Conclusions

Chapter 18 Party Constitutionalisation and the State of Democracy in Sub-Saharan Africa: Key Findings and Possible Ways Forward

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1. Introduction

According to the 2024 Afrobarometer survey "Democracy at Risk – The People's Perspective", Africans continue to overwhelmingly reject one-party rule and prefer democracy to any other kind of government.[1] At the same time, less than half of Africans think their countries are democratic, and only slightly more than one-third of them are satisfied with the way democracy works in their countries.[2] As the case studies in this volume illustrate, this dissatisfaction is also a reflection of the way Africans experience multipartyism and how the latter is shaped by the constitutional and legal frameworks in which it operates.

A first general conclusion that can be drawn from this volume is that party constitutionalisation in sub-Saharan Africa is not influenced by colonial legacies to the same extent as are many other areas of African constitutional law. On the contrary, it may be said that across the anglophone, francophone, and lusophone divides, almost all sub-Saharan African countries follow a similar approach in that they understand the function of political parties in the constitutional system principally by combining elements of the "parties as public utilities" model with those of the "defending democracy" model, such that political parties are constitutionally designed as permanent organisations with public functions that go beyond those that are instrumental solely for holding elections.[3] Overall, we can therefore

1 Afrobarometer, "African Insights 2024: Democracy at Risk – The People's Perspective", *Afrobarometer* (2024), p 5, https://www.afrobarometer.org/wp-content/uploads/2024/05/Afrobarometer_FlagshipReport2024_English.pdf (accessed 27 March 2025).

2 *Ibid*.

3 The only exception is Mauritius, where the constitutional function of parties is limited to elections. On the different models, see J Socher, "Constitutionalisation of Political Parties: International Standards and the Experience of Continental Europe", in this volume.

agree with Sujit Choudhry that "it is preferrable to think about regulating political parties in *any* legal tradition".[4] At the same time, this does of course not mean that experiences of party constitutionalisation are not also shaped by specific regional contexts. In the case of sub-Saharan Africa, several key findings may be derived below (in section 2) from the preceding chapters in this volume. In view of these findings, we then make some concrete suggestions for possible ways forward (in section 3).

2. Key findings

A first key finding is that the constitutionalisation of political parties is the norm in sub-Saharan Africa. All 12 case-study countries in this volume have constitutionalised political parties in one way or another. An explicit commitment to multipartyism is sometimes additionally constitutionalised. Against the background of past one-party regimes in most countries, some constitutions also either prohibit the creation of a one-party state or guarantee the right *not* to join a political party. However, remnants of constitutionalised one-party rule still exist in some instances, as can be seen, for example, from the way in which the Ugandan constitution leaves a return to the "movement system" open as an abiding possibility.[5]

While references to political parties in constitutional provisions can be found across sub-Saharan Africa, such references vary significantly in their scope and depth. The constitution of Cameroon, for instance, merely recognises the right to form political parties but otherwise leaves the specification of the exact nature, scope and limits of that right to a political-party law – the effect of which was that, until the enactment of such a law in 1990, the lack of regulation amounted to an indirect party ban. The Ethiopian and Zimbabwean constitutions also refer to political parties only incidentally, while in Mauritius, party constitutionalisation is limited to stipulating registration requirements for the purpose of elections.

In most cases, however, dedicated chapters in the constitution regulate political parties to some extent and outline their main rights and obligations. Moreover, except for Zimbabwe, all of the cases studied in this volume make party status dependent on registration with the state. On

4 S Choudhry, "Constitutional Design and Political Parties", in VC Jackson and M Khosla (eds.), *Redefining Comparative Constitutional Law: Essays for Mark Tushnet*, Oxford, Oxford University Press (2025), pp 310–326, p 324.

5 See sections 69 and 70 of the Constitution of Uganda, 1995.

the one hand, requirements for registration may be necessary to avoid the fragmentation of the political landscape; on the other hand, the example of Rwanda shows that registration requirements and processes can also be used deliberately as a means to ensure that an opposition party is rendered entirely dependent on the goodwill of the authorities. Conversely, the case study on Zimbabwe demonstrates that a complete lack of a registration process for political parties can also work against opposition parties and lead ultimately to their (self-) destruction. With these general observations having been made, we now discuss a number of specific key findings.

2.1 Insufficient or inadequate constitutional power-sharing arrangements

Critically, constitutional power-sharing arrangements are insufficient or inadequate. As almost all of the case studies show, particularistic interests based on ethnicity, religion or region play a major role in party politics in sub-Saharan countries. The common constitutional response, namely to take an integrationist approach by prohibiting or ignoring these considerations, seems to have little or no effect. This is particularly evident if one considers the widespread constitutional prohibition of ethnicity-based political parties, a prohibition which is nonetheless almost never used as a justification for actual party bans, probably due to its perceived sensitivity.[6] Other measures aimed at fostering inter-ethnic cooperation – such as requiring parties to have a national presence or representatives of different regions in their governing bodies – seem to fare better, albeit that such requirements can also erect significant obstacles to the emergence of new political parties.

2.2 Absence of, or unclear and ineffective, requirements for intra-party democracy

Although a number of sub-Saharan African countries demand that political parties adhere to democratic principles or even explicitly require them to be internally democratic, what this means in concrete terms often remains

6 See J Socher and CM Fombad, "Prohibition of Ethnic Political Parties and Constitutionalism in Sub-Saharan Africa", in CM Fombad, N Steytler, and Y Fessha (eds.), *Ethnicity and Constitutionalism in Africa,* Oxford, Oxford University Press, forthcoming.

unclear. What *is* clear, though, is that even where such requirements exist, they do not prevent the widespread undemocratic practices that have been observed in almost all of the case studies in this volume. The most obvious illustration of this is that party leaders are frequently hand-picked in untransparent processes rather than elected by regular party members in a bottom-up process. Examples of such practices abound in the case studies, with some of them described in dramatic terms – parties in Senegal, for instance, are subject to "the iron law of oligarchy", those in Nigeria are under the power of "godfathers and party barons", and Kenya is fraught with "a cult of party leadership".

Undemocratic practices within political parties often result in internal conflict, which in turn can lead to fragmentation or defection of individual members.[7] To address this, some constitutions sanction defection. For example, in Nigeria, Members of Parliament lose their seats when migrating from one political party to another; however, an exception in the relevant law exists for cases where the defection is a result of a "division" within the party. As the Nigerian case study in this volume shows, this exception in the law is widely used by politicians as a loophole to avoid losing their seats in parliament.

2.3 Ineffective regulations for holding ruling parties accountable

Another key finding concerns the effectiveness of regulations designed to hold ruling parties accountable. Many case studies in this volume show that the use of state resources by ruling parties for their benefit is commonplace. The study on Liberia, for instance, details how civil servants campaign for the ruling party during working hours and how government buildings and vehicles are used for that purpose. In Rwanda, dedicated regulations exist to prevent the abuse of public resources for partisan purposes, but a lack of proper enforcement means that state resources can still be used indirectly to help the ruling party. In the chapter on Mozambique, the authors even speak of a "Frelimisation" of public institutions, one in which public entities are under the directorship of party affiliates and companies receive lucrative contracts with the state in exchange for party donations. In Uganda, the ruling party's use of state resources is exacerbated by extensive military

7 On this problem, see generally M Khosla and M Vaishnav, "Democracy and Defections", 22 (2024) *International Journal of Constitutional Law*, pp 400–430.

involvement in the country's economy and public service delivery, as well as by an increasing militarisation of public-security and law-enforcement functions that are normally executed by civilian authorities.

2.4 The increasing importance of regulating party agreements

Although alliances of multiple parties under an umbrella name are a well-known phenomenon in sub-Saharan Africa, the rise of coalition governments in many countries that have long been ruled by a single party has highlighted the increased importance of formally recognising and regulating such cooperation. In Kenya, an alliance of opposition parties was able to break the decades-long dominance of the Kenya African National Union, but the collapse of that alliance only three years later – as a result of a dispute over a legally non-binding memorandum of understanding – revealed a gap in the regulatory framework at the time. Consequently, a new party law with elaborate provisions on party coalitions was enacted.

While the detailed nature of Kenya's framework regulating coalitions is exceptional, some other countries at least provide for the possibility of multiple parties forming coalitions. Yet, as the example of Uganda shows, gaps in these frameworks can be used by ruling parties to co-opt smaller opponents: since Uganda's party law simply mentions "alliances" but does not say anything about their creation, their status, or the relationship between their constituent parties, this has created uncertainty as to whether the leader of the Democratic Party could indeed sign an agreement with the ruling party that was widely perceived as a "sell-out" of the country's oldest opposition party.

2.5 Limited recognition and weak protection of opposition parties

Another key finding relates to specific regulations addressed at opposition parties. As many examples in almost all of the case studies attest, the existing provisions in the constitutional and legal frameworks recognising and protecting political opposition are insufficient.[8] In particular, while many constitutional frameworks recognise the position of an opposition leader,

8 For a detailed comparative study building on the case studies of Kenya, Uganda and Zimbabwe in this volume, see J Socher, "Constitutionalisation of Political Parties, Multipartyism and Political Opposition in Anglophone Eastern Africa", 57 (2024) *Verfas-*

this seems to be largely symbolic and is generally limited to a parliamentary role.

An interesting exception is Senegal, where the position has recently been introduced and was given not to the leader of the party with the second-highest number of seats in parliament but to the candidate that comes second in the presidential election. The exact status, rights and duties of Senegal's opposition leader are however still unclear, as the relevant organic law has not yet been enacted. Uncertainty about the exact role and independence of the opposition leader seems to exist in other countries as well. In Mozambique, for example, the acceptance of the Renamo leader to take on the position and the privileges associated with it has raised suspicion about his independence from the ruling party.

If recognition of opposition parties is only limited, constitutional and legal frameworks aimed at protecting the members and supporters of these parties against intimidation, harassment and violence are either absent or not applied. As the different examples of "majoritarian abuse" in the case study on Senegal show, this observation is unfortunately applicable not only to authoritarian regimes such as Cameroon and Uganda, but also to the seemingly more democratic countries in sub-Saharan Africa.

2.6 Gaps in party-financing regulation and weak enforcement mechanisms

Although many constitutional systems in sub-Saharan Africa envisage laws dedicated to issues of party funding, their enactment is often still pending. The Electoral Code of Cameroon, for instance, envisages a special instrument regulating private party funding, but to date it has not been enacted. In Senegal, a recently introduced amendment to the constitution foresees the enactment of a dedicated party finance law but, again, no such law has been enacted so far. As the case studies on these and certain other countries in this volume show, the general lack of dedicated party financing laws points to significant gaps in the regulatory system. In Mozambique, for

sung und Recht in Übersee/World Comparative Law. On the potential for empowering African opposition parties more broadly, see also AK Abebe, "Tackling Winner-Takes-All Politics in Africa: Inclusive Governance through Constitutional Empowerment of Opposition Parties", in T Ginsburg, AZ Huw, and T Khaitan (eds.), *The Entrenchment of Democracy: The Comparative Constitutional Design of Elections, Parties and Voting*, Cambridge, Cambridge University Press (2024), pp 119–135.

example, private funding of political parties is not regulated at all, thereby leaving the door wide open for corruption.

In cases where private party funding is regulated, limitations are often placed on donations from abroad. This has led to criticism, especially in countries where there are no exceptions for support from the diaspora – a situation that arguably results in discrimination against citizens residing abroad . Some countries provide for other exceptions to the prohibition for party financing from abroad. In South Africa, the prohibition applies only to foreign governments and agencies, whereas foreign individuals are allowed to make donations up to a certain amount. Similarly, in Senegal in-kind contributions from abroad are exempt from the prohibition (making it easy to circumvent the latter).

When it comes to the availability of public funding, the case studies in this volume suggest that sub-Saharan Africa is roughly split in two halves. While Liberia, Mauritius, Mozambique, Nigeria, and Senegal do not provide public funds to political parties, public party funding is available in Cameroon, Ethiopia, Kenya, Rwanda, Senegal, South Africa, and Zimbabwe. Such funding is generally aimed at supporting the functioning of political parties and establishing a level playing field; nevertheless, the example of Rwanda shows that state funding of parties can also be used by the government to control the opposition. Moreover, an elaborate party funding system in Ethiopia seems not to have made any discernible difference in altering the imbalance between the ruling party and its much less powerful competitors.

Further gaps are observed in the regulation of party spending: in Ethiopia, for example, there are no spending limits at all. In many other countries, such limits do exist but the enforcement mechanisms are weak. In Mauritius, the legislation on party spending is outdated and no enforcement mechanism is in place to impose sanctions outside of election periods. In Nigeria, the sanction mechanism to enforce spending limits has not been able to curb the extreme monetisation of the country's party politics. In South Africa, the sanction mechanism for non-compliance is so lenient that parties often prefer not to comply rather than expend resources on ensuring compliance; in addition, sanctions have been applied in practice only on very few reported occasions.

2.7 Lack of independent oversight

While many sub-Saharan African countries have electoral management bodies (EMBs) or other fourth-branch institutions to oversee political parties, this is far from always being the case. In Cameroon, the Ministry of Territorial Administration is tasked with party oversight, thereby exposing opposition parties to the whims and caprices of the ruling party. Similarly, the Rwandan Governance Board is an executive-controlled entity and has been accused of arbitrarily denying registration to opposition parties. In Senegal, the opposition party PASTEF has been dissolved by the Ministry of the Interior.

Where party oversight bodies are indeed separate from the executive, their status, structures and governance are not always constitutionalised but left instead to statutory law, thus making them vulnerable to political interference. But even where this is the case, maintaining their independence from the executive is often challenging. In Nigeria, for example, the EMB's independent status is guaranteed in the constitution and its commissioners have to be non-partisan. However, as the Nigerian case study in the volume shows, this has not prevented questionable appointments. It is hence interesting to note the different approach taken in Mozambique, where the independence of the electoral commission is ensured not through non-partisanship but through equal representation of party members as commissioners.[9] A third approach is taken by Kenya, where the creation of a separate Office of the Registrar of Political Parties seems to have contributed to improving intra-party democracy and increasing the transparency of party financing.

At a more practical level, many case studies in this volume indicate that oversight bodies have insufficient capacities and resources to execute their conferred functions, making them vulnerable to corruption and compromising their independence and autonomy.

9 The African Court on Human and Peoples' Rights found that having representatives of political parties as commissioners is not necessarily a violation of the obligation to establish an independent and impartial electoral body. See *Suy Bi Gohore Emile & Others v Côte d'Ivoire*, Application No. 044/2019, Judgement, 15 July 2020. See also CM Fombad and J Socher, "African Regional Standards for Regulating Political Parties", in this volume.

2.8 Limited impact of international and regional standards and bodies

Finally, despite the existence of a broad range of international and regional standards and bodies relevant for the regulation of political parties, the case studies suggest that their impact at the domestic level is fairly limited. There are many reasons for this, and the chapter on regional standards identifies some of them. The African Charter on Democracy, Elections and Governance, the most relevant regional instrument for the regulation of political parties, has been ratified by less than three-quarters of African Union member states, and implementation by many state parties remains incomplete. At a sub-regional level, 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 political parties at the domestic level.

The case studies suggest, furthermore, that supranational enforcement of these standards plays only a marginal role. Regional courts became active merely in a few cases, and when they did, they normally did not interfere substantially. For example, in the case before the ECOWAS Court challenging the dissolution of the PASTEF party in Senegal, the court limited its analysis to simply recognising that, in terms of Senegalese law, the government has the authority to dissolve political parties by presidential decree.

3. Possible ways forward

Against the background of these findings, what are possible ways forward that could lead towards more robust constitutional and legal frameworks for regulating political parties in sub-Saharan Africa? In general, the widespread historical experience of one-party regimes and the continued existence of dominant parties in many of these countries arguably calls for constitutionalising an explicit commitment to multipartyism and entrenching at least the most basic principles of political-party regulation where this is not already the case. In addition, a number of specific suggestions can be made.

Firstly, new ways should be considered to channel ethnic considerations in African party politics. As some of the case studies also recommend, inspiration could be taken from Arend Lijphart's model of consociational

democracy to better manage ethnic diversity with measures that integrate, and protect, particularistic interests in the foundations of the political system.[10] Lesser-known models to accommodate ethnic considerations such as the best-loser system in Mauritius could be studied in more detail to draw lessons for other political systems on the continent.

Secondly, considering the undemocratic processes and structures that are widespread among many African political parties, a strong argument can be made for the constitutionalisation of the requirement of internal political-party democracy, combined with strong oversight and enforcement mechanisms. Apart from drawing on the experiences of the few African countries that have constitutionally entrenched this requirement, one could also take inspiration from countries outside of Africa that have done so too. For example, the requirement is enshrined in the German Basic Law and has been further concretised in the country's Political Parties Act. While the details would have to be adapted to each country's realities, a parallel regulation could make use of the principles developed in German constitutional doctrine. The experience of Nigeria with the principle suggests, furthermore, that some kind of internal dispute resolution mechanism should be established to reduce the case-load of oversight bodies mandated to decide on internal party disputes.

Thirdly, although the example of Uganda shows that coalition agreements can be used to co-opt entire opposition parties, Kenya's positive experience with coalitions illustrates how they can also provide a tool for the opposition to overcome fragmentation and join forces against ruling parties. In order to avoid uncertainties over the status and contents of such agreements, these could be made legally binding, with the basic features and requirements outlined in the agreements. Moreover, the approach taken by Senegal in conferring the role of opposition leader to the presidential candidate with the second-highest votes is an interesting departure from the practice in other African countries and should be seriously considered as an alternative in countries with presidential systems. While awarding such a "consolation prize" might entail the risk of co-option by the ruling party, it has at least the potential to strengthen the significance of the position and would reflect the political reality that the most powerful opposition politicians in the presidential systems of sub-Saharan Africa do not compete for parliamentary seats but for the office of the president.

10 A Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands,* Berkeley, University of California Press (1968).

Fourth, the legal frameworks regulating party financing need to be improved. Limitations on funding from abroad often work disproportionally against opposition parties and should be reconsidered. Where state funding does not already exist, the provision of such funds could reduce the reliance of parties on private funding and engender a more level playing field. As suggested by international standards, reasonable limitations on campaign expenditure could also be introduced to ensure that the free choice of voters is not undermined or the democratic process distorted.[11] To improve oversight of political-party financing, independent supervisory bodies need to be established or, where they already exist, strengthened.

Fifth, the potential of regional and international standards could be leveraged more effectively. Initiatives such as the preparation of a study on the implementation of the Freedom of Association Guidelines by the African Commission on Human and Peoples' Rights are welcome developments, but further specific guidance on the regulation of political parties on issues such as party financing and oversight would be important steps towards strengthening the existing constitutional and legal frameworks.[12] Regional bodies, furthermore, could issue recommendations upon request on specific planned reforms touching on the constitutionalisation of political parties, such as the Venice Commission does for the member states of the Council of Europe. In addition, sub-regional and regional approaches to election observation could be developed and further harmonised, using the guidelines developed by SADC and other international and regional organisations as an inspiration. Provisions guaranteeing and protecting election observation by civil society organisations could enhance multipartyism and the integrity of election processes to rebuild trust among Africans in democracy.

11 See UN Human Rights Committee, General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), 12 July 1996, CCPR/C/21/Rev.1/Add.7, paragraph 19.

12 African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa*, May 2017. See Fombad and Socher *supra* n. 9.

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