Chapter 4 African Regional Standards for Regulating Political Parties

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1. Introduction

Political parties are essentially national institutions and hence regulated by national constitutions and domestic laws. However, since the end of the Cold War, the capacity of domestic laws to serve as the exclusive framework for self-governing practices within the state has steadily diminished.

The phenomena of globalisation, liberalisation, and regionalism have not only underscored the need for strong linkages between states, regions, and societies, but also underlined the fact that most political and economic crises today have international effects that call for common solutions. This has resulted in the progressive internationalisation of constitutional law through the incorporation of international and regional norms setting standards of good governance, democracy, and constitutionalism.[1]

The focus of this chapter is on African regional and sub-regional standards for regulating political parties.[2] It examines the nature and scope of the regulatory principles that these regional and sub-regional standards have set. It will consider to what extent these have or could influence the constitutionalisation of political parties on the continent. It will also consider whether there is any scope for such standards not only to complement domestic regulations, but also to act as a sort of compensatory backup for any weaknesses, actual or perceived, in the domestic regulatory framework of political parties.

The discussion will proceed in section 2 to highlight some of the key features of the African regional and sub-regional normative frameworks. This will be followed, in section 3, by a discussion of some of the effects of these supranational standards on national practice. In concluding in

1 See generally CM Fombad, "The Internationalisation of Constitutional Law and Constitutionalism in Africa", 60 (2012) *American Journal of Comparative Law*, pp 439–473.

2 On the relevant international standards, see J Socher, "Constitutionalisation of Political Parties: International Strandards and the Experience of Continental Europe", in this volume.

section 4, it is contended that although some welcome new initiatives are currently under way, a more proactive and decisive approach by the African Union (AU) and its regional economic communities (RECs) could enhance the adoption by African states of constitutional measures enabling political parties play a more effective role in governance on the continent.

2. Regional and sub-regional normative frameworks

Although the focus of this chapter is on the regional and sub-regional norms that have influenced the regulation of political parties in Africa, it is apt to at least note that a number of international instruments have also played an important role and often been cited in cases brought before the African Court on Human and Peoples' Rights (ACtHPR) and the African Commission on Human and Peoples' Rights ("the African Commission"). The main international instrument is the International Covenant on Civil and Political Rights (ICCPR), which guarantees not only a number of political rights in relation to elections but also contains specific provisions protecting the right to freedom of association as well as other interconnected fundamental rights, such as freedom of expression and opinion and freedom of assembly.[3] At a regional and sub-regional level, these fundamental rights are entrenched in the normative frameworks of both the AU (section 2.1) as well as the different RECs (section 2.2).

2.1 The AU normative framework for regulating political parties

The AU normative framework relevant for the regulation of political parties consists of two pillars: on the one hand, provisions in the African Charter on Human and Peoples' Rights ("African Charter") and other "classic" human rights instruments; and, on the other, provisions in AU instruments to promote democracy and good governance.

3 Ibid.

2.1.1 The African Charter and other human rights instruments

Although political parties are not explicitly mentioned in the African Charter, the right to form, join, and participate in them is guaranteed as a specific form of freedom of association in its Article 10.[4] Subject to the obligation of solidarity,[5] this includes the negative freedom not to be compelled to join an association.[6] In its 1992 Resolution on the Right to Freedom of Association, the African Commission considered, furthermore, that "in regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom" and that "the regulation of the exercise of the right to freedom of association should be consistent with States' obligations [under the African Charter]".[7]

The right to freedom of association guaranteed in the African Charter is complemented by a number of protocols obliging state parties to take positive action to promote participation in the political and decision-making process of specific groups. In particular, Article 9(1) of the Protocol to the African Charter on the Rights of Women in Africa provides that state parties shall enable national legislation and other measures which ensure not only that women participate without any discrimination in all elections but also that they "are represented equally at all levels with men in all electoral processes".[8] Similarly, Article 21 of the Protocol to the African Charter on the Rights of Persons with Disabilities calls for the inclusion of persons with disabilities in public and political life, "including as members of political parties". Although this protocol is not yet in force, it is here that

4 On the right to freedom of association under the African Charter more broadly, see, for example, K Olaniyan, "Civil and Political Rights in the African Charter: Articles 8–14", in MD Evans and R Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000*, Cambridge, Cambridge University Press, 2nd ed (2008), pp 213–43, 225–30.

5 Article 29 of the African Charter states: "The individual shall also have the duty … (3) to preserve and strengthen social and national solidarity, particularly when the latter is threatened."

6 Article 10(2) of the African Charter. This aspect was also confirmed by the ACtHPR in *Mtikila & Others v Republic of Tanzania* (see section 3.2.1 below).

7 African Commission, Resolution on the Right to Freedom of Association, ACHPR/Res. 5(XI)92, 9 March 1992.

8 See also African Union Assembly of Heads of State and Government in Addis Ababa, Ethiopia in July 2004, "Solemn Declaration on Gender Equality in Africa", para 5, Assembly/AU, Decl.12 (III) Rev. 1, https://au.int/sites/default/files/documents/38956-doc-assembly_au_decl_12_iii_e.pdf (accessed 20 May 2024).

political parties are explicitly mentioned in an African human rights treaty for the first time.[9] In addition, the African Charter on the Rights and Welfare of the Child should be mentioned, as its Article 8 also guarantees the right to freedom of association. Lastly, the African Youth Charter provides in its Article 11 for a number of ways in which youth may participate in political processes.

Unlike in Europe, for example,[10] no dedicated guidelines have been developed yet for the regulation of political parties in the African region. However, the Guidelines on Freedom of Association and Assembly in Africa ("FoAA Guidelines"), adopted by the African Commission in May 2017, formulate general principles and rules in relation to freedom of association.[11] As the foundational report of the African Commission's Study Group on Freedom of Association and Assembly in Africa makes clear, although political parties were not directly in mind when the FoAA Guidelines were developed, they are of course also covered under them.[12] The Guidelines set standards for national legal frameworks, legal personality, purposes and activities, oversight, internal governance structures, financing, federations and cooperation, and sanctions and remedies for associations. In addition, they formulate 10 fundamental principles. In relation to the regulation of political parties, the following principles[13] are particularly relevant:

9 As per the latest available list, only 13 states have signed the Protocol while a mere 10 have ratified it. See African Union, "List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa", 19 September 2023, https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_PERSONS_WITH_DISABILITIES_IN_AFRICA_0.pdf (accessed 20 May 2024).

10 European Commission for Democracy Through Law (Venice Commission), *Guidelines on Political Party Regulation,* 2nd ed, 14 December 2020, CDL-AD(2020)032.

11 African Commission, *Guidelines on Freedom of Association and Assembly in Africa*, May 2017, https://achpr.au.int/sites/default/files/files/2021-05/guidelinesonfreedomofassociationandassemblyinafricaeng_1.pdf (accessed 22 May 2024).

12 African Commission, *Report of the Study Group on Freedom of Association & Assembly in Africa*, May 2015, p 12, https://www.icnl.org/wp-content/uploads/ACHPR-English-REPORT-21.05.2015.pdf (accessed 15 May 2024).

13 For a proposed list of principles to guide the constitutionalisation of political parties in Africa, see 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, Edgar Elgar (2022), pp 109–135.

- there shall be a presumption in favour of the exercise of the right to freedom of association;
- any legal framework put in place to regulate associations shall have the primary purpose of enabling the exercise of that right;
- governance agencies shall conduct their work impartially and fairly;
- procedures relating to the governance of associations shall be clear, simple, and transparent;
- state decisions shall be clearly and transparently laid out, with any adverse decision by written argumentation on the basis of law and challengeable in independent courts of law;
- state sanctions shall be strictly proportionate and applied only as a matter of last resort and to the least extent necessary; and
- the right to a remedy shall be protected in cases of violation of the right to association.[14]

2.1.2 The AU's democracy and good governance agenda

A commitment to multipartyism by member states of regional organisations has now become an established pattern, and, through this, peer pressure can be brought to bear on states to democratise. Hence, one of the major reasons for the establishment of the AU in 2002 was the desire by African leaders to arrest the faltering democratic transitions and rising threats of authoritarian resurgence which had already begun to appear.[15] The AU was given the special mandate to promote democracy and good governance. Of the six main instruments that can be said to comprise the AU's democracy and good governance agenda, three are binding and contain provisions that enjoin states to incorporate, in their constitutional

14 African Commission, *supra* n. 11, pp 10–22.

15 For in-depth discussion of the role of the AU in promoting good governance, constitutionalism, and democracy, see CM Fombad, "The African Union and Democratisation", in J Haynes (ed.), *Routledge Handbook of Democratisation*, London, Routledge (2012), pp 322–336; F Aggad and P Apiko, "Understanding the AU and its Governance Agenda", *European Centre for Development and Policy Management*, March 2017, https://ecdpm.org/wp-content/uploads/African-Union-Governance-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf (accessed 17 May 2024); J Akokpari, "The OAU, AU, NEPAD and the Promotion of Good Governance in Africa", EISA Occasional Paper No. 14, November 2003, https://www.eisa.org/storage/2023/05/ocassional-paper-2003-oau-au-nepad-promotion-good-governance-africa-eisa.pdf (accessed 17 May 2024).

and legislative frameworks, measures to promote multipartyism and free and fair elections: the Constitutive Act of the AU of 2001; the AU Convention on the Prevention and Combating of Corruption of 2006 (AUCPCC); and the African Charter on Democracy, Elections and Governance of 2012 (ACDEG).

The Constitutive Act of the AU, its founding document, declares in Article 3(g) that one of its objectives is the promotion of "democratic principles and institutions, popular participation and good governance". In addition, its Article 4(m) states that one of its principles is "respect for democratic principles, human rights, the rule of law and good governance". The AUCPCC also contains in its Article 3(1) an undertaking by state parties to abide by various principles, including the "respect for democratic principles and institutions, popular participation, the rule of law and good governance". The AUCPCC's most significant provision in relation to political parties is Article 10, where state parties undertake to introduce measures to combat the use of funds acquired through illegal and corrupt practices whilst incorporating the principle of transparency into funding of political parties.

The furthest-reaching instrument, however, contains elaborate provisions dealing with diverse aspects of democracy, elections, good governance, and constitutionalism within the AU's agenda on democracy and good governance: the ACDEG.[16] Among its objectives is the promotion of regular, free and fair elections as a means to institutionalise and promote best practices in the management of elections for purposes of political stability and good governance.[17] Besides requiring state parties to implement the ACDEG in accordance with a number of principles, which include the holding of regular, transparent, free and fair elections, Article 3(11) specifically requires them to strengthen "political pluralism and recognis[e] the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law".

Other sections, such as chapter 6 on democratic institutions, chapter 7 on democratic elections, and chapter 9 on political, economic and social governance, touch on aspects of the regulation of political parties. This is particularly the case with the latter chapter, where, in Article 27(1), state

16 On the ACDEG as an enforceable human rights treaty, see section 3.2.3.
17 See ACDEG, Articles 2(3) and (13).

parties commit themselves to "strengthening the capacity of parliaments and legally recognised political parties to perform their core functions". Equally significant are provisions in the ACDEG that envisage the full and active participation of women in the promotion and exercise of a democratic culture,[18] and which enjoin state parties to institutionalise measures that consolidate "sustainable multiparty political systems".[19]

2.2 The RECs' normative framework for regulating political parties

Unlike the AU, the primary purpose of the RECs is to facilitate the economic integration of AU member states. However, many RECs have broadened their mandate to include governance issues such as the promotion of democracy, the rule of law, and respect for human rights. As far as the regulation of political parties is concerned, only the Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC) have instruments in place that could influence the approach adopted by their member states to regulate parties at the domestic level; other RECs have developed similar instruments but not yet adopted them.

2.2.1. ECOWAS Supplementary Protocol on Democracy and Good Governance

ECOWAS was established in 1975 to facilitate economic integration, trade, and development in the West Africa region. However, it recognised that good governance and respect for the rule of law were essential for achieving these goals, and in 1999 adopted the Protocol on Democracy and Good Governance to promote democracy, constitutionalism, and respect for the rule of law. The 2001 Supplementary Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security has two key provisions relating to the regulation of political parties. The first is contained in Article 1, which sets out a number of constitutional principles "shared by all Member States". Article 1(i) provides as follows:

18 See ibid, Article 29.
19 See ibid, Article 32(6) and (7).

> Political parties shall be formed and shall have the right to carry out their activities freely, within the limits of the law.
> Their formation and activities shall not be based on ethnic, religious, regional or racial considerations. They shall participate freely and without hindrance or discrimination in any electoral process. The freedom of the opposition shall be guaranteed.
> Each Member State may adopt a system for financing political parties, in accordance with criteria set under the law.[20]

This provision covers several of the core principles relating to the regulation of parties, such as the freedom to establish parties; the requirement that parties be inclusive; and recognition of the need both for the existence of opposition parties and for funding political parties.

The second relevant provision concerns electoral management bodies (EMBs). Article 3 of the Supplementary Protocol on Democracy states:

> The bodies responsible for organising the elections shall be independent or neutral and shall have the confidence of all the political actors. Where necessary, appropriate national consultations shall be organised to determine the nature and the structure of the bodies.[21]

2.2.2 Other REC instruments on democracy and good governance

Some of the other RECs have also adopted instruments on democracy and good governance that refer to political parties, but none of these are as well established as those adopted by ECOWAS (or the AU itself). Of them, one of the more elaborate frameworks providing guidelines on the regulation of parties appears in the Draft Protocol on Good Governance of the East African Community (EAC), developed in 2012.[22] Thereunder, EAC member states commit to respecting several aspects of good governance, constitutionalism, democracy, and respect for the rule of law.

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20 Economic Community of West African States (ECOWAS), Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, Dakar, December 2001.

21 Ibid.

22 East African Community, The East African Community Protocol on Good Governance (Draft), https://meaca.gov.ss/wp-content/uploads/2022/08/Pdf-Draft-Protocol-on-Good-Governace.pdf (accessed 13 May 2024).

Apart from requirements in regard to independent EMBs and other election-related standards, the Draft Protocol in its Article 7(3) contains an undertaking by member states to institutionalise democracy, democratisation, and good governance specifically in relation to political parties by doing the following:

(g) Enacting laws that regulate the establishment of political parties that are national in character, internally democratic, with clear ideologies, visions and missions, devoid of all forms of discrimination;
(h) Developing policies and laws that regulate funding of political parties …
(k) Establishing measures to ensure political parties are accountable through leadership codes, at all levels of governance;
(l) Enacting or reviewing laws and policies that facilitate representation of women, youth, persons with disabilities and other special interest groups to contest electoral and political leadership positions …

The document remains a draft, though, and its future implementation is very much in doubt. Similarly, three other RECs – the Arab Maghreb Union (AMU), the Intergovernmental Authority on Development (IGAD), and the Community of Sahel-Saharan States (CEN-SAD) – have also developed comparable protocols on democracy and good governance, but none of these has gained any traction so far.[23]

2.2.3 SADC Principles and Guidelines Governing Democratic Elections

Although SADC has not yet developed a comprehensive protocol on good governance, mention should be made of the SADC Principles and Guidelines Governing Democratic Elections (adopted in 2004 and revised in 2015), which are essentially limited to promoting the holding and observa-

23 The only RECs that have not developed comparable protocols are the Common Market for Eastern and Southern Africa (COMESA) and the Economic Community of Central African States (ECCAS). That being said, in its Article 3(d), the treaty establishing COMESA lists good governance as one of this REC's aims and objectives; ECCAS, however, does not so much as even mention governance in its institutional structure.

tion of democratic elections.[24] As a result of this focus, SADC's Principles mention political parties only in this narrow context.

First, the principles for conducting democratic elections require member states to ensure, inter alia, that political parties have equal opportunities to use state media.[25] Secondly, with regard to commitments under the SADC Protocol on Politics, Defence and Security Cooperation, the Principles require member states to provide adequate security for the entirety of the electoral process, including for all political parties participating in elections; furthermore, states have to take reasonable measures to ensure that parties are able to communicate freely with the media and have unhindered access to media organs.[26] Thirdly, the principles prescribe the right of SADC election observers to communicate with all competing parties and candidates, as well as other political associations and organisations.[27]

3. The practical implications of regional standards

Given the existence of the regional and sub-regional frameworks discussed above, the question arises as to whether there is any evidence that they have influenced political-party regulation in practice. This raises two further issues. One relates to the extent of the ratification and domestication of the instruments setting down these standards (section 3.1). The other has to do with the possibility of supranational enforcement of some of the treaty obligations (section 3.2). Against this background, a third avenue – namely, monitoring the compliance of national legislation at a supranational level – will be discussed as well (section 3.3).

3.1 The implications of uneven ratification and domestication

There are several advantages to signing, ratifying, domesticating, and implementing treaties, especially those setting out uniform standards. They not only broaden the rights of citizens and promote best practices, but –

24 Southern African Development Community (SADC), SADC Principles and Guidelines Governing Democratic Elections (Revised, 2015), 20 July 2015, https://www.sadc.int/sites/default/files/2021-08/SADC_PRINCIPLES_AND_GUIDELINES_GOVERNING_DEMOCRATIC_ELECTIONS_REVISED_2015.pdf (accessed 13 May 2024).

25 Ibid, para 4.1.6.

26 Ibid, paras 5.1.6 and 5.1.10.

27 Ibid, para 9.1.8.

perhaps more importantly – serve as an important source of law both for improving national legal frameworks and for affording a benchmark by which to hold member states accountable to their regional and international commitments.

In addition, ratified and/or domesticated treaties provide national courts with a greater panoply of texts with which to inform their jurisdictional decisions. They afford national judges the opportunity as well to proceed by way of a comparative approach when the law being interpreted is similar to that of other member states which are also parties to these treaties. This is particularly so when the constitution provides, expressly or implicitly, for reference to be made to foreign law when courts interpret domestic law.[28] Possibly even more significant is the fact that, in most anglophone African countries, a treaty which has been signed by the government, whether or not it has been ratified and domesticated, can have important legal consequences domestically as an aid to constitutional interpretation.[29]

Despite all of these advantages, the impact that regional standards have had on the regulation of political parties in Africa is not substantial. There are several reasons for this. The first is that the overall record of ratification of regional treaties and protocols among AU member states is poor. A recent study shows that since the creation of the Organisation of African Unity (OAU) in 1963, member states have adopted a total of 57 treaties to advance the overall development of the continent. However, the average percentage of signature and ratification by member states in 2021 (the year

28 For example, see section 233 of the South African Constitution of 1996, which states: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

29 The *locus classicus* for this is the famous case in Botswana, *Attorney General v Unity Dow* [1992] BLR, where at p 154 Amissah J stated: "I bear in mind that signing the [OAU] Convention does not give it the power of law in Botswana but the effect of the adherence by Botswana to the Convention must show that a construction of the section which does not do violence to the language but is consistent with and in harmony with the Convention must be preferable to a 'narrow construction' which results in a finding that section 15 of the Constitution permits discrimination on the basis of sex." The judgement concluded thus: "Botswana is a member of the community of civilised states which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret legislation in a manner which conflicts with the international obligations Botswana has undertaken."

of the study) was 66 per cent and 42 per cent, respectively.[30] Although this rate is significantly higher for the legally binding instruments relevant for the regulation of political parties (outlined above), far from all member states have signed and ratified them. The African Charter has been ratified by all 55 member states except Morocco, but so far the ACDEG has been signed only by 46 of all such states (84 per cent of them) and ratified by 39 (71 per cent).[31] Moreover, 49 (89 per cent) member states have signed, and 48 (87 per cent), ratified, the AUCPCC.[32]

Secondly, even those AU member states that have signed and ratified or acceded to the instruments have done little to implement them. With the ACDEG, for instance, state parties have committed themselves to pursue the objectives, apply the principles, and respect the commitments enshrined in the Charter,[33] but implementation by many state parties remains incomplete.[34]

A third challenge that impacts on the domestic effectiveness of regional standards is the fact that the public's awareness of the role of the AU and RECs in creating norms and promoting democracy, good governance, and constitutionalism is limited.[35] It is thus a welcome development that the FoAA Guidelines have been drafted with contributions made by a working group that included non-governmental organisations (NGOs) from across the continent. Moreover, the Support Group to the Special Rapporteur on Human Rights Defenders – established to promote and monitor the

30 See UNDP, Accelerating the Ratification, Domestication, and Implementation of African Union Treaties
Project April 2021 – March 2023 (Revised Project Document), https://erc.undp.org/evaluation/managementresponses/keyaction/documents/download/6685 (accessed 16 May 2024).

31 See African Union, "List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Democracy Elections and Governance", 8 July 2024, https://au.int/sites/default/files/treaties/36384-sl-AFRICAN_CHARTER_ON_DEMOCRACY_ELECTIONS_AND_GOVERNANCE.pdf (accessed 25 March 2025).

32 See African Union, "List of Countries Which Have Signed, Ratified/Acceded to the African Union Convention on Preventing and Combating Corruption", 14 February 2023, https://au.int/sites/default/files/treaties/36382-sl-AFRICAN_UNION_CONVENTION_ON_PREVENTING_AND_COMBATING_CORRUPTION.pdf (accessed 15 May 2024).

33 See Article 44(1) of the ACDEG.

34 For an overview of ACDEG implementation, see M Wiebusch, C Aniekwe, L Oette, and S Vandeginste, "The African Charter on Democracy, Elections and Governance: Past, Present and Future", 63 (2019) *Journal of African Law*, pp 9–38.

35 See UNDP, *supra* n. 30.

implementation of the FoAA Guidelines – consists of a dozen NGOs and networks of human rights defenders. As for the ACDEG, it has been noted that civil society does not yet make full use of the Charter.[36] Nevertheless, even though their focus is not on political parties, the launch of civil society initiatives such as the "Charter Africa" project are welcome developments to support state parties to fulfil their commitments outlined in the ACDEG.[37]

3.2 Supranational enforcement

Notwithstanding the incomplete ratification status and lack of implementation of the relevant regional instruments at a national level, a window of opportunity is afforded for supranational enforcement of some of the AU and REC standards by both the African Commission and the ACtHPR and REC courts. Whilst the African Commission makes recommendations,[38] the ACtHPR usually makes binding decisions, although, as is the case with the decisions of many international courts and tribunals, contracting parties often do not comply with these decisions.

The main basis for many of the cases brought before the ACtHPR that raise questions about the conformity of national regulations on political parties is Article 34 of the Protocol to the African Charter on the Establishment of the Court. This article allows member states to sign a declaration that gives individuals and NGOs with observer status before the African Commission the right to institute cases directly before it. Until recently, 12 countries had signed this declaration, though four have withdrawn since then.[39]

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36 See A Witt, "Whose Charter? How Civil Society Makes (No) Use of the African Democracy Charter", *PRIF Spotlight*, 10 May 2019, https://blog.prif.org/2019/05/10/whose-charter-how-civil-society-makes-no-use-of-the-african-democracy-charter/ (accessed 8 July 2024).

37 Implemented by a consortium of six African and European NGOs, the project supports AU member states to fulfil their commitments under the ACDEG through the use of online citizen consultation. See Charter Africa, "Pan-African Online Citizen Consultation", https://charter.africa/about (accessed 21 May 2024).

38 For an account arguing that the findings of the African Commission are legally binding, see F Viljoen and L Louw, "The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation", 48 (2004) *Journal of African Law*, pp 1–22.

39 See African Union, "List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment

Several cases brought before the ACtHPR and the African Commission concern the obligation of state parties to comply with instruments that have a bearing on the regulation of political parties. Examples of such cases are discussed below. These deal with the freedom of political participation (section 3.2.1); limitations on and dissolution of political parties (section 3.2.2); and various related rights and obligations (section 3.2.3).

3.2.1 Freedom not to belong to a party and the right to political participation

Probably the most prominent case in relation to political parties is *Mtikila & Others v Republic of Tanzania,* brought before the ACtHR.[40] The applicants alleged that Tanzanian election laws prohibiting independent candidates from running for public office were in breach of various articles of the African Charter, Universal Declaration of Human Rights, and ICCPR. In its judgement, the ACtHR held that the freedom of association guaranteed by Article 10(2) of the African Charter "implies freedom to associate and freedom not to associate". Consequently, the Court found "that requiring individuals to belong and to be sponsored by a political party in seeking election … has violated the right to freedom of association".[41]

In addition to *Mtikila & Others*, a few cases before the African Commission touched on the conception of the right of individuals to establish and join political parties as a form of political participation guaranteed under Article 13(1) of the African Charter. In *Sir Dawda K Jawara v Gambia*, the African Commission found that banning former ministers and members of parliament under the Jammeh regime from taking part in any political activity contravened their right to political participation.[42] Similarly, in *Lawyers for Human Rights v Swaziland*, the African Commission found that

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of an African Court on Human and Peoples' Rights", 14 February 2023, pp 2–3, https://au.int/sites/default/files/treaties/36393-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLESRIGHTS_ON_THE_ESTABLISHMENT_OF_AN_AFRICAN_COURT_ON_HUMAN_AND_PEOPLES_RIGHTS_0.pdf (accessed 22 May 2024).

40 ACtHR, Application No. 011/2011.

41 Ibid, para 113. See also O Windridge, "A Watershed Moment for African Human Rights: Mtikila & Others v Tanzania at the African Court on Human and Peoples' Rights", 15 (2015) *African Human Rights Law Journal*, pp 299–328, 311–312.

42 African Commission, Communication Nos. 147/95 and 149/96 (2000).

a proclamation in 1973 abolishing and prohibiting political parties restricts citizens' right to participation in governance as guaranteed under Article 13(1) of the African Charter.[43]

3.2.2 Limitations on and dissolution of political parties

In comparison to Article 22 of the ICCPR,[44] Article 10 of the ACHPR in principle provides more room for discretion for member states to limit the right to freedom of association through its clawback clause stating that the right must be exercised "in conformity with the rules laid down by the law". However, in *Mtikila & Others*, the ACtHR was of the view that Article 10 of the African Charter should be interpreted in the light of Article 22 of the ICCPR, to the effect that any limitations that member states put on the right to freedom of association must not only be provided for by law but also be reasonable and legitimate. That is, they must be required to ensure the "respect for the right of others, collective security, morality and common interest".[45]

Limitations to the freedom of association in relation to political parties were also discussed in some cases that came before the African Commission, in particular where political parties had been banned by member states. In the *Sir Dawda Jawara* case, the African Commission found that banning political parties is a violation of the right to freedom of association,[46] a finding which was reiterated in the *Lawyers for Human Rights* case.[47]

A detailed discussion by the African Commission of the dissolution of political parties can be found in *Interights and Others v Mauritania*.[48] Here, the possibilities to ban political parties were discussed in relation not only to freedom of association (under Article 10 of the African Charter) but also to freedom of expression, as guaranteed by the African Charter's Article 9(2). According to the Commission, this interrelatedness is even clearer in the case of political parties, considering their essential role for

43 African Commission, Communication No. 251/02 (2005).
44 On the extent to which the ICCPR allows member states to limit the right to freedom of association, see Socher, *supra* n. 2.
45 ACtHR, *supra* n. 40, paras 29–33. See also Windridge, *supra* n. 41, p 312.
46 African Commission, *supra* n. 42, para 68.
47 African Commission, *supra* n. 43, para 62.
48 African Commission, Communication No. 242/2001 (2004).

the maintenance of pluralism and the proper functioning of democracy. A political group should therefore not be hounded for the simple reason of wanting to hold public debates, with due respect for democratic rules, on a certain number of issues of national interest.[49]

3.2.3 Related rights and obligations

Apart from the cases above relating to political participation and freedom of association, two cases that came before the ACtHR dealt with the representation of political parties in EMBs and how such representation might affect EMBs' independence and impartiality. The first case is *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire*.[50]

In this case, the ACtHR held that Côte d'Ivoire had violated its obligation to establish an independent and impartial electoral body, as provided for under Article 17 of the ACDEG and Article 3 of the ECOWAS Supplementary Protocol on Democracy and Good Governance; thus, the country also violated its obligation to protect the right of citizens to participate freely in the management of public affairs, as guaranteed by Article 13 of the African Charter. In the Court's view, an electoral body can be deemed independent if "it has administrative and financial autonomy; and offers sufficient guarantees of its members' independence and impartiality".[51] In the case at hand, the Court declared that the imbalance in representation in favour of the ruling coalition amounted to a violation of Côte d'Ivoire's obligation to establish an independent and impartial EMB.[52]

The second case is *Suy Bi Gohore Emile & Others v Côte d'Ivoire*.[53] Referring to the *APDH* case, the applicants alleged that, in violation of the Court's previous judgment, Côte d'Ivoire had enacted a new law that recomposed the EMB in such a way that it was still not independent and impartial. The Court held that Côte d'Ivoire had only partially violated its obligations arising from the *APDH* judgement. In particular, the Court found that "having political parties represented in an electoral body does not necessarily exclude the possibility for it to offer sufficient guarantees

49 Ibid, para 80.
50 ACtHR, Application No. 001/2014, Judgement of 18 November 2016.
51 Ibid, para 118.
52 Ibid, para 120–33.
53 ACtHR, Application No. 044/2019, Judgement of 15 July 2020.

of its independence and impartiality" as required by Article 17 of the ACDEG.[54] In addition, the Court provided guidance on the criteria for determining which opposition parties should be invited to propose members for EMBs.[55]

Apart from the direct relevance of these two judgements to the requirement of independence and impartiality of EMBs, their broader significance is that they explicitly confirmed that the ACDEG is a human rights instrument justiciable before the ACtHR.[56]

3.3 Supranational monitoring of national legislative compliance

Given the low level of implementation and limited means of enforcement of the relevant instruments, a third avenue towards increased harmonisation and compliance with the regional standards on the regulation of political parties is supranational monitoring through reporting mechanisms and/or election observation.

3.3.1 Reporting mechanisms and synthesis reports

A first route to increased compliance is offered by the reporting mechanisms envisaged in the different instruments.[57] In the case of the African Charter, however, the reporting mechanism has been characterised by late, vague, *ad hoc*, and limited reporting.[58] It was possibly for this reason that the African Commission recently established a group to support the mandate of the AU Special Rapporteur on Human Rights Defenders for the implementation of the FoAA Guidelines.[59] Moreover, due to concerns

54 Ibid, para 171.
55 Ibid, para 176.
56 See B Kioko, "The African Charter on Democracy, Elections and Governance as a Justifiable Instrument', 63 (2019) *Journal of African Law*, pp 39–61.
57 See African Charter, Article 62; ACDEG, Article 49; and AUCPCC, Article 22.
58 See M Evans, T Ige, and R Murray, "The Reporting Mechanism of the African Charter on Human and Peoples' Rights", in MD Evans and R Murray (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986–2000*, Cambridge, Cambridge University Press, 2nd ed (2008), pp 49–75.
59 African Commission, Res. 406 (LXIII). The support group's mandate was extended in 2020 and again in 2022. See African Commission, Res. 471 (LXII) and Res. 547 (LXIII).

"about the slow implementation and review of laws in line with the Guidelines by State Parties", the Commission has decided to conduct a study to assess the level of compliance of national legislation with the FoAA Guidelines.[60] The study will be undertaken with the AU Special Rapporteur in collaboration with the UN Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association under the Addis Ababa Roadmap.[61] Following the adoption of the resolution in 2023, the AU Special Rapporteur invited state parties, national human rights institutions, international organisations, and NGOs, and others to provide input with a view to establishing a consultative process.[62]

As for the ACDEG, state reporting so far is limited to contributions within the African Peer Review Mechanism (APRM).[63] Since the APRM's revitalisation in 2017, its mandate has been expanded to include monitoring and reporting on key aspects of AU governance. Reports prepared within the APRM are reviews that assess performance against objectives set out in the mechanism rather than the implementation of specific ACDEG provisions. Consequently, country review reports regularly contain findings and recommendations in relation to the regulation of political parties as envisaged in the ACDEG.

The 2022 country review report of Namibia, for example, criticises the lack of legislative provisions on the transparency of political-party funding and recommends the adoption of such provisions.[64] It also notes the lack of regulations on the internal operations of political parties, and recommends that national laws be put in place to ensure that parties submit lists which are inclusive and diverse.[65] However, due to the APRM's flexible reporting guidelines, the scope of the sections on political parties varies from country

60 African Commission, Res. 571 (LXXVII).
61 Ibid, operational paras 2 and 3.
62 African Commission, "Call for Inputs on the Study to Assess the Level of Compliance of National Legislations with the Guidelines on Freedom of Association and Assembly in Africa", 2 March 2024, https://achpr.au.int/en/news/announcements/2024-03-02/call-inputs-study-assess-level-compliance-national-legislations (accessed 16 May 2024).
63 See ACDEG, Article 36, establishing a link between the ACDEG and the APRM.
64 African Union, *African Peer Review Mechanism: Namibia Country Report*, January 2022, p 19, https://aprm.au.int/doc-viewer/2754 (accessed 21 May 2024).
65 Ibid, pp 22–23.

to country, with the result that the reports sometimes fail to include any critical assessment of the national legal framework in question.[66]

In addition to the country reviews, the APRM, in collaboration with the African Governance Architecture (AGA), published three thematic governance reports, in 2019, 2021, and most recently in 2023. While the 2019 AGA governance report on shared values does not mention political parties at all, the 2021 report on Africa's governance futures highlights their importance to elections and encourages member states "to use available platforms for sharing of best practices on political parties".[67] More importantly, the latest AGA report, on unconstitutional changes of government, makes specific recommendations about the regulation of political parties insofar as they (parties) can potentially contribute to deficits in electoral integrity.[68] In fact, one of the report's key findings is that political-party financing can affect electoral integrity and result in unconstitutional change of government; the report thus recommends developing guidelines and principles in this regard.[69]

More generally, the 2023 governance report suggests that the AU may "establish minimum standards for promoting multipartyism, particularly the recognition and protection of political parties in a way that promotes inclusivity and popular participation in governance".[70]

3.3.2 AU and REC election observation missions

A first route to increased compliance is offered by the findings and recommendations made by election observation missions conducted by the AU

66 For a comprehensive repository of APRM reports, guidelines, and other official documents, see South African Institute of International Affairs, "APRM Toolkit", https://www.aprmtoolkit.saiia.org.za (accessed 22 May 2024).

67 African Union, *Africa Governance Report 2021: Africa's Governance Futures for the Africa We Want*, Johannesburg, African Peer Review Mechanism (2021), p 21, https://au.int/en/documents/20220328/africa-governance-report-2021-africas-governance-futures-africa-we-want (accessed 22 May 2024).

68 African Union, *Africa Governance Report 2023: Unconstitutional Changes of Government in Africa*, Johannesburg, African Peer Review Mechanism (2023), https://aprm.au.int/en/documents/2023-07-12/africa-governance-report-2023-unconstitutional-change-government-africa (accessed 21 May 2024).

69 Ibid, pp 23, 26.

70 Ibid, p 24.

and some of its RECs.[71] In particular, some organisations have developed guidelines which include standards on the regulation of political parties. At the level of the AU, the AU election observation guidelines are relatively vague in that regard.[72] At the level of RECs, the SADC Principles and Guidelines Governing Democratic Elections contain detailed provisions in relation to political parties. In addition to prescribing a number of principles governing democratic elections, section 11 of the Principles set out extensive guidelines for SADC election observation missions (SEOMs). As regards political parties, the Principles prescribe that SEOMs shall observe whether the legal and constitutional framework guarantees freedom of association, including whether any stringent exclusionary elements exist in the regulatory framework for political-party and candidate registration.[73]

Annex 1 to the Principles elaborates on these guidelines, stating that the following factors should be observed in SEOMs in relation to political parties:

(a) Whether criteria for registration of political parties and candidates are explicitly defined in the laws and transparency executed;
(b) The existence of appeal processes and mechanisms upon disqualification of political parties or candidates;
(c) The procedures for nomination and provision of reasonable time frames to allow political parties and candidates to comply with the requirements of the registration process;
(d) The existence of a Code of Conduct governing all political parties and candidates;
(e) The incidence of international interference in the electoral process, through proscribed financial contributions to electoral contestants, or other activities;
(f) Funding to political parties for campaigns, and campaign spending are transparent and oversight of both is in accordance to the laws of the land;

71 See, for example, J Abbink and G Hesseling (eds.), *Election Observation and Democratisation in Africa*, London, Palgrave Macmillan (2000).

72 African Union, *Guidelines for African Union Electoral Observation and Monitoring Missions*, reprinted in African Union Commission, *African Union Election Observation Manual* (2013), Annex 4, https://www.eisa.org/pdf/au2014EOMmanual.pdf (accessed 17 May 2024). On the experience of the AU with election observation, see CC Aniekwe and SM Atuobi, "Two Decades of Election Observation by the African Union: A Review", 15 (2016) *Journal of African Elections*, pp 25–44.

73 SADC, *supra.* n. 24, sections 11.3.2 and 11.3.7.

(g) The use of public assets and funds for electoral campaigns, including impartial application and their improper use for the electoral advantage of particular political parties, candidates or supporters;
(h) The application of anti-corruption laws and other safeguards in the electoral context, including protections for those who expose election related corruption;
(…)
(j) The requirements and practices regarding direct and indirect access to the mass media for political parties, candidates, supporters and the general public;
(k) The requirements and practices concerning reporting by state controlled, public and private media about political parties, candidates and supporters or opponents of referendum initiatives, including quantitative and qualitative coverage of electoral contestants and issues that are pertinent to voter choices in elections or referenda;
(l) The ability of political parties, candidates and supporters and opponents of referendum initiatives to campaign freely for the support of prospective voters.[74]

Looking at some of the election observation reports published in the past, it appears however that SEOMs are not consistently strict with member states' compliance with these guidelines. For example, although the observer mission report by the Electoral Commissions Forum of SADC Countries on the 2023 Eswatini elections repeatedly notes that political parties continue to be banned in the kingdom, it does not condemn the severe restrictions on the right to freedom of association and participation in electoral processes but instead confines itself to noting "the varying views pertaining to the roles political parties can play in the political landscape of the country [are] something which necessitates genuine dialogue and tolerant engagement to promote political inclusion in diversity …"[75]

Other examples show that SEOM reports can also be critical of the situation in a country. For instance, the SEOM's preliminary statement on the 2018 Madagascar presidential elections notes that "a culture of sustainable

74 Ibid, section 13.2.6.
75 Electoral Commissions Forum of SADC Countries (ECF-SADC), *Observer Mission Report of the Kingdom of Eswatini held on the 29th September 2023*, 6 December 2023, p 15, https://www.ecfsadc.org/observer-mission-report-of-ecfsadc-of-the-kingdom-of-eswatini-2023 (accessed 17 May 2024).

political parties is not apparent", resulting in "a deficit of political institutions and processes with strong and transparent internal democracy".[76]

4. Conclusion

As this chapter has shown, the existing regional and sub-regional normative frameworks provide a broad range of minimum standards on the regulation of political parties in African countries. However, to enable political parties to play a more effective role in governance, the implementation, enforcement, and monitoring of these standards would have to be improved significantly.

At the level of the AU and its RECs, there are in principle two ways of working towards this goal. One approach would look at additional ways for enforcing regional standards. In particular, review of compliance with constitutional amendment requirements laid down in national constitutions could also be performed at the supranational level by the ACtHR and the African Commission. Such supranational review is still possible even where review at the national level is not provided for in the constitution or excluded altogether.[77] Supranational review of the legality of constitutional amendments is also justified at the international level.

In this respect, Article 27 of the 1969 Vienna Convention on the Law of Treaties reaffirms the principle that "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". Against the background of rising illiberal regimes on the continent, there is however also a certain risk of backlash in arguing for a more proactive role for supranational institutions in enforcing compliance. Implementation of the ACDEG is more likely in liberal than in authoritarian regimes.[78] It is also contingent on the interests of powerful states. As the editors of a special

76 Southern African Development Community, *Preliminary Statement to the 2018 Presidential Election in the Republic of Madagascar*, 9 November 2018, https://reliefweb.int/attachments/7562f882-996e-3e79-88cd-94575d555f98/Madagascar_SEOM_Preliminary_Statement_English.pdf (accessed 17 May 2024).

77 For a discussion of the possible role of international bodies in offering some protection against abusive constitutional amendments, see G Halmai, "Judicial Review of Constitutional Amendments and New Constitutions in Comparative Perspective", 20 (2016) *Wake Forest Law Review*, pp 101–135.

78 U Engel, "The 2007 African Charter on Democracy, Elections and Governance: Trying to Make Sense of Late Ratification of the African Charter and Non-Implementation of Its Compliance Mechanism", 54 (2019) *Africa Spectrum*, pp 127–146.

issue on the tenth anniversary of the ACDEG's adoption observed, only three of the five AU member states that make the largest contribution to the AU budget have ratified the ACDEG, and none has accepted direct access by individuals and NGOs to the ACtHPR.[79]

Moreover, with non-compliance with the decisions and recommendation already being a problem, if "the ACtHRP's energetic seizure of its mandate (including enforcing the ACDEG) is not matched with a commensurate commitment by states to the idea of human rights and democracy protection, then political backlash against the ACtHPR may follow".[80]

Rather than "hard" enforcement, the other, arguably more promising, approach to reach a higher level of compliance with regional standards would be to look at improving and harmonising existing "soft" mechanisms, that is, undertaking monitoring through reporting and/or election observation. Proposals such as developing guidelines for political parties by the AGA Platform, or the already-initiated process of preparing a study on the implementation of the FoAA Guidelines with the involvement of civil society, are welcome developments in this regard and should be further encouraged. As to the latter initiative, it should be noted that the scope of the study would necessarily be much broader than, and most likely not focus on, political parties as a distinctive subcategory of associations.

Political parties are however different from this broader category in that they aim to express the will of the people by seeking to participate in and influence the governance of the public life of a country, inter alia through the presentation of candidates for public office. While it might not be necessary that political parties are regulated differently than associations, it would be important to have further specific guidance on issues such as political-party funding and oversight to do justice to the unique role that political parties play in a democracy.

Lastly, in relation to election observation, the AU election observation guidelines could be further concretised by taking the guidelines developed by SADC and other international and regional organisations as an inspiration. But above all, just as with any hard approaches to enforcing the regional standards for regulating political parties in Africa, the consistent use of these softer mechanisms across the continent will be crucial to further harmonising and enhancing the implementation of these standards,

79 Wiebusch, et al., *supra* n. 34, p 36.
80 Ibid.

thereby enabling political parties to play a more effective role in African governance.

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