

**CHALLENGES TO CONSTITUTIONALISM AND CONSTITUTIONAL
RIGHTS IN AFRICA AND THE ENABLING ROLE OF POLITICAL
PARTIES: LESSONS AND PERSPECTIVES FROM SOUTHERN
AFRICA***

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1. INTRODUCTION

The 1990s appear to have marked a critical high point for constitutionalism, the rule of law and democracy in Africa. As the so-called “third wave”¹ of democratisation swept through the continent, it generated expectations of a new dawn and the end of an era of corrupt, authoritarian and incompetent dictatorships that had earned the continent notoriety for political instability, civil wars, famine, disease and similar ills. One of the forces unleashed by this dramatic wind of change was a sort of epidemic of constitution-making.² Under pressure from both within and without, African governments sought to re-establish their credibility with external donors and assuage popular internal pressure by tinkering or radically changing their constitutions. Although these new or revised constitutions have taken diverse forms that reflect the received colonial models, they have attempted, by and large, to address the wide-ranging social, economic, ethnic, political and other problems that have afflicted the continent. Almost all these constitutions now contain provisions that purport to recognise and protect most of the fundamental human rights that are associated with constitutionalism and Western liberal democracy.³ Perhaps one of the most significant developments has been the recognition of political pluralism and the legalisation of previously banned political parties.

The history of constitutionalism and constitutional democracy in Africa is not a particularly happy one. Many of the continent’s problems have been caused, not by the absence of constitutions *per se*, but rather by the ease with which constitutional provisions were abrogated, subverted, suspended or brazenly ignored. In short, an absence of constitutionalism and little respect for the rule of law. Constitutionalism cannot take hold within a constitutional framework that does not, amongst other things, promote constitutional and political justice. If, as Cass Sunstein rightly points out, constitutions should be designed to contain provisions that protect a country against the most likely problems in the usual political processes, particularly those aspects of a country’s culture, and traditions, and one should add, history, that will predictably produce harm through the country’s ordinary politics, or its most threatening tendencies,⁴ then Africa’s constitutional engineers have once again failed.

It is therefore no surprise that a decade after the on-set of the third wave and the ensuing explosion in constitutional rights, there are rising doubts about the future of constitutionalism and liberal democracy on the continent. The high hopes that the third wave was going to be a real harbinger of a “second liberation” of Africans, this time, from their own rulers, is giving way to some gloom and desperation. This is particularly so with respect to political rights. The prospects for genuine multi-partyism have reduced considerably since the early successes that saw the removal of certain leaders who had held power for decades such as Kenneth Kaunda of Zambia and Dr. Hastings Banda of Malawi. In fact, the chances of an opposition political party winning election since after the founding elections of 1989 to 1995 have progressively diminished.⁵ The “third wave” democratic leaders and the “born-again” pre-1990 incumbents who were able to weather the storm of change, and the increasing number of dominant parties that have replaced the one party regimes, have either progressively adopted legislation, policies and measures designed to entrench themselves in power or, simply maintained their foothold

on power through rigged elections. The real danger for constitutional democracy and democratic consolidation in Africa that results from the regular rigging of elections is what it portends for the future. In destroying in a serious way faith in peaceful change through the ballot box, it raises the ugly spectre of change by the use of force. Democracy can hardly be expected to take hold where elections are reduced into a symbolic exercise in mass participation with predictable results rather than a process of competition with uncertain results.

The recent constitutional changes, it is contended, have failed to adequately draw inspiration from some of the salient lessons of Africa's dark authoritarian past. For example, little has been done to curb the temptation for leaders to seek to entrench themselves or their parties in office in perpetuity. As a result, the constitutional rights revolution on the continent, whilst real, remains uncertain. One of the major problem areas is that of political rights and political justice, particularly with respect to political parties. It is argued that political justice, constitutional justice and constitutionalism can not take root or operate meaningfully within the present dispensation unless the rights of political parties are constitutionally recognised, protected and guaranteed within a framework of certain minimum principles designed to ensure a free, fair, participatory and competitive political process. The constitutional right to form or join a political party and the right to vote or be voted for, is meaningless if there are no guarantees that the whole political process would not easily be manipulated by the dominant majorities or dominant parties that have emerged today. One of the major challenges that have emerged from the developments of the last decade is the problem of countering the resurgence of majoritarian abuse or dominant party dictatorships that use multi-partyism as a convenient smokescreen behind which to disseminate their dictatorship. This poses one of the main threats to entrenching constitutionalism and the rule of law on the continent. How can constitutionalism counter the risks of democratic majoritarianism descending into the tyranny of the majority? This paper contends that one of the most important ways to arrest this insidious decline towards the one party system is for all African constitutions, first to guarantee constitutionalism and second, to constitutionalise the status of political parties.

The paper examines the possible role that constitutionalising political parties can play in checking majoritarian abuses in African polities by looking at the diverse constitutional approaches and practices in selected Southern Africa countries⁶ to see what lessons can be learnt. It starts by examining the concept of constitutionalism, identifies its core elements and briefly considers its links with cognate concepts such as constitutional democracy. This is followed by an analysis of the core elements of constitutionalism in the different constitutions covered in the study. An examination of the constitutional status of political parties in the selected countries is undertaken and some recent cases that illustrate the scope of existing constraints on legislation dealing with political activities are discussed. The paper then considers the desirability of constitutionalising the status of political parties and on the basis of this suggests some of the important constitutional principles needed to promote a just and fair political process. In concluding, it argues that there is a constitutional politics domain which should and can be distinguished from ordinary politics. It is contended that where the constitutional

foundation on which political rights are exercised, especially where the basis for the establishment and operation of political parties and their participation in the electoral process is weak and flawed, as it is in many African constitutions, then the right to associate, vote and participate in the governance of the state is *ab initio* put in jeopardy because it will depend on the benevolence of African leaders and their dominant parties who have shown in the last decade that they have lost nothing of the pre-1990 self-serving and self-perpetuating autocratic impulses. It is therefore suggested that constitutionalising the status of political parties within the framework of certain basic and legally enforceable principles that will ensure a fair and just outcome to competitive political processes will enable them to play a critical role in enhancing the prospects for constitutionalism, constitutional democracy and the rule of law in Africa's faltering constitutional rights revolution.

2. CONSTITUTIONS, CONSTITUTIONALISM AND CONSTITUTIONAL RIGHTS

In order to fully appreciate the meaning and significance of constitutionalism, it is necessary to first consider the meaning of the word constitution and distinguish it from the former as well as from other closely related but different concepts such as democracy.

2.1 Constitutions and constitutionalism

There is no generally accepted definition of the word constitution.⁷ For our purposes, it will suffice to consider a constitution as what has sometimes been described as a "power map,"⁸ which derives its whole authority from the governed and regulates the allocation of powers, functions and duties among the various agencies and officers of government as well as defines their relationship with the governed. It forms the main source and basis of governmental rulemaking and is primarily designed to check against capricious or arbitrary rulemaking.

The fundamental essence of a constitution is to prevent both tyranny and anarchy. To achieve this, it must sufficiently empower the government to enable it to be strong enough to operate effectively whilst imposing reasonable restraints on it that do not make it too weak and create the risk of anarchy.⁹ A constitution may fail to accomplish its primary goal of preventing either extremes of tyranny or anarchy because it contains nothing but lofty declarations of objectives and goals in terms that import no legally enforceable restraints. Hence, a constitutional government means something more than a government operating in accordance with the terms of a constitution. It means a government controlled by rules as opposed to an arbitrary government; a government actually limited by the terms of the constitution and not a government limited only by the desires and capacities of those who exercise power.¹⁰ Nevertheless, this may not necessarily exclude an arbitrary government, if the provisions of the constitution do not contain any restrictions or only weak restrictions, as was the case with many pre-1990 African constitutions. The absence of meaningful restrictions therefore made it almost impossible for many countries to practice constitutionalism.

The distinction between a constitution and constitutionalism, it has been said, is more than a simple exercise in semantics.¹¹ Constitutional scholars have had great difficulties defining the concept of constitutionalism. Some have even confused it with the very notion of a constitution.¹² The modern concept of constitutionalism certainly defies any easy and simple definition or description. It clearly means something more than the mere attempt to limit governmental arbitrariness, which is the premise of a constitution, and which attempt may fail, as it has done several times in Africa. The concept today can be said to encompass the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule but also that such a government should be able to operate efficiently and in a way that it can be effectively compelled to operate within its constitutional limitations. In other words, constitutionalism combines the idea of a government limited in its action and accountable to its citizens for its actions. The modern concept therefore rests on two main pillars. First, the existence of certain limitations imposed on the state particularly in its relations with citizens, based on certain clearly defined set of core values. Second, the existence of a clearly defined mechanism for ensuring that the limitations on the government are legally enforceable. In this broad sense, constitutionalism has certain core, irreducible and possibly minimum content of values with a well defined process and procedural mechanisms to hold government accountable. The most recent literature on the topic suggests that the following can be identified as the core elements of constitutionalism:¹³

- i) the recognition and protection of fundamental rights and freedoms;
- ii) the separation of powers;
- iii) an independent judiciary;
- iv) the review of the constitutionality of laws; and
- v) the control of the amendment of the constitution.

The central principle in constitutionalism is the respect for the human worth and dignity. It is by no means a static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens.¹⁴ It is the institutionalisation of these core elements that matter. The philosophy behind constitutionalism is the need to design constitutions that are not merely programmatic, shams or ornamental documents that could be easily manipulated by politicians but rather documents that could promote respect for the rule of law and democracy. Nevertheless, constitutionalism needs to be distinguished from both democracy and the rule of law.

2.2 Constitutionalism and the rule of law

Constitutionalism as defined above is closely linked to the rule of law. This revered doctrine, which has an ancient lineage, was popularised by A.V. Dicey, the most eminent British constitutional scholar of the nineteenth century, who viewed it as one of the crucial elements of English constitutionalism.¹⁵ However, the expression remains ambiguous and has been defined differently by different writers. The contemporary interpretations of the doctrine refer to a cluster of ideas, the best known being related to the principle of legality, the prescription of procedural standards in the administration of justice, the separation of powers, the promotion of material justice and individual rights and the maintenance of public order. Thus defined, many of the core elements of constitutionalism listed above are also necessary for the rule of law to exist, but the latter

concept is slightly narrower in scope. Respect for the rule of law on its own, may not necessarily lead to the existence of constitutionalism. Nevertheless, constitutionalism is safeguarded by the rule of law and without the rule of law there can be no constitutionalism.

2.3 Constitutionalism and democracy

There is a tendency to equate constitutionalism with democracy. Just as the existence of a constitution is not a guarantee of constitutionalism, so too the existence of democracy or certain democratic values or institutions within a country does not necessarily indicate that there is constitutionalism. Whilst there is no inherent contradiction between democracy and constitutionalism because some constitutions promote both, there are however many situations where democracy can be used to subvert constitutionalism; which is exactly what has been happening in Africa in the last decade.

Like the words constitution and constitutionalism, democracy is a fuzzy word that has been subjected to a variety of tendentious interpretations. We shall however confine ourselves to the simplest but classic and much hackneyed definition of democracy given by Abraham Lincoln, when he referred to democracy as government of the people, by the people for the people. If the underlying idea behind democracy is no more than rule by the popular will, this can well be achieved with or without a constitution. But even where it is based on a constitution, this may not necessarily produce or result in constitutionalism. Many of the notorious absolutisms of the twentieth century have been produced by popular elections. In Africa, it is difficult to forget the notorious dictatorships of Jean Bedel Bokassa, Sese Seko Mobutu and Marcias Nguema who staged elections at one point or another to legitimise their hold on power. Reliance on the popular will alone is capable of and has indeed resulted in a tyranny of the majority or of a minority or more often of one man. Historical examples of this include the injustices of classical Greek democracy and the terrors of the French revolution.

Neither constitutional governance nor democratic governance is synonymous with constitutionalism. However, as Ulrich Prewss points out, modern constitutionalism involves the reconciliation of the democratic rule of men with the constitutional rule of law.¹⁶ A constitutional and democratic government must not only be based on popular will of the people but should operate within constraints that prevent any arbitrariness for there to be constitutionalism. This is possible only under what is usually referred to as liberal democracy as opposed to illiberal democracy. The former allows citizens not only to vote but to be able to vote for an alternative government to that in power without any fear of intimidation or persecution.¹⁷ In the final analysis, the concepts of democracy and constitutionalism can easily be reconciled. For a democracy to be stable and function properly it needs a constitutional framework; for constitutionalism to thrive, it needs a democratic pedigree. Democracy is therefore an essential prerequisite for constitutionalism.

2.4 Constitutionalism, constitutional justice and political justice

Constitutionalism is bound to face serious problems in a period of radical change such as what is taking place in Africa today. This has not been helped by the listless borrowings from Western liberal constitutions. In fact, the last few years have exposed the contradictions of symbolic constitutionalism where constitutional rights fail to result in constitutional justice. This is particularly acute in the domain of political rights and political justice.

There is a close relationship between constitutionalism and constitutional justice and the existence of the former is essential for the existence of the latter. Constitutional justice is concerned with the adoption of constitutional norms, institutions and processes that are designed to limit and control political power. It entails the exercise of constitutional rights, or for our purposes here, political rights in a manner that leads to political justice. From a transitional perspective, what must be considered as constitutionally and politically just must be contextual and contingent in the sense of redressing the pre- 1990 legacies of injustice. Justice and political “justice” is used in the Rawlsian sense of fairness.¹⁸ This essentially liberal conception of political justice according to Rawls has three features: first, a specification of certain basic rights, liberties and opportunities; second, an assignment of special priority to those rights, liberties and opportunities, especially with respect to claims of the general good; and third, measures assuring to all citizens adequate all-purpose means to make effective use of their liberties and opportunities.¹⁹ In essence, constitutionalism and political justice, requires constitutionalised fairness in a political process that provides each person with a free and equal opportunity to compete. In this respect, it can be said that constitutional politics should be seen as corresponding with a higher level of popular deliberation and consensus that is distinguishable from ordinary politics.²⁰ This calls for an identifiable and justiciable domain of political rights and political justice which, it is contended, can best be achieved by constitutionalising the role of political parties. Before examining the constitutional status of political parties under the selected Southern African constitutions, it is necessary to consider the scope for constitutionalism under these constitutions. Constitutionalising the status of political parties on its own will achieve little if the core elements of constitutionalism are missing from the constitution

3. SOUTHERN AFRICAN CONSTITUTIONS ANALYSED IN THE LIGHT OF THE CORE ELEMENTS OF CONSTITUTIONALISM

The following brief analysis of the core elements of constitutionalism viz, fundamental rights and freedoms, separation of powers, independent judiciary, review of constitutionality of laws and control of constitutional amendment of the constitution, is based on the latest amendments to the constitutions of Angola, Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.²¹ The purpose of this analysis is twofold. First, to briefly explain these elements and their significance as core elements of constitutionalism and second, to see to what extent there is scope for constitutionalism under the constitutions of these

countries. It is necessary to preface this by pointing out that, given the vital importance of each of these elements, it is the cumulative effect of the presence of each of these elements rather than the extent of the presence of one and the absence of the other that determines whether or not a constitution provides any prospects for constitutionalism. The significance of this analysis, it must be emphasised, is the fact that it is the prospects for constitutionalism that makes the constitutionalisation of political rights in general and those of political parties meaningful for purposes of political justice.

3.1 Fundamental human rights

The protection of fundamental human rights and freedoms has become a standard of constitutionalism recognised and accepted by all African countries. The manner and scope of recognition and protection of these rights in the constitutions of Southern African countries varies. In South Africa, it is contained in the Bill of Rights,²² whilst in the other countries, this is usually found in a section with title “Protection of fundamental rights and freedoms.” As regards the scope, whilst older constitutions, such as the Constitution of Botswana, usually cover only the first two generations of rights,²³ most of the recent constitutions, taking the hint from the African Charter on Human and Peoples’ Rights (ACHPR) of 1981 cover all three generations of rights. The Angolan Constitution goes even further in article 21(2) and states that the “fundamental rights provided for in the present law shall not exclude others stemming from the laws and applicable rules of international law.” This is particularly important when it comes to interpreting the rights provisions. A similarly expansive approach to interpreting these rights is provided for in the South African Constitution, which in section 39, states that when interpreting the Bill of Rights, the courts must “promote the values that underlie an open and democratic society based on human dignity, equality and freedom,” and must also consider international law as well as foreign law. To underline the importance of human rights protection, most of these constitutions provide special procedures for their enforcement by allowing any persons aggrieved by any violation of these human rights provisions to seek redress from the courts.²⁴ The significance of fundamental rights is underscored in South Africa, by section 7(1) of the Constitution, which states that the “Bill of Rights is a cornerstone” of the country’s democracy. From the foregoing, it is therefore clear that Southern African constitutions now recognise and protect fundamental human rights and freedoms, even if the extent and scope of protection offered varies from one country to another.²⁵

3.2 The separation of powers

The separation of powers, as one of the fundamental preoccupations of modern constitutionalism, is driven by the suspicion and distrust of power in general and the concentration of power in particular. As Lord Acton had observed several centuries ago, “all power tends to corrupt, and absolute power corrupts absolutely.”²⁶ The abuse of the often exorbitant powers that many African leaders arrogate to themselves has been one of the major causes for the continent’s woes. One of the main ways in which many governments today try to display their new democratic credentials has been through the introduction of constitutional provisions that apparently provide for a separation of

powers. This is not surprising, for the French revolutionaries considered the separation of powers so important that in article 16 of the Declaration of the Rights of Man and the Citizen 1789, they stated that any society in which the separation of powers is not observed “has no constitution.”

The doctrine of separation of powers, in its simplest and probably extreme form, basically requires that the three branches of government, namely the executive, legislative and judiciary, should be kept separate from each other.²⁷ African constitutional engineers, in incorporating the doctrine, had three main Western models to choose from: the semi-rigid presidential form of it that appears in the US Constitution; the Westminster model which, whilst recognising the three branches of government, provides for extensive fusion and overlapping, especially between the legislative and executive powers; and the French model, which is essentially a mix of the other two and provides for a close collaboration rather than a strict separation of powers, with the only peculiarity being the dominance of the executive and the subordinate position of the judiciary. Which ever the model adopted, the modern doctrine of separation of powers does not require a rigid watertight separation of the three powers but rather a system in which the risks of a concentration of powers, and the attendant dangers that go with it, can be forestalled through limited interference by each of the three powers in each other’s domain.

With the exception of Swaziland, all the constitutions of the Southern African countries examined in this study expressly or implicitly provide for a separation of powers. In fact, the Swaziland Constitution, in spite of being the most recent on the continent, only confirms and perhaps reinforces the reputation of this country as Africa’s last absolute monarchy.²⁸ Unlike the Constitution of the Kingdom of Lesotho, which expressly states in section 44(1) that “there shall be a King of Lesotho who shall be a constitutional monarch and Head of State,” the Swazi Constitution provides for a King who controls and dominates the executive, the legislature and the judiciary.²⁹ Even though in exercising his powers to appoint officials to the executive³⁰ and judiciary, there is a requirement in most instances that the King should “consult,” his absolute power of action is unambiguously stated in section 65(4) which states that, “where the King is required by this Constitution to exercise any function after consultation with any person or authority, the King may or may not exercise that function following that consultation.” In other words, he is under no constitutional obligation either to consult anybody or authority or, if he consults, to act on any advice received. It is clear from this alone that within such absolutism there can hardly be any prospects for constitutionalism.

In all the other constitutions, whilst the separation of powers is either explicitly or implicitly provided for in a wide variety of ways,³¹ the scope for mutual checks and balances that inhere in the doctrine is diminished in many of these constitutions by the exorbitant powers conferred on the executive to interfere with the other two branches of government. This is largely manifested by the scope of the power to make appointments to the judiciary and the legislature.³² An example of unconstrained power almost on a par with that of the Swazi King, is found in section 31K of the Zimbabwean Constitution which under the heading “extent to which exercise of President’s functions justiciable,”

exclude from judicial review any inquiry into whether or not, where the President is required to act on advice or recommendation or after consultation, he sought this advice or recommendation or actually consulted, or even the nature of what he was supposed to have received or acted upon. In spite of the apparently dominant position of the executive under these constitutions, there are sometimes provisions that ensure legislative control over the executive through the principles of individual and collective responsibility before parliament.³³ Legislative control over the executive has been reinforced in Namibia by article 32 (a) of the Constitution which provides that “any action taken by the President pursuant to any power vested in the President by the terms of this article shall be capable of being reviewed, reversed or corrected on such terms as are deemed expedient and proper should there be a resolution proposed by at least one-third of all the members of the National Assembly and passed by two-thirds majority of all the members of the National Assembly disapproving any such action and resolving to review, reverse or correct it.” Perhaps the main conclusion that can be drawn from these constitutions is that they do provide for a separation of powers in the sense of checks and balances that can reduce the risks of despotism and thus enhance the chances of constitutionalism. However, the possible effectiveness of any separation of powers provision depends to a large extent on the extent to which the judiciary is independent.

3.3 The independence of the judiciary

An independent judiciary is a necessary and logical corollary to the doctrine of separation of powers. A formal constitutionally entrenched independent judiciary is absolutely essential and a necessary precondition to functional and substantive judicial independence. Although there is no consensus amongst scholars on exactly what this means, an independent judiciary can be defined as one that is free to render justice on all issues of substantial legal and constitutional importance, fairly, impartially, in accordance with the law, without threat, fear of reprisal, intimidation or any other undue influence or consideration.³⁴ Nevertheless, like separation of powers, it is not an absolute concept. It does not refer to a single kind of relationship or something that a judicial system “has” or “does not” have but rather what it may have “more of it” or “less of it.”³⁵ Bearing this in mind, a few conclusions can be drawn.

From the formal perspectives,³⁶ all the constitutions in these Southern African countries have provisions which in varying degree of effectiveness provide for judicial independence.³⁷ Determinants of such formal constitutional independence include³⁸ vesting judicial functions exclusively on the judiciary,³⁹ qualifications for prospective judges, the independence of the appointment process, the independence of the Judicial Service Commissions, security of tenure, judicial remuneration, promotion processes, disciplinary processes and immunity from criminal and civil suits. The scope for judicial independence is quite limited in Swaziland, because of the absolute powers conferred on the King to control the judiciary.⁴⁰ On the other hand, the scope for judicial independence is also quite diminished in Madagascar, Angola, and Mozambique because the relevant constitutional provisions are very narrow in scope, vague in formulation and many details of the critical determinants of judicial independence are reserved for regulation by ordinary laws.⁴¹ Perhaps a possible cause for concern is the scope for

political interference resulting from the formulation of the appointment provisions⁴² and the role played by the Judicial Service Commissions, some of which are largely dominated by executive appointees, in recommending judicial appointments.⁴³

Apart from Swaziland, Angola, Madagascar and Mozambique, the evidence from some recent studies suggest that in spite of political interference in many countries, the judiciary from a functional and substantive perspective, have in many cases been fighting hard to maintain their independence. In fact, the serious crisis that has hampered the work of the courts especially during the past five years in Swaziland as a result of the government regularly ignoring court decisions and intimidating judges, culminating in all the Appeal Court judges resigning from 2002-2004,⁴⁴ is likely to continue under the new illiberal constitutional dispensation. A 2006 Democratic Governance and Rights Unit, University of Cape Town study (hereinafter referred to as UCT Study),⁴⁵ covering many of the countries in the region, whilst concluding that the overall picture is “not a happy one” showed that there was some resilience on the part of the judges in the face of strong political pressure. For example, after noting the increasing appointment in Zimbabwe since 2000 of judges sympathetic to the government, especially in the Supreme Court and the intimidation of judges, the UCT Study concludes that, “despite immense pressure and severe resource constraints, an underlying professionalism remains noticeable in many judgments, especially from the High Court.”⁴⁶ A similar high level of professionalism by judges amidst political pressure was noted in the other countries covered in the study such as Botswana,⁴⁷ Lesotho, Malawi, South Africa⁴⁸ and Zambia. Finally, the findings of an Afrobarometer survey⁴⁹ of some of the countries covered in this study, reveals some interesting results. On the question of public trust in the courts of law, the survey results indicating those who either trusted the courts a lot or, somewhat were: 65% in Botswana, 64% in Namibia, 57% in Zambia, 47% in Malawi, 43% in both South Africa and Zimbabwe and 40% in Lesotho. This might look unusually low, especially in the case of South Africa, which probably has the most carefully crafted constitutional provisions on judicial independence. The legacy of apartheid and the unusually high expectations of the transformation process in South Africa, might explain this. Nevertheless, the general crisis of trust in public institutions is a growing phenomenon in post-third wave Africa.⁵⁰

3.4 The review of constitutionality of laws

A constitution is only as good as the mechanism provided within it for ensuring that its provisions are properly implemented and that any violations of it are promptly sanctioned. An important bulwark of constitutionalism is therefore the existence of an efficient and effective mechanism for controlling and compelling compliance with the letter and spirit of the constitution. In the absence of this, the constitution is not worth the paper on which it is written and is probably as good as being non-existent. Besides this, it is the only way in which the supremacy of the constitution, which all these constitutions explicitly⁵¹ or implicitly⁵² provide for, has meaning.

Three main patterns emerge from an analysis of the mechanism provided for protecting constitutionality and legality in the constitutions of the countries covered in this study. The first pattern is the model of the Constitutional Council, usually associated with

continental Europe and more specifically, the *Conseil Constitutionnel* of the French Fifth Republic Constitution of 1958, which has been adopted in slightly modified form in the Constitutions of Angola,⁵³ Madagascar⁵⁴ and Mozambique.⁵⁵ From a functional and substantive perspective, if the original and congenital defect of this model, its quasi-administrative rather than judicial nature, composed as it is, of political appointees who are not necessarily judges, compromises the chances of effective review, the fact that it can only be seised by the very politicians who are apt to make unconstitutional laws and often mainly with abstract pre-promulgation review, renders the whole mechanism potentially irrelevant and unreal. Because this key pillar of constitutionalism is missing, the prospect for constitutionalism in these three countries is very bleak indeed. This is perhaps accentuated by the enormous scope that these constitutions often allow for direct executive law-making,⁵⁶ which makes it easy for dominant parties in these countries to easily enact legislation that may entrench their hold on power with little fear of judicial oversight.

The second pattern is review by ordinary courts and this appears in diverse forms under the Constitutions of Botswana,⁵⁷ Lesotho,⁵⁸ Malawi,⁵⁹ Mauritius,⁶⁰ Namibia,⁶¹ Swaziland⁶² and Zimbabwe.⁶³

Finally, the third pattern, which may be described as a mixed model is found in two of the constitutions covered in the study. One of this is the South African Constitution, which combines elements of both a diffuse and concentrated system. Despite the fact that there is a specialised Constitutional Court specifically created to deal exclusively with constitutional adjudication, parties may raise constitutional issues before the lower courts, and section 167 (6) of the Constitution allows them, in the interest of justice and with leave of the Constitutional Court, to bring a matter directly to the Constitutional Court or appeal directly to it, from any lower court.⁶⁴ The other example of this is provided for under section 27 of the Zambian Constitution which provides for the creation of *ad hoc* special tribunals to deal with pre-promulgation preventive review of constitutionality whilst reserving repressive *a posteriori* review of constitutionality to the High Court.⁶⁵

Apart from Swaziland,⁶⁶ there have been numerous cases in the countries that have adopted the last two models of judicial review in which the courts, in spite of frequent political interference and intimidation, have declared legislation invalid for violating the constitution.⁶⁷ The fact that even in countries such as Zimbabwe, where some of the superior courts have been packed with judges sympathetic to the government,⁶⁸ have still been able to declare statutes null and void for unconstitutionality, suggests that a constitutionally entrenched system of judicial review of constitutionality may play an important role in strengthening constitutionalism.

If the legislature, in its wisdom, considered it legitimate to establish in a constitution certain guarantees designed to protect citizens as well as control the government as to what to do or not do, then it must also be considered as legitimate to build into the constitution the measures needed to ensure that the guarantees contained in it are respected. It is therefore contended that there can be no constitutionalism, in terms of respect for the constitution and the values and principles that underlie it, if there is no

secure review mechanism, whether by ordinary courts or other specialised courts or bodies, that can independently and impartially enforce the provisions of this constitution and check and control any abuses of its provisions. On the other hand, any system of review of constitutionality of laws, which makes the control to depend to a large extent, on the lawmaker or the executive, as, is the case under the Angolan, Madagascan and Mozambican Constitutions, is clearly a sham and diminishes any prospects for constitutionalism. This is paradoxical because the third wave has come to be associated with the rapid expansion of judicial review in many countries.⁶⁹

3.5 The control of constitutional amendments

A constitution is or, should be an enduring document. It is a law but unlike any other law, is the supreme law of the land based on the sovereign will of the people. It will lose its value as the supreme law of the land, and the will of the people will be subverted, if it can be altered easily, casually, carelessly, by subterfuge or by implication through the acts of a few people holding leadership positions. Constitutionalism implies that the constitution should not be suspended, circumvented or disregarded arbitrarily by the political organs of government and that if it is to be amended, this should be through a clearly laid down procedure that ensures that the will of the people is not defeated in the process. The existence of a constitution that is not overtly vulnerable to governmental or transient majoritarian manipulations through arbitrary amendments, provides a sense of certainty and predictability that enhances the prospects for constitutionalism.

From the perspective of constitutional amendments, written constitutions, such as those examined in this study, are commonly classified as either rigid or flexible, according to the ease with which they can be amended. Whilst flexible constitutions are easily adaptable and adjustable, the opposite is true of rigid constitutions. Although within these two categories there are innumerable possibilities, two main ones are worth noting; semi-flexible and semi-rigid constitutions. The problem of controlling and restricting the frequent and arbitrary constitutional changes that were so rampant prior to the 1990s appears to have been on the minds of the post-1990 constitutional reformers but it would seem that the results achieved can not be seen, even from a purely formal point of view, as a success. Taking into account the number of legal obstacles that have been provided to guard against arbitrary constitutional alterations, the constitutions in this study can be grouped into three categories: the flexible, the semi-flexible and the semi-rigid.

The majority of constitutions, namely, those of Angola,⁷⁰ Lesotho,⁷¹ Madagascar,⁷² Malawi,⁷³ Mozambique,⁷⁴ Zambia⁷⁵ and Zimbabwe⁷⁶ fall into the flexible category. Because of the increasing number of dominant parties with large parliamentary majorities, these constitutions, in allowing constitutional changes to be effected by either simple or two-third parliamentary majorities, provide very limited protection against frequent and unpredictable constitutional changes usually designed to change the “rules of the game” midstream. The second group, consists of those countries with semi-flexible constitutions, such as Botswana, Mauritius and Swaziland, with slightly more restrictions usually requiring approval by a “supermajority” in Parliament, all designed to ensure that any amendments are carefully thought out, due notice is given, elaborate consultations

are carried out and that there is a full and active participation of the people.⁷⁷ However, what will certainly militate against the effectiveness of the restrictions in the Swazi Constitution is the dominant role played by the King in determining the key players in the process, that is, the members of Parliament. Finally, both the Namibian and South African constitutions may be put in the category of semi-rigid constitutions. In the former, article 131 creates a special group of “unamendable” provisions that covers all the fundamental rights and freedoms protected in chapter 3 of the Constitution. Apart from this, all the other provisions can be amended either when the approval of two-thirds of both the National Assembly and the National Council (second chamber of Parliament) is obtained or when the amendment is approved by a two-thirds majority in the National Assembly and later approved in a referendum.⁷⁸ As regards South Africa, the amendment of certain provisions requires the approval of three-quarters majority in the National Assembly and the supporting vote of at least six of the nine provinces in the National Council of the Provinces. Other provisions require the approval of two-third majority in the National Assembly and the supporting vote of at least six of the nine provinces in the National Council of the Provinces.⁷⁹

Two observations are in order here. First, there is this interesting concept of “unamendable” provisions, which appears not only in Namibia’s Constitution but in that of many other African countries.⁸⁰ Nothing, including a constitution, is utterly immune from change. The purpose of a controlled amendatory procedure is not to prevent changes but rather to prevent the process being abused by dictators to serve their own ends. The concept of unamendable provisions, it is contended is an illusion. One constituent body cannot make constitutional provisions that prevent a future constituent body from repealing the constitution, even where it introduces an express provision that purports to do this. Arguably, a constituent body is omnipotent in all save the power to destroy its own omnipotence.⁸¹ A constitution or provisions in it, could with time, become antiquated and if there is no procedure for amending it, or if this is too cumbersome, this may provoke violent changes through revolutionary means. A better approach, it is submitted, is to strictly regulate and control the manner in which amendments can be made, in order to ensure that this is done with due notice, with deliberation, not lightly and wantonly, and in consultation with the people to ensure that the general will of the people is not subverted by a few selfish individuals or transient opportunistic self-seeking majorities.

Second, the mere fact that a constitution contains a number of legal obstacles to its amendment that make it harder to alter, does not necessarily mean that it will be less frequently altered than one which contains fewer or no special obstacles. The ease or frequency with which a constitution is amended will depend not only on the provisions which prescribe the method for effecting changes, but also the predominant political and social groups within the community and the extent to which they are satisfied with or acquiesce in the organisation and distribution of power within the constitution.⁸² Nevertheless, the existence of a defined process for effecting changes and the nature of this process indicate the extent to which the popular will counts and to that extent indicates the prospects for constitutionalism in the country. Where the amendment process is flexible and makes a constitution amendable with the ease and the same simple

majority with which legislation is passed, it becomes difficult to see how such a constitution can promote constitutionalism.

4. Constitutional status of political parties, political rights and implications for constitutionalism

From the preceding analysis of the core elements of constitutionalism in the constitutions of the twelve countries covered in this study, it is clear that the prospects for constitutionalism are not good in countries such as Swaziland, Angola, Mozambique and Zimbabwe and pretty much even in the other countries. One of the major threats to this is the rise of the phenomena of dominant parties which poses a threat to constitutionalism not only because these parties could unilaterally amend constitutions but also because they could do so and also enact laws that will further entrench their dominant positions.

This therefore warrants fresh thinking in constitutional design that goes beyond mere formal constitutional recognition of political pluralism into formal recognition of certain minimum rights of political parties in a way that can shield the political process from majoritarian opportunism and manipulation.

The formal constitutional status of political parties may play a large part not only in defining the role they play in the functioning of state institutions but also limiting the extent to which ordinary legislation may be used to distort the political process. But what exactly do we mean by “political parties.”? A good working definition of the expression for our purposes here is that of Sartori, who defined them as, “any political group that presents at elections, and is capable of placing through elections, candidates for public office.”⁸³ This definition has two merits. First, it makes it clear that political parties are not components or parts of the organised state but rather freely formed organisations rooted in society and public life. Second, it distinguishes political parties from other societal and political groups, such as interest groups or associations of civil society, in that it is only political parties that participate in elections. Political parties may therefore be considered as the veins through which the blood of political activities flows throughout the body polity. The political health of the body polity will very much depend on how this blood flow is regulated. Prior to 1990, the one party system with all its restrictions inevitably led to a haemorrhage within the system and deleterious consequences on the whole political, social and economic life of the state. The legalisation of pluralism was expected to open up more arteries for the steady flow of ideas to strengthen the body polity. However, as we will soon see, multi-partyism has come with its own worrisome tendencies – the rise of dominant parties.

How have these Southern African constitutions recognised and protected the rights of political parties? For purposes of ease of exposition of the general overall picture of the status of political parties in the twelve constitutions covered in this study, a threefold framework of analysis has been developed. This classifies these provisions into three

categories, which for lack of better terms, may be referred to as status provisions, ancillary rights provisions and political processes provisions. The classification is necessarily truncated and neither rigid nor watertight because of inevitable overlaps. The first looks at those provisions that explicitly or implicitly provide for political pluralism (status provisions). The second framework examines what may be considered as ancillary provisions, regulating the exercise of political rights by political parties (ancillary rights provisions). This consists of provisions dealing with rights such as freedom of expression, the right to participate in government, the right to equality and the freedom of assembly. The third, examines the provisions that regulate the political processes that political parties are involved in (political processes provisions). This consists of provisions on election management bodies (EMBs), electoral boundaries commissions (EBCs), electoral codes and the funding of political parties. Table 1 below shows the extent to which these diverse aspects of the exercise of political rights are covered in these different constitutions.

Table 1. SCOPE OF POLICAL RIGHTS IN SOUTHERN AFRICAN CONSTITUTIONS

Nature of right		ANGOLA	BOTSWANA	LESOTHO	MADAGASCAR	MALAWI	MAURITIUS	MOZAMBIQUE	NAMIBIA	SOUTH AFRICA	SWAZILAND	ZAMBIA	ZIMBABWE
1.	Status provisions												
1.1	Specific provision on political parties	Articles 2 and 4	---	---	Article 14	Section 40	First schedule	Articles 31-33 and 74 -77	Article 17 (1)	Sections 1 (d), 8 and 19	---	---	---
1.2	Freedom of association	Article 4	Section 13	Section 16	---	Section 32	Section 13	Article 76	Article 21 (i) (e)	Section 18	Section 25	Article 20	Section 21
2	Ancillary rights provisions												
2.1	Freedom of assembly	Article 32	Section 13	Section 15	Article 8	Section 38	Section 13	Article 75	Article 21 (i) (d)	Section 17	Section 25	Article 20	Section 21
2.2	Right to participate in government and vote	Article 28	---	Section 20	Article 15	Section 40	Sections 42 - 44	Articles 73 and 107	Article 17 (i) 8 (2)	Section 19 (3) (b)	---	---	---
2.3	Freedom of expression	Article 32	Section 12	Section 14	Article 10	Sections 34-36	Section 12	Article 74	Article 21 (i) (a)	Section 16	Section 24	Article 20	Section 20
2.4	Right to equality (freedom from discrimination)	Article 18	Section 15	Sections 18 and 19	Section 8	Section 20	Section 16	Article 66	Article 10	Section 9	Section 20	Article 23	Section 23
3	political process provisions												
3.1	Electoral Management bodies (EMB)	---	---	Section 68	---	Sections 75-77	Sections 38-41	---	---	Sections 190-191	Section 90	Article 76	Section 61
3.2	Electoral boundaries commissions (EBC)	---	---	Section 66	---	Section 76	Section 38 (i) and first schedule	---	Article 104	---	Section 90	Article 76	Section 60
3.3	Electoral code	Article 3 (3)	---	---	Articles 68 and 128	---	---	---	Article 28	Schedule 3	Section 90 (7)	Articles 76 -77	Sections 59 and 60
3.4	Funding of political parties	Article 4 (4) g	---	---	---	Section 40 (2)	---	---	---	Section 236	---	---	---

Although the exact scope of the political rights provided in these constitutions vary considerably, it will suffice for our purposes here just to note to some important patterns that potentially have an impact on and, underscore the importance of designing specific provisions to deal with political parties. The first point to note is that there is now an explicit or implicit freedom to form political parties.⁸⁴ However, most of the provisions recognising this right neither spell out the conditions for the creation and functioning of these parties nor indicate in a clear manner the guidelines for subsequent legislation regulating the exercise of this right. This is particularly so with respect to the right to vote. As Sachs J. pointed out in the South African case of *August and Another v Electoral Commission and Others*,⁸⁵ the “right to vote by its very nature imposes positive obligations upon the legislature and executive,” by requiring them to make the legislation necessary to translate this into reality. The failure to define the scope of such legislation has exposed the whole process of regulating the activities of political parties as well as the whole political process in which they are involved to majoritarian manipulation.

In some of the Commonwealth countries in Southern Africa, such legislation, where they contain restrictions, may have to satisfy the threshold of what is “reasonably justifiable in a democratic society,”⁸⁶ or are subject to the general limitation clauses that apply to some of the fundamental freedoms within which political rights are usually located. An excellent example of this is the South African case of *Minister of Home Affairs v National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) and Others*.⁸⁷ The Constitutional Court was called upon to determine the validity of certain provisions of the Electoral Act which deprived convicted prisoners serving sentences of imprisonment without the option of a fine of the right to participate in elections during the period of their imprisonment. The Court found that since the legislation that was made curtailed the rights of convicted prisoners to vote, the limitations could only be valid if it was justifiable in terms of section 36,⁸⁸ the general limitation clause in the Constitution. Chaskalson CJ (who wrote the majority judgment of the Court), pointed out that the limitation analysis was basically a question of balancing the means with the ends in a process in which the different and sometimes conflicting interests and values at stake had to be taken into account. The government’s justification for disenfranchising a group of citizens was assessed in the light of the policy justification it provided. The Court came to the conclusion that the justification given could not be sustained and the policy basis of it, the logistical and cost issues involved, had been introduced only tangentially. Before finally declaring the two provisions in issue unconstitutional and invalid, the Court had to make sure that this relief would not impair or otherwise threaten the holding of free and fair elections.

A more indirect route of challenging legislation impeding the free exercise of political activities is illustrated by the Zambian case of *Mulundika and Others v The People*.⁸⁹ The appellants were arrested while taking part in a public gathering for which a permit had not been issued under section 5(4) of the Public Order Act, which provided that a permit to convene an assembly or a public meeting or to form a procession in a public place would be issued only if the regulating officer was satisfied that the proposed gathering was unlikely to cause or lead to a breach of the peace. They challenged the constitutionality of this provision on the ground that it contravened articles 20 and 21 of

the Constitution, which guaranteed freedom of expression and freedom of assembly respectively. The Supreme Court, by majority, held that the right to organise and participate in public gatherings was inherent in the freedom to express and to receive ideas and information without interference, and the requirement of prior permission, with the possibility that such permission might be refused on improper or arbitrary grounds or even unknown grounds, was an obvious hindrance to those freedoms. It also held that the absence of adequate guidelines in section 5(4) of the Public Order Act, especially since it gave unfettered and uncontrolled subjective discretion to a regulating officer, rendered it seriously flawed and prima facie constitutionally objectionable. The Court concluded that that cumulative effect of section 5(4) of the Public Order Act was that it was not reasonably justifiable in a democratic society, contravened articles 20 and 21 of the Constitution and was therefore null and void for unconstitutionality.

Perhaps the most controversial area of majoritarian abuse is when making laws regulating the political processes on critical issues such as EMBs, EBCs, electoral laws and the funding of political parties. As table 1 shows, these issues are barely addressed by most of these constitutions. Although seven of the twelve constitutions contain provisions on EMBs, these are hardly designed to ensure their independence and impartiality. The ability of the EMBs to operate impartially without political manipulation is neither provided for nor guaranteed. In fact, there are no measures to guard against the ruling parties packing these EMBs with their supporters or persons sympathetic to them. The main exception to this, is the South African EMB, where section 181(1) specifically states that it must be “independent, and subject only to the Constitution and the law...and must be impartial and must exercise [its] powers and perform [its] duties without fear, favour or prejudice.” In the South African case of *Independent Electoral Commission v Langeberg Municipality*,⁹⁰ the Constitutional Court had no hesitation in pointing out that as a result of the constitutional guarantees of the independence and impartiality of the Independent Electoral Commission (IEC) Parliament had a duty in making the legislation regulating its activities to ensure its manifest independence and impartiality and that such legislation was justiciable for conformity to the Constitution. In the absence of such guarantees, the courts will lack the power to review legislation on EMBs to ensure that it is not biased in favour of ruling parties. In *New National Party of South Africa v Government of the Republic of South Africa and Others*,⁹¹ where questions were raised about the independence of the IEC and possibility of governmental interference with its proper functioning, the Constitutional Court, although concluding that the allegations had not been proven by the facts, nevertheless pointed out that the IEC was one of the institutions provided for under Chapter 9 of the South African Constitution which are a product of a “new constitutionalism”⁹² whose independence had to be jealously preserved by the courts. Two factors that were relevant to this independence were highlighted by the court. First, it pointed out that independence implied financial independence which required that the IEC should be given enough money to discharge its functions. This had to come, not from government but from parliament and the IEC had to be “afforded an adequate opportunity to defend its budgetary requirements before parliament and its relevant bodies.”⁹³ Second, the IEC’s status also implied administrative independence which implied that the IEC was subject only to the Constitution and the law and answerable only to Parliament rather than the executive.

The ability of the constitution to control the way the EMB discharges its functions was again in issue in another South African case: *August and Another v Electoral Commission and Others*.⁹⁴ The IEC had refused to make arrangements for registering prisoners to enable them vote, citing amongst other reasons, the immense logistical, financial and administrative difficulties that this entailed. A prisoner and an awaiting trial prisoner launched an unsuccessful application seeking appropriate relief before the High Court, which agreed with the arguments put forward by the IEC that the predicament of the applicants was of their own making. On appeal, the Constitutional Court held that the Constitution did not contain any provision allowing for disqualification from voting to be prescribed by legislation and Parliament had not made any such legislation. The IEC therefore had no powers to make an administrative decision that had the effect of disenfranchising certain category of electors because this violated the guarantees of political rights in section 19 of the Constitution. The Court pointed out that the positive duties imposed on the IEC by the Constitution required them to take every reasonable step to create the opportunity to enable eligible persons to register and vote.

In many cases, constitutions that contain provisions on EMBs go further to deal with EBCs.⁹⁵ Like EMBs, because of defective appointment mechanisms, they remain vulnerable to political manipulation. Nevertheless, a positive point is the fact that most of these provisions provide clear and justiciable guidelines on what will inform the process of demarcating electoral constituencies. For example, section 76(2) of the Malawian Constitution defines the duties and functions of the Electoral Commission responsible for this and states that it includes the power:

- “(a) to determine constituency boundaries impartially on the basis of ensuring that constituencies contain approximately equal numbers of voters eligible to register, subject only to considerations of—
 - (i) population density;
 - (ii) ease of communication; and
 - (iii) geographical features and existing administrative areas;
- (b) to review existing constituency boundaries at intervals of not more than five years and alter them in accordance with the principles laid down in subsection (2) (a);
- (c) to determine electoral petitions and complaints related to the conduct of any elections;
- (d) to ensure compliance with the provisions of this Constitution and any other Act of Parliament.”⁹⁶

Most African political disputes have arisen over flawed electoral laws skilfully crafted to favour incumbent regimes as well as a host of other electoral malpractices.⁹⁷ Only seven of the constitutions studied here have provisions dealing with election laws. Their wordings hardly do more than article 3(3) of the Angolan Constitution which states that “special laws shall regulate the process of general elections.” This is an open invitation for incumbents to design the law to suit their fancy without any fear that any unfair advantages built into them could be challenged. However, it is possible to use other provisions on political rights to challenge some of the more blatant abuses. An example of a case involving what was perceived as a deliberate attempt to disenfranchise potential

opposition voters that came before the South African Constitutional Court is *Democratic Party v Minister of Home Affairs and Another*.⁹⁸ The Democratic Party challenged the requirement of a bar-coded identification document in the Electoral Act claiming that it violated the provision against unfair discrimination in section 9 (equality clause) of the Constitution. It contended that although the new requirement was facially neutral, it constituted indirect discrimination against discrete vulnerable groups on grounds of race, age, residence, belief, conscience and political affiliation. The Constitutional Court held that in the absence of concrete evidence to show that the persons in the categories identified had in fact registered in smaller numbers proportionately than those outside the categories, there was no basis for invalidating the impugned provisions. In *New National Party of South Africa v Government of the Republic of South Africa and Others*,⁹⁹ on essentially similar facts, the Constitutional Court in a judgment also delivered the same day as the judgment in the *Democratic Party* case, dismissed the applicant's allegation that the bar-coded identification document provided for in the Electoral Act was unconstitutional as it effectively disenfranchised millions of potential voters because the Department of Home Affairs did not have the capacity to issue the relevant documents to persons entitled to vote within the limited time available before the elections. The Court considered the identification document as a constitutional requirement rather than a limitation on a constitutional right. It felt that the document was on the face of it, rationally connected to the legitimate governmental purpose of enabling the effective exercise of the right to vote since it posed no real disadvantage to most people, and was neither arbitrary nor capricious. Another South African case involving a challenge to the constitutionality of laws regulating the political process is *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as amici curiae) No. 2*.¹⁰⁰ The applicant challenged the constitutionality of an amendment to the Constitution which repealed an anti-defection clause as well as the constitutionality of new legislation, based on this amendment, which allowed for floor crossing to take place without the persons changing parties losing their seat. The applicant contended, *inter alia*, that the constitutional amendment was inconsistent with the founding values in section 1 of the Constitution, the multi-party system and the rule of law. It was also argued that the floor crossing legislation infringed the rights of voters in terms of section 19 of the Constitution, could not be reconciled with an electoral system based on proportional representation as provided for under the Constitution, that its 10% threshold within the context of the existing political situation, was to the advantage of the ruling party and that allowing floor crossing would adversely affect the right to funding of political parties in terms of section 236 of the Constitution. The Constitutional Court held *inter alia*, that there was no basis for challenging the constitutionality of an amendment that had been passed in accordance with the prescribed procedures. Nor did the Court see any basis for concluding that the proportional representation system and the anti-defection provisions which supported it, were so fundamental to the constitutional order to preclude any amendment of their provisions. The Court further held that although a proportional representation system with an anti-defection clause was not inconsistent with democracy, it did not follow that a proportional representation system without an anti-defection clause was inconsistent with democracy. It also felt that the fact that a particular system operated to the disadvantage of particular parties on its own would not

make it unconstitutional. The 10% threshold was considered legitimate since it had been deliberately introduced to accommodate mid-term shifts in political allegiances and was neither irrational nor inconsistent with multi-party democracy. The Court also held that there was no inherent contradiction between floor crossing and the funding of political parties because the basis for funding in section 236 of the Constitution remained the same whether or not there was floor crossing.

In fact, the funding of political parties remains one of the most contentious issues today. It is no surprise that only three of the twelve constitutions attempt to address this, and two of them do this in a manner that is hardly convincing. Article 4(4) (g) of the Angolan Constitution bars the funding of political parties,¹⁰¹ whilst section 40(2) of the Malawian Constitution leaves public funding at the discretion of the government.¹⁰² The fact that in most African countries, there is often little distinction between State funds or resources and the funds or resources of the ruling party clearly suggests that such simplistic solutions are unhelpful. On the other hand, section 236 of the South African Constitution provides that to, “enhance multi-party democracy, national legislation must provide for the funding of political parties participating in national and provincial legislatures on an equitable and proportional basis.” This therefore means that any such legislation will only be valid if the allocation of State funding through legislation is done on an “equitable and proportional basis.” Although with no constitutional provision providing for the financing of political parties, the Zimbabwean case of *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Others*,¹⁰³ illustrates in a stark way, the complexities of the political party public funding issue. The two main political parties in the country had just merged to form the ZANU (PF) and later in the 1990 legislative elections won 117 out of the 120 seats in Parliament. In 1992, the Political Parties (Finance Act) (Zimbabwe) was enacted. Section 3(3) of it made provision for the State funding of political parties subject to a system in terms of which monies would be paid out in proportion to the number of elected representatives which each party had in the national legislature. This was subject to the proviso that parties with fewer than fifteen elected representatives would not be entitled to any financial assistance. The effect of the legislation was that only the ruling party, ZANU (PF), qualified for financial assistance and the applicant party, which had been formed in 1994 and had no elected representative in Parliament, did not qualify for funding. The applicant brought an application before the Supreme Court challenging *inter alia*, section 3(3) of the Political Parties Act as violating the Constitution. The Court started by observing that unhindered freedom of political expression was essential to the proper functioning of a democratic system. It then noted that political parties contending for ascendancy should not be subject to legislative measures that limit their capacity to engage in dialogue and communicate arguments and opinions to enable the populace to make informed judgments as to how they should be governed. It then pointed out that public funding of political parties was a vital element of sound democracy both as an egalitarian measure and as a means of curbing dependency of political parties upon private interests. The system of public funding had, it observed, to be respectful of pluralism and the possibility of political change. After drawing attention to some of the possible goals that public funding served, the court pointed out that whatever the goal may be, the formulae that should be adopted should not be one that does no more than entrench and re-enforce the regime of the major political parties and sideline their minor

or new opponents. Whilst acknowledging that the Political Parties (Finance Act) was neutral on the face of it, the Court however concluded that since it had the practical effect that only the ruling party would receive funding because of a high threshold that rendered it impossible for other political parties to gain any foothold, the Act offended the constitutional guarantee of free speech in section 20(1) and had the effect of preventing the small but meaningful voices of the other parties being heard. It therefore declared section 3(3) of the Act unconstitutional.

A number of very vital lessons can be drawn from these mostly South African cases and the jurisprudence that is gradually building up.¹⁰⁴ Whilst there are many who fear that South Africa's "state of the art Constitution" might be overshadowed by one-party dominance, these cases show that the Constitutional Court has firmly positioned itself between the politicians and the Constitution. No provision testifies to the in political rights protection in South Africa as section 19(2) of the constitution, which provides that "every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution." Like almost all other African constitutions, this confers the right to vote but what makes this provision unique, as the Constitutional Court pointed out in the *New National Party of South Africa* case is that it gives every South African citizen the right to expect "free, fair and regular elections," and the Court has not unambiguously stated that it will strike down any legislation that defeats this objective.¹⁰⁵ Again in the *United Democratic Movement* case, the Court whilst recognising the duty of constitutional duty of Parliament to make laws on free and fair elections which are compatible with an open and democratic society, declared that any "laws which go beyond that, and which undermine multi-party democracy, will be invalid."¹⁰⁶ But the Constitutional Court has treaded cautiously or Theunis Roux would argue, too cautiously. When invited to decide whether or not a piece of legislation was reasonable, the Court declined the invitation. Yacoob J., in the *New National Party of South Africa* case, in delivering the judgment for the majority put it thus:

"O'Regan J in her dissenting judgment measures the importance of the purpose of the statutory provision in relation to its effect and asks the question whether the electoral scheme is reasonable. She goes on to conclude that the scheme is not reasonable and, for that reason, to hold that the relevant provisions of the Electoral Act are inconsistent with the Constitution. In my view, this is not the correct approach to the problem. Decisions as to the *reasonableness of statutory provisions are ordinary matters within the exclusive competence of Parliament. This is fundamental to the doctrine of separation of powers and to the role of Courts in a democratic society. Courts do not review provisions of Acts of Parliament on the grounds that they are unreasonable. They will do so only if they are satisfied that the legislation is not rationally connected to a legitimate government purpose.* In such circumstances, review is competent because the legislation is arbitrary. ...Reasonableness will only become relevant if it is established that the scheme, though rational, has the effect of infringing the right of citizens to vote. The question would then arise whether the limitation is justifiable under the provisions of s.36 of the Constitution and it is only as part of this s.36 inquiry that reasonableness becomes relevant."¹⁰⁷(emphasis added).

This shows that the courts are only prepared to go as far as the constitutional expressly or implicitly allows them to go, especially when dealing with matters as sensitive as political disputes. These cases also show that once the independence and impartiality of bodies such as EMBs and EBCs are constitutionally entrenched, courts will indeed take on the challenging task, when called upon to do so, of investigating governmental actions that could directly or indirectly interfere with the working of these important institutions. If, as these cases show, courts have intervened the way they have, at least in the Commonwealth countries in the region, what then is the need for constitutionalising the status of political parties?

5. THE DESIRABILITY OF CONSTITUTIONALISING THE STATUS AND RIGHTS OF POLITICAL PARTIES

Many studies have explored the links between political parties and government but hardly addressed the equally important links between political parties and constitutionalism.¹⁰⁸ Political parties now do more than just form governments – they can, and often have the ability to fundamentally change the whole system of governance with quite serious implications for constitutionalism and constitutional justice. The post-1990 reforms failed, it is contended, to recognise the fact that entrenching genuine pluralism required something more than simply recognising political pluralism. The case for constitutionally entrenching the status and rights as well of course, as duties of political parties, can be justified on a number of grounds.

First, from the perspective of constitutionalism, this may be regarded as a bulwark to the looming threat of dictatorship resulting from the *de facto* one-party resurgence in the form of dominant parties. Table 2 below shows the extent to which parliaments in the region are dominated by the ruling parties.

Table 2. RULING PARTY DOMINANCE IN SOUTHERN AFRICA*

Country	Party System and total number of political parties	Percentage of seats in the previous election		Percentage of seats after most recent election	
		Ruling Party	Main opposition party	Ruling party	Main opposition party
Angola	Two-party (13)	**	**	1992,** Popular Movement for the Liberation of Angola. (MPLA) (53.7%)	National Movement for the Total Liberation of Angola (UNITA) (34%)
Botswana	Dominant-one-party (9)	1999, Botswana Democratic Party (BDP) (57%)	Botswana National Front (BNF) (26%)	2004, Botswana Democratic Party (BDP) (51.7%)	Botswana National Front (BNF) (26%)
Lesotho	Dominant-one-party (11)	1998, Lesotho Congress for Democracy (LCD) (60.7%)	Basotho National Party (BNP) (24.5%)	2002, Lesotho Congress for Democracy (LCD) (54.9)	Basotho National Party (BNP) (22.4%)
Madagascar	Dominant-one-party (24)	1998, Vanguard of the Malagasy Revolution (AREMA) (24.7%)	Economic Liberalism and Democratic Action for National Recovery (LEADER-Fanilo) (13.3%)	I love Madagascar (TIM) (64.3 %)	National Union (FP) (13.7%)
Malawi	Multi-party (14)	1999, United Democratic Front (UDF) (47.3%)	Malawi Congress Party (MCP) (33.8%)	2004, Malawi Congress Party (MCP) (30.6)	United Democratic Front (UDF) (25.3%)
Mauritius	Two party (16)	2000, Mauritian Militant Movement-Mauritian Socialist Movement (MMM-MMS) (82.8%)	Mauritius Labour Party-Mauritian Party of Xaxier Duval (MLP-PMXD) (11.4%)	Social Alliance (AS) (60%)	Mauritian Militant Movement- Mauritian Socialist Movement (MMM-MSM) (34.2%)
Mozambique	Dominant one-party (32)	1999., Mozambique Liberation Front (FRELIMO) (48.5%)	Mozambican National Resistance-Electoral Union (RENAMO-UE) (38.8%)	2004, Mozambique Liberation Front (FRELIMO) (62%)	Mozambican National Resistance- Electoral Union (RENAMO-UE) (29.7%)
Namibia	Dominant-one-party (14)	1999, South West Africa People's Organisation (SWAPO) (76%)	Congress of Democrats (9.9%)	2004, South West Africa People's Organisation (SWAPO) (76%)	Congress of Democrats (COD) (7.2%)
South Africa	Dominant-one-party (38)	1999, African National Congress (ANC) (66.3%)	Democratic Party (DP) (9.5%)	2004, African National Congress (ANC) (69.7%)	Democratic Alliance (DA) (12.3%)
Swaziland	Non-party (traditional monarchy)***				
Zambia	Two-party (17)	1996, Movement For Multiparty Democracy (MMD) (60%)	National Party (NP) (7.2%)	2001, Movement for Multiparty Democracy (MMD) (28%)	United Party for National Development (UPND) (15.5%)
Zimbabwe	Dominant-one-party (24)	2000, Zimbabwe African National Union- Patriotic Front (ZANU-PF) (48.6%)	Movement for Democratic Change (MDC) (47%)	2005, Zimbabwe African National Union- Patriotic Front (ZANU-PE) (59.6%)	Movement for Democratic Change (MDC) (34.5%)

*This analysis is based on information obtained from African Election Database, <http://africanelections.tripod.com/>

**No National Assembly elections have been held since 1992.

***Since the Constitution was suspended in 1973, and political parties banned, some form of elections, through direct and indirect process have taken place since 1993. In 2005, a new constitution was adopted which provides for a "constitutional" monarchy and recognises some token freedom to form political parties.

The prevailing political party systems may simply be classified as two-party, multi-party or dominant one-party.¹⁰⁹ A two-party system, as Mair explains, is one in which two parties of almost equivalent size, compete for office and where, each has a more or less equal chance of winning electoral support to gain an executive monopoly.¹¹⁰ A multi-party system by contrast, is where there are many parties and no party comes close to a majority status.¹¹¹ A dominant one-party system can be described as one in which one party is either constantly in office and often governs alone (as the BDP has done in Botswana since independence in 1966), or has an overwhelming majority of seats in at least two consecutive elections, such as SWAPO in Namibia and ANC in South Africa. There is still one-party dominance even where the ruling party has a relatively small majority over the opposition, such as in Mozambique and Zimbabwe where the ruling parties have managed to keep the opposition weak and fragmented.¹¹² Seven of the twelve countries are effectively run by dominant parties, one as a traditional monarchy with limited tolerance for political parties and the rest of the countries grappling with the challenges of political pluralism in one form or another. There is likely to be little change in the near future to this one party dominance. This is essentially because the emerging ethos is that “winners win twice,” that is, in winning elections the ruling parties feel free and take the opportunity to prepare to win again. However, if the rights and duties of political parties are clearly defined in the constitution in a manner to ensure open, fair, and just electoral processes, the opportunities by incumbent majorities to make legislation that will serve their partisan purposes will certainly be reduced. The symbolic importance of constitutionalising the rights and duties of political parties cannot also be ignored or underestimated. Although it is quite clear from our preceding discussion that the judiciary in most countries have had a hard time fending off political interference and intimidation, there is some comfort that may be drawn from the fact that the courts have not hesitated to strike down legislation that violates the constitution. Therefore, constitutionalising the basic rights and duties of political parties will limit the scope for arbitrary self-serving legislation by dominant parties.

A second reason for constitutionalising the status of political parties flows logically from the right to form political parties that is presently entrenched in all constitutions. However, this right is presently formulated in terms of an individual right, which it is, but ignores the fact that this can only be exercised by individuals forming political parties to carry out political activities. Modern democracy is necessarily constituted around political parties and their political activities. Recognising and protecting political rights therefore calls for the recognition and protection of the primary vehicle for exercising these rights, that is, political parties and the principal ways in which they exercise these political rights.

Third, constitutionally entrenching the rights of political parties is necessitated by their special status. Although essentially private associations freely created and run by the membership in pursuit of a political goal, they are unlike all other private associations. They are not part of the state but their activities extend into the area of the institutionalised state in a way that all other private associations’ activities do not. The potentially wide-ranging reach of their activities in the public domain means that they can no longer simply be always allowed to do their own things their own way.

Constitutionalising their status necessarily means that their actions will come under public scrutiny at all times, not just during elections. The traditional approach to actions against political parties, which allowed them to enjoy a high degree of immunity from legal action by disaffected members on the grounds that their internal rules were considered as those of an unincorporated non-profit society and thus unenforceable as a contract, should have no place under the modern constitutional dispensation.¹¹³ With a special status that recognises the fact that the interpretation of party regulations and party decisions or resolutions can affect the whole country goes with the duty of transparency and accountability, and the need to subject this to judicial scrutiny through the process of judicial review. Subjecting political parties to judicial review as a necessary concomitant of their special constitutional status is a speedier and more effective remedy for wrongs against their members than the limited common law remedies that presently exist.¹¹⁴ Too often in Africa, countries have found themselves with leaders imposed by their predecessors or by party bosses in disregard of internal party rules.¹¹⁵ Perhaps the greatest merit of this process is that it will promote internal democracy and ensure that personal actions can be brought against political parties which break their own rules, as they are often apt to do, when they find this politically expedient.¹¹⁶ Disciplined political parties are at the heart of any effective democracy. The inclusion of provisions providing for “administrative justice,” and its possible application to political parties, in four of the twelve constitutions examined in this study, suggests that the seeds of this idea may already have been sown.¹¹⁷ The sticking point is how decisions by political parties could be considered as “administrative actions” for purposes of judicial review. However, after a critical analysis of section 33 of the South African Constitution, which has as title, “just administrative action,” Lisa Thornton concludes that, “political parties are, to the extent that they exercise a power or perform a function in terms of a constitution or exercise a public power or perform a public function in terms of legislation, subject to just administrative action...”¹¹⁸

Finally, the special status of political parties, on its own may justify a claim for them to be financed by the state. African reality dictates this. The average political activist is too poor to contribute in any meaningful way to the financial well being of a political party. The ruling parties hardly ever distinguish between state funds and party funds or state resources and party resources. They therefore have a considerable edge over all other political parties. A necessary concomitant to constitutionalising the status of political parties is the principle of state funding for genuine political parties. The regulation of state funding for political parties will serve at least five goals. First, it will ensure equality of opportunity in African societies that are characterised by gross inequities in the distribution of wealth. Second, it will make enough money available for competitive campaigns to occur. Third, it will allow new entrants, while not encouraging frivolous political parties or propping up decaying political parties. Fourth, it will reduce the opportunity for undue influence that may come from receiving funds from dubious internal or external sources with secret agendas that may impact negatively on the country. Fifth, it should prevent or reduce the misappropriation of state funds and state resources for political purposes.¹¹⁹ The real challenge is to design rules that ensure that all direct and indirect funds received by political parties taking into account all the circumstances, meet these goals.

6. KEY ELEMENTS IN CONSTITUTIONALISING THE STATUS OF POLITICAL PARTIES

Having seen, as Hans Arnim puts it, “[that political] party laws are an element of the constitutional law,” and that this has not been adequately addressed in the post-1990 constitution-writing revolution, what provisions can possibly fill this void? A word of caution is an appropriate starting point. A constitution should not be cluttered and overloaded with trivia. In other words, one should not attack the vice of inadequate breadth with the equally fatal infirmity of overbreadth. One is therefore mindful of the advice of K.C. Wheare, that a constitution should contain “the very minimum, and that minimum [should] be rules of law.”¹²⁰ Or, as Chief Justice Marshall put it in the celebrated United States’ case of *McCulloch v Maryland*,¹²¹ a constitution by its very nature requires that only its “great outlines” be marked and its “important objects” designated, and that it not descend into the “prolixity of a legal code.” Whilst a good number of African constitutions have indulged in such lengthy, programmatic and convoluted details that defy the wisdom of both Wheare and Marshall,¹²² there is need to start here by recognising the fact that African constitutions can not be as brief as Western constitutions. Whilst the written constitutions in Africa, almost contain every relevant and applicable constitutional principle, Western constitutions rarely embrace all the constitutional principles that apply. These are normally complemented by a number of usages, understandings, customs and conventions that may apply as well as judicial precedents. Over and above this, most Western constitutions are greatly strengthened and supported by centuries of political behaviour, political culture and political tradition and history, which is generally lacking under many African constitutions. The constitutionalisation of the rights of political parties may look like a superfluous aberration to a Western constitutionalist or in a Western setting but in Africa, it must now be regarded as one of the essential elements in the emerging constitutional rights culture of today that should seek to bury the ghost of the one party dictatorships of the past. The critical question remains that of defining what form and what content these rights should take.

A constitution, however comprehensive, cannot address all issues of constitutional rights, particularly political rights and political justice. Nevertheless, it should define and lay down the basic framework for these rights in terms of the rights and duties of political parties. There is no reason to seek to reinvent the wheel; the basic framework principles are found in most of the constitutions studied here but with the difference that they are not made explicitly applicable to political parties or where made applicable, are explicitly or implicitly rendered non-justiciable as “directory principles of state policy” rather than part of the “fundamental rights” principles.

The possible content of some of the rights that provisions defining the rights and duties of political parties should include are: the right to carry out political activities, the right to fair competition, the right to obtain financial assistance, and the right to equality of treatment. This should obviously only reinforce other existing and applicable fundamental rights such as freedom of speech, freedom of assembly, right to privacy, and

right to own property. What is perhaps critical and crucial, that should make the difference between constitutionalising and not constitutionalising the rights of political parties is the margin given to the legislatures to define the rules of the game. There is need for a provision which lays down a set of minimum criteria that legislation on political parties and political processes must pass to be valid or to escape the crushing judicial hammer of unconstitutionality. The following tests seem imperative:

- i) Does the legislation hinder the exercise of political rights in a free and fair manner?
- ii) Does the legislation negate the essential content of the exercise of political rights?
- iii) Is the legislation acceptable and demonstrably justifiable in a free and democratic society? Do the benefits of the legislation in a democratic society, taking into account the purposes and values of the constitution, demonstrably outweigh the detriment it may cause.
- iv) Does the legislation protect the interests of minorities and indigenous people in a fair and reasonable manner taking into account all the circumstances?
- v) Where there are restrictions, it must be determined whether
 - a) the objectives of the restrictions are sufficiently important to justify limiting the exercise of political rights in the manner contemplated;
 - b) the measures are designed to meet the objective rationally connected to it;
 - c) the measures provided do no more than is reasonably necessary to achieve the legitimate objective?

Many of these principles have in recent years guided the courts in many Commonwealth countries in interpreting some of the fundamental rights provisions, especially the freedom of expression clause.¹²³ These standards may not fully exhaust the requirements of political justice but must be seen as a minimum standard. However, the question does arise as to whether these new standards actually add anything to the existing limitations to legislation on fundamental rights. Three reasons may be advanced to show that they do indeed make a difference.

First, the existing scope for reviewing legislation, through limitation clauses, which are often vaguely worded and whose scope is usually narrow provides a rather unsatisfactory and unpredictable basis for reviewing manipulative legislation by opportunistic majorities.

Second, the new standards provide a clear recognition of the domain of political justice and the fact that there is need to distinguish between the sphere of constitutional politics and ordinary politics. Ordinary politics is left in the hands of politicians whilst constitutional politics is practised by politicians but subject to judicial oversight. The legitimacy of judicial review has often been challenged and it is even more controversial when the scope for judicial review is extended to matters that may be essentially political in nature. An expanded scope for judicial review is certainly the best anti-majoritarian device that exists and is in no way anti-democratic, as some critics have argued.¹²⁴ After all, judges do not have the last word: supermajorities could always amend the constitution and even overrule judicial decisions interpreting the constitution.¹²⁵ Besides this, judges,

unlike legislators, are guided by the law and have to give reasons for their decisions and to this extent are exposed to a degree of societal “accountability.”¹²⁶

Perhaps the main advantage of constitutionalising the status of political parties in the manner suggested is that it will shift and spread the political dispute prevention and resolution processes throughout the spectrum of the political activities rather than at the tail end, after election results have been declared, when emotions are extremely high. For example, if flawed electoral laws can be prevented, the likelihood of bitter post electoral disputes will be considerably reduced and this will enhance the chances of fair electoral outcomes. Similar judicial control over laws regulating EMBs and EBCs will also increase the chances of fairer electoral processes and outcomes.

In the final analysis, taming the monster of strategic manipulation by self-serving majorities hinges on the ability of the judiciary to intervene and faith in judicial review of the constitutionality of laws. In those countries where such judicial review is absent, then the monster can hardly be tamed. Where it can work, one cannot afford to totally romanticise the virtues, independence and competence of judges. Nevertheless, because of the woeful record of African politicians, judicial review especially in the domain of constitutional politics is perhaps the most viable and realistic control that can be exercised over the growing might of governments and the emerging domination of the multi-party political scene by single parties. The view of Learned Hand, that if courts are needed to preserve a democracy, that democracy is already lost, has been adequately discounted by history and practical reality.¹²⁷ A comparison of the results of the Afrobarometer survey on the question of public trust in the courts and public trust in the executive (president) is inconclusive.¹²⁸ With their awful record, it is unlikely that politicians will fair better than judges where there is a straight comparison between the two.

7. CONCLUSION

The failure by recent constitutions to avoid the danger of democratic majoritarianism descending into the tyranny of the majority does not auger well for constitutionalism in Africa. The domain of constitutionalism and the very *raison d'être* of the concept is the desire to promote justice. Constitutional justice requires that governments should operate in a manifestly fair and transparent manner within predetermined rules laid down in the constitution. The prospects for this happening are diminishing each day as interest-seeking and self-perpetuating politicians continuously devise strategies and policies to hang on to power. The constitutionalisation of the position of political parties, it is suggested, is a small contribution towards solving a complex problem that requires urgent solutions.

Constitutionalisation of political parties may in many respects level the political playing field. Flawed electoral processes inevitably lead to flawed elections and often bitter post-electoral disputes, political instability and all the social and economic consequences that follow from this. Where the political field is levelled, the risks of bitter conflicts are reduced because of the scope provided for judges to intervene at every stage of the

process from rule-writing to the declaration of results, rather than at the tail end of the process when irreparable damage may already have been caused. Judicial review plays a countermajoritarian role to ensure that the majority plays by the rules and do not change them in an arbitrary and capricious manner.

Strengthening the constitutional position of political parties will also ensure that the future of the nation will depend on the strength of its constitution and institutions rather than the benevolence of incumbent governments. It will also serve as a firm foundation and a catalyst for the development of good democratic principles and behaviour.

The future of Africa's third generation constitutions will depend on whether politicians and their constitutional designers see the looming danger on the horizon. For now, the prospects for radical changes in the positive direction are not good. With so many political parties in Southern Africa sitting with comfortable majorities in parliament, all they will certainly try to do is to prepare to win again rather than open space for effective competition. Nevertheless, the process of constitutionally entrenching the rights of political parties need not come through a constitutional revolution. With many elements of the basic principles already in the constitutions, some degree of judicial activism by the constitutional courts holds some promise of a gradual a shift in this direction. This is likely to be slow, gradual, inductive and incremental. To prevent the third wave from degenerating into a "third wail,"¹²⁹ the constitutional changes that are needed must be informed by our recent historical experiences and take account of the fears, aspirations and hopes of the people as well as tailored to counteract the perennial and predictable problems of African politics. Constitutionally redefining the rules of the political game in a manner that ensures fairness and justice for all must be the ultimate goal of any constitutional reform today that seeks to promote constitutionalism. And what's more, for genuine democracy to take a firm foothold and endure, it must from the very beginning be saved from its own excesses.¹³⁰

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conclusions expressed in this paper are those of the author and do not necessarily reflect the views of SAIFAC.

¹ Samuel Huntington coined the expression in, *The third wave: Democratization in the late twentieth century*. Norma, OK, University of Oklahoma Press (1991), pp. 15-16. He defines a “wave of democratization” simply as “a group of transitions from non-democratic to democratic regimes that occur within a specified period of time and that significantly out-number transitions in the opposite direction during that period.” He identifies two previous waves of democratization: a long, slow wave from 1828–1926, and a second wave from 1943–1962. Most writers consider the “third wave” to have started in the 1970s, although it only reached African shores in the late 1980s and early 1990s, in what Larry Diamond and others such as Julius Ihonvbere and Terisa Turner call “second liberation” or “second revolution”. Larry Diamond, *Developing democracy in Africa: African and international perspectives*, paper presented at the Workshop on Democracy in Africa in comparative perspective, at Stanford University (27 April, 2001), at <http://democracy.stanford.edu/Seminar/DiamondAfrica.htm>; see also Larry Diamond, “Is the third wave over?” 7 *Journal of Democracy*, (1996), pp. 20, 20–21 and Larry Diamond *et al.*, (eds.), in *Consolidating the third wave of democracies*. Baltimore, John Hopkins University Press (1997); and Julius Ihonvbere and Terisa Turner, “Africa’s second revolution in the 1990s,” *Security Dialogue* (1993), pp. 349-352.

² In a sense, one could say here that Africa is going through its third constitution-making revolution. The first constitution –making revolution corresponds with the independence constitutions that were “negotiated” but largely imposed by the departing colonial powers. These, by the standards of the time were complex instruments, which overnight sought to create a potentially liberal and democratic governance framework but were doomed from the very beginning because the illiberal and repressive colonial constitutions and institutions did not prepare the new leaders for these independence constitutions. In fact, one could say here that the lessons of authoritarianism that were taught during the colonial period were learnt rather too well by the Africans. With no experience or knowledge in democratic governance, the new leaders were suddenly overwhelmed by the grandeur and temptations of power. The second constitution-making revolution started soon after independence as African leaders under the pretext of nation-building and development, revised and repealed the liberal principles in the inherited constitutions and in the colourful words of the late Tanzanian President, Julius Nyerere, tried to make constitutions operate as “brakes” rather than “accelerators.” Neither objective of development nor that of national unity for which many basic human rights principles were sacrificed, were attained. The third revolution that started in the 1990s reflects the attempts to correct the errors of the past. Whether this cascade of constitution-making or revision is merely normative in content and hardly transformative and thus leaving a sort of continuity between the second and third constitution-making revolutions, is something which the paper will indirectly address in the ensuing pages. In making this classification, I have ignored the colonial constitutions, which made no pretence at being liberal or democratic and were essentially repressive instruments designed to facilitate the exploitation of the colonies. See Yash Ghai, “A journey around constitutions: Reflections on contemporary constitutions,” 122 *South African Law Journal* (2005), pp. 804-831.

³ See, Christof Heyns and Waruguru Kaguongo, “Constitutional human rights law in Africa,” (forthcoming).

⁴ “Against positive rights,” in András Sajó (ed.), *Western rights. Post-Communist application*, Kluwer Law International, The Hague (1996), pp.226-227.

⁵ See generally, Michael Bratton and Van de Walle, *Democratic experiments in Africa: Regime transitions in perspective*. Cambridge University Press, Cambridge (1997); M. Cowen and L. Laakso (eds.), *Multi-party elections in Africa*. James Currey, Oxford (2002); D. Nohlen, M. Krennerich and B. Thibaut (eds.), *Elections in Africa. A data handbook*. Oxford University Press, Oxford (1999); J. A. Wiseman, “Early democratisation elections in Africa,” 11 *Electoral Studies* (1992), 279; T. Young, “Elections and electoral politics in Africa,” 63 *Africa* (1993), 299.

⁶ The paper will concentrate on the constitutional orders in the following countries; Angola, Botswana, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe.

⁷ See for example, Arthur Dyèvre, “The constitutionalisation of the European Union: discourse, present, future and facts,” 30 *European Law Review* (2005), at p. 169, who suggests that the word is used in at least

four senses: i) constitution in a minimalist or material sense ii) constitution in a formal sense iii) constitution in a richer or modern sense, and iv) constitution in a functionalist sense.

⁸ See, Duchacek, cited in James A. Curry, Richard B. Riley, and Richard M. Battistani, *Constitutional government. The American experience*. 3rd ed. West Publishing, US (1997) at pp. 3, 8.

⁹ Stephen Holmes, *Passions and constraint: On the theory of liberal democracy*. University of Chicago Press, Chicago (1995), pp. 270-271, aptly captures the paradox thus: “How can we exit from anarchy without falling into tyranny? How can we assign the rulers enough powers to control the ruled, while also preventing this accumulated power from being abused?”

¹⁰ See, K. C. Wheare, *Modern constitutions*, Oxford University Press, Oxford (1966), at p. 137.

¹¹ See, James A. Curry, Richard B. Riley, and Richard M. Battistani, *Constitutional Government. The American Experience*. 3rd ed. West Publishing, US (1997), at p. 4.

¹² See for example, B. O. Nwabueze, *Constitutionalism in the emergent states*. C. Hurst & Co., London (1973) at p. 1 and Siri Gloppen, *South Africa: The battle over the constitution*. Ashgate, Dartmouth (1997), at p. 43.

¹³ See Louis Henkin, “Elements of constitutionalism,” 60 *The Review* (1998), pp.11-22 who identifies 9 “essential elements; Sartori Giovanni, *The theory of democracy revisited*. Chatham House, New Jersey (1987), who lists 5 elements of what he terms liberal constitutionalism, although he lays emphasis on the rule of law; Bo Li, “What is constitutionalism”,

http://www.oycf.org/Perspectives/6_063000/what_is_constitutionalism.htm and the same author in,

“Constitutionalism and the rule of law”, http://www.oycf.org/Perspectives/7_083100/constitutionalism_and_the_rule_o.htm; Walter F. Murphy, “Constitutions, constitutionalism and democracy”, in Douglas Greenberg, Stanley N. Katz, Melanie Oliviero and Steven Wheatley (eds), *Constitutionalism and democracy. Transitions in the contemporary world*. Oxford University Press, New York (1993), pp. 3-25; Siri Gloppen, *op. cit.* pp. 23-57 and B. O. Nwabueze, *op. cit.*, pp. 1-22.

¹⁴ In this regard, one could add as an emerging core element, the institutions supporting constitutional democracy, found in Chapter 9 of the South African Constitution. For one can not agree more with Klug, “Constitutional law,” *Annual Survey of South African Law*, Juta & Co. Ltd., Cape Town (1995), pp. 1-11, when he states that Chapter 9 of the South African constitution is probably South Africa’s most “important contribution to the history of constitutionalism.”

¹⁵ *Introduction to the study of the law of the constitution*. 10th ed. Macmillan, New York (1968).

¹⁶ In, Richard Bellamy (ed.), *Constitutionalism, democracy and sovereignty: American and European perspectives*. Aldershot, Hants. England (1996), at p. 2.

¹⁷ This has led some writers to make a distinction between what they term liberal constitutionalism and illiberal constitutionalism, (See, Bo Li, “What is constitutionalism?”, *op. cit.*) and some go further to distinguish between positive and negative constitutionalism (See, Stephen Holmes, *op. cit.*).

¹⁸ See, John Rawls, *Political liberalism*. New York, Columbia University Press (1996), pp. 4-35.

¹⁹ *Ibid.* at p. 6.

²⁰ See, Ruti G. Teitel, *Transitional justice*, Oxford, Oxford University Press (2000), at p. 194.

²¹ The study is based on the amended Constitutions of 25 August 1992 of Angola, 30 September 1966 of Botswana, 25 March 1993 of Lesotho, 19 August 1992 of Madagascar, 18 May 1994 of Malawi, 12 March 1968 of Mauritius, 2 November 1990 of Mozambique, 9 February 1990 of Namibia, 8 May 1996 of South Africa, 24 August 1991 of Swaziland, 24 August 1991 of Zambia and 21 December 1979 of Zimbabwe.

²² See Chapter 2 of the Constitution.

²³ The full listing of what are usually considered as the three generation of fundamental human rights is not necessary here. Nevertheless, it is important to note that the first generation rights, usually referred to as civil and political rights correspond with what is often strictly referred to in the West as fundamental rights and freedoms. These are generally called negative rights because they merely impose a negative duty on States to refrain from violating them but do not require them to take any proactive or positive steps to ensure that their citizens actually enjoy them. The second generation rights correspond with the protection of economic, social and cultural rights and actually require the State to make every reasonable effort to put in place programmes for the full realisation of these rights. The third generation or fraternity rights, which at the international level, are presently only reflected in the ACHPR, are the newest and most controversial of these rights. These consist of a catalogue of vague rights and duties on both the State and the citizens.

²⁴ For example, section 18(1) of the Botswana Constitution states *inter alia*, that "...if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress..." See similarly worded provisions in article 22 of the Lesotho Constitution; articles 9, 15 and 46(2) of the Malawi Constitution; section 17 of the Mauritian Constitution; articles 69, 70 & 79 of the Mozambican Constitution; articles 5 & 25 of the Namibian Constitution, section 38 of the South African Constitution; section 25 of the Swaziland Constitution; article 28 of the Zambian Constitution and section 24 of the Zimbabwean Constitution. There are no such provisions in the Angolan and Madagascan Constitutions.

²⁵ The number of rights recognised in each of these Constitutions is as follows: 23 rights, in the Constitutions of Malawi, Namibia and South Africa, 22 rights in the Constitutions of Mozambique and Zambia, 21 rights in the Constitution of Lesotho, 20 in the Constitutions of Madagascar and Swaziland, 19 in the Constitutions of Angola, 14 in the Constitutions of Mauritius and Zimbabwe and 13 in the Constitution of Botswana. See a detailed analysis of this in, Christof Heyns and Waruguru Kaguongo, "Constitutional human rights law in Africa," *op.cit.*

²⁶ Cited in James A. Curry, Richard B. Riley *et al. op. cit.*, at p. 4.

²⁷ See generally, Charles Manga Fombad, "The separation of powers and constitutionalism in Africa: The case of Botswana," 25 *Boston College Third World Law Journal*, pp. 301-342.

²⁸ In 1973, King Sobhuza II (reigned 1921–1982) abrogated the 1968 Constitution and assumed personal rule and in 1976 the original Constitution was formally abolished. Although a new constitution was adopted in 1978 it was so diluted and ineffective that the King continued to rule by decree. After years of intense internal and external pressure, especially in the last four years, the King finally agreed to the drafting of a new constitution which was approved in July 2005 and came into effect at the beginning of this year.

²⁹ See in general, sections 64-78, 79-137 and 136-160 respectively.

³⁰ For example, under section 67(1), the King shall appoint the Prime Minister from amongst members of the House (some of whom are appointed by him) acting on recommendations of his Advisory Council (which under section 231 is composed of his appointees. He can at any time revoke the appointment of the Prime Minister on grounds such as "incompetence." (See section 68(1)(a) of the Constitution).

³¹ In these constitutions and in the order, executive, judiciary and legislature, respectively, see the following: articles 53-77, 105-119; 120-133; and 78-104 of the Angolan Constitution, sections 30-56; 95-104; and 57-94 of the Botswana Constitution, sections 44-53, 86-104; 47, 118-133; and 54-85 of the Lesotho Constitution, articles 41-65; 97-124; and 66-96 of the Madagascan Constitution; sections 7, 78-102; 9, 103-119; and 8, 48-74 of the Malawian Constitution, sections 28-30, 58-71, 74; 72, 76-86; and 31-57 of the Mauritian Constitution, articles 109, 116-132, 149-157; 161-175; and 133-140 of the Mozambican Constitution, articles 27-43; 78-85; and 44-77 of the Namibian Constitution, sections 83-164, 125-141; 165-180; and 42-82, 104-124 of the South African Constitution, articles 23-61; 91-99; and 62-90 of the Zambian Constitution and sections 27-31; 79-92 and 32-63 of the Zimbabwean Constitution.

³² Perhaps one of the biggest aberrations to separation of powers and democracy are the provisions in the constitutions of many countries in the region that empower the presidents to appoint a certain number of members of the national assemblies, thus giving their parties an unfair advantage over the opposition parties. Examples of this are, section 58(2)(b) of the Botswana Constitution, article 46(1)(b) of the Namibian Constitution, article 68(1) of the Zambian Constitution and section 38(1)(b) and (d) of the Zimbabwean Constitution.

³³ See for example, section 50(1) of the Botswana Constitution; and section 92(2) of the South African Constitution.

³⁴ See, Charles M. Fombad, "Some perspectives on the prospects for judicial independence in post-1990 African constitutions," (forthcoming).

³⁵ See, The Asian Development Bank, Judicial independence project, "Judicial independence overview and country-level summaries,"

http://www.abd.org/Documents/Events/2003/RETA5987/Final_Overview_Report.pdf

³⁶ For a more detailed account of this, see Lovemore Madhuku, "Constitutional protection of the independence of the judiciary: A survey of the position in Southern Africa," 46 *Journal of African Law* (2002), pp. 232-245.

³⁷ See articles 120-133 of the Angolan Constitution, sections 96-104 of the Botswana Constitution, sections 47; 118-133 of the Lesotho Constitution, articles 97-124 of the Madagascan Constitution, sections 9103-109 of the Malawian Constitution, sections 76-86; 113-119 of the Mauritian Constitution, articles 161-175 of the Mozambican Constitution, articles 78-85 of the Namibian Constitution, sections 165-180 of the South African Constitution, sections 62; 138-160 of the Swazi Constitution, articles 901-98 of the Zambian Constitution and sections 79-92 of the Zimbabwean Constitution.

³⁸ For a detailed discussion of this, see Violaine Autheman, “Global best practices: judicial integrity standards and consensus principles,” IFES Rule of Law White Paper Series, http://66.249.93.104/search?q=cache:TVdXJQ6CrywJ:www.ifes.org/searchable/ifes_site/...

³⁹ Although this is not a very common constitutional provision, it is still important to spell it out. The Zimbabwe Constitution provides the very opposite of this in section 79(2)(a) which gives Parliament the right to vest “adjudicating functions in a person or authority other than a court.” In October 2004, Roy Bennett an opposition Member of Parliament, became the first person to be convicted and sentenced outside of the judicial process and under the judicial authority of Parliament in terms of the Privileges, Immunities and Powers of Parliament Act.

⁴⁰ This is evident from the fact that, although judicial appointments are made on the “advice” of the Judicial Service Commission, the King, as was pointed out above, is not bound by such “advice” and under section 159(2) of the Constitution, the Commission is made entirely of his appointees.

⁴¹ This is probably confounded by doubts about the professional capability of the judges. For example, article 122 of the Angolan provision provides for “collegiate” courts composed of professional judges and “citizen assistants,” whilst in Mozambique, article 170 provides for professional judges and elected judges.

⁴² For example, in Botswana, under sections 96(1) and 100(1), the President appoints at his absolute discretion the Chief Justice and the President of the Court of Appeal respectively.

⁴³ See for example, sections 96(2), 100(2) and 103(1) of the Botswana Constitution, sections 120,124 and 132 of the Lesotho Constitution, Sections 84 and 90 of the Zimbabwean Constitution.

⁴⁴ The last straw was a statement on 28 November 2002 by the Prime Minister announcing that the Government would not recognise Appeal Court judgments. They only agreed to return to work in November 2004 after they were promised that the government would respect their decision. See generally, The Democratic Governance and Rights Unit, UCT Study, edited by Linda Van De Vijve, *The judicial institution in Southern Africa. A comparative study of Common Law jurisdictions*. Siberink, Cape Town (2006), pp.160-186.

⁴⁵ *Op.cit.*

⁴⁶ *Ibid.* at p. 274.

⁴⁷ It concludes concerning Botswana at *ibid.* p. 32 that : “All the literature and all the interviewees were unequivocal about the independence of the Botswana judiciary; there was never a case in which there was even a suggestion of government influence or interference.”

⁴⁸ The only possibly serious threat to an otherwise reasonably independent judiciary was the attempts by the South African government in 2005 to introduce five Bills ostensibly to rationalise court structures, enhance justice delivery and ensure judicial accountability, but which many commentators saw as compromising judicial independence. See the UCT Study, *op. cit.* at p.152.

⁴⁹ See Afrobarometer Paper No. 11. A comparative series of national public attitude surveys on democracy, markets and civil society in Africa. <http://www.afrobarometer.org/papers/AfropaperNo.11.pdf>

⁵⁰ To put this in its proper perspective, the results of the same survey this time focusing on trust in the president (a political institution, as opposed to a judicial institution) produced the following results for those who trust a lot or somewhat: 73% in Namibia, 50% in Malawi, 44% in Botswana, 41% in South Africa, 38% in Zambia and 20% in Zimbabwe.

⁵¹ See Section 2 of the Lesotho Constitution, sections 5 and 10(1) of the Malawian Constitution, section 2 of the Mauritian Constitution, article 200 of the Mozambican Constitution, article 1(6) of the Namibian Constitution, sections 1(c) and 2 of the South African Constitution, article 2(1) of the Zambian Constitution and section 3 of the Zimbabwean Constitution.

⁵² See article 153(1) of the Angolan Constitution, sections 18(1) and 105-106 of the Botswana Constitution, and article 122 of the Madagascan Constitution.

⁵³ See articles 134-157. Although these provisions refer to it as a “Constitutional Court,” factors such as the nature of its jurisdiction and its access clearly indicate that it is only such a court in name but not functions.

⁵⁴ See articles 105-113, which also refer to it as a “Constitutional Court,” but for the reasons explained in the preceding note, can not strictly be considered as a court.

⁵⁵ See articles 180-184.

⁵⁶ For example, in the Angolan Constitution, what is usually referred to as the exclusive legislative domain is defined in article 89 (which actually says “full and sole legislative powers” and article 90 (which also refers to “relative sole legislative powers”) whilst the residual legislative domain reserved for the executive is defined in article 91 (under what it refers to as “laws of authorisation”). See provisions on the executive law-making domain in article 83 of the Madagascan Constitution and article 157 of the Mozambican Constitution.

⁵⁷ See sections 18(1) and 105-106.

⁵⁸ See sections 22 and 129.

⁵⁹ See sections 11(3) and (4), 103(2), and 108(2).

⁶⁰ See sections 17 and 83-84.

⁶¹ See articles 25 and 80(2).

⁶² See sections 35, 139(2) and 146(2) (a).

⁶³ See section 24. The constitutional scope for judicial review of constitutionality appears to be very narrow as section 24 restricts review only to matters dealing with the declaration of rights provided for in articles 11-23.

⁶⁴ See sections 167 and 169(a).

⁶⁵ See section 94(1).

⁶⁶ The judicial crisis in Swaziland came to a head in 2002 when in *Gwebu and Bhembe v Rex* ICJ Report 21, the Court of Appeal held that a Royal Decree of 2001 was invalid because a 1978 Order required the entrenchment of a new constitution before such power could be exercised. The Prime Minister announced that the government would not recognise the decision that sought to strip the King of powers accorded to Swazi Kings since “time immemorial.”

⁶⁷ Examples of such cases are not only found in countries where the judiciary has been reasonably free from political harassment such as Botswana and South Africa, but in others where the courts have struggled to remain independent and credible. A good example of this is the Zambian case of *Mulundika and Others v The People* [1996] 2 LRC 175 in which the Supreme Court declared certain sections of the Public Order Act unconstitutional and invalid.

⁶⁸ See *Independent Journalists Association of Zimbabwe v Minister of State for Information and Publicity in the Office of the President and Cabinet, and the Media and Information Commission* (Unreported judgment. S.C. 136/02), where the Supreme Court after finding that several sections of the Access to Information and Protection of Privacy Act violated the Constitution, declared them null and void.

⁶⁹ See, C.N. Tate and T. Valliner (eds.), *The global expansion of judicial review*, (1990). It is also quite puzzling that States will still adopt the largely discredited Constitutional Court model, unless the reason is simply that they want to avoid constitutional adjudication in its entirety. See further, Charles M. Fombad, “Protecting constitutional values in Africa: a comparison of Botswana and Cameroon”, 36 *CILSA* (2003), at pp. 102-103, where the following point is made: “... three significant developments, which Francophone African imitators of French models need to note, have helped to improve the rather limited French system of control of constitutionality of laws, and brought it closer to the standards of constitutional justice of its European partners. Firstly, the Constitutional Council has created for itself the power and duty to control the conformity of non-promulgated legislation beyond what is stated in the constitution. Secondly, the control of constitutionality of laws has been enlarged through the work of the French Council of State and the Court of Cassation. Thirdly, the guarantees of individual rights that France lacks at the national level are to a significant degree available at supranational level, through its membership of the European Union and its various judicial bodies.”

⁷⁰ See article 158(1) which allows Parliament to amend the Constitution on the “decision of two-thirds of members present.” (emphasis added).

⁷¹ Section 85 allows certain provisions to be amended once this is approved by a “majority” of members of Parliament and for other provisions, where there is either approval by two-thirds of each House or an approval by a majority of the population in a referendum.

⁷² Under articles 138-141, the Constitution can be amended once three-fourths of the National Assembly and Senate approve.

⁷³ Sections 195-197 allow changes to the certain provisions of the Constitution to be effective once this is either approved in a referendum and a simple majority in Parliament and in the case of other provisions, a two-third vote in favour by the members of the National Assembly who are entitled to vote.

⁷⁴ Articles 198-199 allow certain provisions of the Constitution to be changed where the Bill secures a simple approval in both the National Assembly and a referendum and for other provisions, a two-thirds majority vote in favour of the amendment by the deputies in the National Assembly will suffice.

⁷⁵ Article 79 of the Constitution allows some provisions to be altered once this is approved by two-thirds of the members of the National Assembly whilst other provisions can only be altered after this has been approved in both a referendum and by a simple majority in the National Assembly.

⁷⁶ Any alteration of the Constitution, under article 52, essentially requires a two-thirds affirmative vote of the members of Parliament entitled to vote.

⁷⁷ In Botswana, section 89 requires at least 4 months of debate and a two-thirds vote in favour in the National Assembly for some provisions whilst for others, it requires that in addition to the 4 months discussion and two-third vote, there should be a referendum. Under the Mauritius Constitution, section 47 requires approval by three-quarters of the members of the National Assembly for changes in certain provisions, a referendum with approval of not less than three quarters of the voters and a vote in the National Assembly supported by “all members,” for amendment to certain provisions and for certain other provisions the amendment simply requires approval by two-thirds of all members of the National Assembly. Finally, for Swaziland, sections 245 – 248 allow for some provisions to be amended by simple majority of both Chambers of Parliament, other provisions require an approval by three-quarters of both Chambers and approval in a referendum and others just a two-thirds vote in favour by the two Chambers.

⁷⁸ See article 131.

⁷⁹ See section 74.

⁸⁰ See for example, article 64 of the 1996 amendment to the Cameroonian Constitution, article 178(4),(5) and (6) of the Constitution of the Republic of Congo of 15 March 1992, article 117 of the Constitution of Gabon of 26 March 1991, article 290(1) of the Ghanaian Constitution of 1993, article 118 provisos 3 and 4 of the Constitution of Mali of 18 July 1999, article 99(3) of the Constitution of Mauritania of 12 July 1991 and article 136 of the Constitution of Niger of 18 July 1999.

⁸¹ By analogy from the analysis of the supremacy of parliament, as explained by Sir Robert Megarry in his judgment in *Manuel v Attorney-General* [1982] 3 AER 833.

⁸² See, K. C. Wheare, *op.cit.* at p. 17.

⁸³ *Parties and party systems: A framework for analysis*. Cambridge, Cambridge University Press (1976), at p. 64.

⁸⁴ This must perhaps be qualified in the case of Swaziland where in spite of a freedom of association provision in section 25, the practical operation of the electoral system, for example, section 87, which prohibits canvassing for votes, makes it difficult to see how political parties can function within such a setting.

⁸⁵ 1999 (4) BCLR 363 (CC), at 372.

⁸⁶ For example, article 17(1) of the Constitution of Namibia, which is similar in many respects to article 21(2)(d) of the Zambian Constitution; section 21(3)(d) of the Zimbabwean; and section 13(2) of the Mauritian Constitution, appear to suggest that legislation on the formation of political parties in general and any restrictions that they may contain, to be valid must be shown to be reasonably justifiable in a democratic society.

⁸⁷ 2004(5)BCLR 445(CC).

⁸⁸ This, under the heading “limitation of rights,” states as follows: “(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation ;(d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

⁸⁹ [1996] 2 LRC 175.

⁹⁰ 2001 (9) BCLR 883 (CC).

⁹¹ 1999 (3) SA 191.

⁹² Per Langa DP at 224. See also comment in note 14 *supra*.

⁹³ *Ibid.* at 231.

⁹⁴ 1999(4) BCLR 363 (CC).

⁹⁵ Interestingly, the South African Constitution deals with the former but not the latter and the Namibian Constitution in article 104 does the opposite.

⁹⁶ For examples of similar stipulations, see section 66 of the Lesotho Constitution and section 60(4) of the Zimbabwean Constitution.

⁹⁷ According to M. Cowen and L. Laakso (eds.), *Multi-party elections in Africa*, James Currey, Oxford (2002), at p. 30, at least eight electoral practices have been associated with recent elections in Africa viz, the imposition of restrictions on the activities or even existence of opposition parties, abuse of voter registration procedures, manipulation of the size of electoral constituencies, restrictions upon the selection or registration of candidates, unfair use of state resources, the amendment of the constitution and the introduction of electoral laws and electoral systems that favour the ruling party, the abuse of voting and counting procedures and the overturning of unfavourable results. Also see, G. Geisler, "Fair? What has fairness got to do with it? Vagaries of election observations and democratic standards," 31 *JMAS* (1993), P. 113.

⁹⁸ 1999 (6) BCLR 607 (CC).

⁹⁹ 1999 (3) SA 191.

¹⁰⁰ 2003(1) SA 495.

¹⁰¹ As one of the fundamental principles regulating political parties, the provision prohibits them from receiving any "contributions of monetary or economic value from foreign governments or governmental institutions."

¹⁰² It states, "The State shall, where necessary, provide funds so as to ensure that, during the life of any Parliament, any political party which has secured more than one-tenth of the national vote in elections to that Parliament has sufficient funds to continue to represent its constituency."

¹⁰³ 1998 (2) BCLR 224 (ZS).

¹⁰⁴ For a critical commentary on these cases, see Theunis Roux, "Democracy," in Stuart Woolman, Theunis Roux, Jonathan Klaaren, Anthony Stein, Matthew Chaskalson and Michael Bishop, *Constitutional law of South Africa*, 2nd ed., Juta & Co., Cape Town(2006), pp.10-22 to 10-37.

¹⁰⁵ 1999 (3) SA 191 at 200-201.

¹⁰⁶ 2003 (1) SA 495 at 510.

¹⁰⁷ 1999 (3) SA 191 at 206. See the criticism of this majority view in Theunis Roux *op. cit.*, pp.10-54 to 10-57.

¹⁰⁸ See for example, M.A. Mohamed Salih (ed.), *African political parties. Evolution, institutionalisation and governance*. Pluto Press, London (2003).

¹⁰⁹ See, Renske Doorenspleet, "Political parties, party systems and democracy in Sub-Saharan Africa," in M.A. Mohamed Salih (ed.), *op. cit.*, pp. 169-187.

¹¹⁰ *The West European party system*, Oxford University Press, Oxford (1990), pp. 420-422.

¹¹¹ See, Renske Doorenspleet, *op. cit.* at p. 175.

¹¹² In most countries, the opposition parties have simply been nothing more than factious assemblies of diverse interest groups that are hastily constituted before elections and dissolved or go into slumber immediately afterwards. Although a good number of opposition parties have been deliberately planted by ruling parties and are funded by them with the sole objective of sowing discord, most of them are either narrow ethnic alliances or opportunistic alliances set up by disgruntled members of former one-party regimes, sharing traits of the former era: corruption, personalisation of politics, excessive ambition and focus on grabbing power. The opposition parties have in many respects been their worst enemies; many, even in Botswana with its reputation as Africa's longest democracy, spend their time squabbling and in most cases provide more competition for each other rather than for the ruling party. See further, Charles M. Fombad, "The African Union, democracy and good governance," 32 *Current African Issues* (2006), pp.14-15.

¹¹³ For the Common law perspective to this, see John Forbes, "Judicial review of political parties," Research Paper 21, 1995-1996 <http://www.aph.gov.au/LIBRARY/pubs/rp/1995-96/96rp21.htm> and for a civilian perspective, see Jörn Ipsen, "Political parties and constitutional institutions," in Christian Starck (ed.), *Studies in German constitutionalism*, Nomos Verlagsgesellschaft, Baden-Baden(1995), pp.195-243.

¹¹⁴ See, Bugalo Maripe, "Judicial review and the public/private body dichotomy: An appraisal of developing trends," (forthcoming), who points out that there are many advantages in terms of the nature of

the proceedings and the remedies available in proceedings by way of judicial review, instead of the traditional proceedings by way of writ. Using the situation in Botswana, he shows that proceedings by way of writ entail issuing a summons with view to a trial. It could take up to three years before the matter is called for hearing. By contrast, an application for judicial review is heard in the regular motion court, or on a day specially arranged for the hearing of the matter, which is usually less than a year from the date when the matter was filed in court. See fuller discussion of this in John Forbes, *op. cit.*

¹¹⁵ For example, the present presidents of Zambia and Malawi were apparently hand-picked and imposed by the predecessors.

¹¹⁶ This in no way underestimates the value of using the sometimes quite sophisticated internal rules for settling disputes that are found in the constitutions and rule books of political parties. The processes are however, often slow and could sometimes be abused by party bosses.

¹¹⁷ See section 43(a) of the Malawian Constitution, article 18 of the Namibian Constitution, section 33 of the South African Constitution and section 33(1) of the Swaziland Constitution. For a discussion of the Namibian provision, see Collins Parker, "The 'administrative justice' provision of the Constitution of the Republic of Namibia: A constitutional protection of judicial review and tribunal adjudication under administrative law," 24 *CILSA* (1991), pp. 88-104.

¹¹⁸ "The constitutional right to just administrative action – are political parties bound?" 15 *SAJHR* (1999), at p.370.

¹¹⁹ See, Gubbay C.J. in *United Parties v Minister of Justice, Legal and Parliamentary Affairs and Others* 1998 (2) BCLR 224 (ZS) at 234.

¹²⁰ *Modern constitutions*, Oxford University Press, Oxford (1966), pp. 33-34.

¹²¹ 4 Wheat 316, 407 (1819).

¹²² For example, see the Swaziland Constitution which has 279 sections and 19 chapters, which are essentially chaotic catalogue of contradictions that make nonsense of the essentials of constitutionalism whilst dwelling on matters which should normally be found in ordinary legislation. Another example is the Nigerian Constitution of 1999 which has 318 sections and 7 schedules, which may be understandable for such a large and complex society but with its own traits of trivia.

¹²³ For a comprehensive study of this, see ARTICLE 19, *The interpretation of fundamental rights provisions. International and regional standards in African and other Common Law jurisdictions*, ARTICLE 19, London (1997).

¹²⁴ See, Mauro Cappelletti, "Repudiating Montesquieu? The expansion and legitimacy of 'constitutional justice,'" 35 *Catholic University law Review* (1985), pp.1-32.

¹²⁵ For example, as Donald P. Kommers, "Constitutional reviews: Limiting Government-An introduction to constitutionalism," 9 *East European Constitutional Review* (2000), at p. 97 points out that, of the 17 amendments to the United States Constitution adopted since 1789, four were deemed necessary in order to reverse decisions of the Supreme Court.

¹²⁶ See generally, Mauro Cappelletti, "Judicial review of the constitutionality of state action: its expansion and legitimacy," 2 *TSAR* (1992), pp.264-266.

¹²⁷ See, Guido Calabresi, "Introductory remarks," 35 *Catholic University law Review* (1985), pp.1-2.

¹²⁸ See notes 48 and 49 *supra*.

¹²⁹ See, Julius Ihonvbere, 'A balance sheet of Africa's transitions to democratic governance,' in John Mukum Mbaku and Julius Ihonvbere, *The transition to democratic governance in Africa: The continuing struggle*, Westport, Praeger (2003), at p. 50.

¹³⁰ See, Theunis Roux, *op. cit.*, at p. 10-22.