, hispanophone, or lusophone constitutions incorporate a rule

⁶² Emphasis added.

⁶³ Other provisions that underscore the need for compliance with the values and principles of democracy include articles 20(4) and (5), 56 (a), 232, 234(2)(c), 249(1)(b), and 259(a).

⁶⁴ See, for example, sections 3(2), 46, and 194(1)(k).

⁶⁵ See sections 1(d), 7(10), 39(1)(a), 143(2)(a), and 195(1) and (3).

imposing compliance with democratic values and principles.⁶⁶ This is a shortcoming on their part, as the significance of such provisions bears underscoring: constitutional entrenchment of such a principle means that all national laws and policies that do not reflect these values and principles will not pass constitutional muster.

5. Post-1990 trends and tendencies in the evolution of political parties

Having constitutions that entrench the basic framework for regulating political parties is one thing; having these constitutions enforced in a manner which ensures parties play their critical role in enhancing constitutional democracy is another. So far, it can be argued that the regular holding of multiparty elections in Africa since 1990 has been the main manifestation of the revival of multipartyism. This raises a number of questions. One concerns the extent to which, if at all, multipartyism has indeed eradicated the cancer of the one-party systems that facilitated the rise of repressive and incompetent dictators. The other is the question whether multipartyism and party constitutionalisation are now ingredients that enable parties to compete for power in an environment where today's losers can become tomorrow's winners.

Two international indicators will be used to see what practical impact multipartyism has had on the evolution of civil and political rights in Africa over the last three decades. The first indicator is from Freedom House's Freedom in the World annual surveys. Since 1973, Freedom House surveys have been used to assess the condition of political rights and civil liberties around the world.⁶⁷ Table 1 below captures the trend over the last three decades by using the survey results of 1990 (the beginning of the new wave

66 The few other anglophone constitutions that entrench similar principles include Malawi, in section 11(2)(a) of its Constitution of 1994, and Zambia, in articles 8, 9, and 267(1)(a) of its Constitution of 1991.

67 For information on the methodology and scope of the survey, see Freedom House, "Freedom in the World Research Methodology", <https://freedomhouse.org/report-s/freedom-world/freedom-world-research-methodology> (accessed 1 March 2024). The combination of the overall score awarded for political rights and the overall score awarded for civil liberties is used to determine the status of a country as either Free, Partly Free, or Not Free. An important aspect of the survey on political rights is its focus on political pluralism and participation. In this regard, the survey asks whether people have the right to organise in different political parties or other competitive political groupings of their choice, and the system is free of undue obstacles to the rise and fall of these competing parties or groupings; and also, whether there is a

of multipartyism in Africa) to see how the situation has changed in the course of each decade; the table also shows results from 2023.

Table 1: Evolution of civil and political rights in Africa (1990–2020)

Category	1990 results	2000 results	2010 results	2020 results	2023 results
Free category	3 countries (5.5%)	9 countries (16.9%)	10 countries (18.9%)	8 countries (14.9%)	9 countries (17%)
Partly Free category	15 countries (27.8%)	25 countries (47.2%)	23 countries (43.3%)	25 countries (46.2%)	20 countries (37%)
Not Free category	36 countries (66.7%)	19 countries (35.9%)	20 countries (37.8%)	21 countries (38.9%)	25 countries (46%)

Source: Compiled from Freedom House's Freedom in the World reports for 1990,⁶⁸ 2000,⁶⁹ 2010,⁷⁰ 2020,⁷¹ and 2023⁷²

Two observations can be made about this table. First, the number of “free” states, only three in 1990, had by 2023 increased to nine. What is striking is that the high number of “not free states” (36, or 66.7 per cent, in 1990) dropped dramatically to 19 in 2000, but since then has been on the increase, rising to 25, or 46 per cent, in 2023. In fact, the sharpest increase in the number of “not free” states has been between 2020 and 2023 (an increase of 7.1 per cent).

realistic opportunity for the opposition to increase its support or gain power through elections.

68 Freedom House, “Freedom in the World: Political Rights & Civil Liberties 1989–1990”, https://freedomhouse.org/sites/default/files/2020-02/Freedom_in_the_World_1989-1990_complete_book.pdf (accessed 1 March 2024).

69 Freedom House, “Freedom in the World: The Annual Survey of Political Rights & Civil Liberties 2000–2001”, https://freedomhouse.org/sites/default/files/2020-02/Freedom_in_the_World_2000-2001_complete_book.pdf (accessed 1 March 2024).

70 Freedom House, “Freedom in the World 2010: The Annual Survey of Political Rights & Civil Liberties”, https://freedomhouse.org/sites/default/files/2020-03/FIW_2010_Complete_Book_Scan.pdf, (accessed 1 March 2024).

71 Freedom House, “Freedom in the World 2020: The Annual Survey of Political Rights & Civil Liberties”, https://freedomhouse.org/sites/default/files/2021-08/FIW2020_book_JUMBO_PDF.pdf (accessed 1 March 2024).

72 Freedom House, “Freedom in the World 2023”, https://freedomhouse.org/sites/default/files/2023-03/FIW_World_2023_DigitalPDF.pdf (accessed 1 March 2024).

Secondly, and of particular significance, is that since 1990, 10 countries have been classified continuously as “not free”: Angola, Cameroon, Chad, DR Congo, Equatorial Guinea, Libya, Rwanda, Somalia, South Sudan (since it became independent in 2011), and Sudan. Whilst the general trend confirms the global democratic recession, it is clear that there are countries that have hardly made any progress in spite of professing to be multiparty democracies. This leads to the conclusion that, in spite of the freedom to form political parties today, 46 per cent of Africans live in countries classified as “not free” due to constraints of one form or another on the exercise of these rights.

The second indicator is the Ibrahim Index of African Governance (IIAG), which currently is the most comprehensive dataset on African governance. While the annual survey covers a range of governance issues, we extracted the results that focus on political participation, rights, and inclusion on the continent. Table 2 shows the level of political pluralism, broadly covering the freedom of political parties, overall governance, and participation rights and inclusion in Africa from 2012 to 2021.

Table 2: Political pluralism in Africa (2012–2021)

Form of political participation	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021
Freedom of political parties	63.5	63.8	63.8	63.1	62.9	62.6	61.6	61.1	59.6	57.4
Overall governance	47.8	47.8	47.8	48.2	48.3	48.5	48.7	48.9	48.9	48.9
Participation, rights and inclusion	47.5	47.3	47.2	47.5	47.1	47.4	47.4	47.2	47.1	46.7

Source: Compiled from various annual reports of the Ibrahim Index on African Governance

Table 2 indicates that since 2012, participation, rights, and inclusion remain the lowest-scoring IIAG category, with the average rate of decline doubling since 2017.⁷³ More than 60 per cent of Africa’s citizens, according to the

⁷³ Mo Ibrahim Foundation, “2022 IIAG: Key Findings”, January 2023, https://assets.iiag.online/2022/2022-IIAG-Key-Findings_EN.pdf (accessed 1 March 2024).

reports, live in a country where this category has declined over the past 10 years, and more than one-third live in a country where the decline has accelerated since 2017. In fact, between 2017 and 2021, the deterioration in the participation sub-category has accelerated, driven by further restrictions on freedom of association and assembly, as well as by less free and fair elections.⁷⁴ Again, this tells us that, in spite of party pluralism, a majority of Africans still live in countries where effective rights of political participation are being progressively restricted.

Currently, the contracting political space has enabled multipartyism to flourish only in 46 of the 54 countries in Africa (that is, 85 per cent of them). Whilst political parties are banned in Eswatini, where the 2005 Constitution does not even mention them, albeit that it allows for freedom of association, Eritrea is currently the only one-party state on the continent. As a result of the resurgence of coup d'états in the last decade, the suspension of constitutions has also led to bans on political-party activity in Burkina Faso, Guinea, Niger, and Sudan.

It is not easy to present exact figures for the number of parties in the different countries. This is not only because accurate figures are hard to come by, but also because the figures vary from one election year to another. Be that as it may, statistics for a few countries will give us some indication of the number of political parties that are registered in the various African countries.

According to the Independent Electoral Commission of South Africa, in 2022 there were 1,501 registered political parties in the country.⁷⁵ With a population of just over 60 million, the latest statistics show that South Africa now has 1,793 registered parties; a further 738 are deregistered, while 94 applications for registration were rejected.⁷⁶ By contrast, Ethiopia, with a population of more than 126 million, has only 73 registered political

74 Ibid, p 5, where the report states that, out of all the IIAG's 81 indicators, freedom of association and assembly has deteriorated the most since 2012, with 60 per cent of citizens living in a country where the level is worse than it was in 2012.

75 Africa Check, "How Many Registered Political Parties Are There in South Africa?", *Infofinder*, 31 January 2024, <https://africacheck.org/infofinder/explore-facts/how-many-registered-political-parties-are-there-south-africa> (accessed 1 March 2024).

76 Independent Electoral Commission of South Africa, "Political Party Statistics", <https://www.elections.org.za/pw/StatsData/Political-Parties-Statistics> (accessed 1 November 2024).

parties;⁷⁷ Nigeria, Africa's most populous country, with a population of almost 224 million, has merely 18.⁷⁸ Togo, with a population of 9 million people, has 34 parties. Zambia, with a population of over 20 million, has about 28 parties. Cameroon, with a population of 28.6 million, has 369.

Two overall observations can be made here. The first and fairly obvious point is that party pluralism is very much alive in the countries that have legalised multipartyism; the second is that there is no correlation between population size and the number of political parties.

Perhaps one of the most disappointing features of the last three decades has been the limited scope that the revival of multipartyism has given to the alternation of power. Even on those rare occasions when a new opposition party makes a breakthrough, it starts another endless cycle of winning. In practical terms, 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 are several manifestations of this.

First, the ruling parties in eight African countries (Angola, Cameroon, Mozambique, Namibia, South Africa,⁷⁹ Tanzania, and Zimbabwe) – that is, about 15 per cent – originated in pre-independence liberation movements and have been continuously in power since independence to this day. Ruling-party dominance has occurred not only under manifestly repressive and autocratic regimes, such as those in Angola, Cameroon, and Zimbabwe, but also in countries considered as the most democratic on the continent, such as Botswana (until the 2024 elections) and South Africa. Does this not raise questions about the quality of multiparty democracy in practice on the continent?

Secondly, there are a number of political parties that came to power after the first post-1990 multiparty elections and which have won every election since then. In other words, much like the pre-1990 political parties, they have, whilst allowing space for other parties to participate in elections, used their incumbency to perpetuate their stay in power. In addition to the ruling party in the eight countries indicated above, those in nine other

77 National Election Board of Ethiopia, "Temporary Election Registration", <https://nebe.org.et/sites/default/files/Accrediated%20Political%20Party%20Lists.pdf> (accessed 1 March 2024).

78 Go Vote, "Political Parties in Nigeria", <https://govote.ng/political-parties/> (accessed 1 March 2024).

79 It is worth noting that in the 29 May parliamentary elections, the ruling ANC lost its majority for the first time since 1996 and has been able to hold on to power by forming a government of national unity with several minority parties.

countries (Burundi, DR Congo, Republic of Congo, Djibouti, Equatorial Guinea, Ethiopia, Rwanda, Togo, and Uganda) have won all elections since multipartyism was introduced to date.

This means that in 17 of the 54 countries in Africa (that is, about 31 per cent of them), there has effectively been no alternation of power. If we add the fact that there have been no elections in Eritrea and South Sudan since they gained independence, this means there has been no alternation in 35 per cent of African countries for several decades. It is no coincidence, as we show below, that many of these 19 countries have the longest-serving leaders on the continent and even, in a few cases, the world.

The insidious return of the *de jure* one-party syndrome through *de facto* dominant parties has largely been facilitated by leaders who have manipulated their constitutions in one way or another to prolong their stay in power and, in doing so, held their parties in tow. It is no surprise that most of the countries with dominant parties are led by the longest-serving leaders on the continent. These are Teodoro Obiang Nguema Mbasogo of Equatorial Guinea (46 years in power); Paul Biya of Cameroon (43 years); Denis Sassou Nguesso of the Republic of Congo (41 years); Yoweri Museveni of Uganda (39 years); Isaias Afwerki of Eritrea (34 years); Ismail Omar Guelleh of Djibouti (26 years); Paul Kagame of Rwanda (25 years); Faure Gnassingbé of Togo (20 years); and Salva Kiir Mayardit of South Sudan (14 years).

What all of this suggests is that while political-party constitutionalisation and regulation has, on the whole, paved the way for more political elites to sit at the dining table, the substance of governance has remained the same. That is to say, the regulatory framework has changed only the rules of entry, enabling many new parties to emerge and a few alternations of ruling parties to occur, even while the substance of governance and the benefits of democracy remain elusive. In fact, our democracy is becoming a government of politicians, by politicians, for politicians.

6. Conclusion

It is widely accepted that political parties are a key component to entrenching and consolidating democracy and constitutionalism. African constitutions incorporate most of the fundamental principles and institutions needed to facilitate the effective operation of political parties. Whilst the manner, nature, and scope of the incorporation varies from one constitution to the other, none of them fully incorporates all of the eight principles and

institutions needed to ensure that parties compete on a level playing field. This is understandable because the exact formulation of these principles will depend on a number of variable factors, such as the country's legal tradition, its electoral system, and the model of democracy.

This overview shows that political-party constitutionalisation is critical to promoting and sustaining the waning momentum towards a culture of genuine democracy, constitutionalism, and respect for the rule of law in Africa. However, the continent's large number of dominant parties at a time of a global democratic recession (particularly severe in Africa) is a clear indication that the constitutional entrenchment of the rights and duties of political parties undertaken has so far not been sufficient to promote political pluralism throughout Africa. The dominant-party system which has emerged is, much like the single-party system, not good for constitutional democracy and constitutionalism, nor is it what one should expect from genuine multipartyism. Instead it has given space to some of the most malevolent authoritarian ruling parties, such as Paul Biya's Cameroon Peoples' Democratic Movement (CPDM), Teodoro Obiang Nguema Mbasogo's Democratic Party of Equatorial Guinea (DPEG), and Emmerson Mnangagwa's Zimbabwe African National Union – Patriotic Front (ZANU-PF).

This raises many questions for which there are no easy answers. Is the problem due to the fact that no constitution fully incorporates all the fundamental principles and institutions needed to ensure free and fair competition among parties? Is it due to the manner of incorporation? Does it have to do with weak enforcement mechanisms? Is it due to lack of political will? One can argue that it is a combination of all these factors.

The evidence is overwhelming that contracting political space is limiting the scope for inclusive participation in governance. Nevertheless, there is no doubt that there has been considerable progress since the pre-1990 era. The foundations for inclusive and competitive multipartyism have been laid; even so, there are enormous challenges due to the resistance of many enemies of democracy posing as democrats. In addition, the history of multipartyism in Africa is short, and traditional African governance practices are not easily reconcilable with contemporary standards of democracy. More fundamentally, perhaps, the foundations for democracy and constitutionalism on the continent are shaky. This underscores the need to deliberately build political-party regulation into our constitutions and thereby nurture a culture of political tolerance, debate, and inclusivity.

There is no denying that political parties are key democratic and constitutional institutions, even if they are not on par with the traditional triad

branches of government, but the question after more than three decades of experience is whether they are having the desired impact on the quality of African democracy, constitutionalism, and respect for the rule of law.

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