

**CONSTITUTIONALISATION OF THE RIGHTS OF POLITICAL  
PARTIES IN AFRICA AND ITS IMPACT ON  
CONSTITUTIONALISM: A COMPARATIVE STUDY OF THE  
CENTRAL AFRICAN REPUBLIC, SENEGAL AND SOUTH  
AFRICA**

by

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Submitted in fulfilment of the requirements for the degree

Doctor Legum (LLD)

In the Faculty of Law,  
University of Pretoria

August 2018

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## **Declaration of originality**

I, the undersigned, hereby declare that this thesis, which I submit for the degree Doctor Legum (LLD) in the Faculty of Law at the University of Pretoria, is my own work and has not previously been submitted for a degree at another university. I have correctly cited and acknowledged all my sources.

Signed:

Date:

Supervisor:

Date:

## **Dedication**

To my husband, Chikezie Anyanwu, for his love and support. To our children, Olivier Uchenna, Emmanuelle Amarachi and Gabriel Chiwetel; you are my driving force and the reason why this thesis came to life. To my parents, Professor Michel Dieudonné Vohito and Doctor Jeanne Angèle Vohito, who are my source of inspiration.

## Acknowledgment

While I juggled between writing this thesis, performing my daily job as child rights activist, caring for my children and fighting for my child with special needs, I have incurred many debts. I am immensely grateful to my supervisor, Professor Charles Manga Fombad, for his guidance and support along this journey. Thank you for your rigour, insightful comments and for pushing me to my limits. Thank you to Professor Frans Viljoen for his thoughtfulness and encouragement. To Professor Mai Cheng, thank you for sharing your knowledge and for always referring me to useful resources.

A special thank you to Firmin Mokoue for his technical assistance and for providing me with valuable resources from the CAR. It would have been difficult to write this thesis without an expert in Bangui. Thank you to all my friends and colleagues who encouraged me during this journey and those who kindly agreed to proofread my work, including Triona Lenihan, Remember Miamingi and Elvis Fokala. I am very grateful to my friends, Nanou Manga and Alina Miamingi, who supported me throughout the preparation of this thesis. Thank you, Alina, for your words of wisdom and continuous encouragement.

Finally, to my siblings, Stephan, Muriel, Cécile, Olivier, Nancy Vohito and their families, thank you for your love and encouragement! In loving memory of Emma Nathalie Christine.

Oli, this is for you!

## Acronyms and abbreviations

ACDEG	African Charter on Democracy, Elections and Governance
ACHPR	African Charter on Human and Peoples' Rights
ANC	African National Congress
AU	African Union
CAR	Central African Republic
CSOs	Civil Society Organisations
ECOWAS	Economic Community of West African States
ICCPR	International Covenant on Civil and Political Rights
IEC	Independent Electoral Commission
MESAN	Movement for the Social Change of Black Africa
OAU	Organisation of African Unity
PDS	Parti Democratique Sénégalais
PR	Proportional representation
PSC	Peace and Security Council
RDA	Rassemblement Démocratique Africain
RDC	Rassemblement Démocratique Centrafricain
SADC	Southern African Development Community
SAPC	South African Communist Party
Universal Declaration	Universal Declaration of Human Rights
UN	United Nations
UPS	Union Progressiste Sénégalaise
ZANU-PF	Zimbabwe African National Union - Patriotic Front

## Abstract

This thesis examines how the constitutionalisation of political parties is implemented in the political systems of the Central African Republic (CAR), Senegal and South Africa, and how this affects constitutionalism and the rule of law. These countries' different political histories and their successful or unsuccessful democratic experiences make them appropriate for selection in this research.

The thesis argues that party constitutionalisation is the expression of pluralism, participation and competition. The constitutionalisation of political parties in modern democracies therefore highlights the relevance of political parties as indispensable institutional components of the democratic system and factors of political stability. The thesis finds that, at various levels, the process of implementing party constitutionalisation remains a challenge in the CAR, Senegal and South Africa. The entrenchment of political parties in national constitutions does not necessarily imply that their constitutional rights and obligations are fulfilled and that government authorities, as primary enforcer of the constitution, ensure that appropriate and enabling instruments and mechanisms are in place in this regard. The thesis therefore recommends the entrenchment and promotion of judicial independence in national constitutions as in CAR, Senegal and South Africa. Specific references to the South African constitutional provisions are made with regard to ensuring judicial independence and setting the scope of judicial review by the Constitutional Court. The thesis also highlighted the need for entrenching transparency and accountability institutions in constitutions as a way of protecting political parties against manipulation and pressure from state actors. It highlights the role of international and African Union human rights mechanisms in promoting constitutionalism and party constitutionalisation.

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# Chapter 1

## General Introduction

- 1.1 Background
- 1.2 Problem statement
- 1.3 Theoretical framework
- 1.4 Research questions
- 1.5 Aims and objectives
- 1.6 Significance of the study
- 1.7 Literature review
- 1.8 Research methodology
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### 1.1 Background

In constitutional democracies, constitutions are expected to empower democracy, since they create and entrench institutional structures, mechanisms and frameworks for decision making. Moreover, constitutions are expected to ensure the protection of fundamental and collective rights of citizens. In this context, the relationship between individual citizens and various communities should normally be guided by constitutional and legal provisions and not subjected to governments' direct interference. Citizens should enjoy the fundamental right to form any private association within the law, without state intervention.<sup>1</sup> Political parties however seem to occupy a specific position with regard to state non-interference, since on the one hand they are merely citizens' associations, while on the other hand they also aim to gain access to government power, which makes them major stakeholders in the sphere of national public policy and constitutional life. Party constitutionalisation, which is the

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<sup>1</sup> See L Karvonen 'Legislation on political parties: A global comparison' (2005) paper presented at the Southwestern Political Science Association 2005 Annual Meeting, New Orleans, USA.

process of attributing constitutional status to political parties,<sup>2</sup> implicitly recognises the ‘ambiguous’<sup>3</sup> status of political parties, as they belong to both the state and civil society spheres.<sup>4</sup>

Unlike the trends observed in Western Europe, where party constitutionalisation started in the late 1940s, the history of party constitutionalisation is fairly recent in Africa. Indeed, beside the rise of liberation movements during the colonial period, the actual emergence of African political parties only took place around the time of African countries’ independence. This is because the colonial period was not characterised by any form of democratic or constitutional regimes,<sup>5</sup> hence party pluralism was not a prime concern. Historically, although at independence African constitutions made implicit or explicit provisions for the protection of the rights of political parties (multipartyism), by the mid-1960s most Sub-Saharan African constitutions were transformed to make provision for only one-party systems.<sup>6</sup> The one-party system era came to an end in the 1990s’ wave of African democratisation when most African states amended their constitutions to embrace multiparty systems, good governance and the rule of law.<sup>7</sup> As in the post-war European experience,<sup>8</sup> considering the key role that political parties were expected to play in the early 1990s’ African democratic systems, it had become important for states to legalise their existence through various national instruments, primarily through constitutions.

The thesis aims to assess how the constitutionalisation of political parties is implemented in the political systems of three selected African countries, and how this affects constitutionalism and the rule of law. The Central African Republic (CAR), Senegal and South Africa are selected as case studies, since these countries have gone through different experiences of political parties’ regulations. The fact that the three

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<sup>2</sup> G Borz ‘Contemporary constitutionalism and the regulation of political parties: A case study of Luxembourg’ (2011) *Working Paper Series on the Legal Regulation of Political Parties* at 4.

<sup>3</sup> Karvonen (n 1) 2.

<sup>4</sup> Karvonen (n 1) 2.

<sup>5</sup> C Fombad, ‘Conceptualising a framework for inclusive, fair and robust multiparty democracy in Africa: The constitutionalisation of the rights of political parties’ (2015) 48 *Politics in Africa, Asia, Latin America* at 6.

<sup>6</sup> Fombad (n 5) 6.

<sup>7</sup> Fombad (n 5) 8.

<sup>8</sup> I van Biezen ‘Constitutionalizing party democracy: The constitutive codification of political parties in post-war Europe’ (2012) *British Journal of Political Science* 42(1) at 190.

countries are characterized by different legal traditions constituted an incentive in the selection of the countries. The comparison of countries with different legal traditions would feed into current research and discussion on party constitutionalisation and its impact on constitutionalism. Indeed, based on the French Napoleonic legal tradition, the CAR and Senegal have adopted a civil law system, while South Africa has a hybrid legal system composed of English common law as well as Roman- Dutch legal system. Considering that the civil law system revolves primarily on the codification of statutes, the analysis of constitutional and legal regulations of political parties in the CAR and Senegal will be of primary importance in this thesis. Both countries' constitutions and statutes will therefore represent the main source of regulation of political parties. In South Africa, by contrast, because of its 'mixed' legal tradition, statutes and case laws will be equally important in analyzing the statutes of political parties in the country. The predominant role played by judges in common law systems requires a greater scrutiny of case laws pertaining to political parties in South Africa. Ultimately, the difference between the countries' legal traditions may impact on constitutionalism. It can be argued that in a common law system, through their decisions, judges will play a key role in protecting the constitutional rights and duties of political parties and promoting constitutionalism. While in civil law systems, as in the CAR and Senegal, existing constitutional and legal provisions will be fundamental in ensuring that political parties' rights are protected.

These three countries' different legal traditions, political histories and their successful or unsuccessful democratic experiences make them appropriate for selection in this research.

## 1.2 Problem statement

The constitutionalisation of political parties, which started in Europe after World War II when political parties were progressively regulated by European constitutions and recognised as key components of a democratic system,<sup>9</sup> started decades later in Africa. Party constitutionalisation nowadays, as van Biezen points out, portrays parties as an 'important part of the political and social reality which brings an essential contribution to the functioning of democracy'.<sup>10</sup> The emerging trends of constitutionalisation were

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<sup>9</sup> Borz (n 2) 4 G (2011).

<sup>10</sup> van Biezen (n 8) 190.

however preceded by a long period of anti-partyism sentiment in the Western world, whereby political parties were perceived as elites' institutions that empowered 'the few' at the expense of 'the many'.<sup>11</sup> Even the oldest constitution in the world, the American constitution, deliberately omitted mention of political parties.<sup>12</sup>

In Africa, from the colonial period until the early 1990s, African states' experiences of constitutionalism and multiparty democracy were inconsistent and often non-existent.<sup>13</sup> Most post-independence constitutions raised hopes with the inclusion – or at least the non-prohibition – of multiparty systems. However, the widespread constitutionalisation of one-party systems that followed in the late 1960s marked a grim period for democracy and constitutionalism, mostly across Sub-Saharan African states. After the 1990s, African states went through a democratisation momentum, which was implemented through constitutional reforms and multiparty systems across most parts of the continent.<sup>14</sup> With the collapse of the Soviet Union, signalling the end of the Cold War in the early 1990s, African regimes, mostly authoritarian and undemocratic, ended up losing the unconditional support of their Western or communist allies.<sup>15</sup> During what was called the third wave of democratisation<sup>16</sup> in the 1990s, African states were therefore forced to embrace democratic and liberal values, especially as they faced increasing pressure from an empowered civil society and endeavoured to meet international financial institutions' loan conditions<sup>17</sup> pertaining to good governance, civil society empowerment and constitutionalism. African states adopted new or revised constitutions, which entrenched democratic principles such as 'political

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<sup>11</sup> J Ajzenstat 'Two forms of democracy: A response to Mendelsohn's public brokerage: Constitutional reform and the accommodation of mass publics' (2000) *Canadian Journal of Political Science* 33 (3) at 590.

<sup>12</sup> R Pildes 'Political parties and constitutionalism' (2010) *New York University and Legal Theory Working Papers* at 11.

<sup>13</sup> By 1989, African authoritarian regimes included 11 military regimes and 29 one-party regimes. Pluralist regimes included five inclusive multi-partyism regimes and one racial oligarchy (i.e. South Africa). Source: Adapted from G Carbone 'Political parties and party systems in Africa: Themes and research perspectives' (2007) *World Political Science Review* 3.

<sup>14</sup> International Institute for Democracy and Electoral Assistance *Political parties in Africa: Challenges for sustained multiparty democracy* (2008) 42.

<sup>15</sup> AO Nwauwa 'Concepts of democracy and democratization in Africa revisited' Paper presented at the Fourth Annual Kent State University Symposium on Democracy 2011.

<sup>16</sup> A concept developed by SP Huntington in relation to the global democratic transition, the first two waves began in the 1820s and the 1940s. (SP Huntington *The third wave: Democratization in the twentieth century* (1992) at 366).

<sup>17</sup> S Limpach & K Michaelowa 'The impact of World Bank and IMF programs on democratization in developing countries' (2010) 62 *Center for Comparative and International Studies Working Paper* at 2.

alternation’,<sup>18</sup> transparent democratic practices and the reinforcement of political rights, as well as political competition. Indeed, as pointed out by one author,<sup>19</sup> this third wave of democratisation enabled post-1990s African constitutions to embrace ‘values and practices rooted in constitutionalism and the rule of law’. The ‘routinisation’ of multiparty elections<sup>20</sup> therefore became the political norm on the continent.

Considering the increasing role played by political parties in the African democratic process, and following the trends of party constitutionalisation observed in Europe and other parts of the world, African governments also sought ways of regulating political parties. This wave of party regulation can be explained by the multiple roles that political parties can play. In modern democracies, since political parties are expected to empower vulnerable and marginalised groups, they can also be used to increase the influence of the elite.<sup>21</sup> Political parties can be misused and ultimately violate the very democratic principles that they are expected to represent. Studies have shown that the trends of party constitutionalisation, as well as the development of African political parties, were mainly influenced by their colonial experiences. This has given rise to two main trends – Francophone and Anglophone party constitutionalisation.<sup>22</sup> It would be important to shed light on this aspect of party constitutionalisation and its potential impacts/implications. It would also be interesting to find out if there is a relationship between the provisions of party constitutionalisation and the democratic or non-democratic status of the countries, and whether or not party constitutionalisation is an inclusive process that makes provision for new parties and/or opposition parties.

### 1.3 Theoretical framework

Research evidence suggests that the issue of party constitutionalisation is closely linked to the changing nature of constitutionalism over time. There are various theoretical approaches to constitutionalism, which in turn have an impact on the nature and scope of party constitutionalisation.<sup>23</sup> The three theoretical models guiding this study are

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<sup>18</sup> N van de Walle ‘Presidentialism and clientelism in Africa’s emerging party systems’ (2003) 41 *The Journal of Modern African Studies* at 300.

<sup>19</sup> C Fombad ‘Strengthening constitutional order and upholding the rule of law in Central Africa: Reversing the descent towards symbolic constitutionalism’ (2014) 14 *African Human Rights Law Journal* (2014) at 416.

<sup>20</sup> Fombad (n 19) 416.

<sup>21</sup> International Institute for Democracy and Electoral Assistance (n14) 19.

<sup>22</sup> Fombad (n 5) 7.

<sup>23</sup> See Borz (n 2); Pildes (n 12) and Fombad (n 5).

derived from various scholars and researchers who use similar concepts and definitions to explain party constitutionalisation and constitutionalism. The analysis that follows is an attempt to provide a theoretical view of the dominant theories and models for explaining party constitutionalisation and constitutionalism.

### **1.3.1 The evolving nature of constitutionalism**

Scholars who have studied the trends of party constitutionalisation have also analysed the gradually changing views on constitutionalism. Constitutions and judicial reviews are commonly viewed as instruments for ensuring the protection of individual rights against anarchy and authoritarianism.<sup>24</sup> In this regard, the legal enforcement of constitutional norms is thought to be the appropriate channel for limiting governmental arbitrariness and oppression.<sup>25</sup> Over time some scholars<sup>26</sup> have increasingly called for the adoption of the concept of ‘modern constitutionalism’, which goes beyond the mere idea of protecting citizens from arbitrary rule. While rejecting the idea of ‘symbolic constitutionalism’, they advocate a modern constitutionalism that enables the government to be limited in its actions and accountable to its citizens for its actions<sup>27</sup>. Modern constitutionalism requires that the state be equipped with a set of empowered institutions leading to a strong government. It implies that, as opposed to merely limiting the power of the state, functioning institutions are accountable to, and controlled by, the people they are intended to serve. In other words, modern constitutionalism revolves around the concept of accountability as well as powerful and effective institutional structures. In this vein, Fombad defines the core elements of modern constitutionalism as follows: the recognition and protection of fundamental rights and freedoms, the separation of power, an independent judiciary, the review of the constitutionality of laws, control of the amendment of the constitutions and institutions supporting constitutional democracy and accountability.<sup>28</sup>

The concept of modern constitutionalism will be used in this study to examine the actual entrenchment of constitutionalism in the three countries. Through this theoretical

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<sup>24</sup> Pildes ( n 12) 11.

<sup>25</sup> Fombad ( n 19) 415.

<sup>26</sup> Fombad (n 19) 417.

<sup>27</sup> Fombad (n 19) 417.

<sup>28</sup> Fombad (n 19) 420.

framework the study therefore intends to conduct a critical analysis of the existence – or inexistence – of effective and empowered institutions that ensure government accountability in the three countries.

### **1.3.2 Framework of analysis for party constitutionalisation**

In terms of research on party constitutionalisation, van Biezen developed a comparative analysis of modern constitutions through her pioneering research on constitutional regulation of political parties in post-war Europe.<sup>29</sup> Van Biezen's categorisation of party constitutionalisation was based on four key principles, which are: (i) the principles and values relating to political parties and enshrined in the constitution; (ii) the rights and duties of political parties; (iii) the organisational structure of the political system; and (iv) judicial oversight. Although this framework was developed in a European context, it could still assist in establishing whether the constitutions of the three African countries include provisions defining political parties in terms of key principles and values, including participation, popular sovereignty or pluralism.<sup>30</sup> Any constitutional provisions pertaining to political parties' activity and behaviour, as well as identity and programme, will also be considered, since these will entail restrictions on the parties' democratic rights and freedoms.<sup>31</sup> Other constitutional provisions relating to political parties' access to public resources, as well as judicial control of political parties, will also inform the comparative analysis of these three countries' constitutions.

### **1.3.3 Models of party constitutionalisation**

Janda extensively studied the phenomenon of party law at global level and its impact on national public affairs.<sup>32</sup> In doing so, Janda developed what he called five 'alternative models' that reflect different ways in which states have regulated parties, which are: the proscription model, the permission model, the promotion model, the protection model and the prescription model. In other words, while studying examples of constitutional norms, Janda set categories of party regulations according to whether

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<sup>29</sup> I van Biezen 'The constitutional regulation of political parties in post – war Europe: Full research report end of award report' (2010) *Economic and Social Research Council* at 1.

<sup>30</sup> van Biezen (n 8) 16.

<sup>31</sup> van Biezen (n 8) 16.

<sup>32</sup> K Janda 'Political parties and democracy in theoretical and practical perspectives: Adopting party law' (2005) *National Democratic Institute for International Affairs* at 8.

they outlaw, permit, promote, protect or control political parties. This theoretical concept will be used to evaluate the models of party constitutionalisation in the CAR, Senegal and South Africa and the subsequent impact on constitutionalism.

In the European context, van Biezen also developed three models of party constitutionalisation, namely the modern party government model, the defending democracy model and the public utilities model.<sup>33</sup> Each of these models is expected to reflect ‘a particular understanding of the place of political parties within the democratic system’. In the modern party government model political parties’ roles are primarily based on their participation as parliamentary groups or political actors. Political parties are therefore understood to be key components of the effective functioning of party government, requiring them to be supported by the state. In the defending democracy model that can be found in Germany, for instance, political parties are strictly regulated in view of protecting national democracy. In this case, the state plays a key role in safeguarding national democracy while infringing on parties’ freedoms and autonomy. Finally, in the public utilities model, which can be found in new European democracies, political parties are viewed as ‘unique vehicles for the realisation of democratic values and principles. Political parties are therefore given constitutional privileges pertaining to their democratic liberties and status. In the African context, can one say that the public utilities model also influenced the 1990s’ party constitutionalisation wave? Using this model, van Biezen referred to political parties as ‘quasi-official agencies of the state’, especially considering their democratic importance. Is this applicable to the constitutional provisions of the three countries? These models, adopted in a European context, will also be used to assess the models of constitutions in the CAR, Senegal and South Africa. This study will apply a synthesis of these theoretical frameworks in delineating party constitutionalisation processes in Africa. The above-mentioned theoretical models complement one another, as they all aim to assess whether or not the constitutional rights of political parties are actually respected. They will assist in examining what has actually happened in the three countries with regard to compliance with political parties’ fundamental rights, including free and fair elections and political alternation. For instance, the party government model will be used to assess the actual level of political parties’ participation in the three countries’ democratic systems.

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<sup>33</sup> van Biezen (n 8) 22.

Similarly, the defending democracy model will be used to assess the magnitude of the state's involvement in the democratic system, and whether such a role still enables political parties to enjoy their constitutional rights freely. Finally, the public utilities model will be used to assess whether or not political parties in the CAR, Senegal and South Africa are given constitutional privileges in relation to the central role that they are expected to play in the democratic system. Like the above-mentioned modern constitutionalism approach, these models are expected to enrich this research, since they will help in identifying the gap and challenges of party constitutionalisation and their impact on constitutionalism in the three countries.

## **1.4 Research questions**

This study is about the trend of party constitutionalisation in Africa (namely the CAR, Senegal and South Africa) and its impact on constitutionalism. Anchored within a comparative theoretical framework, it is about the development or otherwise of constitutionalisation of political parties in nascent democracies and its implications for or impact on constitutional democracy and the rule of law. It is about the nature and extent of political party constitutionalisation in these three countries. Three sets of questions guide this study.

Question 1: Is party constitutionalisation sufficient to facilitate constitutionalism progress in the CAR, Senegal and South Africa?

Question 2: If so, what level of constitutionalisation, if any, is needed?

Question 3: What are some of the crucial elements of party constitutionalisation in the CAR, Senegal and South Africa?

## **1.5 Aims and objectives**

This study aims to examine and analyse the nature and scope of the constitutionalisation of the rights of political parties in three specific African countries. The specific objectives of the research are to

- a) Analyse the background, evolution and scope of political party constitutionalisation during the pre-1990 and post-1990 periods for each selected country.

- b) Compare the extent and intensity of party constitutionalisation in each country, taking into account their respective histories and possible current political challenges.
- c) Identify and analyse the culture of constitutionalism developed in the three selected countries, taking into account each country's politico-socio-cultural background.
- d) Contribute to current discussions on constitutionalism and build on previous comparative research on party constitutionalisation in Africa.
- e) Identify gaps and challenges pertaining to constitutionalism, and how this has affected the entrenchment of constitutionalism; also suggest how to facilitate political parties' constitutional rights in the three countries and beyond.

## 1.6 Significance of the study

At global level, the trend of party constitutionalisation started in Europe, following World War II in the late 1940s. This momentum reached the African continent during the third wave of democratisation marked by constitutional reforms in the early 1990s, which established competitive political systems in most African states. The democratisation of African regimes, coupled with the constitutionalisation of African political parties, may lead to the emergence of a 'culture of constitutionalism'<sup>34</sup> in Africa. Almost all African states have adopted constitutions that entrench multi-partyism and respect for citizens' basic political rights.<sup>35</sup> The adoption of multi-partyism and political alternation is evidence that African states are trying to embrace democratic values and the rule of law. However political scientists and constitutional lawyers are increasingly highlighting the changing nature of constitutionalism, which entails the need for the development of enabling and enforceable constitutional norms. The constitutionalisation of political parties and the adoption of constitutionalism must

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<sup>34</sup> Fombad (n 19) 430.

<sup>35</sup> The Kingdom of Swaziland is the only exception in Africa. Article 79 and articles 80-90 of the Swaziland Constitution of 2005 prohibit multi-partyism and provide for a 'Tinkhunla-based system' of governance, which allows election to national office based on 'individual merit'.

be supported by core principles: institutions and processes protecting the rule of law and encouraging political competitiveness.<sup>36</sup> Considering the evolving views on the concept of constitutionalism and the increased vigilance against ‘symbolic’ constitutionalism, this study will assess the impact of provisions pertaining to political parties on constitutionalism and whether such provisions are in line with the modern vision of entrenching constitutionalism. Based on these three countries’ examples, the study is intended to provide some guidance for other African countries with similar historical, political and colonial experience, in terms of constitutionalisation of the rights of political parties.

This study will focus on party constitutionalisation in three specific African countries. Geographical considerations were considered while selecting the three countries used as case studies in this research. The CAR, Senegal and South African respectively belong to different African sub-regions with different democratic trajectories. For instance, according to the Mo Ibrahim 2014 Index<sup>37</sup> on Africa’s sub-regions’ performance relating to safety and the rule of law, Southern Africa recorded the highest average on the continent (63.7 out of 100), while West Africa recorded 58.2 and Central Africa recorded the lowest average on the continent (42.8).<sup>38</sup> The index found that the average performance of compliance with the rule of law for the continent was at 52.8 in 2017.

In this regard, one of the author’s primary aims is to examine three African countries with typically different political and democratic paths and experiences, and for one, a different colonial experience (South Africa). Senegal and South Africa are currently regarded as multiparty constitutional democracies with multiparty elections, political competitiveness and political alternation. In its 2017 interactive map of freedom in the world,<sup>39</sup> the Freedom House ranked Senegal among the ‘partly free’ countries and South Africa among the ‘free’ countries in the world. It used three indexes of freedom:

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<sup>36</sup> C Fombad ‘Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa’ (2007) 55 *The American Journal of Comparative Law* at 7.

<sup>37</sup> <http://iiag.online/> (accessed 30 July 2018).

<sup>38</sup> The indicators relating to the rule of law include judicial process, judicial independence, access to justice, property rights, transfers of power and multilateral sanctions.

<sup>39</sup> <https://freedomhouse.org/report/freedom-world/freedom-world-2017> (accessed 30 July 2018).

freedom, political rights and civil liberties.<sup>40</sup> In contrast, the CAR was ranked among the ‘not free’ countries in the world.<sup>41</sup> Nevertheless, the rights of political parties are enshrined in the constitutions of the CAR, Senegal and South Africa. Since its first democratic elections following the downfall of the apartheid regime in 1994, South Africa has become a constitutional and multiracial democracy guided by the rule of law. Senegal is considered a good example of democracy and political stability in West Africa. Despite recurrent episodes of conflict in its Casamance region<sup>42</sup> – which have now come to an end – the country has witnessed relative peace, with no coup d’état since its independence from France. The CAR, by contrast, has a different and rather tumultuous experience of constitutional democracy and political alternation. Since its independence, the country has witnessed five coups combined with various political upheavals, which were interrupted by a few episodes (three) of multiparty elections.

The leadership of the three selected countries should also be regarded as a significant factor in their political and democratic trajectories. Democratic South Africa was indelibly marked by Nelson Mandela’s active role in negotiating an end to apartheid and leading the country to its first multiracial general elections. Nelson Mandela led a coalition government, which promulgated the 1996 South African Constitution, considered to be a model constitution that provides equal rights for all people. Mandela’s promotion of national reconciliation and unity has undoubtedly sowed the seeds of South Africa’s current performance in terms of rule of law and good governance. In Senegal, the first president, Leopold Sédar Senghor, also played a critical role in the country’s political path during the period leading to its independence. Although he served as president for 20 years in the context of party dominance and limited political opposition, Senghor, a poet and cultural theorist, resigned before the end of his fifth term in 1980 and was peacefully replaced by his prime minister, Abdou Diouf. It is argued that Senghor’s personality and credentials contributed to Senegal’s current political stability and maturity. As mentioned earlier, Senegal has never experienced a coup d’état. In the CAR, by contrast, although nationalist leader

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<sup>40</sup> South Africa’s rating was: Freedom: 2; Political rights: 2; Civil liberties: 2.; Senegal’s rating was: Freedom: 2; Political rights: 2; Civil liberties: 2 (Each country score is based on two numerical ratings—from 1 to 7—for political rights and civil liberties, with 1 representing the freest and 7 the least free).

<sup>41</sup> CAR’s rating was: Freedom: 7; Political rights: 7; Civil liberties: 7.

<sup>42</sup> On 1 May 2014 the leader of the Movement of Democratic Force of Casamance (MDFC) declared a unilateral cease-fire.

Barthélemy Boganda successfully negotiated the country's independence from France, his premature death seems to have had an impact on the country's political stability to date. In 1958, Barthélemy Boganda became Oubangui Chari's first prime minister and intended to serve as first president of independent CAR. However, he was mysteriously killed in 1959. Unlike in South Africa and Senegal, the CAR did not have an influential figure that embodied national unity, reconciliation and patriotism. It may be argued that the political unpreparedness of the nascent country, coupled with the vacuum left by Barthélemy Boganda's untimely death, could also have contributed to the CAR's turbulent political trajectory.

The selection of these countries may therefore seem eclectic considering their diverse track record of democracy and rule of law. However, this study aims to adopt one of Zweigert and Kotz's basic methodological principles of comparative law, which is functionality.<sup>43</sup> The functionality principle revolves around the understanding that 'in law, the only things which are comparable are those that fulfil the same function'.<sup>44</sup> Hence, despite the differences of CAR, Senegal and South Africa's performance and trajectories in terms of political rights and party systems, the study aims to focus specifically on the comparison of their experience of party constitutionalisation in entrenching constitutionalism. This study therefore aims to limit itself to comparing what is comparable; it does not intend to compare these countries' very diverse democratic experiences as a whole. The functionality approach is strengthened by Zweigert and Kotz's views that 'the legal system of every society faces essentially the same problems, and solves these problems by quite different means though very often with similar results'.<sup>45</sup> In this regard, while assessing the prospects of party constitutionalisation in the three countries, this comparative study will attempt to provide a much richer range of recommendations than if it had focused on a single country or countries with similar democratic experiences. It will explore whether the differences in legal tradition of these three countries influence/shape their manner and level of political party constitutionalisation.

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<sup>43</sup> K Zweigert & H Kotz *Introduction to comparative law* (1998) 34.

<sup>44</sup> Zweigert & Kotz (n 43) 34.

<sup>45</sup> Zweigert & Kotz (n 43) 34.

## 1.7 Literature review

The key role of political parties in the democratic process has been widely acknowledged across the world, including in Africa.<sup>46</sup> Katz observed that political parties have become ‘legitimate objects of state regulation to a degree far exceeding what would normally be acceptable for private associations in a liberal society’.<sup>47</sup> Janda points out that ‘political parties are necessary for democratic government, and there is a need for legal frameworks to facilitate the emergence and growth of strong, competitive political parties’.<sup>48</sup> However, van Biezen points out that ‘despite the increased amount of regulation of party activity, organisation and behaviour, the phenomenon of party regulation has hitherto received relatively little systematic scholarly attention from political scientists or constitutional lawyers’.<sup>49</sup> There seems to be little comparative research on the constitutionalisation of political parties, especially in the African context. The study aims to close a gap by conducting a comparative analysis on party constitutionalisation pertaining to three African countries.

Although Avnon’s innovative research in the early 1990s on party regulation seems to be commonly cited, it focuses on a limited number of states, with no African state included.<sup>50</sup> In 2005, Janda developed a comprehensive analytical study on political party law and democracy in the world.<sup>51</sup> He set out a clear definition of ‘party law’, including five pioneering models of political party law, which will undoubtedly inform the research. Janda’s approach is based on a wider understanding of ‘party law’ which includes not only national constitutions, but also legislative statutes, administrative rulings and court decisions. Janda created a cross-national survey of over 1000 government party regulations in 169 countries that affect the legal status of parties, their

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<sup>46</sup> van Biezen (n 29) 8.

<sup>47</sup> See van Biezen I & Casal Bertoa F ‘Party regulation in post-authoritarian contexts: Southern Europe in comparative perspective’(2014) 19 (1) *South European Society and Politics* at 71.

<sup>48</sup> Janda (n 32) 7.

<sup>49</sup> Van Biezen (n 29) 1.

<sup>50</sup> D Avnon (1995), ‘Parties laws in democratic systems of government’ (1995) 1 *The Journal of Legislative Studies* 285, reviewed by L Karvonen (2005) ‘Legislation on political parties: A global comparison’ paper presented at the Southwestern Political Science Association Annual Meeting, 23 - 26 March, New Orleans, USA

<sup>51</sup> Janda, K. ‘How nations govern political parties’: Prepared for the 20<sup>th</sup> World Congress of the International Political Science Association, Fukuoka, Japan, 9 - 13 July 2006.

activities, organisation and other related matters.<sup>52</sup> His research resulted in the creation of a database, which included information on the legal framework regulating parties in selected countries. Unfortunately, Janda's database has not been updated since 2006,<sup>53</sup> which illustrates the lack of up-to-date information on party regulation in Africa and beyond. Janda himself recognised the lack of comprehensive comparative information about the legal origins of party regulations and their political target and scope.<sup>54</sup> This study will therefore build on Janda's research, since it intends to include up-to-date information on party constitutionalisation, especially in the CAR, Senegal and South Africa.

In 2007, Karvonen conducted a comprehensive review of worldwide legislation dealing with political parties, including a specific focus on party laws in established democracies. However, her research concerned only six African states'<sup>55</sup> legislation, as opposed to national constitutions, which are the main focus of this study. Can one say that the trends and reasons for political parties' regulation have evolved since Karvonen's study? Based on Karvonen's findings, can one still say that there is a link between the degree of democracy and the scope of restrictions against political parties? This study will build on Karvonen's findings, as it aims to examine the constitutional rights of political parties in countries that were not included in Karvonen's comparative study.

In Europe, van Biezen conducted various pioneering studies on the constitutional regulation of political parties in post-war Europe, including post-communist Europe and Southern Europe.<sup>56</sup> Her work entailed an analysis of the ways in which political parties had become incorporated in European constitutions and shed light on the degree and kind of constitutional recognition for political parties across European liberal democracies. Her research resulted in a comprehensive searchable database on constitutional regulation of political parties in European democracies in the post-war period.<sup>57</sup> Van Biezen's framework on party constitutionalisation in Europe will be used

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<sup>52</sup> Janda (n 51)1.

<sup>53</sup> <https://www.ndi.org/db> (accessed 30 July 2018).

<sup>54</sup> Janda (n 51) 1.

<sup>55</sup> Algeria, Angola, Ghana, Mali, Sao Tome and Principe and Somaliland.

<sup>56</sup> van Biezen (n 29).

<sup>57</sup> <http://www.partylaw.leidenuniv.nl/> (accessed 30 July 2018).

in this study as theoretical framework to conduct a specific categorisation of party constitutionalisation in the CAR, Senegal and South Africa. By using up-to-date analysis and discussions<sup>58</sup> on party constitutionalisation in Europe, this study will attempt to adapt such analyses to the African context and close the gap of comparative research on party constitutionalisation in Africa.

As regards specific research on political parties in the three selected countries, it should be noted that the existing studies do not specifically provide an analysis of the impact of party constitutionalisation on constitutionalism. In the CAR for instance, Daniele Darlan's research on the constitutional and judicial evolution in the CAR does not place an emphasis on party constitutionalisation.<sup>59</sup> Similarly, while Doui Wawaye's PhD thesis on security and the rule of law in the CAR highlights the influence of the French legal system on the design of CAR's constitutional and domestic laws, it only focuses specifically on the security challenges faced by the country. In Senegal, Hartmann's<sup>60</sup> research on the regulation of political parties provides a primary analysis on the context of party constitutionalisation and its challenges from the country's independence to 2010. However, the analysis does not include the latest amendments of the constitutional statutes of political parties, which occurred in 2016. Similarly, Fall's<sup>61</sup> compendium on the evolution of Senegal's constitutions starting from its independence, is essential in understanding the various amendments of the constitutional status of political parties. However, it does not include hindsight on the circumstances of the constitutional amendments as well as the country's experiences and challenges in terms of party constitutionalisation. Finally, in South Africa, there are a number of research studies focusing mainly on the phenomenon of party dominance, the role of opposition parties in the country as well as the challenges of party funding. However, with the exception of Charles Fombad's comparative research on constitutionalism and the role of political parties in Southern Africa,<sup>62</sup> the existing studies do not include a

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<sup>58</sup> <http://www.partylaw.leidenuniv.nl/> (accessed 30 July 2018).

<sup>59</sup> D Darlan, *L'évolution constitutionnelle et juridictionnelle de la République centrafricaine à travers les textes* (2018) 1.

<sup>60</sup> C Hartmann 'Senegal's party system: the limits of formal regulation' (2010) 17 (4) *Democratization* at 773.

<sup>61</sup> IM Fall, *Textes constitutionnels du Sénégal de 1959 à 2001* (2007)102.

<sup>62</sup> For instance, see C Fombad 'Challenges to constitutionalism and constitutional rights in Africa and the enabling role of political parties: Lessons and perspectives from Southern Africa' (2007) 55 *The American Journal of Comparative Law* at 26.

comparative approach of the rights of political parties with civil law countries in the Central and West African sub-regions.

In the African context more generally, while recognising the lack of a framework for analysing the extent of the constitutionalisation of the rights of political parties, Fombad developed an analytical framework for assessing the level of constitutionalisation of political parties in Africa by using a three-fold classification.<sup>63</sup> The classification aimed to present the extent to which the rights and duties of political parties are recognised and protected in the constitutions of the CAR, Senegal and South Africa. Fombad also analysed the concept of constitutionalism in the African context, and highlighted the attempts made to adopt constitutions that promote constitutionalism in Africa.<sup>64</sup> As mentioned above, this theoretical framework will be used to assess the impact of the constitutionalisation of the rights of political parties on constitutionalism in CAR, Senegal and South Africa. It will be crucial to find out if constitutionalism in the above-mentioned countries is effective, if it does embrace democratic values and the rule of law and subsequently whether the rights of political parties are adequately entrenched in national constitutions.

## **1.8 Research methodology**

Firstly, desktop research will be carried out to analyse and understand the general situation relating to constitutionalisation and other regulations of the rights of political parties in the three countries.

National constitutions and national laws regulating political parties will be reviewed as primary sources of information. In this instance, the laws regulating political parties refer to laws that govern the definition, composition, structure and activities of political parties; laws that focus on political parties as organisations subject to state regulation.<sup>65</sup> It should therefore be noted that this study will not examine the countries' 'party statutes', which are internal rules 'generated by each party for its own internal governance'.<sup>66</sup> Indeed, the study specifically aims to analyse and compare national

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<sup>63</sup> Fombad ( n 36) 25.

<sup>64</sup> Fombad (n 36) 25.

<sup>65</sup> Janda ( n 51) 2.

<sup>66</sup> Janda ( n 51) 6.

constitutional provisions for ‘what parties must or must not do – what is legal and illegal’.<sup>67</sup> Key websites will be consulted (for example van Biezen’s dataset and Janda’s cross-national database survey, as well as the African Democracy Encyclopaedia of the Electoral Institute for Sustainable Democracy in Africa). As secondary sources, various reports on national human rights performance will be consulted and analysed, in addition to scholarly writings, journal articles and any other relevant reports.

The sources will be in both English and French. This study will not only address the constitutionalisation of the rights of political parties, but will also include other national legal frameworks, which may equally have a significant – positive and/or negative – impact on the rights of political parties.

Using Frankenberg’s critical approach to comparative law, as described by Zumbansen,<sup>68</sup> this comparative law research will aim to take into account the selected countries’ ‘domestic legal consciousness’.<sup>69</sup> Frankenberg is critical of comparative methods, which only seek to compare what is functionally comparable and regulated (for example courts, legislature, texts, etc.). Frankenberg therefore calls for a comparative law approach that takes into account the social nature of the law, as well as other ‘phenomena of the political order’, which in turn are expected to shape the domestic legal order.<sup>70</sup> This study will therefore be influenced by Frankenberg’s rethinking of comparative law, as it intends to be informed by each country’s social and cultural contexts, namely their historical and political struggles and agenda, while analysing the scope and target of the constitutionalisation of the rights of political parties.

Using Hirschl’s categorisation of comparative constitutional law, the study aims to adopt Hirschl’s ‘concept formation through multiple description approach’,<sup>71</sup> by analysing the three countries’ experiences and constitutional/normative responses to facing constitutional challenges. The proposed comparison method aims to enable

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<sup>67</sup> Janda (n 51) 6.

<sup>68</sup> P Zumbansen, ‘Comparative law’s coming of age? Twenty years after critical comparison’ (2005) 6 *German Law Journal* at 1080

<sup>69</sup> Zumbansen (n 68) 1080.

<sup>70</sup> Zumbansen (n 68) 1080.

<sup>71</sup> R Hirschl ‘The question of the case selection in comparative constitutional law’ (2006) *American Journal of Comparative Law* at 130.

better understanding of how over the years, the CAR, Senegal and South Africa, in their respective cultural, social and political contexts, have equipped themselves and/or have been able to address constitutional challenges pertaining to the rights to political parties and the true implementation of constitutionalism.

## **1.9 Organisation of chapters**

### Chapter 1: Introduction

The first chapter gives a background to the study, presents the research questions, highlights the aims and objectives of the study, reviews the available literature, explains the research methodology, mentions limitations to the study and explains why the three countries are being used as case studies.

### Chapter 2: Theoretical framework and evolution of the constitutional status of political parties in Africa

Using existing theoretical frameworks (e.g. Janda, van Biezen and Fombad), this chapter will lay out the theoretical approaches that will be used to inform the comparative analysis on party constitutionalisation and constitutionalism. It also intends to provide background information on the general trends of the legality of African political parties – particularly in Anglophone and Francophone Sub-Saharan Africa – spanning from the colonial period up to the post-1990 period, culminating in the wave of democratisation across the continent. This will entail historical review of African party systems, including the role of liberation parties, the era of one-party systems and the subsequent emergence of multiparty systems. This chapter will also review the global process of party constitutionalisation, including key international and regional instruments regulating the rights of political parties.

### Chapter 3: Background and historical evolution of party regulation in CAR, Senegal and South Africa

This chapter will conduct a critical analysis of the evolution of party constitutionalisation prior to the wave of democratisation, before the 1990s. It will provide background and historical information on the regulation of political parties in the three selected countries. The politico-socio-cultural context of each country – including challenges – will also be highlighted as a way of informing the following chapter pertaining to the current constitutional provisions.

#### Chapter 4: Current state of party constitutionalisation in the CAR, Senegal and South Africa

Based on van Biezen's framework analysis on party constitutionalisation and using existing constitutional provisions and relevant national laws, this chapter will conduct a critical analysis of the various constitutional rights and duties of political parties in the three selected countries.

#### Chapter 5: Practice and prospects of party constitutionalisation in entrenching constitutional rights in the selected countries

This chapter will use recent examples (such as political crises, elections), to examine and compare the current context of political parties (for example number of parties in parliament, level of representation, possible challenges to multi-partyism and level of party dominance). The chapter will identify possible challenges and shortcomings of the constitutionalisation of the rights of political parties in the three countries. Using previous analysis, it will also attempt to suggest possible mechanisms for effective implementation of the constitutional rights of political parties in CAR, Senegal and South Africa. Recommendations will take into consideration the respective steps that the government, the judiciary, political parties and civil society organisations (CSOs) and international and regional human rights mechanisms should also take in order to strengthen the rights of political parties in the three countries and beyond.

#### Chapter 6: Conclusion

This chapter concludes the study by summarising the lessons learned from the previous chapters and making recommendations to improve the advancement of party constitutionalisation.

## Chapter 2

### Theoretical framework and evolution of the constitutional status of political parties in Africa

2.1 Introduction

2.2 Constitutionalism and party constitutionalisation

2.3 The international framework for constitutionalism and its implications

2.4 Party constitutionalisation in Africa

2.5 Post-1990s period: Emerging party systems and constitutionalism

2.6 Conclusion

#### 2.1 Introduction

African states have entrenched the principles of constitutionalism and rule of law. In doing so they have given constitutional status to political parties. This chapter analyses the theoretical approaches related to constitutionalism and party constitutionalisation, which are the central themes of this thesis. Using examples of African countries, this chapter maps out the evolution of party constitutionalisation across the continent, spanning the period from the inception of party systems in Africa, up to the emergence of multiparty systems and constitutional democracies in Africa.

The chapter begins by defining the concept of constitutionalism before reviewing the different theoretical frameworks pertaining to the concept of constitutionalism and its core elements. The main reasons for the constitutionalisation of political parties and the actors involved in the party constitutionalisation process are also reviewed. Different theoretical models of party constitutionalisation are examined and the influence of national circumstances and priorities are highlighted in the process of party constitutionalisation. The chapter also reviews the key international and regional instruments regulating the rights of political parties in Africa. In order to understand the phenomenon of party constitutionalisation in post-independence Africa better, the

chapter goes on to trace the history of political parties and the emerging patterns of multiparty systems in Sub-Saharan Africa.

The chapter finds that the entrenchment of constitutionalism and the constitutionalisation of multiparty systems in Africa can only be effective if the letter and spirit of the constitutions are respected.

## **2.2 Constitutionalism and party constitutionalisation**

The following section will explore the concept of constitutionalism and its core elements. Using the existing analytical framework on the definition of constitutionalism, it will examine the rationale and models for party constitutionalisation, as well as the actors involved in the constitutional regulation of political parties. It will also review key international and regional instruments regulating the rights of political parties in Africa.

### **2.2.1 The concept of constitutionalism**

In defining the concept of constitutionalism, a distinction is made between constitutions and constitutionalism. The term ‘constitution’ refers to the supreme document itself, the power map<sup>72</sup> – whether written or unwritten – which governs, regulates and allocates powers, functions and duties among the different agencies within the state and between the governed and the government.<sup>73</sup> Henkin posits that a government is legitimate only if it complies with the words of the constitution.<sup>74</sup> Constitutionalism in particular implies not just the adoption of fundamental principles as guiding rules (constitution), but also entails widespread willingness and readiness on the part of those who govern and those who are governed to abide by both the letter and the spirit of the constitution.<sup>75</sup> Sartori is of the view that constitutionalism calls for restrictions on the arbitrary power of the state.<sup>76</sup> In other words, constitutionalism is a synonym for the

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<sup>72</sup> ID Duchacek *Power maps: Comparative politics of constitutions* (1973) cited in HWO Okoth-Ogendo ‘Constitutions without constitutionalism: Reflections on an African political paradox’ in GS Issa (ed.) *An African debate on democracy* (1991) 5.

<sup>73</sup> Fombad (n 19) 416.

<sup>74</sup> L Henkin ‘Constitutionalism, democracy and foreign affairs’ (1992) 67 (4) *Indiana Law Journal* at 885.

<sup>75</sup> A Kolawole ‘Good governance, constitutionalism and the rule of law: Imperative for a sustainable development in Nigeria’ (2013) 6 *OIDA International Journal of Sustainable Development* at 135.

<sup>76</sup> G Sartori ‘Constitutionalism: A preliminary discussion’ (1962) 56 *The American Political Science Review* at 854. See also MJC Vile *Constitutionalism and the separation of powers* (1998) 8. Cited in M Tushnet (2011), ‘Progressive constitutionalism: What is it?’ (2011) 72 *Ohio State Law Journal* at 1073.

enforcement of constitutional rules; it is an essential component of a constitutional order,<sup>77</sup> a tool for preventing arbitrary government.<sup>78</sup> Other scholars posit that the concept of constitutionalism entails the idea that a government should not only be sufficiently limited in a way that protects its citizens from arbitrary rule, but that it should also be able to operate within its constitutional limitations.<sup>79</sup> The concept of constitutionalism is therefore associated with the concept of government accountability, supported by empowered and effective institutional structures. Typically, in the case of the constitutionalisation of political parties, the entrenchment of constitutionalism would mean that constitutions will attribute constitutional rights and obligations to all political parties – including minority parties – and such provisions would be enforceable by the government as well as those who are governed (political parties, civil society and individuals). Scholars have noted that although constitutionalism presupposes the existence of a constitution, the constitution itself does not necessarily imply the entrenchment of constitutionalism.<sup>80</sup> For instance, constitutions of Eastern Europe after World War II took the form of government ‘manifestos’, listing the rights and duties granted to citizens while failing to list governments’ own obligations. It is argued that because such constitutions were not enforceable like ordinary laws, they had no impact on the national normative framework.<sup>81</sup> Similarly, in the African context, Okoth-Ogendo<sup>82</sup> established that constitutions dating from the mid-1960s up to the early 1990s were ‘constitutions without constitutionalism’, since the regimes then were characterised by their authoritarian nature. Using Grimm’s definitions of constitutions, reference has been made to ‘semantic constitutions’ that are ‘instrumentalistic’ or ritualistic and do not include binding rules.<sup>83</sup> In short, when attempting to define the concept of constitutionalism, reference can be made to Nwabueze’s definition, which is the

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<sup>77</sup> N Barber ‘Constitutionalism: Negative and positive’ (2015) *Dublin University Law Journal* at 254.

<sup>78</sup> R Bellamy ‘Constitutionalism’ in B Badie; D Berg-Schlosser & Morlino, L (eds) *International encyclopedia of political science* (2011) at 1.

<sup>79</sup> Fombad (n 19) 415.

<sup>80</sup> A Mbata Mangu ‘Constitutional democracy and constitutionalism in Africa’ (2006) 2 *Conflict Trends* at 6.

<sup>81</sup> L Henkin ‘Elements of constitutionalism’ (1998) *The Review* at 11.

<sup>82</sup> HWO Okoth-Ogendo ‘Constitutions without constitutionalism: Reflections on an African political paradox’ in GS Issa (ed) *An African debate on democracy* (1991) 25.

<sup>83</sup> D Grimm ‘Types of constitutions in contemporary history from 18<sup>th</sup> century classic liberal to post-colonial and post authoritarian’ in M Rosenfeld & A Sajo *The Oxford handbook of comparative constitutional law* (2012) cited in Fombad (n 19) 415.

limitation of government according to rules that are predetermined and enforceable.<sup>84</sup> Equally, Okoth-Ogendo<sup>85</sup> refers to ‘fidelity to the principle that the exercise of state power must seek to advance the ends of society’. Although the proposed definitions of constitutionalism are by no means exhaustive, constitutionalism could be summarised as a government in which power is distributed and limited by a legal framework with which the rulers must comply. Following this tentative definition of constitutionalism, it is important to examine its core elements as identified by previous research.

### 2.2.2 Core elements of constitutionalism

Scholars have identified core elements of constitutionalism as:<sup>86</sup>

- (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 above listed core elements involve cross-cutting issues, which are all relevant to the concept of constitutionalism. However, the issue of party constitutionalisation and its impact on constitutionalism in Africa requires that specific focus be placed on key selected core elements, namely the recognition and protection of fundamental rights and freedoms, the separation of powers, the existence of an independent judiciary and the control of constitutional amendments.

Firstly, it can be said that the recognition and protection of fundamental rights and freedoms are essential to the entrenchment of constitutionalism and the rule of law. Some African constitutions and national legal frameworks have entrenched all three generations of human rights, namely civil and political rights, economic, social and cultural rights, as well as other third generation human rights. In addition to specific

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<sup>84</sup> R Martin ‘*Constitutionalism in the emergent states by BO Nwabueze*’ (1975) 13 (1) *The Journal of Modern African Studies* at 154.

<sup>85</sup> HWO Okoth-Ogendo (n 82) 20.

<sup>86</sup> See Henkin (n 81) 15 (Henkin identified nine essential elements to constitutionalism, namely: 1. Government according to the constitution; 2. Separation of powers; 3. Popular sovereignty and democratic government; 4. Constitutional review; 5. An independent judiciary; 6. Controlling the police; 7. Civilian control of the military; 8. Individual rights; 9. Suspension and derogation); Also see Fombad (n 19) 416.

constitutional provisions pertaining to fundamental human rights, the preambles of a few African Francophone constitutions also make specific reference to the 1789 French Declaration of the Rights of Man and of the Citizen,<sup>87</sup> which encompasses certain basic civil and political rights. It is in this context that African citizens' rights to political participation and freedom of association are enshrined in national constitutions. Political parties are given constitutional recognition through the right to political participation, citizens' freedom to make political choices<sup>88</sup> or political pluralism. In former Anglophone African colonies, such rights are enshrined either in a separate bill of rights and/or in other specific chapters of the constitutions.<sup>89</sup> With the recognition of such fundamental human rights (and duties), coupled with the existence of protective mechanisms for their enforcement, it can be said that most African states have taken one essential step to enhance the prospect of constitutionalism.

Secondly, constitutionalism implies that governmental authority is exercised within the limitations and prescriptions set by the constitution, including through the principle of separation of powers among a legislature, an executive and a judiciary. The overarching idea of separation of power is that those who make the laws should be distinct from those in charge of their interpretation, their application, and their enforcement.<sup>90</sup> Article 16 of the Declaration of the Rights of Man and the Citizen of 1789 stipulates that a society in which rights are not secured and where separation of powers is not established, 'has no constitution at all'. The principle of separation of power will therefore strengthen the promotion and protection of citizen's fundamental rights, as well as the constitutional rights and duties of political parties. Almost all African constitutions – whether with presidential or parliamentary systems – have entrenched the principle of separation of powers. In practice, existing research seems to highlight the non-rigid aspect of separation of powers that allows a system of collaborative checks and balances between the three branches,<sup>91</sup> with limited interference in each

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<sup>87</sup> See Gabonese Constitution of 2011.

<sup>88</sup> See Article 14 of the 2016 CAR Constitution, which provides for citizens' right to form political parties.

<sup>89</sup> See Section 19(1) of the 1996 South African Constitution, which provides that every citizen is free to form a political party.

<sup>90</sup> B Badie, D Berg-Schlosser & Morlino, L (eds) *International encyclopedia of political science* (2011).

<sup>91</sup> Fombad (n 36) 13.

other's domains.<sup>92</sup> It should be noted that the principle of separation of powers can only be effective if there is a real independent judiciary. An independent judiciary is expected to protect the constitutional rights and duties of all political parties regardless of whether they are majority or minority parties. The overall rationale of having an independent judiciary is that the legislative and executive powers should be prevented from infringing on individual human rights through an empowered and constitutionally protected judicial power.<sup>93</sup> Practically, the scope of judicial independence relies greatly on the level of interference of the powers (specifically executive) in the judiciary's domain and the government's willingness to comply with the spirit of constitutionalism. In this vein, Henkin argued that judicial independence ought to be nurtured and protected as part of a political culture of constitutionalism.<sup>94</sup>

Finally, a core element of constitutionalism that is key to the protection of constitutional rights – and particularly those of political parties – is the control of constitutional amendments. Constitutionalism implies strict compliance with the letter of the constitution and control of the amendment of the constitution. Because the constitution is the supreme law of the land and it has binding force over all authorities and individuals throughout the country, it must be protected from any violation and arbitrariness. For this reason, any amendment to the constitution should be subject to a clear and explicit procedure. Restrictions to the ability to amend the constitution are therefore paramount to the enforcement and promotion of modern constitutionalism. In this regard, some scholars have opposed the idea of engaging in constitutional amendments as a whole on the grounds that such a process would affect its prestige and 'trivialise' its majesty.<sup>95</sup> However other scholars have also argued that there must still be a formal mechanism for amending the constitution, since the constitution is a 'living document',<sup>96</sup> which evolves over generations and reflects changing realities as well as 'fears, hopes, aspirations and desires'.<sup>97</sup> Authors who have examined the various methods for achieving constitutional amendments in African countries have made a

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<sup>92</sup> For instance, article 83 of the 2016 CAR Constitution provides that lawmaking prerogatives concurrently belong to the government and the parliament.

<sup>93</sup> Fombad (n 36) 16.

<sup>94</sup> Henkin (n 81). 14.

<sup>95</sup> A Vermeule 'Constitutional amendments and the constitutional common law' (2004) 73 *University of Chicago Public Law and Legal Theory Working Paper* at 2.

<sup>96</sup> C Fombad 'Some perspectives on durability and change under modern African constitutions' (2013) *Oxford University Press and New York University School of Law* at 385.

<sup>97</sup> Fombad (n 96) 385.

distinction between formal and informal constitutional changes.<sup>98</sup> Typically, the promotion of constitutionalism implies the existence of mechanisms that prevent unlawful changes and impose strict requirements concerning formal changes. The entrenchment of ‘unamendable’ provisions<sup>99</sup> appears to be one of the key mechanisms that aim to curtail arbitrary constitutional alterations, for it ensures the protection and perpetuation of certain fundamental values and principles throughout generations. From the foregoing, it can be noted that the entrenchment of constitutionalism is not incompatible with fairly flexible and adaptable constitutions that are designed to reflect the changing social, economic and political environment. The overarching rationale of constitutional amendment is that it should not constitute a mechanism used to derogate from the commitment to constitutionalism, including respect for individual human rights.<sup>100</sup>

The above discussion establishes the fact that most modern democracies have adopted a constitution as a supreme law, whether written or unwritten. However, adopting a constitution does not necessarily mean that governments fully comply with the principles of the constitution. It also shows that there are various definitions of the concept of constitutionalism and that the inclusion of the core elements of constitutionalism in the constitution does not guarantee actual constitutionalism.<sup>101</sup> That said, the existence of these core elements makes the prospects for constitutionalism more likely.

### **2.2.3 Rationale of party constitutionalisation**

In democratic societies, constitutional or legal regulation is used as an instrument aimed at guaranteeing rights and freedoms in political and social life. There is a distinction between party constitutional regulation and party legal regulation.<sup>102</sup> Party legal regulation refers to laws that govern the definition, composition, structure and activities

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<sup>98</sup> Fombad (n 96) 385. Basically, a formal constitutional change will be implemented in compliance with constitutional provisions, with the implication that the amendment will be considered lawful. An informal constitutional change is lawful when carried out through judicial interpretation and unwritten understanding as well as conventions.

<sup>99</sup> In Mali, multi-partyism is one of the unamendable themes of the constitution (article 118 of the 1992 Malian Constitution).

<sup>100</sup> Henkin (n 81) 21.

<sup>101</sup> C Fombad ‘Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects’ (2011) 59(4) *Buffalo Law Review* at 1015.

<sup>102</sup> G Borz (2016) ‘Justifying the constitutional regulation of political parties: A framework for analysis’ (2016) *International Political Science Review* at 2.

of political parties.<sup>103</sup> Mere legal regulation of political parties could therefore lead to the enactment of legislation that protects the interests of dominant parties (in the government or in the legislature) and privileges their own positions.<sup>104</sup> Political parties may also be less inclined to implement basic democratic principles such as intra-party democracy or equal representation of citizens (on the basis of gender, minority groups, etc.).<sup>105</sup>

The constitutional regulation of political parties, on the other hand, means that specific provisions on political parties are enshrined in a constitution. The effect of this is that the constitutional provisions concerning political parties can only be reviewed through a clearly laid down procedure,<sup>106</sup> which ensures the protection of the will of the people. Party constitutionalisation sets the principles to be followed by ordinary laws and provides stability to the legal status of political parties. With party constitutionalisation, the constitution becomes a point of reference in the event of litigation related to the operations of political parties.<sup>107</sup> Furthermore, party constitutionalisation ensures the long existence and sustainability of political parties, especially when the constitution requires state resources to support them. Party constitutionalisation provides evidence that political parties are recognised as ‘necessary institutions of the political system’.<sup>108</sup>

Momentum towards the constitutionalisation of political parties first gained pace in Europe in the period following World War II.<sup>109</sup> Italy and Germany were the first countries in the world to give constitutional status to political parties, and the practice gradually spread to other parts of Europe through the process of constitutional revisions. This happened to such an extent that van Biezen noted that nowadays the majority of European democracies have recognised the rights of political parties in one form or another.<sup>110</sup> The constitutionalisation of political parties has become widely

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<sup>103</sup> Janda (n 51) 2.

<sup>104</sup> A Gauja *Political parties and elections: Legislating for representative democracy* (2010) cited in Borz (n 98) 2.

<sup>105</sup> A Gauja ‘Legislative regulation, judicial politics and the cartel party model’ *The University of Sydney*, Paper for the Contemporary Challenges of Politics Research Workshop, 31 October 2011 at 3.

<sup>106</sup> Fombad (n 36) 21.

<sup>107</sup> van Biezen (n 8) 3.

<sup>108</sup> Borz (n 102) 2.

<sup>109</sup> van Biezen (n 8) 1.

<sup>110</sup> E Rashkova & I van Biezen, I ‘Deterring new party entry? The impact of state regulation on the permeability of party systems’ (2014) 20(6) *Party Politics* at 890.

accepted as evidence of a state's commitment to ensuring the political and civil rights of its citizens, the rule of law and constitutionalism. It evidently reflects the constitution designers' willingness to ensure the legitimacy of political parties in modern democracies.

Authors have established that the process of party constitutionalisation may involve different actors pursuing different purposes.<sup>111</sup> These range from national actors – including political parties themselves, the media, as well as CSOs – to external actors, such as state or non-state international organisations. The motivation for achieving party constitutionalisation varies according to the actors. For this reason, there are various theories concerning the rationale of party constitutionalisation. In Europe, for instance, Borz explained the wave of party constitutionalisation around six main justifications:<sup>112</sup>

- Borz's first justification focuses on the recognition of political parties as 'agents' or representatives of the citizens in the political system. Party constitutionalisation therefore constitutes a legitimation of the role and activities of political parties in a democracy. Constitutional recognition places political parties in a more stable position, so they are less vulnerable to change.
- The second justification for party constitutionalisation is based on political parties' need for resources and subsidies. In other words, political parties need constitutional recognition to be able to obtain certain advantages, including access to state funding, ultimately to guarantee their sustainability in the power structure.
- The third justification is the need for political parties to differentiate themselves from other political groups and associations. The constitutionalisation of political parties enables them to remain relevant in the political structure, to ensure that they continue to support candidates for elections and are represented in parliament.
- The fourth justification for party constitutionalisation aims to restrict competition from potential undemocratic parties by preventing their access to the system. This may be applicable in the context of fascist parties in Europe.

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<sup>111</sup> Borz ( n 102) 4.

<sup>112</sup> Borz ( n 102) 4.

Party constitutionalisation would therefore satisfy ‘private’ interests (by preventing competition) while also setting the limits of acceptable parties in a democracy.

- The fifth justification originates from the necessity to regulate the activities of political parties by ensuring that they comply with the constitution. Party constitutionalisation would force political parties to comply with the principles of accountability and transparency.
- Finally, the sixth justification for party constitutionalisation is based on the administrative necessity for all actors involved in the process to comply with the constitution. For instance, secondary legislation will need to comply with the constitution. Similarly, in legal cases involving political parties, the judiciary will use the constitution as its main point of reference, which will consequently reinforce the legitimacy of court judgments.

In opposition to Borz’s justifications for party constitutionalisation, it is important to examine a situation where there is no party constitutionalisation. Without party constitutionalisation there is a risk of lack of control over the activities and behaviour of political parties, therefore leading to corrupt activities, misuse of power and the emergence of cartel parties.<sup>113</sup> Without party constitutionalisation, minor parties or opposition parties could be vulnerable to abuse by dominant parties. The absence of party constitutionalisation could lead to the creation of political parties based on racial, ethnic or regional identities. Without party constitutionalisation, party systems would not be ‘institutionalised’, which means that political parties would not have strong and stable roots in society, and stable patterns of competition between parties would be non-existent.<sup>114</sup>

In short, party constitutionalisation is the expression of pluralism, popular will, sovereignty, equality, participation and competition.<sup>115</sup> This was pointed out by the Senegalese government when, after a long period of a *de facto* one-party regime, it

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<sup>113</sup> According to Katz and Maiz, a cartel party is characterised by the interpenetration of party and state and by a tendency towards inter-party collusion. See R Katz & P Mair ‘A cartel party thesis: A restatement’ (2009) 7 *Articles* at 755.

<sup>114</sup> M Basedau, A Mehler & G Erdmann *Votes, money and violence: Political parties and elections in sub-Saharan Africa* (2007) 100.

<sup>115</sup> Borz (n 102) 6.

amended the constitution of 1981 to finally include specific provisions on multi-partyism: ‘the purpose of these provisions is to organise the expression of political opinions in order to prevent anarchy, which is the negation of democracy.’<sup>116</sup> In sum, the constitutionalisation of political parties in modern democracies highlights the relevance of political parties as indispensable institutional components of the democratic system and factors of political stability.<sup>117</sup>

#### **2.2.4 Models of party constitutionalisation**

The phenomenon of party constitutional regulation has received relatively little systematic scholarly attention from political scientists and constitutional lawyers.<sup>118</sup> Hence, there is little comparative research on the issue. The following discussion relies mainly on the models of party constitutionalisation proposed by Janda and van Biezen, who are among the few scholars to have discussed the issue of party constitutionalisation, particularly at global level.

First of all, Janda points out that in addition to the prominent role of national legislation in regulating the status of political parties, national constitutions ought to be considered a ‘source of party law’.<sup>119</sup> Janda uses the term ‘party law’ to refer to legislative statutes, administrative rulings and court decisions, as well as national constitutions.<sup>120</sup> He further contends that most countries use party constitutionalisation as a tool for regulating the organisation and behaviour of political parties. He proposes five ‘alternative models’ of the constitutionalisation of political parties, namely the proscription model, the permissive model, the promotion model, the protection model and the prescription model. Overall, Janda’s models and categorisation of party constitutionalisation aim to define the appropriate degree of party constitutionalisation that is suitable in a modern democracy. In other words, how much of constitutional or legal regulation is ‘just right’ for a society? Janda also highlights the importance of the contextual factors and issues that influence the design and implementation of party laws in general. For instance, in his proscription model, the author refers to the constitutional prohibition of political parties carrying out certain types of activities or being formed

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<sup>116</sup> IM Fall (n 61)102.

<sup>117</sup> van Biezen (n 8) 1.

<sup>118</sup> van Biezen (n 8) 1.

<sup>119</sup> Janda (n 32) 3.

<sup>120</sup> Janda (n 32) 4.

in a certain way – a model that can be found in many African constitutions, regardless of their colonial legacies.<sup>121</sup> This type of proscription model has also been analysed by previous researchers in relation to countries experiencing a post-authoritarian phase.<sup>122</sup> It can be concluded that with the proscription model, at different levels, constitutions present a special concern with the necessity to protect the democratic regime against extremism or secession. Similarly, in his protective party constitutionalisation model, Janda places emphasis on the entrenchment of constitutional provisions that aim to protect existing parties from competition, which may take the form of constraining constitutional provisions regarding new party creation or entry, and even lead to the constitutionalisation of a single party. Janda's protective model can also be illustrated through the constitutionalisation of intra-party discipline, including anti-defection provisions<sup>123</sup> or other internal party democracy requirements. With the protective party constitutionalisation model, it appears that the primary intention of the constitutional designers is to control and preserve the existing political structure of the country by closely regulating the formation, activities and behaviour of political parties. The democratic nature of such constitutional provisions will depend on whether the regulations are 'just right' and can be implemented under the country's existing circumstances.

Based on Janda's analytical framework, one can suggest that past and current contextual factors are key elements that may influence constitutional designers when regulating political parties. Party constitutionalisation is the reflection of national circumstances and aspirations. Moreover, the number and type of political parties in a nation, and their level of participation in public affairs, will depend mainly on the restrictive or unrestrictive nature of constitutional provisions. Janda's framework is therefore used as a basis for studying the process of party constitutionalisation in the CAR, Senegal and South Africa.

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<sup>121</sup> Prohibition of political parties and associations that are founded on race, ethnic group, tribe, lineage, region, sex or religion basis. See Article 57 of the Constitution of Rwanda (2015); Article 14 of the Constitution of Madagascar (2010); Article 91(2) of the Constitution of Kenya (2010).

<sup>122</sup> The constitutions of Italy, Spain and Turkey explicitly link political parties' organisational structure, political programme and/or activities to the requirement that they respect the democratic constitutional order. See I van Biezen & F Bertoas 'Party regulation in post-authoritarian contexts: Southern Europe in comparative perspective' (2014) *South European Society and Politics* at 77.

<sup>123</sup> Article 68 of the Constitution of Nigeria; Article 48 of the Constitution of Namibia.

The second framework this thesis proposes to rest on is that of van Biezen – one of the few scholars to have conducted studies on the constitutional regulation of political parties, particularly in post-war Europe, including post-communist Europe and Southern Europe.<sup>124</sup> Her work entails, among others, an analysis of the ways in which political parties have become incorporated in European constitutions. Van Biezen’s analytical framework of party constitutionalisation in Europe revolves around the idea that there are significant variations in the ways political parties have been constitutionalised. In other words, the dimension of constitutionalisation of political parties varies according to the focus and the intensity with which political parties are regulated. Using party constitutionalisation trends in Europe, van Biezen posits that the ‘constitutional codification of political parties’ can be divided into four main elements:<sup>125</sup>

- 1) The principles and values in which the constitution – or its preamble – refers to political parties in the context of human rights principles and democratic values.
- 2) The rights and duties: In this model, while the constitution entrenches the basic democratic liberties of political parties (such as freedom of association, freedom of assembly), it also makes provision for the duty on political parties to comply with defined rules pertaining to party activities and behaviour.
- 3) Institutional structure: As constitutions encompass provisions related to the ‘establishment, transfer, exercise and control of political power’,<sup>126</sup> political parties will be equally regulated as part of the structure of the political system. For instance, constitutions will provide for political parties in their electoral capacities, as parliamentary groups, or for the party in public office (‘governmental party’). Political parties’ access to public resources may also be regulated by constitutions in this context.
- 4) Meta-rules or the rules on constitutional interpretations concern the question of constitutional validity, amendment and change. In this context, constitutions will make provisions for the judicial control of the constitutionality of political parties’ identity, activities and behaviour.

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<sup>124</sup> van Biezen, ( n 29) 1.

<sup>125</sup> van Biezen ( n 8) 14.

<sup>126</sup> van Biezen (n 8) 15.

From van Biezen's perspective, it can be said that party constitutionalisation is not a standardised phenomenon, but rather entails significant variations in its focus and intensity, in accordance with national contexts and priorities. While some constitutions will place special emphasis on the rights and duties of political parties, others may also regulate them as part of the overall national political structures.

However, in the context of modern constitutionalism, international actors tend to influence national constitutional practices, including the process of party constitutionalisation.<sup>127</sup> The involvement of international actors and legal instruments in party constitutionalisation will unquestionably have an impact on states' constitutional independence and sovereignty. As this thesis aims to evaluate party constitutionalisation in three selected African states, it is therefore important to briefly review the impact of international human rights instruments on this phenomenon. Based on the above-mentioned models of party constitutionalisation, this thesis proposes to rest on van Biezen's theoretical framework regarding the constitutional rights and duties of political parties, to assess the role and power assigned to political parties in the CAR, Senegal and South Africa, by the constitutional designers. Using Janda's protective model of party constitutionalisation, this thesis examines the extent to which the activities and behaviour of political parties have been regulated by the constitutions in the CAR, Senegal and South Africa, and how appropriate such constitutional regulation is, especially with regard to international and regional requirements on political parties' basic rights.

### **2.3 The international framework for constitutionalism and its implications**

There are no specific international obligations requiring state parties to give constitutional status to political parties. However, international and regional<sup>128</sup> instruments require state parties to ensure that the national framework provides the right for all individuals and groups to establish their own political parties or political organisations freely, with legal guarantees to enable them to compete with each other

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<sup>127</sup> Borz ( n 102) 6.

<sup>128</sup> Article 3 (11) of the African Charter on Democracy, Elections and Governance (2007) requires state parties to strengthen political pluralism and recognise the role, rights and responsibilities of legally constituted political parties, including opposition parties, which should be given a status under national law.

on a basis of equitable treatment before the law.<sup>129</sup> States are therefore expected to take all steps deemed necessary to guarantee citizens' basic political rights, and since national constitutions are the supreme instruments that reflect the principles and values of a state,<sup>130</sup> the rights of political parties are almost systematically enshrined in constitutions to ensure better protection against arbitrariness. Although reference will be made to some international instruments, such as the Universal Declaration of Human Rights (Universal Declaration) of 1948 and the International Covenant on Civil and Political Rights (ICCPR) of 1966, the focus will be on regional instruments and developments in Africa.

The main international instruments regulating freedom of association and citizens' right to participate in public affairs are the Universal Declaration of 1948<sup>131</sup> and ICCPR of 1966.<sup>132</sup> Like the Universal Declaration, the ICCPR confirms the right to participate in the conduct of public affairs. It recognises citizens' right to freedom of opinion, freedom of expression as well as freedom of information (art. 19). Regarding political parties in particular, the *Travaux préparatoires* of the monitoring body of the ICCPR, the Human Rights Committee, states that political parties are called upon to function democratically in order to guarantee citizens equal rights and the opportunity to be elected and to participate in public affairs.<sup>133</sup> However, it should be pointed out that in its article 22, the ICCPR limits certain rights, including freedom of expression, assembly and association, through 'restrictions prescribed by law and which are necessary in a democratic society.' It is therefore important to examine the various African Union (AU) instruments that promote democratic principles and constitutionalism and their impact on the promotion of the rights of political parties.

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<sup>129</sup> International Institute for Democracy and Electoral Assistance: *International obligations for elections, guidelines for legal frameworks* (2014), IDEA, Stockholm.

<sup>130</sup> Borz ( n 2) 5.

<sup>131</sup> Universal Declaration Article 21: (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country.

<sup>132</sup> Article 21: (1) Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests. (2) No restriction may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others (...). Article 25: Every citizen shall have the right and the opportunity ... (a) To take part in the conduct of public affairs, directly or through freely chosen representatives. (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.

<sup>133</sup> CCPR/C/SR.1509, *Travaux préparatoires* GC25 para 52.

### 2.3.1 The AU agenda on constitutionalism and good governance

The AU has put in place norms, standards and instruments to strengthen Africa's political and socio-economic integration and unity, including the promotion of democracy through the rule of law and constitutional order. In this regard, the AU Constitutive Act of 2000, the fundamental governing document of the AU, includes in its objectives the promotion of democratic principles and institutions, popular participation and good governance (article 3(g)). It requires state parties to promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights agreements (article 3 (h)). The Constitutive Act constitutes a cornerstone for the promotion of constitutionalism in Africa, as it establishes a close relationship between democracy, human rights, the rule of law, and good governance.<sup>134</sup> It is seen as the legal basis of the AU's present democracy agenda.<sup>135</sup> In this regard, the Constitutive Act makes provision for the AU's intervention in case of grave circumstances, such as war crime, genocide and crimes against humanity, as well as serious threats to legitimate order (article 4 (h)). In sum, the AU Constitutive Act sets out the major democratic objectives and principles that African states are expected to implement as they meet their commitments towards human rights, the rule of law and constitutionalism.

The African Charter on Human and Peoples' Rights (ACHPR) (1981) is one of the key AU human rights instruments, which aims to protect human rights and basic freedoms in Africa. Articles 10 and 11 of the Charter reiterate the language of international instruments pertaining to freedom of association and freedom of expression.<sup>136</sup> The African Commission on Human and Peoples' Rights, which is the treaty body that monitors the implementation of the ACHPR, has ruled in favour of the protection and

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<sup>134</sup> Mbata Mangu ( n 80) 63.

<sup>135</sup> C Fombad 'The African Union and democratization' in J Haynes (ed) *Routledge handbook of democratization* (2012) 324.

<sup>136</sup> Article 10 of the ACHPR (1981):

1. Every individual shall have the right to free association provided that he abides by the law.
2. Subject to the obligation of solidarity provided for in Art. 29 no one may be compelled to join an association.

Article 11 of the ACHPR: Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law, in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others.

promotion of freedom of association and freedom of expression. It has called on state parties to comply with national constitutions and promote political pluralism<sup>137</sup>. For instance, in the *Interights and Others v Mauritania* case in 2004, the African Commission found that the Mauritanian government had violated article 10 of the ACHPR when it dissolved a political party. The African Commission therefore called on the Mauritanian government to ‘work, within the framework of the Constitution, towards the reinforcement of healthy pluralist and democratic practice, which would preserve social unity and public peace.’ In the light of this, it can be argued that the ACHPR plays a significant role in the protection and promotion of human rights and basic freedoms in Africa, which are key components of constitutional democracy and the rule of law.

The AU Constitutive Act of 2000 enshrines the promotion of democracy, good political governance and the rule of law. The Constitutive Act provides that the objectives of the AU are inter alia to ‘promote democratic principles and institutions, popular participation and good governance’ (article 3 (g)). It entrenches major principles that all AU member states are expected to implement, including ‘respect for democratic principles, human rights, the rule of law and good governance’ (article 4 (m)); the right of the AU to intervene in a member state pursuant to a decision of the assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity (article 4(h)); as well as the condemnation and rejection of unconstitutional changes of government (article 4 (p)). In sum, it can be concluded that the AU Constitutive Act is the AU’s fundamental law, which aims to instil fundamental values and principles for democratic governance, including respect for constitutional order and the rule of law among all 55 AU member states.<sup>138</sup>

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<sup>137</sup> See *International Pen and Others (on behalf of Saro-Wira) v Nigeria*, Comm Nos 137/94, 139/94, 154/96 and 161/97 (1998), paras 107- 110, which finds a violation of the right to freedom of association where the government takes action against an association because it does not approve of its positions. See also *Interights and Others v Mauritania*, Comm 242/2001 (2004) in which the Commission found that the dissolution of a political party by the Islamic Republic of Mauritania was not proportional to the nature of the breaches and offences committed by the political party and was therefore in violation of the provisions of article 10(1) of the African Charter. The African Commission went on to call on all the republican political forces in the Islamic Republic of Mauritania to work, within the framework of the Constitution, towards the reinforcement of healthy pluralist and democratic practice, which would preserve social unity and public peace.

<sup>138</sup> G Mukundi Wachira ‘The role of the African Union in strengthening the rule of law and constitutional order in Africa’ (2014) in International Institute for Democracy and Electoral Assistance, *Rule of Law and Constitution Building, the Role of Regional Organizations* (2014) 12.

Another AU key instrument that aims to promote constitutionalism and the rule of law is the Declaration of 2000 on the framework for an Organisation of African Union (OAU – AU) response to unconstitutional changes of government. The Declaration, which was adopted by the OAU during its summit in Lomé, has been integrated in the AU’s framework for promoting democracy and good governance. The Lomé Declaration is therefore in line with article 4 (p) of the AU Constitutive Act regarding unconstitutional changes of government. It provides for a set of common values and principles for democratic governance, as well as a definition of an unconstitutional change of government and the measures and actions to be taken by the AU in such circumstances. An implementation mechanism with respect to unconstitutional change of government is also provided for. The AU Declaration of 2002 on the principles governing democratic elections in Africa establishes the principles of free and fair democratic elections in Africa.<sup>139</sup> The Declaration recognises the organisation of regular elections as a key component of a constitutional democracy, good governance and the rule of law. In addition to the Lomé Declaration, the declaration on the principles governing democratic elections in Africa provides for the principles of democratic elections in Africa. It places emphasis on the role of regular elections as an essential element of the democratisation process with a view to achieve good governance, the rule of law, the maintenance and promotion of peace and security, stability and development.

The African Charter on Democracy, Elections and Governance (ACDEG) of 2007, which came into force in 2012, also aims to promote African states’ adherence to the rule of law and good governance. It is one critical element of the AU’s agenda for constitutionalism and good governance, as it includes detailed provisions on human rights and the rule of law, democratic institutions, democratic elections and political, economic and social governance, as well as mechanisms for its application at individual state party, regional and continental level.<sup>140</sup> Under its guiding principles (chapter three), the charter recognises the supremacy of the constitution and constitutional order in the political arrangements of its state parties. For instance, it can be said that chapter three of the ACDEG is the cornerstone of the AU’s vision of constitutionalism and the

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<sup>139</sup> Declaration of 2002 on the principles governing democratic elections in Africa, para II.

<sup>140</sup> Fombad (n 135) 327.

rule of law, since it enshrines three main topics, namely democracy, elections and governance. It requires state parties to ensure effective participation of citizens in democratic and development processes and in governance of public affairs. In other words, it recognises multiparty elections where citizens can freely participate in the democratic process. The major role played by political parties is highlighted as article 3 (11), which requires state parties to reinforce political pluralism and recognise the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law.<sup>141</sup> Chapter seven also emphasises the rights of political parties during elections, notably their right to access public resources (media).

It is worth noting that the AU normative framework on constitutionalism and the rule of law is composed of various norms, standards and instruments (among others the Constitutive Act, charters and declarations), which are not all legally binding at the same level. For instance, while the AU Constitutive Act and ACDEG are binding instruments for member states that have signed or ratified them, the Lomé Declaration and the declaration on the principles governing democratic elections in Africa are instruments that are not necessarily binding, even though they aim at influencing the conduct of member states.<sup>142</sup> Questions on the actual impact of the international or regional frameworks in promoting constitutional order and the rule of law among African states may be asked. To what extent can AU instruments influence individual states' obligations to promote the constitutional rights and duties of political parties and the entrenchment of constitutionalism in general? The following section sheds light on the actual implications of AU instruments on individual states' legal framework and their obligations to enforce them in the context of promoting democracy, human rights and good governance.

### **2.3.3 Implications of the international framework**

It is important to note that despite its critical role in promoting constitutional democracy, the ACDEG has been signed and ratified by only 30 African states out of

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<sup>141</sup> Article 3(11) of the ACDEG (2007).

<sup>142</sup> Fombad (n 135) 323.

55 AU member states,<sup>143</sup> including South Africa<sup>144</sup>. The CAR and Senegal<sup>145</sup> only signed the ACDEG, which may mean that the two countries are not legally bound by the ACDEG. Similarly, since the Lomé Declaration and the declaration on the principles governing democratic elections are mere declarations, thus not legally binding instruments, it may be assumed that in reality the AU framework on constitutionalism and good governance has a limited effect on African countries such as the CAR and Senegal that have not ratified the ACDEG. This would mean that the effective promotion and protection of the constitutional rights and duties of political parties by individual states would therefore depend on whether they have ratified and domesticated the international or regional human rights framework or not.

However recent decisions by the African Court of Human and People's Rights have shown that the non-ratification of regional instruments does not preclude AU member states from being legally bound and held accountable for the promotion of constitutionalism and good governance. The African Court, which complements the work of the African Commission on Human and People's Rights, has the mandate to review all cases and disputes concerning the application and implementation of the ACHPR, or any other relevant human rights instruments.<sup>146</sup> It is in this context that in 2013, in its first case decided on merit,<sup>147</sup> the African Court ruled that a Tanzanian legislative ban on independent candidates was unconstitutional. In accordance with the African Charter, the African Court found that the ban on independent candidacy violated the individual right to equal protection of the law and the prohibition against discrimination, the right to association – which includes the right not to associate, and the right to political participation guaranteed in the African Charter. The Court therefore called on Tanzania to review relevant provision of its Constitution accordingly. Similarly, in the case of *APDH v The Republic of Côte d'Ivoire*,<sup>148</sup> the African Court ruled that by adopting an impugned law on the composition of the

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<sup>143</sup> As at 15 June 2017 ([https://au.int/sites/default/files/treaties/7790-sl-african\\_charter\\_on\\_democracy\\_elections\\_and\\_governance\\_8.pdf](https://au.int/sites/default/files/treaties/7790-sl-african_charter_on_democracy_elections_and_governance_8.pdf)).

<sup>144</sup> South African instrument of ratification deposited on 24 January 2011.

<sup>145</sup> CAR signed the ACDEG on 28 June 2008, while Senegal signed it on 12 December 2008.

<sup>146</sup> Article 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

<sup>147</sup> *Christopher R. Mtikila and others v Republic of Tanzania*, Applications 009/2011 and 011/2011, Judgment of 14 June 2013.

<sup>148</sup> *Actions pour la Protection des Droits de l'Homme v The Republic of Cote d'Ivoire*, Application 001/2014, Judgment of 18 November 2016.

Independent Electoral Commission (IEC),<sup>149</sup> the Republic of Côte d’Ivoire violated its commitment to establish an independent and impartial electoral body as provided under article 17 of the African Charter on Democracy and article 3 of the Economic Community of West African States (ECOWAS) Democracy Protocol. The Court consequently held that the violation of article 17 of the African Charter on Democracy affected ‘the right of every Ivorian citizen to participate freely in the conduct of public affairs [in] his country as guaranteed by article 13 of the Charter on Human Rights’. In addition, the Court ruled that Côte d’Ivoire had violated its obligation to protect the right to equal protection of the law guaranteed by the African Charter on Democracy, the African Charter on Human and People’s Rights, as well as article 26 of the ICCPR. The Court therefore ordered the Republic of Côte d’Ivoire to amend the impugned law on the IEC to make it compliant with the above-mentioned human rights instruments.

In the light of the two cases mentioned above, it appears that the African Court serves as a ‘super constitutional court’ for African states, since in both judgments it found constitutional and legal provisions incompatible with the African Charter on Human and People’s Rights and other regional and international instruments and called on the respective states to amend their national framework accordingly. The extended mandate of the African Court seems to imply that as African states are legally bound by international and regional instruments, the African Court can serve as super constitutional court by ordering African states to review their constitutions and laws in accordance with AU instruments. Through the active role of the African Court, regional human rights instruments are given primary consideration for promoting democracy and good governance and therefore ensuring that citizens’ right to participate in their countries’ public affairs is guaranteed at all times. Decisions of sub-regional courts have also been adopted at national level. For instance, in 2010, in the case of *Hissein Habre v. Republic of Senegal*,<sup>150</sup> the ECOWAS Community Court of Justice ruled that Senegal’s constitutional and legal reforms were likely to affect former Chadian President Hissein Habre’s human rights. The Court specifically urged Senegal to respect the absolute principle of non-retroactivity in order to ensure the claimant’s fair trial. It also held that concerning the claimant’s prosecution, Senegal was merely

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<sup>149</sup> Law 2014-335 of 28 May 2014 on the Independent Electoral Commission.

<sup>150</sup> *Hissein Habre v Republic of Senegal*, judgment no ECW/CCJ/JUD/06/10.

expected to comply with a strict ad hoc procedure that is based on international law practices and within the AU mandate. In line with the above-mentioned regional and sub regional Court judgments, it should be pointed out that the AU's Peace and Security Council (PSC) has also invoked the Lomé Declaration and the ACDEG in cases concerning states that had not ratified the Charter, namely South Sudan and the CAR,<sup>151</sup> In the particular case of the CAR, following the coup d'état of 2013 and even though the CAR had not ratified the ACDEG, the PSC noted that the coup d'état was in breach of the AU Constitutive Act, the ACDEG and the Lomé Declaration. It should be pointed out that even though the Lomé Declaration is not legally binding, it has become part of the AU soft law, since it sets principles and standards with which all AU member states are expected to comply. Moreover, since most of the Lomé Declaration provisions have been included in the ACDEG, it is argued that the ACDEG is applicable to all AU member states regardless of whether they have ratified it or not.<sup>152</sup> There are however some limitations in the applicability of the decisions of the super constitutional courts. For instance, as regards the African Court on Human and People's Rights specifically, and pursuant to article 34 (6) of the Protocol on the Establishment of the African Court on Human and People's Rights, direct access to the Court by an individual or and NGO is subject to the deposit by the relevant State of a special declaration authorizing a case to be brought before the Court. Considering that the CAR,<sup>153</sup> Senegal and South Africa have not made such declaration, the Court does not have jurisdiction to hear application from individuals and NGO of these countries. The Court has dismissed individual applications from Senegal and South Africa to that effect.<sup>154</sup> Equally, in the case of *Khalifa Ababacar Sall and others v Republic of Senegal*,<sup>155</sup> although the ECOWAS Court ruled that the human rights of political opponent Khalifa Sall had been violated and that he had been arbitrarily detained, the Senegalese Court of Appeal upheld his five-year jail term. This case may highlight some limitations in implementing super constitutional courts' decisions at national level.

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<sup>151</sup> AU Peace and Security Council: Resolution PSC/COMM (CCCLXII) para 2 of the AU Peace and Security Council 362<sup>nd</sup> Meeting, 23 March 2013.

<sup>152</sup> Mukundi Wachira (n 138) 13.

<sup>153</sup> The CAR has signed but not ratified the Protocol.

<sup>154</sup> For instance, see *Michelot Yogogombaye v Senegal*, application 001/2008, judgment 15 December 2009; also see *Delta International Investments SA, Mr. AGL DeLange and Mrs. M. De Lange v. The Republic of South Africa*, application 002/2012, decision, 30 March 2012; and *Emmanuel Joseph Uko and others v The Republic of South Africa*, application 004/2012, decision, 30 March 2012.

<sup>155</sup> *Khalifa Ababacar Sall and Others v Republic of Senegal*, judgment no. ECW/CCJ/JUD/17/18.

National courts have also highlighted the primary role of international and regional instruments in the promotion of good governance and constitutionalism. They have ensured that national frameworks comply with international and legal instruments, even in the absence of domestication. For instance, in the *Glenister* case,<sup>156</sup> when the South African Constitutional Court was asked to decide whether the national legislation that created a new anti-corruption unit known as the Scorpions (DSO)<sup>157</sup>, was constitutionally valid, the Court found that the impugned legislation was inconsistent with the Constitution and invalid, since it failed to provide for an adequate degree of independence for the unit that it intended to create. The Court also ruled that based on section 39(1)(b) of the 1996 Constitution, which requires the Court in interpreting the Bill of Rights to consider international law and section 231, which states that all international agreements approved by parliament are binding, the establishment of the anti-corruption unit was not compliant with international instruments and was therefore not a reasonable constitutional measure.<sup>158</sup> The *Glenister* case is evidence that the South African Constitutional Court gave primary consideration to international instruments in the promotion of constitutionalism and good governance and that the government's actions and legislative measures could be invalidated on this basis. In addition to this, it should be pointed out that the Court of Appeal of Botswana had previously adopted this approach in the case of *Attorney-General v Dow*<sup>159</sup>, in which the Court found that even though a treaty (OAU Convention) had not been domesticated, the courts 'will strive to interpret legislation in such manner that it will not conflict with international law'. The judge ruled that 'it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations that Botswana had undertaken'. In other words, the *Glenister* and *Attorney-General v Dow* cases have established that the mere adherence to international and regional instruments – with or without domestication – implies that individual states may still be held accountable by their national courts and be compelled not to be in breach with them.<sup>160</sup>

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<sup>156</sup> *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

<sup>157</sup> The new legislation created the Directorate for Priority Crime Investigation, known as the Hawks (DPCI), and disbanded the Directorate of Special Operations, known as the Scorpions (DSO).

<sup>158</sup> C Fombad 'The role of emerging hybrid institutions of accountability in the separation of powers scheme in Africa' in C Fombad (ed) *Separation of powers in African constitutionalism* (2016) 339.

<sup>159</sup> *Attorney-General v Dow* (2001) AHRLR 99 (BwCA 1992).

<sup>160</sup> *Attorney-General v Dow* (2001) AHRLR 99 (BwCA 1992).

In the light of the above-mentioned judgments by the African Court and the national courts of South Africa and Botswana, it can be concluded that international and regional human rights instruments can play a crucial role in fostering human rights, democracy and good governance principles and objectives among African states. In this respect, national and regional judicial organs are key actors in ensuring that African states give primary consideration to international and regional normative frameworks while developing their national normative frameworks. They will do so by reviewing the compatibility of constitutional and legal provisions with relevant AU human rights instruments. African citizens' rights and freedoms are therefore expected to be fostered and protected both at national and regional levels. In sum, the prospects for entrenching the concepts of constitutionalism, the rule of law and good governance are therefore enhanced through the existence of regional and international instruments and the active role played by national and regional judicial organs.

## **2.4 Party constitutionalisation in Africa**

### **2.4.1 Historical perspective and post-independence period**

Political parties have a relatively short history in African countries. They emerged in the context of national liberation struggles in which small groups of African elites established formal entities to express their opposition to colonial rule and demand independence.<sup>161</sup> The first political party in Africa was the Whig Party, which was established in 1860 in Liberia. It should be noted that the Liberian Constitution of 1847 was significantly inspired by the Constitution of the United States. Considering the prevalent anti-partyism sentiment<sup>162</sup> at the time, the Liberian constitutional designers did not grant political parties' constitutional status,<sup>163</sup> as exists in the American Constitution. The next political party to be established was the African National Congress in 1912 in South Africa, followed by the Communist Party of South Africa in 1921. Between 1921 and 1945, nine more parties were founded in Africa.<sup>164</sup> During that period most African countries were still under colonial rule, hence the issue of

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<sup>161</sup> S Mozaffar 'Introduction' (2005) 11(4) *Party politics* at 395.

<sup>162</sup> J Madison described political parties as 'factions' that can work in the public interest and cause violence and division. (See *The Federalist Papers* No. 10).

<sup>163</sup> Section 11 of the Declaration of Rights states: 'All elections shall be by ballot and every male citizen, of twenty-one years of age, possessing real estate, shall have the right of suffrage.'

<sup>164</sup> Political parties were formed in countries including Senegal, Liberia, Kenya, Nigeria and Sudan.

party constitutionalisation and constitutionalism did not arise. According to Mozaffar,<sup>165</sup> these parties were ‘established by small groups of African elites as the organised expression of their political demands for reforming the colonial system, gaining access to colonial governments and influencing colonial policy.’ Between 1945 and 1968, 143 political parties were established in Sub-Saharan Africa. The formation of African political parties was accelerated when France and Britain, the two main colonial powers in Africa, started undertaking reforms towards a gradual decolonisation process.

Mozaffar identified two processes that led to the proliferation of political parties in Africa after 1945. The first process was the devolution of political authority from the European colonial rulers to the nationalist leaders.<sup>166</sup> This process led to the provision of voting rights to the local population or the repeal of voting restrictions concerning certain categories of the population.<sup>167</sup> The second process consisted of the organisation of competitive elections, which enabled African leaders to seek the support of the newly enfranchised voters.<sup>168</sup> Mozaffar noted that in Anglophone countries the colonial authorities required that African nationalist elites demonstrate popular support through democratic elections as a condition for the transfer of power to them. In Francophone countries, emergent African elites were required to compete for election to the French National Assembly as well as to the newly established territorial assemblies.<sup>169</sup> Hence, at independence, African constitutions (whether Anglophone or Francophone) made implicit or explicit provisions for multiparty politics and freedom of association. Kilson<sup>170</sup> contends that during the pre-independence period, African nationalists had to adopt the principle of free competition between political groups because this was the decolonisation framework within which political parties could operate in order to demand independence. Political parties therefore became the main platforms for mass mobilisation and independence struggles.<sup>171</sup>

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<sup>165</sup> Mozaffar (n 161) 395.

<sup>166</sup> S Mozaffar & J Scarritt ‘The puzzle of American party systems’ (2005) 11 (4) *Party Politics* at 400.

<sup>167</sup> Mozaffar (n161) 395.

<sup>168</sup> Mozaffar (n161) 395.

<sup>169</sup> Mozaffar (n161) 395.

<sup>170</sup> M Kilson ‘Authoritarian and single party tendencies in African politics’ (1963) *World Politics* XV at 262.

<sup>171</sup> Kilson (n 170) 262.

The first wave of party constitutionalisation in Africa started soon after independence when the first post-independence constitutions recognised the rights and duties of political parties. For instance, the CAR Constitution of 1959 and the Senegalese Constitution of 1960 respectively make provision for multi-partyism.<sup>172</sup> Generally, the characteristics of the newly formed political parties varied across the continent. Using the European types of political parties, authors<sup>173</sup> have tried to determine some key categories of African political parties during the pre- and post-independence period, based on their organisational features. These included elite-based parties or parties of notables;<sup>174</sup> mass-based parties;<sup>175</sup> ethnicity-based parties<sup>176</sup> and movement parties.<sup>177</sup> If African nationalist leaders adopted party competition during the pre-independence period, shortly after independence almost all Sub-Saharan African countries opted for authoritarian regimes in which political parties were either prohibited or assigned a limited role.<sup>178</sup> Because single-party regimes were widespread during the post-independence period, it is important to analyse their characteristics and implications for the rule of law, including citizens' rights to political participation.

#### **2.4.2 The constitutionalisation of the one-party system and its implications for constitutionalism**

From the mid-1960s until the early 1990s, the constitutional status of multi-partyism changed significantly. With the exception of Botswana, Mauritius and the Gambia for

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<sup>172</sup> Article 2 of the CAR Constitution of 1959 and article 3 of the Senegalese Constitution of 1960 recognise citizens' rights to form political parties.

<sup>173</sup> G Carbone (2007) 'Political parties and party systems in Africa: Themes and research perspectives' (2005) *World Political Science Review* at 5. Also see Kilson (n 162) 264.

<sup>174</sup> Elite-based parties were at the forefront of the decolonisation struggle in order to participate in and influence the colonial policy. They mainly involved notables and elites in local society, including chiefs, emirs and traditional leaders.

<sup>175</sup> The organisation of the mass-type party relied mostly on direct links with the masses in an effort to put an end to colonialism. The party was characterised by its numerous branches at national and grassroots levels. For instance, in Guinea, the 7000 local government units known as *comités de village* were also the ruling party's (Parti Démocratique de Guinée) units. See Kilson (n 162).

<sup>176</sup> Ethnicity-based parties emerged in the context of the politicisation of nationalist demands made by sub-national and ethnic communities. For instance, in Ghana, between 1954 and 1958 two ethnicity-based parties emerged, namely the National Liberation Movement, set up by members of the Ashanti community, and the Northern People's Party, which aimed to protect the interests of the people of Northern Ghana. However, it should be noted that most African states later curtailed the emergence of ethnicity-based parties through the entrenchment of specific constitutional provisions prohibiting this type of party. See Carbone (n 165) 8.

<sup>177</sup> Movement parties are former African nationalist movements, which fought for independence and were later transformed into political parties. These are liberation political parties, which represent the entire oppressed population and draw their nationalist legitimacy from their role in achieving national independence. Kilson (n 162) 267.

<sup>178</sup> Mozaffar (n 161) 396.

a certain period, it can be said that the one-party system became the norm on almost the entire continent.<sup>179</sup> Post-independence authoritarian regimes were therefore characterised by different governance types, with various roles attributed to political parties.<sup>180</sup> Various studies have identified two types of single-party systems, namely *de facto* single-party states and *de jure* single-party states.<sup>181</sup>

*De jure* single-party states are states that have enshrined the existence of one authorised political party in their constitutions. Heywood compares *de jure* single-party states with the one-party states that belonged to the communist 'second world', dominated by 'ruling' communist parties.<sup>182</sup> African *de jure* single-party states included countries such as Angola, Benin,<sup>183</sup> Ethiopia, Gabon,<sup>184</sup> Mozambique and Tanzania.<sup>185</sup> Typically, the single party constituted the only 'leading and guiding force'<sup>186</sup> within the one-party state. The party was the custodian of national unity and its power and influence spread to the political and socio-economic spheres. Moreover, because the single-party system had been attributed constitutional status, all other forms of opposition were unconstitutional and prohibited. Citizens' freedom of expression and association and their right to political participation could only be expressed through the single party. This trend was illustrated for example in the Constitution of Gabon of 1983. Although in its preamble the 1983 Gabonese Constitution made reference to the 1948 Universal Declaration (which recognises citizens' freedom of opinion and expression), article 5 of the same Constitution provided that a single party – the Democratic Gabonese Party

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<sup>179</sup> Fombad (n 5) 7.

<sup>180</sup> For instance, by 1989, African authoritarian regimes were composed of 11 military regimes and 29 one-party regimes, while pluralist regimes included five inclusive multi-partyism regimes and one racial oligarchy (South Africa). See Carbone (n 165) 4.

<sup>181</sup> International Institute for Democracy and Electoral Assistance (n 14) 44.

<sup>182</sup> A Heywood *Politics* (2002) at 29.

<sup>183</sup> Article 4 of the Constitution of the People's Republic of Benin of 1975 states: 'In the People's Republic of Benin, the development path is socialism. Its philosophical foundation is Marxism-Leninism, which must be applied to Benin realities in a lively and creative manner. All activities of the national social life in the People's Republic of Benin are organized in this way under the leadership of the Party of the People's Revolution of Benin, a vanguard platform of the exploited and oppressed masses, core leader of the entire people of Benin and its revolution.'

<sup>184</sup> Article 5 of the Constitution of Gabon of 1983 states: 'The Gabonese Democratic Party's primary mission is to create and maintain in the country a political, economic and social climate conducive to balanced and harmonious development of the Gabonese society and to preserve peace and democracy based on dialogue, tolerance and justice. It is the guarantor of the national unity ... Its opinion must be sought before any appointment to the highest public positions and functions ...'

<sup>185</sup> Article 3 (2) of the Constitution of the United Republic of Tanzania of 1997 provides that all political activity in Tanzania shall be conducted by, under the auspices and control of, the Party.

<sup>186</sup> Heywood (n 182) 55.

– was responsible for contributing to the protection of human rights and citizens and responsible for providing civic education to Gabonese citizens.

From a constitutional law perspective, it appeared that the constitutionalisation of the single-party model was incompatible with the entrenchment of constitutionalism, as well as citizens' basic rights to political alternation and equal participation. As mentioned above, some of the core elements of constitutionalism include the recognition and protection of fundamental rights and freedoms. However, with the single-party influence in all the power structures, the promotion of this core element is compromised. In the CAR, for instance, the 1976 Constitution that established a constitutional monarchy recognised the ruling party, the Movement for the Social Change of Black Africa (MESAN) as the sole political party of the country.<sup>187</sup> In the absence of a national assembly, the leader of the executive, Emperor Bokassa, had leeway to use the ruling party for reinforcing his legitimacy across all realms of society. In this vein, Okoth-Ogendo argued that constitutions became a political instrument providing for concentration of power in the hands of the elites and/or prohibiting any other form of political opposition.<sup>188</sup>

It should be noted that not all African states formalised the existence of a single party through one-party system constitutionalisation as in *de jure* single-party states. Unlike *de jure* single-party states, *de facto* single-party states were ruled by single parties (ruling parties), which kept the monopoly of power and dominated all branches of government.<sup>189</sup> Such examples could be found in Ghana,<sup>190</sup> Kenya<sup>191</sup> and Zimbabwe, where ruling parties (former liberation movements) became vehicles for political independence. In the contemporary African context, Eritrea for instance, is considered a *de facto* single-party state, since the People's Front for Democracy and Justice is the only political party that has been legally allowed in the country since 1993. As in the *de jure* single-party systems, *de facto* single-party systems constituted a violation of citizens' rights to political participation, since they monopolised the political sphere

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<sup>187</sup> CAR Constitution of 4 December 1976.

<sup>188</sup> Okoth-Ogendo (n 82) 12.

<sup>189</sup> International Institute for Democracy and Electoral Assistance (n 14) 45.

<sup>190</sup> The Convention People's Party (CPP) was a *de facto* single party in independent Ghana between 1957 and 1964. In 1964 the constitution was amended to make CPP the only legal party in Ghana.

<sup>191</sup> In 1969, the Kenya African National Union (KANU) became a *de facto* single party until 1982 when the constitution was amended to adopt a one-party system, making KANU a *de jure* single party.

and in practice prevented party pluralism. In fact, most post-independence *de facto* single parties were converted to *de jure* single parties following constitutional amendments (e.g. Ghana, Kenya and Tanzania).

Overall, Tunteng<sup>192</sup> has tried to explain the root cause of single-party systems on the grounds that African states needed to be supported by one strong and unifying party, especially soon after the post-independence period. A single-party system was therefore expected to be a stabilising factor soon after African states became independent. However, it became clear that single-party systems, whether *de jure* or *de facto*, infringed citizens' basic rights to freedom of opinion and freedom of association. This was because citizens, political candidates and government officials were compelled to be members of a single party, and any other political party was deemed illegal. The single-party system was therefore not compatible with the democratic values and principles needed to achieve political independence and social development.<sup>193</sup> In the words of Tunteng, the single-party phenomenon was merely 'a continuation by African states of a power exercised by colonial governments.'<sup>194</sup>

## **2.5 Post-1990 period: Emerging party systems and possible implications for constitutionalism**

As previously noted, with the end of the Cold War, the global influence struggle between the two main superpowers (Western powers and the Eastern bloc) also ended. African states, mostly characterised by their authoritarian nature, could no longer use their strategic positions to seek military and economic support from either of the two superpowers. In the absence of the superpowers' patronage and with the effects of the global economic crises (such as the oil crisis, economic depressions), African authoritarian states had to adopt structural adjustment policies spearheaded by two of the Bretton Woods institutions, namely the International Monetary Fund and the World Bank. The conditions attached to loans granted by the Bretton Woods institutions not only focused on macroeconomic policies, but also on political reforms, including good governance and the rule of law. In addition, African governments were facing mounting

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<sup>192</sup> See K Tunteng 'Towards a theory of one-party government in Africa' (1973) 13 *Cahiers d'Etudes Africaines* at 653. Also see Kilson (n 170) 263.

<sup>193</sup> See Okoth-Ogendo (n 82) 16. Also see RL Haxton 'Evolution and institutionalization of Nigerian political parties' Master of Art Thesis, Oklahoma State University 1971 at 24.

<sup>194</sup> Tunteng (n 192) 658.

pressure from civil society, which demanded more civil and political, government accountability. This process culminated in the African ‘third wave’ of democratisation in the 1990s, where African states started recognising multi-partyism and gradually amended their constitutions to reflect the transition to multiparty systems. A multiparty system refers to a political party system in which more than two political parties compete against one another to gain political power and implement their political and social programmes. Almost all African states now conduct regular elections, which allow opposition parties to be represented in parliament.<sup>195</sup> Multiparty politics have become the norm in Africa to such an extent that scholars have highlighted the ‘routinisation of multiparty elections.’<sup>196</sup>

### 2.5.1 The emergence of multi-partyism in the 1990s

Political parties are considered the most essential institutions in the democratic process. They ensure the promotion of civil and political rights, such as freedom of association and freedom of expression. Political parties play numerous key roles in the functioning of a democracy.<sup>197</sup> They not only contest elections, but also mobilise and organise the social forces required in a modern democracy.<sup>198</sup> In a multi-party system, political parties connect leaders to their constituency and facilitate citizens’ political and ideological choices by articulating their political and socio-economic programmes.<sup>199</sup>

African political parties that emerged in the 1990s had different origins. Firstly, it should be pointed out that some of the parties were already in existence. These were former single parties already in power before Africa’s democratisation process started. Many of them succeeded in remaining in power following the transition to multi-partyism. Such parties include the Zimbabwe African National Union - Patriotic Front (ZANU-PF), the *Parti démocratique gabonais* in Gabon, as well as Chama Cha Mapidunzi in Tanzania.<sup>200</sup> There were also cases of former single parties that

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<sup>195</sup> With the exception of Swaziland and Eritrea.

<sup>196</sup> van de Walle (n 18) 299.

<sup>197</sup> M Kuenzi & G Lambright (2001) ‘Party system institutionalization in 30 African countries’ (2001) 4 *Party Politics* at 438.

<sup>198</sup> M Johnston ‘Political finance policy, parties and democratic development’ (2005) *Political Parties and Democracy in Theoretical and Practical Perspectives* at 5.

<sup>199</sup> Johnston (n 198) 5.

<sup>200</sup> Van de Walle found that by the end of 2002, 15 single parties that had already been in power before 1989 remained in power following the transition to a multiparty political system (see van de Walle (n 18) 300).

temporarily became opposition parties following the democratic transition. These include the *Rassemblement démocratique centrafricain* (RDC) in the CAR, as well as the United National Independence Party in Zambia. In addition to the former single parties, Carbone identified three other origins of political parties in Africa in the 1990s. The first category of new political parties concerns parties that were founded by one popular politician, a public figure who had been involved in political life before the transition occurred. Such examples can be found in Côte d'Ivoire with Laurent Gbagbo's Front Populaire Ivoirien or in Uganda with Kizza Besigye's Forum for Democratic Change. The second category of new political parties that emerged in the 1990s originated from CSOs or networks. These were existing movements (trade unions, student groups, church organisations) who converted to political parties following the transition to multi-partyism.<sup>201</sup> Finally, Carbone highlights the role of former guerrilla movements that became political parties in the 1990s, such as the Rwandan Patriotic Front and the Ethiopian People's Revolutionary Democratic Front.

Critics have pointed out the weakness of African political parties and their inability to play an essential role in the 'democratic consolidation'.<sup>202</sup> It is argued that African opposition political parties, for instance, fail to hold governments accountable and suggest alternative policies.<sup>203</sup> In other words, this means that African citizens' effective participation in the conduct of public affairs is unlikely to occur when citizens are members of opposition parties. Van de Walle argues that the mere presence of multiple parties does not ensure effective democracy. He notes that other external elements such as ethnicity and regional identity play a key role in defining party loyalty.<sup>204</sup> An effective multi-party system should allow fair competition between political parties (whether majority or minority parties). Furthermore, party competition should be based on socio-political programmes as opposed to clientelism and/or regional identities. Similarly, opposition parties should have genuine chances of winning elections in order to implement their policies.

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<sup>201</sup> van de Walle (n 18) 300.

<sup>202</sup> V Randall V & L Svasand L 'Political parties and democratic consolidation in Africa' paper for European Consortium for Political Research Joint Sessions of Workshops, Grenoble, April 6-11, 2001: Workshop on 'Parties, party systems and democratic consolidation in the Third World'.

<sup>203</sup> Randall & Svasand (n 202).

<sup>204</sup> van de Walle ( n 18) 305.

The researcher argues that the constitutionalisation of political parties and the entrenchment of constitutionalism constitute a mechanism for addressing political parties' potential weaknesses and reinforcing their role in the 'democratic consolidation'. The dimension and focus of the constitutional regulations of political parties will define the degree of efficiency of a multiparty system in a given country.<sup>205</sup> In this context, it is important to examine the phenomenon of party dominance, which occurs in a multiparty system with implications for the exercise of citizens' civil and political rights.

### 2.5.2 Dominant party systems

The notion of dominant party systems refers to a political system in which democratic regimes are dominated by one party for prolonged periods.<sup>206</sup> De Jager highlights five criteria to identify party dominance,<sup>207</sup> namely the political system, the threshold for dominance, the nature of the dominance, the inclusion of opposition features and time span. Regarding the political system, De Jager posits that a dominant party system occurs in a democratic multi-party system, where regular elections are held and the dominant party enjoys popular support. Unlike in a one-party system, other political parties have the legal right to participate in electoral competition; the characteristic of the dominant party system is that it promotes the predominance of one political party. Secondly, there are various views on the second criterion of party dominance, which consists in identifying the actual threshold for dominance. Sartori, for instance, contends that for a party to be dominant it must win an absolute majority in elections,<sup>208</sup> while for Bogaards, the threshold for dominance is reached when the party controls the parliament and the presidency during elections.<sup>209</sup> The third criterion on the nature of the dominance mainly is the party's history, regardless of its actual performance in ruling the country. In this regard, studies have established a link between the historical accomplishment of the dominant party and its endurance under a multi-party

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<sup>205</sup> Basedau; Mehler & Erdmann (n 114) 116. Basedau uses three indexes (moderate fragmentation index, total institutionalisation score, total polarisation score) and makes recommendations about the level of fragmentation, institutionalisation and polarisation required to achieve a democratic multi-party system.

<sup>206</sup> P du Toit & N de Jager *Friends or foe? Dominant party systems in Southern Africa: Insights from the developing world* (2013) 3.

<sup>207</sup> Du Toit & De Jager (n 206) 3.

<sup>208</sup> Du Toit & De Jager (n 206) 8.

<sup>209</sup> MPJ Bogaards (2004) 'Counting parties and identifying dominant party systems in Africa' (2004). 43 *European Journal of Political Research* cited in Du Toit & De Jager (n 206) 8.

democracy. For instance, in South Africa, the ANC's leading role during the apartheid regime seems to have strengthened its position of dominant party, regardless of the party's performance over time.

The fourth essential aspect to consider in the dominant party system is the characteristics of opposition parties. Although the dominant party system occurs in a context of party competition, opposition parties tend to be weak, since they are unlikely to win any elections. Their role will be limited to holding the dominant party accountable. Finally, there are different views about the duration of party dominance. Sartori contends that for a party to be considered dominant, it should win at least three consecutive elections, while Du Toit and De Jager argue that four consecutive national elections are required to become a dominant party.<sup>210</sup> Using the endurance criteria for one-party dominance, it can be said that countries such as Namibia<sup>211</sup>, Tanzania<sup>212</sup> and South Africa<sup>213</sup> will be categorised as dominant party systems.

Furthermore, Sartori makes a distinction between two categories of party dominance, namely the dominant party systems on the one hand and the dominant-authoritarian party systems on the other hand.<sup>214</sup> An example of a dominant-authoritarian party system is Zimbabwe, where the ruling party ZANU-PF<sup>215</sup> has increasingly exercised its power in an authoritarian manner. ZANU-PF has been Zimbabwe's ruling party since its independence in 1980. As a leading nationalist liberation movement, the party benefited from wide popular support. However, the party has used different methods to preserve its dominant position in the country, including constitutional amendment, manipulation of state institutions, violence and opposition repression.<sup>216</sup> The effective participation of citizens in Zimbabwean public offices will remain bleak as long as the phenomenon of party dominance in Zimbabwe is associated with violence and intimidation of opposition voters.

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<sup>210</sup> Du Toit & De Jager (n 206) 10.

<sup>211</sup> Dominant party South West Africa People's Organisation (SWAPO) has won five consecutive elections since 1989.

<sup>212</sup> The Chama Cha Mapinduzi (CCM) has won five consecutive elections since 1995.

<sup>213</sup> The African National Congress (ANC) has won five consecutive elections since 1994.

<sup>214</sup> R Doorenspleet & L Nijzink (2013), *One-party dominance in African democracies* (2013) 4.

<sup>215</sup> Zimbabwe African National Union - Patriotic Front.

<sup>216</sup> A Britz & J Tshuma (2013) 'Heroes fall, oppressors rise: Democratic decay and authoritarianism in Zimbabwe' in Du Toit P & De Jager (n 206).

Overall, it can be said that because the party dominance system allows party competition and regular elections, the system is deemed fair and democratic. Using the example of South Africa, studies have established that dominant parties can be a source of national unity and stability, as they cut across class and ethnic differences.<sup>217</sup> However, dominant parties could also be a potential threat to genuine multi-partyism, since they are a source of limited competition and their monopoly of power implies little chance of political alternation. Cases of dominant parties in Cameroon and Equatorial Guinea and the Gambia can be used as examples of hegemonic dominant parties.<sup>218</sup><sup>219</sup> The long-term monopoly of dominant parties, regardless of their past achievement, can represent a threat to the entrenchment of constitutionalism. This is because ruling parties will be able to influence and intervene in all branches of government. Dominant parties may even influence the regulation (whether constitutional or legal) of political parties at the expense of opposition and/or minorities parties. The protection of civil and political liberties could be compromised and the prospect of promoting the core elements of constitutionalism could be undermined. The key issue is to ensure that all citizens participate in public affairs even when they are candidates or supporters of opposition parties, especially in the context of a dominant party system. The South African and Senegalese experience of a dominant party was used to illustrate the impact of this phenomenon on the concept of constitutionalism.

## 2.6 Conclusion

This chapter has two broad objectives. The first is to analyse the different theoretical frameworks related to the concept of constitutionalism and to establish the fact that entrenchment of the notion of constitutionalism goes beyond the mere adoption of fundamental principles contained in a constitution. The second objective is to trace the global phenomenon of party constitutionalisation and the emergence of multi-partyism in Africa. These two objectives are essential for understanding the historical context of party constitutionalisation in the CAR, Senegal and South Africa and how it affects the entrenchment of constitutionalism. Hence, the chapter first defined the significance of the concept of constitutionalism, while placing emphasis on the core elements of

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<sup>217</sup> A Alesina and others 'Fractionalization' (2003) 8(2) *Journal of Economic Growth* at 8.

<sup>218</sup> In 2015, for political rights and civil liberties, the Freedom House ranked Cameroon, Equatorial Guinea the Gambia as "not free".

<sup>219</sup> Doorenspleet & Nijzink (n 214) 19.

constitutionalism. In this regard, it argued that although the adoption of national constitutions has been widely accepted, including in Africa, the promotion of constitutionalism requires the existence of mechanisms that compel governments to be compliant with the constitution. The chapter examined the rationale of party constitutionalisation and the main justifications in favour of the constitutionalisation of political parties. It found that party constitutionalisation is a global phenomenon based on various motivations, with the fundamental objective of protecting the rights and duties of political parties. Party constitutionalisation is the expression of pluralism, competition and citizens' constitutional right to participate in public affairs. We observed that some of the models of party constitutionalisation initially implemented in the European context may also be also adaptable to party constitutionalisation trends in Africa.

The chapter also observed that international and regional human rights instruments have consistently placed emphasis on the need for promoting and protecting citizens' civil and political rights. The role of AU instruments such as the ACHPR and the ACDEG were also highlighted. The researcher found that the specific provisions of the ACDEG make it a point of reference on constitutionalism and the rule of law in Africa.

From a historical perspective, the researcher traced the evolution of political parties in Africa from the pre-independence period until the early 1990s. It was submitted that most of the initial political parties were instrumental to national liberation struggles during a period when a multiparty system was not illegal. However, by the mid-1960s almost all African countries adhered to a one-party system. The distinction between *de jure* and *de facto* single-party systems was established. It was found that both systems violated citizens' right to political participation, despite African states' initial commitment to people's liberation and emancipation during the pre-independence period.

Finally, the researcher established a link between the end of the Cold War and Africa's transition to multi-partyism in the 1990s. The chapter recognised the emergence of multiparty systems as well as multiparty constitutionalisation following Africa's third wave of democratisation. An attempt was made to identify the various origins of emerging political parties in the 1990s. Despite the criticisms and challenges faced by

African political parties concerning their actual performance and contribution to the political life, it was suggested that the constitutionalisation of political parties could be a protection mechanism that would ensure African citizens' effective participation in public affairs.

The next chapter is dedicated to assessing the evolution of party constitutionalisation in the CAR, Senegal and South Africa from a historical perspective.

## Chapter 3

# Legal background and historical evolution of party constitutionalisation in CAR, Senegal and South Africa

### 3.1 Introduction

### 3.2 Party constitutionalisation in CAR: historical perspectives

### 3.3 Party constitutionalisation in Senegal: historical perspectives

### 3.4 Party constitutionalisation in South Africa: historical perspectives

### 3.5 Divergent approaches to party constitutionalisation in the three countries

### 3.5 Conclusion

## 3.1 Introduction

This chapter conducts a critical analysis of the major phases of party constitutionalisation in the CAR, Senegal and South Africa, beginning from their independence, through the period of democratisation in the 1990s to the present day. It will provide the background and historical information on the constitutional and legal regulation of political parties in the three countries. The politico-socio-cultural context of each country – including the challenges – will also be highlighted as a way of contextualising the current constitutional regulations of political parties in the three countries. The objective is not only to highlight the similarities and differences in the legal framework of each country, but also to identify what lessons can be learned from a comparative constitutionalist perspective. The CAR, Senegal and South Africa are characterised by their unique historical backgrounds and legal systems. Despite their dissimilar colonial histories and socio-political backgrounds, Senegal and South Africa are currently considered multiparty constitutional democracies characterised by multiparty elections, political competitiveness and political alternation. By contrast, the CAR's experience of constitutional democracy and political alternation has proven to be more turbulent and uncertain. The CAR is currently affected by sectarian and religious tensions and violent armed groups, all leading to a serious humanitarian crisis. Despite the differences in the CAR, Senegal and South Africa's performances and trajectories in terms of political rights and party systems, this chapter aims to focus

specifically on the comparison of their experiences of party constitutionalisation in entrenching constitutionalism. This study will adopt a functionalist comparative approach,<sup>220</sup> in the sense that it will only compare the constitutional and possibly legal regulation of political parties in each country. The objective is not to compare these countries' very diverse democratic experiences as a whole. The aim is to make reference to each country's legal culture with a view to identifying the influences and rationale behind the three countries' domestic legal order, including the constitutional and legal regulation of political parties. In other words, this study will be informed by each country's social and cultural contexts, i.e. their historical and political struggles and agenda, which in turn may have directly or indirectly influenced each country's domestic legal framework.

## **3.2 Party constitutionalisation in CAR: historical perspectives**

### **3.2.1 General background**

Formerly known as Oubangui Chari, the CAR is a landlocked country located in the centre of Africa. From 1884 the CAR was colonised by the French who leased the country to private companies. The indigenous people of the CAR were consequently subjected to long periods of forced labour, spanning from 1899 to 1930. In 1930, along with Congo, Gabon and Chad, Oubangui Chari became a full member of French Central Africa. CAR law and the country's judicial institutions have been largely inspired by those of France and mostly draw their roots from French civil law. As in the French model, CAR laws are adopted in the form of statutory laws, since they are adopted by parliament and published in the National Gazette. It is important to point out that French law remains applicable in CAR territory under the Plantey Order of 6 October 1958, which provides for continued enforcement of colonial legal instruments in the newly independent states in the absence of domestic law on the matter. In this regard, it has been observed that CAR's legal framework is merely a carbon copy of French law, without real autonomy.<sup>221</sup> Other sources of law complement the French-style civil law. These are based on local traditions and customs practised by the various CAR

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<sup>220</sup> K Zweigert & H Kotz (n 43) 34. Zweigert and Kotz's definition of the functionality principle revolves around the understanding that 'in law, the only things which are comparable are those which fulfil the same function.'

<sup>221</sup> A Doui Wawaye 'La sécurité, la fondation de l'Etat centrafricain: Contribution à la recherche de l'état de droit' *PhD thesis, Université de Bourgogne* 2012 at 5 (on file with the author).

communities. In sum, it is argued that CAR's existing constitutional and legal regulations should be seen as a set of written laws largely drawn from the French legal framework, in development of its own identity.<sup>222</sup>

In terms of civil and political rights, besides the long and harsh periods of forced labour imposed by the French during the colonial era, it should be pointed out that the CAR has not been marked by a smooth experience of constitutional democracy. Even though the first constitution of the country provided for multi-partyism in 1959, by 1964 all successive CAR constitutions had made provision for a *de jure* single-party system. This persisted until 1991 when the country finally reinstated multi-partyism. Typically, between 1959 and the 1991 phase of democratisation, the CAR adopted five different constitutions and experienced five different regimes, which included a period of constitutional monarchy, with three *coups d'état*. Like many other African countries, the CAR experienced a long period of a one-party system, hence the constitutionalisation of multi-party politics occurred at a later stage in the early 1990s, when most African states undertook a transition to multi-partyism.

A review of the evolution of the constitutional regulation of political parties will shed light on the unique trajectory of CAR political history before its transition to constitutional democracy and the rule of law.

### **3.2.2 Evolution of constitutional regulation of political parties in CAR**

The very first constitution of the newly created CAR was adopted in 1959. The Constitution set up a parliamentary system and made provision for the rights and duties of political parties.<sup>223</sup> Article 2 of the 1959 Constitution – which was similar to article 4 of the 1958 French Constitution – stipulated that political parties and groups contributed to the exercise of suffrage. They formed and exercised their activities freely, and they had to respect the principles of sovereignty and democracy. When the 1959 constitution was adopted, the main political party was MESAN,<sup>224</sup> founded by Oubangui-Chari's 'founding father', Barthélemy Boganda, in 1949. Other political parties included the *Rassemblement Démocratique Africain*<sup>225</sup> (RDA), the French

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<sup>222</sup> Doui Wawaye (n 221) 5.

<sup>223</sup> The Constitution of the Central African Republic, 1959 (article 2).

<sup>224</sup> MESAN was founded in 1949 by CAR founding father Barthélemy Boganda.

<sup>225</sup> A federation of African political parties created during the Bamako Congress in 1946.

Section of the Workers' International<sup>226</sup> (SFIO) and the *Mouvement Populaire Republicain*.<sup>227</sup> By all indications, it can be said that the constitutionalisation of political parties and a multi-party system was established in the CAR even before the country achieved formal independence, which took place later in August 1960. However, in reality, this was just lip service, since during the legislative elections of 5 April 1959, only MESAN party members were allowed to be candidates and MESAN won all the seats.<sup>228</sup>

In June 1960 MESAN suffered a drawback when some of its prominent members broke away and decided to establish an opposition party called Movement for the Democratic Development of Central Africa (MEDAC)<sup>229</sup>. The brief experience of multi-partyism of the newly independent country ended abruptly when in December 1960 the opposition party, MEDAC, was formally prohibited, making MESAN a *de facto* single party. In January 1962, under President David Dacko, members of the MEDAC were formally prosecuted for threatening national security. In November 1962, a cabinet meeting dissolved all political parties and recognised MESAN as the only legitimate party in CAR. From this period onward, all successive regimes in the CAR ensured that only a one-party system was allowed to operate. On 21 December 1962, a law amending the Constitution was adopted to formally prohibit multi-partyism and establish a one-party system in CAR.<sup>230</sup> The Constitution therefore provided that the people freely and democratically exercised their sovereignty within the single party. With the 1962 constitutional amendment, the CAR formally moved from a multiparty system to a *de jure* one-party system, which would continue for the next three decades. In 1964, a new constitution<sup>231</sup> stipulated that MESAN was the supreme institution of the Republic and that it would be the single national political movement (article 12). Following a coup led by Colonel Jean-Bedel Bokassa on 31 December 1965, the 1964 Constitution

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<sup>226</sup> A former French political party founded in 1905. In 1957, the federations of SFIO in African countries, including Oubangui Chari and Senegal, decided to separate from the French parent organisation and set up a new Pan-African party called the African Socialist Movement (MSA).

<sup>227</sup> A former French Christian Democrat Party founded in 1944.

<sup>228</sup> Opposition candidate lists submitted in three constituencies were rejected owing to 'irregularities'. See P Kalck *Barthélemy Boganda* (1995) 218.

<sup>229</sup> MEDAC was created in May 1960 by Abel Goumba and prohibited under President David Dacko in December 1960.

<sup>230</sup> CAR Constitutional law 62.365 of 21 December 1962.

<sup>231</sup> Law 64/37 of 26 November 1964, on the revision of the Constitution of the Central African Republic.

was suspended and the interim Constitutional Act on 4 January 1966 confirmed the position of MESAN as the single state party.<sup>232</sup>

The third Constitution of 1976, which proclaimed the Central African Empire and established a constitutional monarchy, reiterated the position of MESAN as the sole political party of the country.<sup>233</sup> However, it is important to point out that the CAR experienced a brief period of multi-partyism when it adopted its fourth constitution on 1 February 1981 under David Dacko.<sup>234</sup> The 1981 Constitution explicitly entrenched multi-partyism<sup>235</sup> and as a result, multiparty presidential elections were held on 15 March 1981. However, following a post-electoral crisis, the multiparty experience was curtailed by a *coup d'état* in September 1981, which led to the suspension of the 1981 Constitution. Following a five-year transitional period of military regime led by General Andre Kolingba, a new constitution was adopted in 1986 through referendum<sup>236</sup> and once again, it enshrined a single-party system in CAR. Based on the 1986 constitutional provisions for a one-party system, Andre Kolingba created the RDC in 1987. The party became the only constitutionally authorised party of the CAR until 1992. In July 1987, when Andre Kolingba organised the first legislative elections since 1964, the RDC won all seats.

In sum, it can be said that during the post-independence period in CAR, the constitutionalisation of political parties was characterised by the exclusion of opposition parties. This culminated in the constitutionalisation of the MESAN and the explicit prohibition of opposition parties. Two attempts at entrenching party pluralism in constitutions (namely the Constitutions of 1959 and 1981) were swiftly interrupted by a constitutional reform and a *coup d'état*. With the exception of the above-mentioned attempts, it appears that the general trend of party constitutionalisation before the 1990s in the CAR was relatively consistent in the sense that it mostly aimed to establish a *de jure* single-party system.

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<sup>232</sup> Title V of the Constitutional Act of 1966 states: 'MESAN, a movement created by President Barthélemy Boganda, is and remains the national movement of the Central African Republic.'

<sup>233</sup> Articles 15 and 16 of the Constitution of 1976.

<sup>234</sup> The CAR Constitution of 1981 adopted by referendum.

<sup>235</sup> Article 14 of the CAR Constitution of 1981 states that political parties concur in the expression of universal suffrage. They can be formed and carry out their activities freely.

<sup>236</sup> Article 3 of the CAR Constitution of 1986.

The CAR model of party constitutionalisation was similar to Janda's protection model of party constitutionalisation, in which only one party was declared legitimate.<sup>237</sup> It was obvious that the leaders of the CAR had no intention of ensuring that the various constitutions would enshrine and protect citizens' participation in political affairs through pluralism. Although most constitutions recognised the fundamental rights of citizens, such rights were to be exercised through one political party. In other words, the constitutionalisation of the political party was meant to legitimise the single party, reinforce presidential power and ostracise any divergent views and ideologies. It was only when the sixth constitution of the CAR was adopted in 1995 that it finally confirmed the entrenchment of multi-partyism<sup>238</sup> through article 19, which provided for the rights and duties of all political parties. From this point onwards, all subsequent CAR constitutions have explicitly entrenched the rights and duties of political parties and also recognised the contribution of political parties to the country's political, economic and social life.<sup>239</sup> Article 31 of the 2016 CAR Constitution requires that political parties respect gender and regional balance and that they should not represent any armed groups.

From 1995 onward, all CAR constitutions specifically referred to national legislation regulating the rights and duties of political parties. It is therefore important to examine the key legal regulations on political parties and their implication for citizens' participation in political affairs.

### **3.2.3 Evolution of legal regulation of political parties in CAR**

In 1991, in the context of political and social unrest and following an 'inclusive national consultation', the government<sup>240</sup> had to approve the adoption of an Organic Law on the Formation, Operation, Financing and Dissolution of Political Parties<sup>241</sup>. The 1991 Organic Law on Political Parties constituted a major turning point in the political history of CAR. Even though the existing constitution – which provided for a single-party system – had not yet been formally amended, the new Party Law enshrined the

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<sup>237</sup> Janda (n 32) 4.

<sup>238</sup> The Constitution of the Central African Republic, 1995.

<sup>239</sup> Art 20 of the CAR Constitution of 2004; Art 31 of the CAR Constitution of 2016.

<sup>240</sup> In 1991, under pressure from civil society movements, unauthorised political parties as well as the international community, President Andre Kolingba repealed the ban on multi-partyism.

<sup>241</sup> Law 91.004 of 4 July 1991 on the Formation, Operation, Financing and Dissolution of Political Parties

principle of political pluralism in CAR and lifted the ban on political parties. It included provisions on the rights and duties of political parties, requirements for their activities and behaviour, as well as funding requirements. It also provided for conditions for the creation and dissolution of political parties. The 1991 Party Law laid the foundation for the organisation of multiparty presidential elections, which took place in 1993. The Party Law also paved the way for the constitutional regulation of political parties, which formally occurred in the 1995 Constitution. Overall, it is important to point out that after a long period of a *de jure* single-party system, CAR's first regulation of political pluralism occurred through the law (the 1991 Party Law). The Party Law in turn enabled the organisation of multiparty elections (1993) and a multiparty system was ultimately entrenched in a new constitution (1995 Constitution).

In 2005, the 1991 Party Law was replaced by a Presidential Ordinance relating to political parties and the statutes of the opposition in the CAR<sup>242</sup>. The 2005 Ordinance defined the requirements for the creation, registration, coalition, suspension, dissolution, functioning and funding of political parties or party coalitions, as well as the status of opposition parties.<sup>243</sup> With the 2005 Ordinance, for the first time, a legal instrument in the CAR made specific provision for the protection of opposition parties. The participation of political parties in the electoral process was supported by other legal instruments, including the electoral code<sup>244</sup>, which created the Independent Joint Electoral Commission.

### **3.3 Party constitutionalisation in Senegal: historical perspectives**

#### **3.3.1 General background**

Although the Portuguese were the first to land on the coastline of Senegal in the mid-fifteenth century, the country was colonised by the French, who initially used its territory as a point of departure for the Atlantic slave trade. Senegal occupied a special

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<sup>242</sup> Presidential ordinance 05007 of 2 June 2005 on political parties and opposition parties' statutes in the Central African Republic.

<sup>243</sup> Chapter V of Presidential ordinance 05007 of 2 June 2005 on political parties and opposition parties' statutes in the Central African Republic.

<sup>244</sup> Law 98.004 of 27 March 1998 amended by Law 99.015 of 1 July 1999 relating to the Electoral Code; Law 09.016 of 2 October 2009 relating to the Electoral Code; Law 13.003 of 23 November 2013 relating to the Electoral Code as aligned with Law 15.004 of 28 August 2015 derogating from certain provisions of Law 13.003 of 23 November 2013 and by Law 15.005 of 8 December 2015 amending certain provisions of Law 15.004 of 28 August 2015.

position over other French colonies in Africa. Its capital city, Dakar, was also the capital of French West Africa and became the centre from which the French governed and developed their West African colonies. Article 60 of the French Constitution of 27 October 1946 recognised overseas territories as part of the French Republic. The four Senegalese ‘*communes*’ of Dakar, Goreé, Rufisque and Saint Louis are the oldest colonial towns in the West African territories controlled by the French. Their citizens were granted full citizenship rights in France. In 1914, for the first time, an African parliamentarian – who originated from one of the four Senegalese communes – was elected to the French National Assembly.

Generally, the Senegalese legal system, like that of CAR, is inspired by French civil law. French laws and regulations were fully enforced in the four Senegalese ‘communes’, since they were regarded as part of French territory. Most importantly, after Senegal became independent in 1960, its new constitution provided that existing laws and regulations (mostly colonial laws) would continue to be enforceable in the country provided that they were not in violation of the Constitution and had not been repealed (article 70). Moreover, considering the involvement of Senegalese politicians<sup>245</sup> in French political institutions, the influence of French law in the initial development of the Senegalese constitutional laws was inevitable, especially during the post-independence period. It should be observed that Senegalese law is also composed of traditional laws, which are influenced by customary laws as well as Islamic law.

In terms of civil and political rights, Senegal is considered a peaceful country with a long-standing democratic tradition. Senegal is often cited as one of the few models of democracy in Africa, especially in comparison with its West African neighbours. Since its independence in 1960, the country has never experienced any military coups, and it has continuously consolidated its status as an example of good governance and democracy. With the exception of the political unrest related to the organisation of the presidential elections in 2012,<sup>246</sup> Senegalese elections have generally resulted in peaceful political alternation, confirming the maturity of the Senegalese institutions.

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<sup>245</sup> In 1914, Blaise Diagne became the first African deputy elected to the French Chamber of Deputies.

<sup>246</sup> Despite popular opposition, the Constitutional Council validated the candidacy of incumbent president Abdoulaye Wade, while it invalidated the candidacy of other key figures. Several demonstrations broke out immediately after the announcement, leading to a dozen deaths.

Although multi-partyism was entrenched in the first Senegalese Constitution of 1959, this was not actually enforced until a later stage in the 1970s, under certain restrictive conditions. It is therefore important to examine the evolution of the constitutional and legal regulation of political parties in a country regarded as an example of democracy in Africa.

### 3.3.2 Evolution of constitutional regulation of political parties in Senegal

Senegal already had a number of existing political parties before independence. These included the RDA, the SFIO<sup>247</sup>, the *Bloc Démocratique Sénégalais*, founded in 1948 by Leopold Sédar Senghor, who became the first president of independent Senegal in 1960. In 1958, Senghor initiated the merger of other parties to form the *Union Progressiste Sénégalaise*<sup>248</sup> (UPS), which became the most prominent political force when Senegal decided to remain in the French confederation during the 1958 referendum.

On 24 January 1959, in an attempt to form a federation with the Republic of French Sudan (Mali), Senegal adopted its first constitution based on a parliamentary system that was inspired by the French constitution of 1958. The 1959 constitution recognised all Senegalese citizens' basic human rights, including the right to freedom of expression (article 4) and the right to form associations and companies (article 5), subject to compliance with the laws and regulations. However, the 1959 Constitution did not make specific provision for political parties. After the Mali Federation initiative failed, Senegal revised its Constitution in 1960. The Senegalese Constitution of 26 August 1960 confirmed Senegal's adherence to a parliamentary system. Most importantly, Senegalese political parties were given constitutional status for the first time.<sup>249</sup> Article 3 of the 1960 Constitution provided for the rights and duties of parties, while emphasising their obligations to respect the principles of sovereignty and democracy.

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<sup>247</sup> RDA and SFIO were also existing political parties in CAR and other Francophone African countries.

<sup>248</sup> L'*Union progressiste sénégalaise* was created in 1958 and renamed *Parti Socialiste* in 1976.

<sup>249</sup> Law 60-045 of 26 August 1960 on the amendment of the Constitution of the Republic of Senegal.

In 1963, following a political crisis<sup>250</sup> within the executive power, a new constitution<sup>251</sup> entrenching a presidential system was adopted. Article 3 of the 1963 Constitution reiterated the provisions of the 1960 Constitution concerning political parties' rights and duties. Theoretically, political pluralism had been implemented in Senegal before the country's independence and the rights of political parties were enshrined in the constitution as soon as Senegal became independent in 1960. However, in practice, President Leopold Sédar Senghor's party, UPS, held all seats in parliament<sup>252</sup> while other political parties were prohibited.<sup>253</sup> This contradicted the existing constitutional provisions on the rights and duties of all political parties in Senegal, since in reality the representation of the citizens of Senegal occurred solely through the ruling party.

Between 1966 and 1974, in violation of the Constitution, Senegal experienced an 'authoritarian presidential regime'<sup>254</sup>, and became a *de facto* one-party state<sup>255</sup> with the predominance of the UPS. While there was no formal prohibition of political pluralism, opposition parties were either curtailed or merged<sup>256</sup> with the ruling party. The constitutionalisation of political pluralism was therefore only symbolic. The concept of constitutionalism, which implies that governmental authority is exercised within the limitations and prescriptions set by the Constitution, did not apply. In reality, the ruling party was involved in state institutions, religious groups as well as trade unions.<sup>257</sup> It was only in 1974, following a wave of political and social unrest, in which student movements, trade unions and clandestine political parties (e.g. *Parti Africain de l'indépendance*) actively challenged the Senegalese government on economic and

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<sup>250</sup> Political tensions between Prime Minister Mamadou Dia and President Leopold Sedar Senghor which culminated with the imprisonment of Mamadou Dia, accused of plotting a coup d'état. Mamadou Dia was released in 1974.

<sup>251</sup> Law 63 – 22 of 7 March 1963 on the amendment of the Constitution of the Republic of Senegal.

<sup>252</sup> During the 1963 presidential elections Senghor won by 99% of the votes.

<sup>253</sup> Cheikh Anta Diop's *Bloc des Masses Sénégalaises* (BMS) was banned in 1962; BMS converted into *Front National Sénégalais* and was banned again in 1964.

<sup>254</sup> A Tine 'De l'un au multiple et vice-versa ? Essai sur le multipartisme au Sénégal (1974-1996)' (1997) 1 *Les classiques des sciences sociales* at 16.

<sup>255</sup> The government then referred to a "unified party" (*parti unifié*) while the opposition critiqued the existence of a single party (*parti unique*).

<sup>256</sup> In 1966, the *Parti du Regroupement Africain - Senegal* merged with the ruling party, UPS.

<sup>257</sup> Tine (n 254) 18.

political issues<sup>258</sup>, that the government authorised the creation of a second political party, namely the *Parti Democratique Senegalais* (PDS).<sup>259</sup>

It should be pointed out that during the period from 1963 until 2001 (when a new constitution was finally adopted), the constitutional status of political parties was amended on several occasions, in accordance with the government's political visions.<sup>260</sup> Firstly, in 1976, article 3 of the constitution was amended to authorise Senegal's transition from a multiparty system to a three-party system.<sup>261</sup> In the preamble of the constitutional law, the government recognised pluralism of political parties as a guarantee of Senegalese citizens' free exercise of democracy, but noted that the proliferation of political parties could also constitute a danger for a 'proper functioning of democracy'. Thus, the government chose to limit the exercise of party pluralism by setting the number of political parties to three, hence each party was required to belong to three specific ideologies.<sup>262</sup> The revised article 3 of the 1963 Constitution therefore provided that 'Political parties contribute to the expression of suffrage. They are no more than three in number and they must represent different currents of thought. They are required to comply with the principles of national sovereignty and democracy and conform to those included in their statutes.' It should be noted that the Constitution did not specify to which ideologies the three political parties should belong. The government therefore amended the existing Party Law in order to specify the three ideologies authorised by the Constitution'.<sup>263</sup> The revised article 2 of the 1975 Party Law subsequently provided that the three political parties authorised by the Constitution should represent respectively the liberal and democratic ideology, the socialist and democratic ideology and the Marxist-Leninist or communist

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<sup>258</sup> In May 1968, Senegal experienced successive strikes of students and workers, which led to urban riots. Influenced by leftist ideologies (Maoists, communists), the students notably challenged the political control of the government. The crisis caused the government of President Senghor to retreat for a period. Following this crisis, the regime started a democratisation process by setting up a leftist current within the ruling party UPS in 1969 and appointing a prime minister (Abdou Diouf) in 1970. This momentum culminated in 1974 with the creation of an opposition party, the Senegalese Democratic Party of Abdoulaye Wade.

<sup>259</sup> The *Parti démocratique sénégalais* was founded by Abdoulaye Wade in 1974.

<sup>260</sup> Overall, between 1967 and 1999, the Senegalese Constitution of 1963 was amended 20 times. Three constitutional amendments specifically concerned the status of political parties.

<sup>261</sup> Constitutional Law 76-01 of 19 March 1976 on the revision of the Constitution of the Republic of Senegal.

<sup>262</sup> The revised article 3 of the Constitution included the following provision: 'Political parties contribute to the expression of suffrage. They are three in number and must represent different currents'.

<sup>263</sup> Law 76-26 of 26 April 1976 repealing and replacing article 2 of Law 75-68 of 9 July 1975 on political parties.

ideology. It is argued that with the 1976 constitutional amendment, the Senegalese government formally adopted an ‘ideology-based party system’.<sup>264</sup> The constitutional ‘tri-partyism’ was consequently enforced by the Senegalese judiciary, which declared political parties illegal based on their ideologies. For instance, in a judgment of 7 January 1978, the Senegalese Supreme Court rejected the *Rassemblement national démocratique’s* (RND) appeal against the government's unilateral decision to allocate the communist ideology to the party. Following the Supreme Court’s judgment, the RND was declared illegal and the PAI Renovation became the third legal party of Senegal, a Marxist-Leninist Party.

The second amendment of the constitutional status of political parties took place in 1978, aiming to provide for the establishment of a four-party system in Senegal and to explicitly list in the Constitution the four types of party ideologies.<sup>265</sup> The revised article 2(3) of the 1963 Constitution therefore stated: ‘Political parties contribute to the expression of suffrage. They are four in number and must each represent one of the following currents of thought: Conservative; Liberal; Socialist; Marxist-Leninist or Communist.’ In the preamble to the law amending the Constitution, the government argued that because setting the number of legally authorised political parties constituted a major aspect of the political life of the country, this had to be enshrined in the Constitution. Similarly, the government indicated that it was essential to include the definition of political parties’ ideologies in the Constitution, since this was a ‘fundamental element of the status of political parties’.<sup>266</sup> From the foregoing, it became clear that while officially adhering to the principle of political pluralism, Senegal opted for a prescription model of party constitutionalisation or a ‘controlled multi-partyism’ in which constitutional provisions were specific and restrictive concerning the activities of political parties. The Senegalese government argued that because it aimed to prevent political anarchy resulting from the proliferation of political parties,<sup>267</sup> it had to resort to a system that closely regulated the status of political parties.

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<sup>264</sup> Hartmann (60) 773.

<sup>265</sup> Constitutional Law no. 78-60 of 28 December 1978.

<sup>266</sup> Fall (61) 94.

<sup>267</sup> Fall (n 61) 102.

As the government limited the number of political parties and imposed specific ideologies on them<sup>268</sup>, their democratic nature was debatable. It was only in 1981, during a third constitutional amendment of the status of political parties, that article 3 of the Constitution was amended to reinstate ‘absolute multi-partyism’ in Senegal, as stated by the government in the preamble to the law amending the constitution.<sup>269</sup> The government clarified that it recognised that other ideologies had since emerged, and that the four-party limitation could constitute a restriction on political parties’ freedom of expression. The 1981 constitutional amendment therefore established a system of unrestricted multi-partyism,<sup>270</sup> which allowed all political currents to operate legally, without the obligation of relying on a pre-defined ideology. The principle of multi-partyism was later enshrined in the new Senegalese Constitution adopted in 2001. The 2001 Constitution made provision for the rights and duties of both political parties and coalitions of political parties (article 4). More specifically, it also enshrined the rights of opposition parties (article 58).

In 2016, the Senegalese Constitution was amended to provide more rights and protection to all political parties and independent candidates alike. Senegalese political parties were given a societal role in terms of ‘training of citizens, promotion of citizens’ participation in national life and public affairs management’.<sup>271</sup> In a separate article, the 2016 constitutional amendment enshrines the rights of opposition parties as well as those of the leader of the opposition.<sup>272</sup> Officially, the government justified this step based on its aim to reinforce Senegal’s ‘reputation as a major democracy in Africa and the world.’ It argued that the reform would ‘modernise the political regime, strengthen good governance and consolidate the rule of law and democracy.’

In sum, it can be said that the first decade following Senegalese independence was marked by a *de facto* single-party system, in violation of the provisions of the 1960 Constitution. Using an ideology-based party constitutionalisation, Senegal opted for a

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<sup>268</sup> Conservative, liberal, socialist; Marxist-Leninist or communist.

<sup>269</sup> Constitutional Law 81-16 of 6 May 1981. President Abdou Diouf reinstated a ‘*multipartisme absolu*’ in Sénégal.

<sup>270</sup> See Fall (n 61) 102.

<sup>271</sup> Constitutional Law 2016-10 of 5 April 2016 (article 4).

<sup>272</sup> Article 58 of the Constitutional Law 2016-10 of 5 April 2016 states: ‘The Constitution guarantees political parties that oppose Government’s policy, the right to oppose. The Constitution guarantees the opposition a status that enables it to carry out its functions. The law defines its status and sets out its rights and duties as well as those of the leader of the opposition’.

prudent and gradual approach to the protection and promotion of the rights of all political parties. Hartmann suggested that by imposing specific ideologies on parties, the Senegalese government had wished to prevent the emergence of other potential social cleavages such as ethnic, religious or regional conflicts, which affected other African countries.<sup>273</sup> Such an approach would mean that the primary goal of party constitutionalisation was not to promote democracy but rather to preserve political power.

### 3.3.3 Evolution of legal regulation of political parties in Senegal

While the successive Senegalese constitutions enshrined the rights and duties of political parties, including through various constitutional amendments, the Senegalese government simultaneously enacted laws relating to political parties.<sup>274</sup> The first Senegalese Party Law, which regulated political parties' participation in elections, was enacted in 1964.<sup>275</sup> The 1964 Party Law was adopted when the multiparty system had already been entrenched in the 1960 Senegalese Constitution. However, in reality only the ruling party was authorised to operate in the country and opposition parties were either intimidated or banned.<sup>276</sup> It appears that the 1964 Party Law had little influence on the enforcement of the rights and duties of political parties, since the provisions of the Constitution on multi-partyism were not respected.

In 1975, a new Party Law was adopted<sup>277</sup> which required political parties to include in their internal regulations their commitment to national sovereignty and democracy, in accordance with the country's constitution (article 2). In 1976, as the Senegalese government decided to amend its constitution and move from a multiparty system to a three-party system,<sup>278</sup> the 1975 Party Law (article 2) was amended to list the three party ideologies authorised in the country.<sup>279</sup> Referring to article 3 of the Constitution, the amended Party Law required the three political parties respectively to belong to three

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<sup>273</sup> Hartmann (n 60) 773.

<sup>274</sup> Law 75- 68 of 9 July 1975 on political parties; Law 81-17 of 6 May 1981 on political parties; Law 89-36 of 12 October 1989 amending law 81-17 of 6 May 1981 on political parties.

<sup>275</sup> Hartmann (n 60) 770.

<sup>276</sup> Following the 1963 elections, the ruling party UPS was holding all seats in parliament and Cheikh Anta Diop's *Front National Sénégalais* was banned in 1964.

<sup>277</sup> Law 75- 68 of 9 July 1975 on political parties.

<sup>278</sup> Constitutional Law 76-01 of 19 March 1976 (amending article 3 of the Constitution).

<sup>279</sup> The three authorised ideologies were: liberal and democrat; socialist and democrat; Marxist-Leninist/communist ideologies.

listed ideologies, namely the liberal and democratic, socialist and democratic and Marxist-Leninist/communist ideologies, or else they could face dissolution. In fact, the 1975 Party Law was reflecting the amended provisions of the 1963 Constitution (article 3), which provided for a ‘limited party pluralism’. Such development was considered uncommon in comparison with the prevalent one-party systems and military regimes in other parts of the continent.<sup>280</sup> The constitutional and legal regulation of political parties in Senegal in 1963 did not lead to a free multiparty system, but it did not provide for the typical single-party system either.

In 1981, after the Senegalese constitution had been amended to provide for ‘absolute multi-partyism’<sup>281</sup>, a new Party Law was adopted as well to reflect the change. The 1981 Party Law repealed the ‘three ideologies’ requirement and merely required political parties to comply with the principles of national sovereignty and democracy. It also prohibited political parties based on race, ethnicity, sect, language and region. In 1989, a law amending the 1981 Party Law established the conditions for the dissolution of political parties.<sup>282</sup> It appears that from the return of effective multi-partyism in 1981, the Senegalese government gradually reinforced its legal framework to ensure that political parties adopt a code of conduct that is primarily based on the Constitution.

With the constitutional amendment and Party Law of 1981, Senegal confirmed its transition from controlled multi-partyism to absolute multi-partyism. The various constitutional amendments affecting political parties, coupled with the Party Laws, are evidence that Senegal has a relatively long history of party regulation. With the exception of the period of a *de facto* single-party system, which clearly violated the provisions of the existing Constitution, constitutional and legal party regulation in Senegal seems to have been consistent with the Senegalese government’s beliefs on the position and role of political parties in the country’s public affairs.

### **3.4 Party constitutionalisation in South Africa**

#### **3.4.1 General background**

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<sup>280</sup> Hartmann (n 60) 771.

<sup>281</sup> With Constitutional Law 81-16 of 6 May 1981, President Abdou Diouf reinstated a ‘*multipartisme absolu*’ in Sénégal. See Fall (n 61) 102.

<sup>282</sup> Law 89-36 of 12 October 1989 amending Law 81-17 of 6 May 1981 on political parties.

Following an initial period of Portuguese exploration and trade in the fifteenth century, South Africa was successively colonised by the Dutch and the British as early as the seventeenth century. The Dutch colonisation, which started in 1652 in the Cape Colony on behalf of the East India Company, was marked by slavery and forced labour. Following the defeat of the Afrikaners in the Anglo-Boer War (1899-1902), the Union of South Africa, a dominion of the British Empire, was formed in 1910. The Union of South Africa was composed of previously separate British colonies, namely the Cape Colony, Natal Colony, Transvaal Colony and Orange River Colony. On 31 May 1961, the Union of South Africa formally became the Republic of South Africa when the country adopted a new Constitution. From a legal perspective, considering its colonial history, South Africa is characterised by a mixed legal system that is mainly composed of a civil law system inherited from the Dutch, a common law system inherited from the British, and African customary law, which was a system developed and practised by the various indigenous communities of South Africa.

Concerning its political history, South Africa has held regular elections since 1910 when the country adopted its first constitution. However, until the early 1990s, South Africa had been a constitutional oligarchy in which the white minority ruled and governed the country by assuming all legislative and administrative authority. By contrast, the majority of black South Africans were deprived of civil and political rights, including the right to vote. Between 1959 and 1994, elected bodies that represented black South Africans were those that functioned within the boundaries of the ethnic homeland system.<sup>283</sup> The political history of South Africa has been shaped by the active role played by political parties across the political spectrum. On the one hand, the white ruling party – the National Party<sup>284</sup> – imposed a system of institutionalised racial segregation and discrimination, also called apartheid, between 1948 and 1991. On the other hand, the African Native National Congress<sup>285</sup> was founded in 1912 with the aim of fighting for the rights of black South Africans. The South African Communist Party, founded in 1921, also participated in the struggle against apartheid. The trade union<sup>286</sup> movement equally played an essential role in the national democratic struggle. The

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<sup>283</sup> D Nupen 'Elections, constitutionalism and political stability in South Africa' (2004) *African Journal on Conflict Resolution* at 120.

<sup>284</sup> The National Party was founded in 1915 by Afrikaner nationalists.

<sup>285</sup> The ANNC became the African National Congress (ANC) in 1923 and was banned in 1960.

<sup>286</sup> The United Democratic Front was a major anti-apartheid organisation in the 1980s.

apartheid system was a codified system of racial stratification supported by legislation, which mainly aimed to restrict the basic human rights of the black majority.

In sum, it can be said that although South Africa had a long history of elections and political parties, its segregationist nature meant that a large majority of the population was excluded from participating in the public affairs of the country. The socio-political situation of the country was characterised by repression, resistance and harassment, which culminated in a period of urban conflict and the declaration of a state of emergency in 1984. From a constitutional angle, until the South African interim Constitution was adopted in 1993, all South African constitutions confirmed the exclusion of black South Africans in the running of South Africa's political affairs.<sup>287</sup>

### **3.4.2 Evolution of constitutional regulation of political parties in South Africa**

In South Africa, although the country has had a long history of political parties, party constitutionalisation took place at a later stage, specifically following the collapse of apartheid and the country's accession to constitutional democracy in 1994. Despite the oligarchic nature of South Africa's political system prior to 1994, the country has had various authorised<sup>288</sup> and unauthorised<sup>289</sup> political parties. However, the status (rights and duties) of political parties was not enshrined in the constitutions of the apartheid era, even though political parties and opposition parties were specifically mentioned in the constitutions, particularly with regard to the composition of the houses of parliament.<sup>290</sup> Citizens' political and civil rights were not enshrined in the initial South African constitutions. Only the South African constitution of 1983 pledged 'to respect and protect ... human dignity, life, liberty and property'. An attempt by the anti-apartheid Progressive Federal Party to incorporate a bill of rights in the 1983 constitution was opposed by conservative political forces. The bill aimed to guarantee, among others, freedom from discrimination on the grounds of race or colour, freedom of conscience, thought, belief, opinion and expression, and freedom of association, peaceful assembly and movement. This was evidence that constitutionalisation of

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<sup>287</sup> The Constitution of the Union of South Africa 1910; the Republic of South Africa Constitution Act, 1961; Republic of South Africa Constitution Act, 1983.

<sup>288</sup> Founded in 1915, the National Party was the ruling party from 1948 to 1994; the Conservative Party and Progressive Federal Party were opposition parties respectively from 1982 to 2004 and 1977 to 1989. The South African Communist Party was founded in 1921 and banned in 1950.

<sup>289</sup> The ANC was founded in 1912 and banned in 1960.

<sup>290</sup> Republic of South Africa Constitution Act, 1983 (Art. 64(2)(b) and art. 70 (2)(a)(b)).

political parties and/or the constitutional recognition of citizens' political and civil rights was purposely curtailed by the supporters of the apartheid regime who saw in such proposal a 'leftist-liberal' political attitude.<sup>291</sup>

It is only in post-apartheid South Africa that the constitutional status of political parties was finally enshrined in the 1996 Constitution (Sections 1(d), 8 and 19). The right to form political parties and participate in their activities is an essential element of political rights recognised by the South African Constitution under freedom of association, freedom of assembly and freedom of expression.<sup>292</sup> The Bill of Rights, which focuses on citizens' political rights, does not include provisions on the duties (activities, behaviour) of political parties, nor does it assign any special protection to opposition parties. For instance, the Bill of Rights does not include prescriptions prohibiting the formation of political parties based on ethnicity, religion, regionalism or tribalism.

The Constitutions of the CAR and Senegal make reference to national legislation concerning the formation, suspension and dissolution of political parties. By contrast, the South African Bill of Rights<sup>293</sup> only lays down a basic framework and implicitly allows laws to be adopted to implement it. It therefore becomes important to examine the evolution of the legal provisions pertaining to political parties in South Africa (if any), even though all South African constitutions have remained silent on this issue.

### **3.4.3. Evolution of legal regulation of political parties in South Africa**

The legal regulation of political parties in South Africa during the apartheid era was characterised by its prohibiting nature. The apartheid regime enacted a wide range of legislation to implement its segregationist goals. Some of the apartheid legislation aimed at repressing and prohibiting political resistance and activism. Considering the key role of political parties and trade union movements in the anti-apartheid struggle, they were naturally the target of the apartheid regime legislation. For instance, in 1950

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<sup>291</sup> <https://web.archive.org/web/20131202224121/http://www.samedia.uovs.ac.za/cgi-bin/getpdf?id=1917014> (accessed 9 April 2017).

<sup>292</sup> Sections 9, 16, 17, 18 of the Constitution of the Republic of South Africa, 1996.

<sup>293</sup> With the exception of section 236 of the South African Constitution of 1996 regarding funding for political parties.

the Suppression of Communism Act<sup>294</sup> prohibited any non-parliamentary political opposition to the government. The Act concerned a wide spectrum of political activism, as communism was defined extensively. It banned any campaign for political, economic, industrial and social change through the ‘promotion of disorder or disturbance’. Pursuant to the Act, any person considered to be communist would be prohibited from being involved in political activities.

In 1968, the Prohibition of Political Interference Act prohibited non-racial political parties and foreign financing of political parties. The Act aimed to prevent different racial groups from collaborating with one another for a political purpose. It is argued that through this Act, the ruling party had intended to prevent the political activities of the multi-racial Liberal Party of South Africa<sup>295</sup>, which was actively fighting against apartheid policies. Following the enactment of this Act, the Liberal Party of South Africa was outlawed and dissolved.

The restrictive legal regulations on political parties were gradually repealed through a law reform process during the negotiations leading to the end of the apartheid era. For instance, some sections of the Prohibition of Political Interference Act No 51 of 1968 were repealed by the 1985 Constitutional Affairs Amendment Act. Section 3 was repealed by the Abolition of Restrictions on Free Political Activity Act No 206 of 1993, which aimed to abolish the restrictions imposed on political parties and organisations during the apartheid era. The Abolition of Restrictions on Free Political Activity Act paved the way for free political activities in South Africa, which were later confirmed in the Bill of Rights of the 1996 South African Constitution.

Currently, unlike the CAR and Senegal, South Africa does not have a specific Party Law regulating the formation, functioning and dissolution of political parties. Although the South African Constitution provides for the free formation of political parties, there is no law that regulates their formation. There are laws and instruments pertaining to political parties, including a party financing law provided for by the 1996

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<sup>294</sup> Suppression of Communism Act 44 of 1950.

<sup>295</sup> Formed in 1953, the Liberal Party of South Africa aimed to repeal racially discriminating legislation and ensure equal human rights for all South Africans.

Constitution,<sup>296</sup> as well as an Electoral Code.<sup>297</sup> The procedure for the formation and dissolution of political parties is regulated by the Electoral Commission Act of 1996. Pursuant to the Electoral Commission Act, the Electoral Commission has the mandate to make regulations<sup>298</sup> regarding the registration of parties (Electoral Commission Act 1996, 23(c)). In this regard, the chief electoral officer may decide to register or not register a political party. This seems to indicate that besides the provisions of the Bill of Rights on the freedom to form political parties, the rights and duties of South African political parties are primarily associated with the electoral process.

This lack of party law in South Africa could be explained by the fact that during the apartheid era, legal regulation of political activities was extensively used by the segregationist regime to suppress any resistance and liberation struggle. The enactment of the Abolition of Restrictions on Free Political Activity Act 206 of 1993 and the entrenchment of the rights to form political parties in the Constitution may constitute a sufficient protection of the status of political parties in South Africa.

The South African judiciary has implicitly or explicitly called for the enactment of legislation that regulates political activities, including the rights and duties of political parties. For instance, in the case of *August and Another v Electoral Commission and Others*, Justice Sachs ruled that the ‘rights to vote by its very nature imposes positive obligations upon the legislature and executive’, requiring them to enact legislation for this purpose. In fact, many rights pertaining to political parties and citizens’ participation in political affairs are recognised by the Constitution; however it is the inherent duty of the parliament to actualise these rights. The onus is therefore on South African political parties themselves, especially the dominant party, the ANC, to promote the enactment of legislation that specifically regulates the rights and duties of all political parties in South Africa.

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<sup>296</sup> Public Funding of Represented Political Parties Act of 1997.

<sup>297</sup> Electoral Act 73 of 1998.

<sup>298</sup> Registration of Political Parties 2004 (‘Regulations 2004’).

### 3.5 Divergent approaches to party constitutionalisation in the three countries

It is worth noting that the process of party constitutionalisation differs from one country to another. There is a dichotomy between party constitutionalisation in the CAR and Senegal on the one hand and South Africa on the other hand. Various factors have led to the constitutionalisation of political parties in the CAR and Senegal. Firstly, party constitutionalisation in the CAR and Senegal coincided with both countries' journey towards independence, and their close political and historical links with France, the former colonial power. Conac<sup>299</sup> argues that as they gained independence, most African Francophone countries – like the CAR and Senegal – duplicated France's government structures, its institutions and parliamentary system. In reality, post-independence institutions in African Francophone countries were either supervised by representatives of the French government or run by French public servants and experts. This practice was in line with the French colonial model which – as opposed to the British protectorate model – dismantled existing traditional territories to establish new administrative divisions during the colonial period.<sup>300</sup> French public servants therefore replaced the traditional authorities and directly supervised the newly created administrative divisions. The French colonisation model was therefore marked by an intertwined relationship between France and its former colonies. Conac therefore contends that because of France's political and cultural domination over its former colonies, Francophone African leaders then chose to adopt constitutions and institutions influenced by the French model. It is in this context that the CAR and Senegal designed their respective constitutions and provided for the status of political parties as in the French Constitution of 1958. In other words, it is through the adoption of a 'Western constitutionalism'<sup>301</sup> model that party constitutionalisation occurred in the CAR and Senegal.

Secondly, it should be pointed out that the international human rights context played a significant role in the move towards party constitutionalisation in the CAR and Senegal.

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<sup>299</sup> G Conac 'L'évolution constitutionnelle des états francophones d'Afrique noire et de la République démocratique malgache' in G Conac (ed) *Les institutions constitutionnelles des états francophones d'Afrique noire et de la République malgache* (1979) at 10.

<sup>300</sup> G Conac 'L'évolution constitutionnelle des états francophones d'Afrique noire et de la République démocratique malgache' in Conac (n 299) 2.

<sup>301</sup> Conac (n 300)10.

The adoption of written constitutions including the constitutionalisation of political parties symbolised the CAR and Senegal's adherence to values pertaining to human rights, democracy and civil liberties, which were widespread in Western democracies. The CAR and Senegal were not only influenced by France as former colonial power, but also by the international community at large, typically symbolised by the United Nations Charter of 1947, and the Universal Declaration of 1948. The CAR and Senegal's post-independence constitutions aimed to mark the end of colonial oppression and discrimination, legitimise the activities of liberation political parties and promote equal rights for all citizens. In this context, political parties symbolised democracy, freedom of expression and pluralism.

Finally, it should be added that the process of party constitutionalisation in the CAR and Senegal relied significantly on the backgrounds of the countries' elites who instigated the design of the first constitutions. For instance, President Barthélemy Boganda in the CAR was the first native of the CAR to be elected to the French National Assembly in 1946, before the country gained independence. He served in the French parliament in Paris until 1958 when he returned to his country to campaign for its independence. In Senegal, Leopold Sédar Senghor was also elected as member of the French National Assembly in 1946 and 1951. He became a member of the French cabinet from 1955 to 1956. In reality, the founding fathers of the CAR and Senegal had both served in the French parliament and government and were evidently conversant with the French constitutional model and governance practices. It is therefore not surprising that the model of party constitutionalisation adopted in the CAR and Senegal was a duplication of the 1958 French Constitution, since the leaders' primary reference was the French constitutional model.

However, it is argued that because African Francophone countries – including CAR and Senegal – designed their constitutions by imitating the French model, these did not actually reflect the countries' social norms and political realities. The constitutional model then did not reflect the actual political development of the countries. That is why the first constitutions were rapidly amended or not implemented. The trajectory of party constitutionalisation in the CAR and Senegal is a typical illustration of this premise. For instance, as mentioned earlier, while it is true that the 1959 CAR Constitution enshrined the rights and duties of political parties, by December 1960 the opposition

party, MEDAC was formally prohibited, making the CAR a *de facto* single-party regime. Moreover, in November 1962 all political parties recognised the ruling party, MESAN, as the only legitimate party in CAR. This culminated in a constitutional amendment in December 1962, which formally prohibited multi-partyism and establish a one-party system in CAR. Similarly, in Senegal, although the 1960 Senegalese Constitution provided for the rights and duties of political parties, as noted previously, in practice, President Leopold Sédar Senghor's party, UPS, held all seats in parliament while other political parties were prohibited. Between 1966 and 1974, Senegal became a *de facto* one-party state with the predominance of the UPS. While there was no formal prohibition of political pluralism, Senegalese opposition parties were either curtailed or merged with the ruling party.

In other words, in the CAR and Senegal, party constitutionalisation primarily meant to theoretically enshrine the role of political parties in a constitutional democracy, as seen in the 1958 French Constitution. In practice, it did not necessarily presuppose the existence of a democratic system and the promotion of the rule of law. It is therefore argued that the development of postcolonial constitutions and the subsequent process of party constitution in African Francophone countries did not reflect existing social realities. Party constitutionalisation was initiated by elites, leaders of dominant or single parties, with the technical assistance of foreign experts.<sup>302</sup> In sum, the early constitutionalisation of political parties in the CAR and Senegal could not constitute a guarantee of a multiparty system in either country.

In South Africa, by contrast, party constitutionalisation occurred at a later stage – that is, following the collapse of the apartheid regime – even though political parties had been in existence since the beginning of the twentieth century. The existence of political parties in South Africa did not necessarily lead to the constitutionalisation of their status. On the contrary, it led to the enactment of restrictive legal regulations on political parties involved in the liberation struggle. Consequently, party constitutionalisation occurred only in the 1990s during the post-apartheid era, when the country became a constitutional democracy and adopted a bill of rights. The Bill of

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<sup>302</sup> A Diarra *Démocratie et droit constitutionnel dans les pays francophones d'Afrique noire: le cas du Mali depuis 1960* (2010) 30.

Rights intended to be the legal expression of rights denied and won by South Africans who had been discriminated against, as well as a source of security for all South Africans.<sup>303</sup>

It can be said that in South Africa, party constitutionalisation reflects South Africans' aspiration to freedom, equality and justice. The countrywide public consultations that preceded the adoption of the 1996 South African Constitution are evidence that the entrenchment of political parties in the Constitution is owned by most South Africans. Party constitutionalisation was the outcome of a long political struggle against a repressive regime that prohibited any form of equal and democratic participation of all citizens in the country's public affairs. It can therefore be concluded that in South Africa, party constitutionalisation occurred through a rights-based approach involving all stakeholders, including politicians, civil society and ordinary citizens. By contrast, in the CAR and Senegal, the initial process of party constitutionalisation was a formal process initiated by the elites, without tangible commitment and mechanisms to promote political competition and protect citizens' equal participation in public affairs.

The three countries' approaches to party constitutionalisation therefore differ in the sense that, unlike in South Africa, constitutionalism and the rule of law were not essential to the initial stage of party constitutionalisation in the CAR and Senegal. Party constitutionalisation in the CAR and Senegal occurred mainly through the duplication of the provisions of the French Constitution. In reality, party constitutionalisation coincided with multiparty democracy only in 1981 for Senegal and 1995 for the CAR, while party constitutionalisation occurred in South Africa at a later stage, during the post-apartheid era, when the country really became a constitutional democracy and adopted a bill of rights. Party constitutionalisation in South Africa intended to affirm the country's commitment to constitutionalism and promote all South Africans' right to freedom of expression.

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<sup>303</sup> N Haysom 'Democracy, constitutionalism, and the ANC's Bill of Rights for a new South Africa' (1991) 7 *South African Journal on Human Rights* at 42.

### 3. 6 Conclusion

This chapter had two main objectives. The first was to review the emergence and evolution of party constitutionalisation in the CAR, Senegal and South Africa, in light of their respective histories and socio-political contexts. The second objective was to establish whether constitutional and legal regulation of political parties reflected the governments' views of the role that they wanted political parties to play in the political system. These two objectives are essential in understanding the current position of political parties in the three countries, and their impact on constitutionalism.

The chapter established that the French legal framework, including the Constitution of 1958, played a crucial role in the process of party constitutionalisation in the CAR and Senegal. To some extent, the two countries share a common political history in the sense that during the decolonisation period, similar political parties were represented in both countries and they actively participated in the decolonisation process. For instance, the RDA, a Pan-Africanist and anti-colonial political party represented across French West Africa and French Equatorial Africa, was operating in both the CAR and Senegal. Similarly, the SFIO was represented in both the CAR and Senegal in the late 1950s.

Party constitutionalisation emerged in the CAR and Senegal as they became independent. The chapter observed that party constitutionalisation does not necessarily imply multiparty constitutionalisation and multiparty constitutionalisation, in turn, does not prevent the existence of a *de facto* single-party system. Implicitly, it was argued that party constitutionalisation is not necessarily synonymous with party pluralism. It appeared that prior to the democratisation process in the CAR and Senegal, the purpose of party constitutionalisation was to control the existence and activities of political parties in both countries and to protect the existing regime. It was also observed that party constitutionalisation was purposely set aside in South Africa owing to the segregationist nature of the apartheid regime. It was therefore seen that the absence of constitutional protection of political parties in the apartheid era was used as a mechanism for curtailing the active role played by liberation movements and/or political parties. Be that as it may, it was noted that by the mid-1990s, party constitutionalisation in the three countries implied the entrenchment of party pluralism

and the implicit or explicit recognition of the key role played by political parties in the constitutional order.

The chapter examined the existence and role of party law in the three countries, since the Constitutions of the CAR and Senegal make specific reference to national legislation regulating the behaviour and activities of political parties. It was submitted that in the CAR and Senegal the legal regulation of political parties has complemented and strengthened the process of party constitutionalisation, regardless of the democratic or undemocratic nature of the regimes. However, during the apartheid period in South Africa, it was noted that the legal regulation of political parties played a crucial role in repressing the black majority's struggle for political change. It remains to be established whether the absence of a party law in South Africa implies that political rights are less protected than in other countries, such as the CAR and Senegal, where party laws provide clear guidance on the rights and duties of political parties, including opposition parties. In other words, it is essential to consider whether party constitutionalisation ought to be explicit and supported by additional national legislation in order to be more effective.

While comparing the trend of party constitutionalisation in the three countries, one important aspect to examine is the existence of independent and impartial institutions such as electoral management bodies (EMBs), which are essential to ensuring equal treatment for all political parties. The constitutional protection of such institutions may contribute to ensuring an effective and fair exercise of citizens' political rights. For instance, the South African Constitution enshrines the rights of the Electoral Commission<sup>304</sup> (section 181(1)). The Electoral Commission being only subject to the Constitution, theoretically it becomes difficult for this body to be influenced by the government and any ruling party. On the contrary, in Senegal the Constitution does not recognise the existing National Independent Electoral Commission,<sup>305</sup> which is an independent body responsible for implementing the Electoral Code. In CAR, prior to the 2016 Constitution,<sup>306</sup> all previous constitutions were also silent on any enforcement

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<sup>304</sup> Section 181(1): '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 and prejudice'.

<sup>305</sup> Law 2005-07 of 11 May 2005 establishing the National Independent Electoral Commission.

<sup>306</sup> Article 143 of the 2016 CAR Constitution provides for an independent body, the National Elections Authority.

mechanisms to ensure equal treatment of political parties, especially in terms of electoral matters. The existence or not of enforcement mechanisms to protect and promote the constitutional rights of political parties will undoubtedly have an impact on the position of political parties in the constitutional order.

Finally, it was noted that currently, in all three countries, freedom to form political parties exists. The procedures evidently vary in the countries and it can be said that the two Francophone countries have party laws, which regulate such issues in different ways. The South African party constitutionalisation pattern differs from that of the CAR and Senegal in the sense that it is less specific and the rights of political parties are raised from a human rights perspective. In this light, the next chapter conducts a critical analysis of the current constitutional rights and duties of political parties in the three countries.

## Chapter 4

### **Analysis of current constitutional and legal regulation of political parties in CAR, Senegal and South Africa**

#### 4.1 Introduction

#### 4.2 Constitutional regulation of party finance in CAR, Senegal and South Africa

#### 4.3 Constitutional regulation of internal party democracy in CAR, Senegal and South Africa

#### 4.4 Party constitutionalisation and the role of political parties in elections

#### 4.5 Conclusion

### **4.1 Introduction**

Political parties are critical components of modern democracies. They are expected to reflect citizens' concerns<sup>307</sup> and aspirations and enable them to influence and participate in public affairs. It is argued that fair access to the political process is an integral part of good governance<sup>308</sup> and political parties are expected to facilitate this process. Political parties develop socio-political programmes and policy alternatives, which they present to voters during elections.<sup>309</sup> It is because of the key role played by political parties that their rights and obligations are enshrined in national constitutions across the world, including in Africa. Overall, it should be noted that the CAR, Senegal and South Africa share a common characteristic, as their respective constitutions recognise citizens' right to form political parties and to participate freely in political parties' activities. These constitutions therefore recognise political parties as key vehicles for enabling citizens to make free political choices and participate in public affairs. This chapter will conduct a critical analysis of the current constitutional rights and duties of political parties in these three countries. The aim of this chapter is to determine the extent to which party constitutionalisation has led to promoting equal participation and

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<sup>307</sup> International Institute for Democracy and Electoral Assistance: *International obligations for elections, guidelines for legal frameworks* (2014) 82.

<sup>308</sup> See J Hatchard *Combating corruption: Legal approaches to supporting good governance and Integrity in Africa* (2014) 59.

<sup>309</sup> S Scarrow 'Implementing intra-party democracy' (2005) *Political Parties and Democracy in Theoretical Perspectives Series* at 3.

representation of political parties in the three countries, with a view to fostering citizens' free and fair participation in public affairs.

This chapter therefore emphasises three key areas relating to the essence of political parties in modern democracies, namely the financing of political parties, internal democracy rules of political parties, as well as the role of political parties in elections. This is because it is recognised that in order to operate, political parties need money, staff, elected officers and established procedures for internal governing.<sup>310</sup> In addition, because political parties need to access power to implement their policies and programmes, the constitutional and legal regulation of the electoral systems will influence how political parties will be able to represent the people in the executive and legislative spheres.

This chapter is particularly important in the sense that examining the regulation of political parties will establish the level of state intervention and control over political parties, which will bring to light how much actual freedom or room for manoeuvre political parties enjoy in the three countries.

## **4.2 Constitutional and legal regulation of party finance**

The relationship between money and politics has been recognised as a sensitive issue. Money is not only essential for implementing national development policies and programmes, but is also a critical resource for political parties to operate, mainly by organising their campaigns, disseminating their alternative visions and policies and expanding the number of their voters. As Butler posits, money is essential to the operation of any democracy.<sup>311</sup> However, it is also recognised that unequal access to political finance may contribute to an uneven political landscape.<sup>312</sup> Indeed, even though it is widely accepted that political parties require financing, it is equally acknowledged that non-transparent financing may 'discourage participation in political parties and encourage cynicism'.<sup>313</sup> In this context, Hatchard argues that the regulation

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<sup>310</sup> International Institute for Democracy and Electoral Assistance (n 14) 19.

<sup>311</sup> A Butler (ed) *Paying for politics: Party funding and political change on South Africa and the global South* (2010) 1.

<sup>312</sup> International Institute for Democracy and Electoral Assistance *Funding of political parties and election campaigns: A handbook on political finance* (2014) v.

<sup>313</sup> S Bryan & D Baer (eds.) *Money in politics: A study of party financing in 22 countries* (2005) 7.

of party financing is essential because the nature and modality of funding of candidates and political parties can be detrimental to political life.<sup>314</sup> In the specific case of political parties, it is feared that unregulated and opaque sources of funding could pervert their primary aims of public interest and socio-economic development in favour of their private interests or those of their donors. Regulation of the funding of political parties and candidates is therefore an essential tool in working against political corruption.<sup>315</sup> Party funding regulation is expected to promote citizens' trust in politics and political parties in particular.<sup>316</sup>

Over the years, there has been considerable momentum to address the issue of party finance and political corruption across the world, including in Africa. For instance, the 2003 United Nations Convention against Corruption requires state parties to take appropriate legislative and administrative measures to enhance transparency in the funding of candidates and political parties.<sup>317</sup> The 2003 AU Convention on preventing and combating corruption calls on state parties to proscribe the use of funds acquired through illegal and corrupt practices to finance political parties and to incorporate the principles of transparency into funding of political parties.<sup>318</sup> Overall, public and private funding are the two main sources of finance for political parties and candidates. Equally, the regulation of political parties' funding is achieved through two basic forms, namely constitutional regulations and legal regulations. In this study, CAR, Senegal and South Africa are used as examples to assess the impact of party constitutionalisation on political funding and its enforcement in practice.

#### **4.2.1 The constitutional regulation of state funding for political parties in CAR, Senegal and South Africa**

Article 31 of the CAR 2016 Constitution provides that a law determines the conditions of formation, operation and financing of political parties. Accordingly, the financing of

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<sup>314</sup> Hatchard (n 308) 59.

<sup>315</sup> Political corruption is defined as a situation of conflict between the personal interests of a decision-maker in the private and public sector and those of the entity that he or she serves. See Z Jolobe 'Financing the ANC: Chancellor House, Eskom and the dilemmas of party finance reform' in Butler (n 311) 206.

<sup>316</sup> International Institute for Democracy and Electoral Assistance (n 312) 2.

<sup>317</sup> Article 7(3) of the United Nations Convention against Corruption.

<sup>318</sup> Article 10 (a) (b) of the AU Convention on Preventing and Combating Corruption.

political parties in the CAR is regulated by a Presidential Ordinance of 2005,<sup>319</sup> which provides for annual state funding of political parties proportionate to their number of members of parliament.<sup>320</sup> In the context of elections, the state is required to support political parties' election expenses by reimbursing 50% of the authorised campaign expenses limit. The state is also required to provide election materials and staff in order to ensure equal media coverage for all political parties.<sup>321</sup> It is important to note that the proportion of state funding to political parties is determined on an annual basis through the annual budget. However, it appears that in reality, there have been no annual budget allocations to political parties in recent years in CAR.<sup>322</sup> Consequently, it appears that the 2005 Ordinance on political parties is not fully implemented and political parties in the CAR do not have access to state funding even though there is a legal framework in place.

In Senegal, the 2016 amendment to the Constitution stipulates that the conditions on which political parties carry out their activities and receive public funding should be determined by law.<sup>323</sup> The Senegalese Constitution therefore makes explicit reference to political parties' public funding. However, the existing Party Law of 1981<sup>324</sup> does not make provision for direct public funding.<sup>325</sup> In other words, the 2016 constitutional provisions on public funding are currently not being enforced, since there is no implementing legislation that sets out the modalities of direct state funding to political parties. It can be concluded that despite the existence of constitutional provisions, Senegalese political parties do not have access to public funding because of lack of an appropriate legal framework and mechanisms.

The South African Constitution, by contrast, is more explicit on state funding of political parties. Section 236 of the 1996 Constitution provides that national legislation

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<sup>319</sup> Ordinance 05.007 of 2 June 2005 on political parties and the statute of the opposition in the Central African Republic.

<sup>320</sup> Ordinance 05.007 of 2 June 2005 on political parties and the statute of the opposition in the Central African Republic (article 44).

<sup>321</sup> Ordinance 05.007 of 2 June 2005 on political parties and the statute of the opposition in the Central African Republic (article 46).

<sup>322</sup> The 2016 and 2017 CAR budget did not provide for state party funding: <http://www.droit-afrique.com/uploads/RCA-LF-2017.pdf>; <https://www.droit-afrique.com/uploads/RCA-LF-2016-.pdf>.

<sup>323</sup> Constitutional Law 2016-10 of 5 April 2016 (article 4) on the Revision of the Constitution.

<sup>324</sup> Amended by Party Law of 12 October 1989 in Senegal.

<sup>325</sup> Article 5 of Party Law of 12 October 1989 in Senegal.

must provide for the funding of political parties participating in the national and provincial legislatures on an equitable and proportional basis. Pursuant to this constitutional provision, the Public Funding of Represented Political Parties Act of 1997 was adopted and a fund was established for political parties participating in national and provincial legislatures. South Africa has been found to be among the countries in Africa that allocate the highest proportion of public funds to political parties.<sup>326</sup> The Act provides that public funds are allocated based on the proportion of members that a party has in the National Assembly and provincial legislature, in addition to a minimum threshold to ensure equity. The most represented political party receives the largest proportion of public funding. It is worth noting that since South African democratic elections commenced in 1994, the ANC has held the majority of seats in the National Assembly and provincial legislatures, hence the largest amount of public funding has continuously been allocated to the ANC for more than 20 years. Such eligibility criteria for accessing public funds has been criticised as sustaining South Africa as a dominant party state.<sup>327</sup> The disparity between the public funds allocated to the ANC and to other opposition parties has also been decried.<sup>328</sup> In this regard, using the ‘cycle of dominance’ theory, it has been established that access to state resources seems to be strongly related to the endurance of one-party dominance. Hence, long-term victory allows a dominant party better access to state resources, thus increasing the opportunity for further electoral successes.<sup>329</sup> Such an example may strengthen the theory that unequal access to political finance may contribute to an uneven political landscape, especially in a dominant party system.

Generally, state funding of political parties is regarded as a mechanism for ensuring equal opportunities for political parties to play a significant role in politics, and

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<sup>326</sup> International Institute for Democracy and Electoral Assistance (n 312) v.

<sup>326</sup> Bryan & Baer (n 313) 50.

<sup>327</sup> See A Sokomani ‘Party financing in democratic South Africa: harbinger of doom?’ In A Butler (ed) *Paying for politics: Party funding and political change on South Africa and the global South* (2010) at 171.

<sup>328</sup> In 2009, the ANC received about five times more public funds than the next two parties combined (i.e. Democratic Alliance and Inkatha Freedom Party); see S Booysen & G Materson ‘Chapter 11: South Africa’ in D Kadima & S Booysen S (eds) *Compendium of elections in Southern Africa 1989-2009: 20 years of multiparty democracy* (2009) 415.

<sup>329</sup> R Doorenspleet & L Nijzink ‘Patterns of one-party dominance in African democracies: How one-party dominant systems endure and decline’ University of Warwick, United Kingdom and University of Cape Town, South Africa, paper prepared for International Political Science Association – European Consortium of Political Research joint conference, University of Sao Paulo, Brazil, February 16-19 2011, 12.

reducing potential risks of dependence on private donors, which may lead to corruption and subversion. In this regard, Nassmacher has established a relationship between state funding to political parties and party competition.<sup>330</sup> The author argues that state funding to political parties represents such an important intervention into the rules of party competition that its introduction requires consensus from all relevant parties. A situation of unbalanced state funding would jeopardise fair party competition. In the context of political corruption, state funding is regarded as a remedy against corrupt practices in party politics.<sup>331</sup> However, in CAR, although the Constitution requires the legislature to regulate political parties' funding, it appears that the state has failed to enforce the existing framework,<sup>332</sup> leaving political parties vulnerable to uncontrolled sources of funding and undue influence. Similarly, in Senegal, the Constitution makes explicit reference to public funding of political parties, but there is no implementing legislation to that effect. With the Public Funding of Represented Political Parties Act 1997, the provisions of the South African Constitution on public funding of political parties are enforced. However, the eligibility criteria are currently such that not all political parties are treated equally. Such a context leaves open to debate whether the South African constitutional requirement of 'equitable' funding to political parties is satisfied, and challenges Nassmacher's theory on public funding enhancing party competition.

#### **4.2.2 The constitutional regulation of private funding to political parties in CAR, Senegal and South Africa**

Most African political parties rely predominantly on funding from private sources.<sup>333</sup> This applies particularly to small political parties that do not qualify for public funding. Private sources of funding contribute to the emergence of small and otherwise unrepresented political parties in the electoral landscape.<sup>334</sup> Equally, bigger political parties that qualify for state funding also benefit from private sources of funding. It should be pointed out that the Constitutions of CAR, Senegal and South Africa are all silent on the issue of private sources of funding to political parties. While the CAR

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<sup>330</sup> KH Nassmacher *The funding of party competition: Political finance in 25 democracies* (2009) 44.

<sup>331</sup> Nassmacher (n 330) 44.

<sup>332</sup> See <http://rjdh.org/centrafrique-partis-politiques-finances/> and <http://www.journaldebangui.com/article.php?aid=570> (accessed 21 July 2017).

<sup>333</sup> International Institute for Democracy and Electoral Assistance (n 307) 44.

<sup>334</sup> See A Sokomani 'Party financing in democratic South Africa: harbinger of doom?' in Butler (n 327) 172.

Constitution refers in general terms to the role of national legislation in regulating the funding of political parties, the Constitutions of Senegal and South Africa, at different levels, provide only for public funding of political parties.

In line with article 31 of the CAR Constitution of 2016, the CAR Ordinance of 2005 authorises private sources of funding to political parties, provided that the donors are CAR nationals and the funds do not exceed 50% of the parties' total income.<sup>335</sup> Political parties are required to declare private donations to government authorities, including information on the donors and the nature of the donation.<sup>336</sup> In reality, since it has been established that political parties do not receive state funding, in spite of the existing legal framework, political parties in the CAR mostly rely on private sources of funding<sup>337</sup> which, statutorily, should not exceed 50% of their total income. By all indications, article 31 of the CAR Constitution that requires the law to determine the financing of political parties is not enforced in practice, and does not seem to adequately protect the rights of political parties to operate freely. The sustainability of sources of funding of political parties in the CAR is therefore uncertain and barriers against possible subversion and political corruption are weak or non-existent. Such circumstances could defeat the purpose of party constitutionalisation and affect the prospect for constitutionalism.

In Senegal, the Constitution is silent on private sources of funding. However, the Senegalese Party Law of 1981 implicitly recognises private funding of political parties, since it requires political parties to file their annual accounts with the government, in order to establish that they do not benefit from any resources other than those derived from subscriptions, gifts and legacies from their national members and supporters. However, the law does not explicitly include any regulation of the amount that may be received, the modalities or the nature of these private contributions. The Senegalese example of party funding seems to be characterised by conflicting aspects. While the Constitution stipulates that state funding to political parties should be regulated by legislation, in reality there is no applicable legislation that regulates public funding of

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<sup>335</sup> Articles 42 of Ordinance 05.007 of 2 June 2005 on political parties and the statute of the opposition in the Central African Republic.

<sup>336</sup> Articles 40 of Ordinance 05.007 of 2 June 2005 on political parties and the statute of the opposition in the Central African Republic.

<sup>337</sup> <http://rjdh.org/centrafrique-partis-politiques-finances/>

political parties. On the other hand, while the Senegalese Constitution is silent on the private financing of political parties, the existing legislation implicitly recognises such funding without regulating it and requires political parties to report on it. In such circumstances, political parties remain vulnerable to political corruption or bankruptcy, since the existing constitutional provisions are not enforced. As political parties do not receive public funding, they are likely to become over-reliant on private sources of funding, which include wealthy individuals as well as lobby groups, and this may ultimately compromise their independence and neutrality while implementing their programmes. The impact of the relationship between political parties and private donors may be exacerbated when ruling parties are involved. Private donors may be inclined to make donations to the ruling party in order to enjoy preferential treatment, for example in relation to state contracts or with state-owned companies. In addition, it should be pointed out that the future of smaller political parties may be compromised without access to sustainable private sources of funding, especially in the absence of public funding. In such an instance, the enforcement of the Senegalese Constitution – which promotes political parties’ right to equality and free access to the political system – could be jeopardised. This refers to the concept of ‘semantic constitutions’ that do not include binding rules and ultimately do not fully protect citizens’ rights.<sup>338</sup>

In South Africa, the Constitution is similarly silent on private funding of political parties. As opposed to the CAR and Senegal, there is no existing legislation that regulates private funding of political parties. Any political party may receive funds from its members and from other sources, such as business (both local and foreign) and civil society groupings.<sup>339</sup> The issue of private funding of political parties in South Africa is controversial, since there are no disclosure requirements attached to the receipt of private contributions. The practice of private funding was challenged in the Cape High Court in Cape Town in 2005.<sup>340</sup> In this case, the Institute for Democracy in South Africa (IDASA) unsuccessfully took legal action against four main South African parties<sup>341</sup> to compel them to disclose their sources of funding. The Constitutional Court

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<sup>338</sup> Fombad (n 19) 415.

<sup>339</sup> <http://www.elections.org.za/content/Parties/Party-funding/>

<sup>340</sup> *Institute for Democracy in South Africa and Others v African National Congress and Others 2005 (5) SA 39 (C)*.

<sup>341</sup> African National Congress (ANC); Democratic Alliance (DA); Inkatha Freedom Party (IFP) and African Christian Democratic party (ACDP). The parties argued that they had to protect their donors’

held that although the applicants made out a compelling case that ‘private donations to political parties ought to be regulated by way of specific legislation in the interest of greater openness and transparency’, existing legislation did not oblige them to disclose details of private donations made to them. The Constitutional Court did not issue a final judgment, since the political parties concerned agreed to adopt legislation regulating the funding of political parties. It is worth noting that in 2017, following the case of *My Vote Counts NPC v President of the Republic of South Africa and Others*,<sup>342</sup> the Western Cape High Court ruled that information about the private funding of political parties was reasonably required for the effective exercise of the right to vote and to make political choice.<sup>343</sup> Subsequently the South African parliament has been considering a political party funding bill<sup>344</sup> that aims to provide for and regulate the public and private funding of political parties, including the prohibition of certain donations made directly to political parties. The issue of unregulated and undisclosed private funding is crucial to the integrity of political parties and to the fight against political corruption. It is argued that there is a relationship between the disclosure of parties’ sources of funding and voting decisions whereby citizens would participate in free and fair elections with full knowledge of political parties’ ideologies as well as their benefactors.<sup>345</sup> Large donations<sup>346</sup> in particular can be problematic, since they can lead to political parties’ indebtedness to their donors, which in turn may jeopardise democracy and good governance.<sup>347</sup>

Senegal and South Africa omitted to regulate private funding of political parties. Their respective constitutions only provide for public funding and their national legislatures are equally silent on private sources of funding. The issue of unregulated – and

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anonymity and that instead of a court order it was necessary to adopt legislation regulating the funding of political parties in the Republic of South Africa.

<sup>342</sup> *My Vote Counts NPC v President of the Republic of South Africa and Others* 2017 (6) SA 501 (WCC).

<sup>343</sup> *My Vote Counts NPC v President of the Republic of South Africa and Others* 2017 (6) SA 501 (WCC) para 75.

<sup>344</sup> The bill also aims to provide for the disclosure of donations accepted and the creation of offences and penalties.

<sup>345</sup> See O’Regan, K <http://www.corruptionwatch.org.za/political-parties-the-missing-link-in-our-constitution/> (accessed 30 July 2018)

<sup>346</sup> During the 2016 local elections, ANC elections head, Nomvula Mokonyane initially reported spending ZAR 1 billion on the election before retracting her statement (see <https://www.dailymaverick.co.za/opinionista/2016-08-01-who-is-funding-our-political-parties-and-why-dont-we-know/#.WWXzMCN95PM>) (accessed 30 July 2018)

<sup>347</sup> International Institute for Democracy and Electoral Assistance (n 307) 45.

undisclosed in the case of South Africa – private funding of political parties is even more acute in the context of a dominant party system, as in South Africa. It is feared that private businesses might be tempted to support the ruling party financially in order to benefit from possible patronage.<sup>348</sup> Unregulated private contributions may lead the dominant party to be less inclined to introduce new laws that provide for more transparency and accountability in its own finances. Equally, it is argued that private contributions to opposition parties might be jeopardised if the identity of the private donors are disclosed, making them more vulnerable to the ruling party.<sup>349</sup> In any case, if the provisions of the constitutions are enforced, all political parties in CAR, Senegal and South Africa (whether dominant or not) should be treated equally; they should be able to operate freely in a transparent and enabling environment. This is in line with the concept of constitutionalism, where rulers and citizens abide by the constitution without discrimination.

#### **4.2.3 The constitutional regulation of foreign funding of political parties in CAR, Senegal and South Africa**

Most African countries ban foreign funding of political parties.<sup>350</sup> Foreign funding of political parties is often regarded as the interference of foreign forces in domestic political matters. The CAR Constitution is silent on foreign funding of political parties. However, the Political Parties Ordinance of 2005 provides that foreign donations should not exceed 20% of parties' total income.<sup>351</sup> In this regard, political parties are required to declare private donations to the government authorities, including details of the donors and the nature of the donation.<sup>352</sup> Other than the annual reporting obligation, the 2005 Ordinance does not contain specific control and monitoring measures

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<sup>348</sup> The wealthy Gupta family, which owns a wide range of businesses in South Africa, has been controversially linked to former President Jacob Zuma and his family. The Gupta family was reported to have access to state contracts and exert undue influence on both the former presidency and the ANC. In May 2017, ANC Treasurer-General Zweli Mkhize confirmed that the ANC had received donations from the Gupta family. (see <https://www.businesslive.co.za/bd/politics/2017-08-16-anc-confirms-the-party-received-funding-from-guptas/>) (accessed 6 August 2018). In 2009 and 2010, the main opposition party, the DA, also received donations worth ZAR 400,000 from an associate of the Gupta family (see- <http://www.iol.co.za/news/politics/zille-explains-gupta-donation-1461382>) - (accessed 6 August 2018).

<sup>349</sup> A Sokomani 'Party financing in democratic South Africa: harbinger of doom?' in Butler (n 327) 183.

<sup>350</sup> International Institute for Democracy and Electoral Assistance (n 312) 48.

<sup>351</sup> Article 41 of Ordinance 05.007 of 2 June 2005 on political parties and the statute of the opposition in the Central African Republic.

<sup>352</sup> Article 42 of Ordinance 05.007 of 2 June 2005 on political parties and the statute of the opposition in the Central African Republic.

regarding the funding of political parties. Thus, the declaration of foreign funds is left to the discretion of political parties.

In Senegal, the Constitution does not refer to foreign funding of political parties. However, the 1989 law amending the 1981 Party Law provides for the dissolution of political parties where a party has received funding directly or indirectly from foreigners or foreigners established in Senegal. In such an instance, the dissolution will be imposed by the Ministry of the Interior and the assets of the political parties will be confiscated. The 1989 Party Law does not include monitoring mechanisms, hence the flow of foreign funding in the Senegalese party system is hardly preventable in practice, especially in the absence of public funding.

In South Africa, the Constitution is silent on foreign funding and therefore all private sources of funding are permitted, both from national and foreign origins. This relates to the issue of unregulated and undisclosed private funding in general and the risks of undue influence on political parties and the constitutional order as a whole. It also relates to the CAR, Senegal and South Africa's obligations under relevant international and regional standards against corruption in political affairs. With party constitutionalisation, the rulers' primary consideration should be to ensure that political parties operate in a transparent and favourable environment and that citizens' trust in their political systems and parties is reinforced. Fighting against political corruption implicitly empowers political parties and enhances the prospect of constitutionalism. In this regard, in the *Glenister*<sup>353</sup> case, the South African Constitutional Court by a majority held that the Constitution is 'the primal source for the duty of the government to fight corruption'. Referring to section 7(2) of the Constitution, which imposes a duty on the state to 'respect, protect, promote and fulfil' the rights in the Bill of Rights, the South African Constitutional Court pointed out that corruption undermines the rights in the Bill of Rights, and imperils South African democracy. Although the Constitutional Court was not prescriptive as to what measures the state should take to ensure compliance with the Bill of Rights and the fight against corruption, it is argued<sup>354</sup> that the Court may have implicitly called for the adoption of a party law, which would

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<sup>353</sup> *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC).

<sup>354</sup> P de Vos (2015) 'It's my party (I'll do what I want to)? Internal party democracy and section 19 of the South African Constitution' (2015) 31 *South African Journal on Human Rights* at 54.

set out minimum democratic principles to which political parties should conform.

### **4.3 Constitutional and legal regulation of internal party democracy**

#### **4.3.1 The rationale of internal party democracy**

Internal party democracy is commonly described as a set of various methods for including party members in intra-party deliberation and decision-making. Internal party democracy is expected ultimately to strengthen the general democratic culture of a country. Scarrow<sup>355</sup> points out that the rationale of internal party democracy revolves around the understanding that political parties' decision-making structures and processes should provide opportunities for citizens to influence the choices that parties offer to voters. Internal party democracy not only sets out rules and obligations to be observed by party members but it also creates procedural rights for party members, with a view to promote and protect a democratic culture inside the parties. The promotion of internal party democracy may occur through constitutional or legal regulation. The German Constitution represents an early example of constitutionalisation of internal party democracy, as it requires political parties' internal organisation to conform to democratic principles.<sup>356</sup> The Constitution is complemented by a comprehensive Law on Political parties, which explicitly provides for decision-making and policy formation within the political parties' bodies. The law regulates party registration, candidate selection and leadership elections.<sup>357</sup>

In the same vein, some African constitutions have enshrined provisions requiring political parties to abide by the democratic principles of good governance and national sovereignty.<sup>358</sup> The regulation of internal party democracy may concern party nomination, leadership appointment, internal decision-making as well as regional and gender representation. Constitutional or legal regulation of internal party democracy could potentially have an impact on the independence of political parties, since it primarily aims to influence their internal affairs and functioning, especially considering

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<sup>355</sup> Scarrow ( n 309) 3.

<sup>356</sup> Article 21(1) of the Basic Law of Germany, 1949.

<sup>357</sup> Political Parties Act of 24 July 1967 last amended by Article 5a of the Act facilitating electronic registration for the registration of associations and other amendments to the law of associations of 24 September 2009 (Federal Law Gazette I 2009) at 3145.

<sup>358</sup> For instance, see the Constitution of the Republic of Rwanda, 2015 (article 56); the Constitution of the Republic of Kenya, 2010 (section 91); the Constitution of the Federal Republic of Nigeria, 1999 (article 223).

that the right of political parties to be created and to operate freely is equally recognised by most constitutions. In this regard, questions may be raised about the extent of regulation that is needed to ensure that political parties are internally democratic with a view to promoting constitutionalism and democracy generally.<sup>359</sup> It is also worth noting that constitutional or legal regulation of internal party democracy can also have implications for party members. It provides the right and the mechanisms for party members to ensure that their internal decisions are respected and enforced. This raises the questions about the role that the judiciary could play in the internal affairs of political parties. Political parties are not public entities, they are supposed to operate freely, without external intervention. In principle, the judiciary is therefore not expected to intervene in the running of political parties' internal affairs. However, with constitutional or legal provisions on intra-party democracy, the judiciary may intervene to ensure that that political parties comply with their own constitutional or legal obligations. In reality, the judiciary may intervene not only to protect the rights of party members- based on internal party democracy requirements- but also to protect citizens' basic human rights as enshrined in constitutions. In other words, party members' rights are not only protected by intra-party regulations but also by constitutional provisions pertaining to citizens' political and civic rights. The premise that political parties are private entities, which operate without external intervention is therefore debatable. Be that as it may, a review of the constitutional regulation of political parties in the CAR, Senegal and South Africa will shed light on how the countries' respective constitutions provide for internal democracy of political parties, and how applicable such provisions (if any) are in practice.

#### **4.3.2 Constitutional and legal regulation of internal party democracy in CAR, Senegal and South Africa**

In the CAR, under article 31 of the 2016 Constitution, political parties are required to promote and conform to the principles of democracy, national unity and sovereignty. They are required to respect human rights, as well as the republican nature of the state, in accordance with the existing laws and regulations. Political parties are banned from identifying with any race, ethnic group, sex, religion, sect, language, region or armed group. In this regard, article 2 of the 2005 Ordinance on Political Parties requires political parties to develop programmes with specific objectives that aim to achieve

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<sup>359</sup> Scarrow (n 309) 3.

development in the public interest. Article 3 also requires political parties to consistently act in accordance with fundamental values, including patriotism, national unity and gender equality. However, the ordinance neither prescribes how political parties are to observe these basic principles in carrying out their activities, nor does it provide for any monitoring mechanism. The modalities of political parties' compliance with democratic principles in their activities, as prescribed by the Constitution, therefore remain unclear. In line with the provisions of the Constitution, a new law on gender parity<sup>360</sup> was adopted in 2016, which requires public and private bodies as well as political parties<sup>361</sup> to have a minimum quota of 35% of women in their decision-making bodies. In case of non-compliance with the new law, all decisions made by the organisation will be invalidated. The law also provides for the creation of a monitoring body to that effect; its effectiveness will depend on the human and financial resources at its disposal. In summary, in the CAR, pursuant to the 2016 Constitution (article 31) and the 2016 Law on Gender Parity (article 8), political parties' decision-making processes that do not involve 35% of women in the decision-making body can be invalidated by a statutory body. It should be pointed out that with the exception of cases of violation of national security and non-compliance with the annual reporting requirement, the 2005 Party Law of the CAR does not provide for the dissolution of a political party in the case of violation of the Constitution or any other internal democracy requirement.<sup>362</sup>

In Senegal, in addition to the obligation to abide by the principles of democracy, national sovereignty and unity, article 4 of the Constitution explicitly provides that political parties are required 'to strictly observe the rules of associative good governance' or else face sanctions that may lead to their suspension and dissolution. Article 2 of the 1981 Party Law reiterates political parties' obligation to conform to the Constitution, as well as the principles of national sovereignty and democracy. Political parties will be subjected to dissolution in case of non-compliance with the above-

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<sup>360</sup> Law 16.004 of 24 November 2016 establishing parity between men and women in the Central African Republic.

<sup>361</sup> Article 8(2) of Law 16.004 of 24 November 2016 establishing parity between men and women in the Central African Republic.

<sup>362</sup> Articles 50, 51 and 52 of Ordinance 05.007 of 2 June 2005 on political parties and the statute of the opposition in the Central African Republic.

mentioned obligations.<sup>363</sup> However, it should be pointed out that the 1981 Party Law<sup>364</sup> does not specify how political parties are expected to comply with the principles of national sovereignty and democracy. Requirements for internal party democracy therefore exist, but there is no specific guidance or threshold pertaining to their enforcement. Senegal has also opted for the promotion of internal party democracy through equal gender representation. As in the CAR, in 2007, the Senegalese parliament amended the electoral code<sup>365</sup>, in order to require all political parties to introduce gender parity during legislative elections. However, referring to article 1 of the Constitution, which enshrines equality before the law for all citizens irrespective of race, sex or religion, the Senegalese Constitutional Council in its judgment 97/2007,<sup>366</sup> found the new law to be unconstitutional, since it would lead to gender discrimination and violated the principle of citizens' equal access to power. Following the Constitutional Council ruling, article 7 of the Constitution was amended to enshrine the country's commitment to gender equality. Article 7 of the Senegalese Constitution consequently provides that 'All human beings are equal before the law. Men and Women have equal rights. The law promotes the equal access of women and men to the mandates and functions. Subsequently, in 2010, Senegal adopted a Gender Parity Law, which requires absolute gender parity in electoral lists for all elected or partly elected institutions.<sup>367</sup> In this instance, Senegalese lawmakers amended the Constitution to ensure that political parties comply with basic principles such as gender equality. Although the modalities for implementing internal party democracy are not clearly spelt out, it can be said that in Senegal, both the constitutional designers and lawmakers have made provision for the enforcement of internal party democracy. Internal democracy requirements relate specifically to compliance with democratic principles in the party, as well as equal gender representation. Moreover, relevant sanctions are explicitly provided for by the Constitution and other national legislation.

In South Africa, the constitution does not include specific provisions pertaining to political parties' behaviour and internal affairs. However, the Electoral Commission Act of 1996 provides for the condition of registration of political parties (sections 15-

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<sup>363</sup> Article 4 of the Law of 12 October 1989 amending the 1981 Party Law.

<sup>364</sup> Amended by Law of 12 October 1989.

<sup>365</sup> Law 23/2007 of 27 March 2007 amending article L 146 of the Electoral Code.

<sup>366</sup> Decision 97/2007 of the Constitutional Council – Case 1/C/2007.

<sup>367</sup> Law 2010-11 of 28 May 2010 (articles 1 & 2).

17). In this regard, the Act requires political parties to have a deed of foundation that ‘has been adopted at a meeting of, and has been signed by the prescribed number of persons who are qualified voters’ (section 15(3)). It is argued that by imposing registration conditions on political parties before they participate in elections, the 1996 Electoral Commission Act regulates political parties’ internal affairs, since it has an impact on the freedom of political parties in South Africa.<sup>368</sup> The Act however does not make any reference to internal party democracy. It does not impose a gender or regional representation quota, nor does it specify the modalities of leadership elections or appointment within a party. In short, internal party democracy in South Africa is regulated neither by the Constitution nor by legislation. It is worth noting that this does not imply that party members have no other options for ensuring that their rights are protected by any court. For instance, section 34 of the Constitution allows everyone to have any dispute resolved by the application of law in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum. Moreover, section 38 allows anyone acting as a member of, or in the interest of, a group or class of persons to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened. This implies that in order to ensure that their rights are enforced within the party, and using section 38 of the Constitution, party members are able to claim that their political rights enshrined in the Bill of Rights have been infringed. Even though sections 34 and 38 do not primarily intend to regulate internal party democracy, they can be used by party members to ensure that political parties observe democratic principles in their functioning. The *Ramakatsa* case of 2012 provides an example of the existing constitutional protection of political parties in South Africa. In this case, the appellants brought their claim before the Constitutional Court in terms of section 38 since their constitutional right to participate in the activities of their party (as per section 19 of the Constitution) had been violated. With the *Ramakatsa* case in 2012, the South African Constitutional Court issued a key judgment considered to be critical to internal party democracy in South Africa.<sup>369</sup> In the *Ramakatsa* case, the Constitutional Court ruled that the constitutions of political parties must be consistent with section 19 of the Constitution that provides for the right to form and participate in the activities of political parties.<sup>370</sup> Referring to South Africa’s history

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<sup>368</sup> De Vos (n 354) 47.

<sup>369</sup> *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC).

<sup>370</sup> The appellants, members of the ANC and voters resident in the Free State Province, requested the

of discrimination, the Court held that the purpose of section 19 was to prevent the ‘denial of political rights to citizens of the country from ever happening again’. The Court further emphasised that ‘success for political parties in elections lies in the policies they adopt and put forward as a plan for addressing challenges and problems facing communities. In other words, and as De Vos argues, with this judgment, the Constitutional Court expressed support for internal party democracy as a mechanism to ensure political participation of party members and citizens in line with section 19(1)(b) of the Constitution. However, the Court did not explicitly recommend the adoption of legislation (namely party law) in order to ensure that political parties comply with section 19(1)(b) of the Constitution.

The Constitutional Court confirmed its position in 2017, in the case of *United Democratic Movement v Speaker of the National Assembly and Others*,<sup>371</sup> in which it ruled that:

the electorate is at times entitled to know how their representatives carry out even some of their most sensitive obligations, such as passing a motion of no confidence. They are not supposed to always operate under the cover of secrecy. Considerations of transparency and openness sometimes demand a display of courage and the resoluteness to boldly advance the best interests of those they represent no matter the consequences, including the risk of dismissal for non-compliance with the party’s instructions.

In this instance, the Constitutional Court unanimously held that the Speaker of the National Assembly had the constitutional power to prescribe that voting in a motion of no confidence in the President of the Republic of South Africa be conducted by secret ballot, even though this process might be against the party’s interests. In other words, the Court held that by opting for the secret ballot process, the interest of the people should prevail over the interest of the party. Based on the *Ramakatsa* case, De Vos opines that the South African judiciary remains reluctant to intervene in political parties’ internal affairs, giving them the discretion to entrench democratic principles in their respective constitutions and enforce them accordingly. Moreover, since the Constitutional Court did not explicitly recommend the adoption of a specific party law

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annulment of an ANC Free State provincial conference, as well as its deliberations, due to a number of irregularities that took place before the ANC provincial conference.

<sup>371</sup> *United Democratic Movement v Speaker of the National Assembly and Others* 2017 ZACC 21 para 80.

that would ensure that political parties enforce internal party democracy, De Vos contends that the Court is rather inclined to review the compliance of political parties' constitutions against the Bill of Rights.<sup>372</sup> This raises the issue of 'political question doctrine' in which judges choose to refrain from ruling on issues due to their political nature. Based on the principle of separation of power, the political question doctrine revolves around the premise that certain questions of constitutional law should be referred to the discretion of elected branches of the government for resolution.<sup>373</sup> The above-mentioned court decisions seem to suggest that the South African judiciary consider the issue of the regulation of political parties' internal affairs as a non-justiciable issue, which is in line with the political question doctrine. Although it has ruled on issues relating to political parties, the South African judiciary has not recommended the enactment of a party law which would regulate political parties' behaviour and activities. Even though the South African judiciary has not explicitly adopted the political question doctrine, it is argued that such mechanism could be useful to address issues of proliferation of cases brought to the courts, which threaten to discredit the role of courts in a democracy.<sup>374</sup> On the other hand, such approach could contradict the terms of sections 34 and 38 which allow people to seek redress through the courts. People's human rights could be jeopardised if, based on the political question doctrine, the judiciary refrained from ruling on issues relating to the Bill of Rights (e.g. section 19).

Overall, it can be noted that the theory of internal party democracy is multi-faceted. Internal party democracy primarily aims to foster citizens' democratic participation in the internal affairs of a political party. It is the epitome of citizens' basic right to political participation at the level of a political party. Scarrow described this phenomenon as a 'virtuous circle' that contributes to the stability and legitimacy of modern democracies. The prescription of gender representation in the CAR and good governance in Senegal are clear indications of constitutional designers and lawmakers'

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<sup>372</sup> De Vos (n 354) 55.

<sup>373</sup> MO, Mhango, 'Separation of powers and the political question doctrine in South Africa : a comparative analysis' *PhD thesis, University of South Africa* 2018 at 13 (on file with author).

<sup>374</sup> Mhango (n 373) 44.

willingness to foster inclusive political participation in which all party members are given the opportunity to participate in decision-making processes.<sup>375</sup> However, in this regard, critics have highlighted that internal democratic processes in political parties might also be at risk of empowering a relatively small and unrepresentative group of citizens to make decisions that will be of national importance.<sup>376</sup> This is because political parties can also be used as instruments for the elites to capture power, influence the legislative and executive branches and control the administrative functions of the state bureaucracy.<sup>377</sup> Equally, questions may arise regarding the effectiveness of constitutional and legal regulation if these are not supported by monitoring mechanisms and possible sanctions. In the CAR, for instance, the constitutional requirement of gender representation relies solely on the effectiveness of the National Observatory – a statutory body that is not recognised by the Constitution. This may suggest that in reality the constitutional provisions on internal party democracy could be rendered purely aspirational as long as political parties are not held accountable for their obligations. Another issue that may arise is the absence of clear constitutional or legal regulation on internal party democracy, as in South Africa. In this regard, De Vos contends that in order to ensure that political parties fully conform to constitutional provisions on citizens’ right to political participation (i.e. at party and national levels), the adoption of a party law might be necessary. The author argues that the duty rests with the legislature to adopt a party law and guide political parties, *inter alia*, on internal democracy as opposed to the judiciary.<sup>378</sup>

#### **4.4 Party constitutionalisation and the role of political parties in elections**

##### **4.4.1 Political parties and citizens’ electoral rights**

It is widely accepted that political parties play a key role in modern democracies. Political parties are voluntary entities in which people share commonly understood values, interests and attitudes with a view to accessing power and implementing their policies and programmes for the development and welfare of society. In order to access power, political parties will prepare and select candidates for elections and support

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<sup>375</sup> Scarrow (n 309) 6.

<sup>376</sup> See O’Regan (n 345).

<sup>377</sup> International Institute for Democracy and Electoral Assistance (n 14) 43.

<sup>378</sup> De Vos (n 354) 55.

them into positions of leadership and government.<sup>379</sup> Elections therefore constitute a means that translates the free expression of the will of the electors into representative government.<sup>380</sup> Political parties, elections and electoral systems are therefore closely interrelated. This is because elections are contested by political parties, political organisations and individuals (independent candidates), and electoral systems are therefore crucial to political parties' prospect of accessing power after the election.<sup>381</sup> While it is each country's sovereign right to choose how to conduct its elections, countries have also subscribed to international and regional standards and instruments that protect and promote the electoral rights of their citizens, and these have subsequent implications for the electoral rights of political parties. For instance, at global level, the ICCPR commits its state parties to comply with the civil and political rights of individuals, including their electoral rights. Similarly, at regional level, the AU has developed the ACDEG, which seeks to promote adherence by state parties to the universal values and principles of democracy and respect for human rights based on the supremacy of the constitution and constitutional order. In line with their international and regional obligations, countries therefore adopt constitutional and legal frameworks that provide for the free and equitable participation of individuals and political parties in elections. Such frameworks generally provide for the conduct of elections and electoral campaigns, and regulate the country's party system, as well as bodies and mechanisms monitoring elections and resolving electoral disputes. The overarching role of such constitutional and legal rules is to ensure that in terms of elections, citizens and political parties enjoy equal treatment and participation in their countries' public affairs.

#### **4.4.2 Constitutional and legal regulation of political parties' electoral rights in the three countries**

##### **4.4.2.1 The role and participation of political parties in elections in the three countries**

In CAR, the preamble of the 2016 Constitution explicitly recognises that universal suffrage is the only source of legitimacy of political power. The preamble also proclaims the country's full adherence to international and regional instruments, including the ACDEG. Article 26 of the Constitution provides that institutions that are

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<sup>379</sup> International Institute for Democracy and Electoral Assistance (n 307) 82.

<sup>380</sup> International Institute for Democracy and Electoral Assistance (n 307) 214.

<sup>381</sup> International Institute for Democracy and Electoral Assistance (n 14) 57.

responsible for running the state derive their powers from the people by means of elections, through direct or indirect universal suffrage. Article 30 sets the voting age and enshrines citizens' right to vote. As regards the link between political parties and the electoral process in CAR, the Constitution states that 'political parties and political groups contribute to the expression of suffrage' (article 31). Furthermore, article 67 of the Constitution stipulates that a law determines the number of members of the National Assembly and senators, as well as the electoral system of the National Assembly and the Senate. The CAR Constitution therefore enshrines citizens' electoral rights in general terms, recognises political parties' role in the electoral process, and provides for legislation to regulate the modalities of the electoral system of the country. In addition to the Constitution, the CAR Electoral Code of 2015 provides that any citizen can be a candidate in the presidential<sup>382</sup> and parliamentary<sup>383</sup> elections. Article 52 of the Electoral Code specifically provides that any legally constituted political party, or any independent person wishing to participate in legislative elections, is required to submit a declaration of candidacy. In 1999, in the *Koudoufara* case,<sup>384</sup> the CAR Constitutional Court confirmed this approach by ruling that a case of floor-crossing did not provide a legal basis allowing the Court to unilaterally dismiss a parliamentarian who had been regularly elected to the National Assembly.<sup>385</sup> In this instance, the Constitutional Court invoked article 18 of the Universal Declaration, which provides for freedom of thought, conscience and religion, as well as article 20, which states that no one may be compelled to belong to an association. It should be pointed out that despite the Constitutional Court ruling in the *Koudoufara* case, when a new electoral code was adopted in the CAR in 2011, it provided that any parliamentarian who had been elected under the banner of a political party or a political association would be considered as having resigned from the National Assembly if he or she left his or her party.<sup>386</sup> The CAR lawmakers evidently intended to prohibit floor-crossing and its

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<sup>382</sup> Article 108 – Law 13-003 of 13 November 2013 amended by Law 15-005 of 8 December 2015 on the Electoral Code of the Central African Republic (adopted specifically for the consultations and general elections held after the CAR transition period in 2015).

<sup>383</sup> Article 150 – Law 13-003 of 13 November 2013 amended by Law 15-005 of 8 December 2015 on the Electoral Code of the Central African Republic (adopted specifically for the consultations and general elections held after the CAR transition period in 2015).

<sup>384</sup> Decision 002/CCP of 24 February 1999 of the CAR Constitutional Court.

<sup>385</sup> The plaintiff, leader of the Parti Social Démocrate (PSD), called on the Constitutional Court to dismiss Mr Koudoufara as an MP, since he had decided to join the ruling party, giving it a majority by one seat in the National Assembly.

<sup>386</sup> Article 193 – Law 13-003 of 13 November 2013 on the Electoral Code of the Central African Republic.

impact on citizens' electoral choice. The Code appeared to privilege citizens' vote regardless of intra-party differences by providing that parliamentarians who were excluded from their respective political party would retain their seats in the National Assembly.<sup>387</sup> In sum, it can be concluded that in the CAR political party membership is not a prerequisite for participating in elections and holding a seat in parliament. In other words, the constitutionalisation of political parties is not exclusively correlated to the fulfilment of citizens' electoral rights in CAR. While the Constitution states that political parties contribute to the expression of suffrage, they are not the only channels for expressing citizens' political choice in the CAR and independent candidates are equally accepted.

In Senegal, article 4 of the Constitution<sup>388</sup> recognises that political parties and coalitions of political parties contribute to the expression of suffrage under the conditions laid down by the Constitution and the law. The Constitution further emphasises that political parties contribute to training citizens and to promoting their participation in national life and in the management of public affairs. In addition, article 4 of the Constitution guarantees independent candidates' participation in all types of elections. As in CAR, although the civic contribution of political parties is enshrined in the Constitution, Senegalese citizens are equally authorised by the Constitution to stand in any elections as independent candidates, in other words without adhering to any political party. However, article 60 of the Constitution makes provision for party discipline in the sense that all parliamentarian who resign from their parties during a legislative period will automatically lose their parliamentary seats.

In South Africa, chapter one of the Constitution sets out the 'founding provisions', and recognises 'universal adult suffrage, a national common voters roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness.' In addition, the Bill of Rights entrenches citizens' right to make free political choices, including forming a political party; to participate in free, fair and regular elections for any legislative body established in terms of the

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<sup>387</sup> Article 193 – Law 13-003 of 13 November 2013 on the Electoral Code of the Central African Republic.

<sup>388</sup> Constitutional Law No. 2016-10 of 5 April 2016 on the Revision of the Constitution.

Constitution; to stand for public office and, if elected, to hold office.<sup>389</sup> The Constitution enshrines the functions of the Electoral Commission as the primary body responsible for managing elections of national, provincial and municipal legislative bodies in accordance with national legislation and ensure, *inter alia*, that elections are free and fair in the country.<sup>390</sup> Even though the South African Constitution does not regulate the role of political parties in the country's electoral process, it appears that political parties play a crucial role in the national electoral process. This is because South Africa has adopted a party-list proportional representation system (PR).<sup>391</sup> In other words, unlike in the CAR and Senegal, South African citizens do not vote for individual candidates, they vote for a list presented by a political party. Each party will get a number of seats in parliament in direct proportion to the number of votes it obtains in the election. Moreover, it should be pointed out that South Africa implements a 'closed' list PR system, which means that it is the party that establishes the list and sets the order of candidates. Voters do not have the possibility of intervening and indicating any candidate preference in the party. It is argued that the adoption of such a system in South Africa was based on the country's history of discrimination and human rights violation. A comparative analysis of the CAR and Senegalese 'majoritarian' systems with the list PR system may shed some light on the impact of political parties' electoral role on constitutionalism.

#### **4.4.2.2 Political parties and electoral systems in the three countries**

The electoral systems of the CAR and Senegal are significantly influenced by the French electoral system. Like France, both countries have adopted a two-round 'majoritarian' electoral system for their presidential elections.<sup>392</sup> The two-round majoritarian system means that when a candidate has not obtained an absolute majority of votes (namely more than 50% of votes) in the first round, the two candidates with most votes then proceed to a second round. In practice, with the two-round system, despite the existence of small political parties, most of them are unlikely to win elections and access power, since the system favours parties with the majority of votes. The constitutional rights of small political parties to participate in public affairs and be

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<sup>389</sup> Section 19(1)-(3).

<sup>390</sup> Section 190 of the 1996 Constitution of South Africa.

<sup>391</sup> Sections 46(1)(d) and 105(1)(d) of the 1996 Constitution of South Africa.

<sup>392</sup> Constitutional Law 2016-10 of 5 April 2016 on the Revision of the Constitution (articles 26 and 59).

represented in parliament may be jeopardised if they have little chance of winning elections. The choice of an electoral system will be essential in ensuring that political parties' activities and role are promoted in a constitutional democracy. The choice of a particular electoral system is expected to ensure that a country's various ideologies, interests and concerns are represented in parliament.<sup>393</sup>

In Senegal, the 'majoritarian' system has probably contributed to the dominance of the ruling party, PS, for four decades.<sup>394</sup> Between 1981 – when multi-partyism was finally authorised – and 2000, the PS won all presidential elections in the first round with an absolute majority. The opposition was not sufficiently strong to curtail the ruling party's domination. In 2000, with the support of other opposition parties, Abdoulaye Wade's PDS finally won the presidential elections during the second round of presidential elections. Similarly, in 2012, Abdoulaye Wade lost the presidential elections to his former prime minister, Macky Sall, with the support of a heterogeneous coalition of political parties. In the case of Senegal, it can be noted that even though the two-round 'majoritarian' system does not favour small political parties that have little prospect of accessing power, these can play a key role by forming a coalition and supporting major parties to win elections. In other words, it appears that for small political parties to realise their constitutional rights in a 'majoritarian' system, they have to form strategic alliances with major parties with a view to sharing power. This may lead to the phenomenon of 'satellite parties', where the ruling party rallies and controls several small parties, which actually have little power. In such circumstances, it may be argued that the constitutionalisation of political parties does not protect small political parties from major parties' supremacy and control.

The pivotal role of small parties in a 'majoritarian' electoral system was confirmed during the 2016 CAR presidential elections. Independent candidate Faustin-Archange Touadera was elected President of the Republic with the support of a coalition of political parties and other independent candidates. The coalition was formed during the run-up to the second round of the election. The election of the CAR president therefore relied on a group of small parties and independent candidates. This situation reflected

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<sup>393</sup> International Institute for Democracy and Electoral Assistance (n 14) 57.

<sup>394</sup> The Socialist Party ruled Senegal from 1960 to 2000.

the absence of strong political parties and the fragmentation of political parties in CAR. Once again, the impromptu creation of party coalitions in the context of elections demonstrated the limits of the country's electoral system and the need for adopting appropriate electoral laws and systems. In this context, citizens' rights to make free political choices may be affected by political parties' electoral strategies and alliances. In sum, the implementation of the constitutional rights and duties of political parties can be affected by electoral considerations. The fact that the 'majoritarian' system in the CAR and Senegal has led to 'opportunistic' coalition formation in order to win elections has shown the limits of such an electoral system.

Finally, as mentioned earlier, South Africa has adopted a party-list PR electoral system. The closed party-list PR system is regarded as an inclusive and fair electoral system where most members of a diverse society would be represented. Such a system is expected ultimately to lead to a strong sense of ownership across the population.<sup>395</sup> Indeed, following the 2014 general election, a number of small political parties won seats in the South African parliament.<sup>396</sup> However, it should be noted that the implementation of the party-list PR system has yet to promote political alternation in South Africa. The ANC's predominance in parliament for the past two decades has shown the limits of the PR list system. Ultimately, the subsistence of party dominance may constitute an impediment to South African citizens' right to make free political choices as proclaimed in the South African Bill of Rights.

Based on the experience of electoral systems in the three selected countries, it should be pointed out that party constitutionalisation is indeed essential to ensure the protection of political parties' status in a constitutional democracy and promote constitutionalism. However, the appropriate choice and implementation of electoral systems is equally important, since these are expected to guarantee inclusiveness, fair representation and political stability.<sup>397</sup>

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<sup>395</sup> J February 'Could a change in SA's electoral system be the missing link needed for greater accountability in government?' <https://issafrica.org/iss-today/why-south-africas-electoral-system-needs-to-be-reviewed> (accessed 6 August 2018).

<sup>396</sup> The Pan-Africanist Congress and the African Peoples' Convention won one seat each and Agang South African won two seats.

<sup>397</sup> International Institute for Democracy and Electoral Assistance (n 14) 58.

#### 4.4.3 Party constitutionalisation and citizens' electoral rights

The Constitutions of the CAR, Senegal and South Africa enshrine citizens' rights to vote and to be elected through free and fair elections. The Constitutions equally proclaim the right to form political parties in a multiparty and democratic system. However, it appears that the roles assigned to political parties in the national electoral processes differ from one country to another. Although political parties are considered 'agents of democratic participation and representation'<sup>398</sup> in the sense that they represent citizens' views and choices in modern democracies, they are not citizens' only means of expressing their political choices in the CAR and Senegal. The newly amended article 4 of the 2001 Senegalese Constitution<sup>399</sup> explicitly enshrines the right of independent candidates to stand in any elections. Similarly, article 52 of the CAR Electoral Code of 2015 provides for independent candidatures to any elections. As mentioned earlier, both countries use a 'majoritarian' electoral system for their presidential and legislative elections.<sup>400</sup> South Africa, by contrast, uses a party-list PR system, which revolves exclusively around political parties, meaning that citizens can only express their political choices through political parties.

If the overarching aim of party constitutionalisation is to ensure that citizens' representation and their participation in public affairs are reinforced, it can be argued that the predominant role that political parties play in the electoral process is legitimate. However, the CAR and Senegal have opted for, and constitutionalised in the case of Senegal, an electoral system that allows citizens to express their political choices outside political parties. In these two countries, party constitutionalisation does not imply party indispensability in the electoral processes. For instance, in 2016, during the CAR presidential elections, even though long-standing political parties presented their candidates, an independent candidate was elected.<sup>401</sup> The recognition of independent candidates is in line with the ACDEG, which refers to 'contesting parties and candidates' in its article 17(3). In South Africa, by contrast, even though the Constitution does not explicitly make reference to political parties' role in elections,

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<sup>398</sup> van Biezen (n 8) 190.

<sup>399</sup> Constitutional Law 2016-10 of 5 April 2016 on the Revision of the Constitution.

<sup>400</sup> Although Senegal uses a list PR system for part of its legislative election and for its high councillors elections.

<sup>401</sup> Standing as independent candidate, Faustin-Archange Touadera was elected president of CAR in 2016.

the closed-list PR system adopted by the country ultimately gives them a crucial role. The fact that such a system offers limited options for citizens' intervention may constitute a threat to transparency and accountability, especially in the context of a dominant party.<sup>402</sup> It is argued that if citizens are unable to choose the candidates for whom they vote, this will create disengagement between voters and their elected representatives, and the latter will become less accountable to the voters. The critical role played by political parties in the South African electoral system seems to suggest that the model of party constitutionalisation may not reflect the actual role played by political parties in the constitutional order. The constitutional provisions on political parties in South Africa are not prescriptive; the country has not adopted a party law and the Constitutional Court has so far not explicitly recommended the adoption of such legislation. Moreover, it appears that political parties play a central role in South African elections. While the dominant party receives the majority of state funding, neither it nor any other party is required to disclose the source of any private funding that it receives. This gives South African political parties a significant degree of freedom to operate with little or no control.

A notable common denominator shared by CAR, Senegal and South Africa, despite the dichotomy between their electoral systems, is the role played by the judiciary. In the CAR and Senegal, the Constitutional Court and Constitutional Council respectively monitor the regularity of national elections and validate the final election results. In CAR and Senegal electoral disputes are resolved by the Constitutional Court. In South Africa, although the Electoral Court oversees the conduct of elections, the Constitutional Court may decide on the constitutionality of electoral matters. This implies that in the absence of appropriate laws and mechanisms to protect the rights of citizens and political parties to participate freely in public affairs, an independent judiciary will act as safeguard, ensuring that the constitutional provisions pertaining to political parties are enforced, hence promoting constitutionalism.

#### **4.4.4 Gaps and challenges in party constitutionalisation in the three countries**

The issue of party funding is highly sensitive and may pose various challenges. For instance, as mentioned above, private sources of funding are critical to political parties

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<sup>402</sup> The dominant party, the ANC, has ruled South Africa since the 1994 elections; it therefore holds the majority of seats in the National Assembly and in most provincial legislatures.

that do not have access to public funding. Private funding enables small parties to promote their programmes and participate in elections. However, it is argued that private donors may be reluctant to fund small parties, which appear to have little chance of winning elections and accessing power.<sup>403</sup> Such a situation may lead to a situation in which small political parties are supported by neither the state nor private donors. The enforcement of the constitutional rights of all political parties to operate freely and participate in elections would therefore be compromised. Another aspect that may constitute a challenge to the operations of political parties is the funding of a political party by its leader. It is argued that although the funding of political parties by the leadership represents a valid alternative to public and private funding, internal party democracy might be affected, since the leader cum major funder is likely to hold a dominant position in the party, which could potentially reduce the prospect for internal democratic processes. Firstly, the party may become over-reliant on the funding of its leader and indebted to him or her. This could therefore curtail any opposing and alternative views within the party. Secondly, there is a danger that the party leader will use his or her dominant position in the party to impose his or her views, regardless of the party's interests. Finally, it is argued that unregulated party funding may lead to cases of 'involuntary donations', where political parties (for example ruling parties) would exert pressure on businesses to support their activities.<sup>404</sup>

While analysing the provisions of the constitutions of study, it appeared that although political parties are expected to promote accountability, openness and citizens' participation in public affairs, their role in local governments is seldom covered by the constitutions of the three countries. In South Africa, for instance, the role of political parties in local governments is raised with regard to their fair representation within the Municipal Council. In the context of appointments made in the Municipal Council, section 157 (6) requires that a national legislation establish a system that allows parties and interests to be fairly represented. Similarly, section 160 (8) (a) provides for the fair participation of parties and interests in the Council's proceedings. In Senegal, constitutional provisions related to political parties (article 4) do not make reference to local authorities. Article 102, which provides for the statutes of local authorities, merely

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<sup>403</sup> International Institute for Democracy and Electoral Assistance (n 312) 45.

<sup>404</sup> International Institute for Democracy and Electoral Assistance (n 312) 45.

recognizes their role as an elected body in the implementation of specific regional policies. The Senegalese Constitution does not provide for the role that political parties could play within local governments. Finally, in the CAR, articles 128 and 129, which provide for the role of local authorities do not refer to political parties. It may be concluded that with the exception of the South African Constitution which, provides for a fair representation and participation of political parties in local governments, there is no link between party constitutionalisation and municipal governance in the CAR and Senegal. This may be due to the fact that the CAR and Senegalese constitutions provide for the rights and protection of political parties and independent candidates alike. A special emphasis on the role of political parties in local governments could constitute a discrimination against independent members of municipal bodies. In both countries, the constitutions enshrine political parties from a national perspective, including through the promotion of national sovereignty, respect for human rights and democratic principles.

In terms of internal party democracy, in contrast to the German Party Law, which specifically regulates party registration, candidate selection and leadership elections, the constitutional and legal rules pertaining to internal party democracy in the three countries examined do not provide such regulation. The Senegalese Constitution, for instance, requires political parties ‘to strictly observe the rules of associative good governance’ or face sanctions that may lead to their suspension and dissolution. However, a definition of the rules of associative good governance is not provided. This may suggest that the Minister of the Interior may exercise his or her own discretion to decide whether a political party complies with the ‘rules of associative good governance’ or not. This may give rise to questions on the Minister of the Interior’s willingness to recognise the ruling party’s non-compliance with the rules of associative good governance. Equally, opposition parties may be at risk of suspension or dissolution, should the Minister of the Interior rule that they do not comply with internal party democracy rules.

Similarly, it is worth noting that there is a need for adopting the measures and mechanisms for implementing legislation pertaining to intra-party democracy. For

instance, in the CAR, although a Parity Law<sup>405</sup> was adopted and promulgated by the president in 2016, an implementing decree has not yet been adopted.<sup>406</sup> This makes the CAR Parity Law unenforceable, and therefore, in reality, political parties' decision-making processes are still not required to involve 35% of women and political parties are still not required to comply with gender parity in CAR.

Another challenge with party constitutionalisation and citizens' electoral rights is the protection of public interest against party interest. The relationship between political parties and electoral systems revolves around the principle that political parties promote citizens' participation in public affairs, while the electoral systems aim to ensure fair representation of citizens' ideologies, aspirations and concerns. For instance, as an electoral system, the PR system is reputed to enable more equitable representation of the proportion of the votes cast. The PR system leads to the PR of groups from diverse ideologies and backgrounds (both minority and majority parties) in the legislature, hence ensuring better representation of small parties in decision-making bodies. However, the challenge with the closed PR list system – as it is implemented in South Africa – is that it could potentially weaken the relationship between citizens and their elected representatives. Since parliamentarians owe their position to the senior party leadership, they may be inclined to be more accountable to their party than to their constituencies. With the closed PR list system and the potential disconnection between citizens and political parties, the risk is that party interests may prevail over public interest. This would defeat the conception of democracy as a 'government of the people, by the people, for the people'. In this regard, it is worth noting that in 2017, in the case of *United Democratic Movement v Speaker of the National Assembly and Others*,<sup>407</sup> the South African Constitutional Court reaffirmed the principle that parliamentarians were 'required to swear or affirm faithfulness to the Republic and obedience to the Constitution and laws' and that 'nowhere does the supreme law provide for them to swear allegiance to their political parties, important players though they are in [the] constitutional scheme'.<sup>408</sup> Overall, the case of *United Democratic Movement v Speaker*

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<sup>405</sup> Law 16.004 of 2016 establishing parity between men and women in the Central African Republic.

<sup>406</sup> See S Martin-White 'Centrafrique: la loi sur la parité hommes-femmes, toujours pas de décret d'application' <http://www.lanouvellecetrafricainfo/2018/03/13/centrafrique-loi-sur-la-parite-hommes-femmes-toujours-pas-de-decret-dapplication/> (accessed 6 August 2018).

<sup>407</sup> *United Democratic Movement v Speaker of the National Assembly and Others* 2017 ZACC 21.

<sup>408</sup> *United Democratic Movement v Speaker of the National Assembly and Others* 2017 ZACC 21, para 79.

*of the National Assembly and Others* raised the fundamental question about the primary loyalty of members of parliament. It begged the question of whether members of parliament should be primarily loyal to their party or to the people and the Constitution. Considering that politicians are mere ‘representatives’ of citizens, since they are supposed to enable citizens to exercise their rights to participate in public affairs, it is expected that members of parliament will be primarily loyal to the Constitution. This approach is in line with the concept of constitutionalism, which requires all stakeholders, including governments and political parties, to operate within constitutional limitations.<sup>409</sup> The case of *United Democratic Movement v Speaker of the National Assembly and Others* is also evidence of the role of constitutional courts as guardians of the constitutional rights of citizens to participate in public affairs in the context of party constitutionalisation. The next chapter intends to scrutinise this aspect and make recommendations on developing an effective framework for party constitutionalisation.

#### **4.5 Conclusion**

This chapter investigated the extent and impact of constitutional and legal regulation on the rights and duties of political parties in the CAR, Senegal and South Africa. In doing this, the study focused on critical areas that characterise political parties’ *raison d’être*, namely the funding of political parties, the internal democracy of political parties and the participation of political parties in electoral processes. Comparative analysis was carried out to identify the characteristics of the modes of operation of political parties in CAR, Senegal and South Africa, and identify respective differences and common denominators, as well as gaps and challenges.

Another important aspect considered in this chapter is how the constitutional and legal regulations of political parties in the three countries have influenced the promotion of constitutionalism in the three countries. In this regard, it was observed that the entrenchment of political parties in national constitutions did not imply that political parties were the only vehicles for citizens’ participation in public affairs. Political parties are critical assets to modern democracies, but in the case of the CAR and Senegal – pursuant to the constitutional principles of freedom of thought and freedom

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<sup>409</sup> Fombad (n 19) 415.

of association – national constitutions equally provided for citizens’ engagement in public affairs without resorting to political parties. Such an approach may mitigate the effects of dominant parties in modern democracies.

The chapter found that equal funding of political parties in the three countries remains a challenge. With the exception of South, Africa where public funding is established although it benefits mostly the dominant party, state funding of political parties in the CAR and Senegal is still at the ‘semantic’ stage, even though the Senegalese Constitution explicitly provides for such a resource. This raises the issue of ‘semantic constitutions’ that are not enforced in practice and consequently jeopardise the prospect of constitutionalism.

The theory of internal democracy as a means of promoting democratic principles in society has been scrutinised. The chapter found that in practice, the South African constitutional designers and lawmakers have opted for a non-prescriptive approach concerning the internal affairs of political parties. Currently, the South African Constitutional Court seems to be the last recourse for ensuring that all actors – including in political parties’ internal operations – abide by the founding provisions of the Constitution. In contrast, internal democracy requirements of political parties are explicitly enshrined in the CAR and Senegalese constitutions, although the enforcement mechanisms are yet to be established.

Acknowledging that the constitutionalisation of political parties does not necessarily imply that all activities and behaviours of political parties are based on the constitution and monitored by constitutionally recognised bodies, the judiciary through its progressive case law is highlighted as essential in ensuring that political parties ultimately conform to the supreme law of the land, hence fostering the promotion of constitutionalism. The next chapter will attempt to make recommendations on a framework to achieve effective party constitutionalisation.

## Chapter 5

### Developing a framework for effective party constitutionalisation

#### 5.1 Introduction

#### 5.2 Party constitutionalisation and the promotion of constitutionalism

#### 5.3 Towards a sustainable framework for party constitutionalisation

#### 5.4 Constitutionalisation of mechanisms of transparency and accountability for better implementation of party constitutionalisation

#### 5.5 Constitutionalisation of key principles to promote party constitutionalisation

#### 5.6 Role of international and regional human rights mechanisms in promoting constitutionalism and party constitutionalisation

#### 5.7 Role of civil society as advocate of constitutionalism and rule of law

#### 5.8 Conclusion

### 5.1 Introduction

Chapters three and four of this thesis examined the phenomenon of party constitutionalisation in the CAR, Senegal and South Africa, from the emergence of party constitutionalisation to the advent of multiparty systems in the three countries. The thesis examined the position that the three countries respectively gave to political parties in the process of democratisation and how this influenced constitutionalism. Because of the critical role that political parties play in allowing citizens' participation in public affairs, political parties are specifically entrenched in national constitutions. In some cases, this is complemented by specific party laws and other implementing statutory instruments. Political parties are therefore key components of the constitutional order in modern democracies, including in the CAR, Senegal and South Africa.

While reviewing key areas that are emblematic to the fundamental role of political parties in modern democracies, namely the financing of political parties, internal democracy rules of political parties and the role of political parties in elections, the

thesis found that, at various levels, the process of implementing party constitutionalisation remains a challenge in CAR, Senegal and South Africa. The entrenchment of political parties in national constitutions does not necessarily imply that their constitutional rights and obligations are fulfilled and that government authorities, as primary enforcer of the constitution, ensure that appropriate and enabling instruments and mechanisms are in place in this regard. In practice, it was found that the scope and nature of party constitutionalisation is key to the concretisation of the rights and duties of political parties. In other words, a weak constitutional framework would not be able to prevent the negative aspects of dominant party systems, which include electoral fraud, intimidation of political parties, as well the lack of political alternation. A weak constitutional framework will consequently affect citizens' right to political freedom and their right to choose their leaders in a genuine multiparty system where all political parties can freely operate and compete for power. It was contended that the non-implementation of political parties' rights and obligations would jeopardise the prospects of promoting constitutionalism, which requires that the letter and spirit of the constitutions be respected.

This chapter will therefore advance a normative framework for effective party constitutionalisation that not only protects and promotes the rights of political parties, but also ensures that political parties' obligations are uniformly implemented. This is intended to mitigate the potential negative effects of party dominance or a party-centred democracy, where political parties' actions and behaviours are not adequately regulated, which would ultimately constitute a challenge to citizens' free and fair participation in public affairs.

In light of the lessons drawn from the various experiences of party constitutionalisation in CAR, Senegal and South Africa, this chapter will first conduct a critical review of the current trend of party constitutionalisation and constitutionalism. It highlights the rights-based approach to party constitutionalisation through which national constitutions give all political parties active, free and meaningful participation in the country's socioeconomic and political affairs, without discrimination. This occurs through specific constitutional provisions recognising political parties' right to be formed and to carry out political activities freely and without discrimination. Based on the general trends of parties' constitutional regulation, it distinguishes between

prescriptive interventions and permissive interventions, which both aim to foster the contribution that political parties make to modern democracies. In an attempt to suggest a sustainable normative framework for effective party constitutionalisation, the chapter places emphasis on the role of an independent judiciary in ensuring the protection of the constitutional rights and obligations of political parties. It suggests the constitutionalisation of independent accountability institutions, which will monitor and promote the implementation of national constitutions and review the existing international and regional framework supporting democracy and constitutionalism. In addition, in light of the challenges observed in the CAR, Senegal and South Africa, the chapter suggests the entrenchment of constitutional safeguards, which promote the key principles and fundamental rights of political parties. These include political parties' right to participate in free, fair and regular elections and to access state funding, as well as the duty of intra-party democracy. The chapter finally recognises the contribution of CSOs in fostering accountability and transparency in constitutional democracies.

## **5.2 Party constitutionalisation and the promotion of constitutionalism**

### **5.2.1 Purpose and scope of party constitutionalisation**

The phenomenon of party constitutionalisation legitimises political parties as critical agents in the political landscape and acknowledges them as an important element of the power structure.<sup>410</sup> Borz contends that direct recognition of political parties legally validates parties' roles and activities.<sup>411</sup> It institutionalises the relationship between voters and party representatives in parliament. Finally, as political parties are entrenched in the supreme law of the land, this ultimately makes their position more stable and less prone to change in comparison with an ordinary law. It is argued that the relationship between party constitutionalisation and constitutionalism is closely related to the evolution of the concept of constitutionalism. While Sartori posited that constitutionalism aimed to impose restrictions on the arbitrary power of the state,<sup>412</sup> Borz contented that the contemporary concept of constitutionalism goes beyond the premise of limiting the exercise of political power to place the emphasis on the

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<sup>410</sup> Borz (n 102) 5.

<sup>411</sup> Borz (n 102) 5.

<sup>412</sup> Sartori (76) 853. See also MJC Vile *Constitutionalism and the separation of powers* (1998) 8. Cited in M Tushnet 'Progressive constitutionalism: What is it?' (2011) 72 at 1073

protection of the rights of citizens and the promotion of accountability. Since modern democracies are mostly indirect democracies where citizens elect representatives to take socio-political initiatives on their behalf, political parties are included in national constitutions as ‘agents’ or representatives of the citizens.<sup>413</sup> In this context, constitutions recognise political parties as institutions that reflect citizens’ various interests, concerns<sup>414</sup> and aspirations. In sum, it can be said that the overarching purpose of party constitutionalisation is to promote citizens’ human right to participate in their country’s public affairs. Moreover, based on Sartori’s definition of constitutionalism, states and other duty-bearers are held accountable for ensuring full compliance with this fundamental human right.

Considering the experiences of party constitutionalisation in the CAR, Senegal and South Africa as analysed in the previous chapters, the countries’ rationale for party constitutionalisation seems to be based on the same premise. The three countries’ constitutions enshrine citizens’ rights to access, without discrimination, the exercise of political power at all levels. The CAR, Senegal and South Africa are also parties to international and regional human rights instruments that outline the different aspects of citizens’ participation as a fundamental human right. Questions may arise about the scope and possible limitations of party constitutionalisation. While it is true that constitutions generally prohibit all actions – including those of political parties – that aim to infringe on the constitutional order and rule of law, it is important to ascertain whether, in the name of citizens’ right to political participation, all political parties are given constitutional status in the three countries.

There are examples of constitutional rights of political parties being given precedence over other constitutional provisions. In Germany, for instance, despite the country’s stringent constitutional and legal provisions regarding political parties, the Constitutional Court rejected a ban on a far-right and ultranationalist political party, even though it recognised that the party’s aims violated the Constitution.<sup>415</sup> In this case,

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<sup>413</sup> Borz (n 102) 3.

<sup>414</sup> International Institute for Democracy and Electoral Assistance (n 307) 82.

<sup>415</sup> *BVerfG, Judgment of the Second Senate of 17 January 2017 - 2 BvB 1/13 - Rn. (1-1010)*.

The Court found that despite its racist views, the National Democratic Party was too weak to succeed in replacing the existing constitutional order and endangering democracy.

<http://www.businessinsider.com/german-national-democratic-party-ban-rejected-2017-1> (accessed 14 September 2017).

the German Constitutional Court privileged both citizens' human right to freedom of expression and the constitutional rights of political parties, even though the visions of the political party concerned were found to be unconstitutional.

In the CAR, Senegal and South Africa it appears that party constitutionalisation is also closely linked to the promotion of Borz' concept of constitutionalism, which involves citizens' rights to political participation and freedom of expression through political parties. For instance in Senegal, although the 2016 constitutional amendment prohibits political parties from identifying with race, ethnic groups or religion, and the 1989 Party Law (article 4) explicitly provides for respect for the republican, secular and democratic state, the country has registered political parties that are linked to religious brotherhoods and directed by religious leaders.<sup>416</sup> Based on the selected countries' experiences, it can be concluded that if party constitutionalisation is a neutral exercise, its impact is not neutral as regards the promotion of constitutionalism. Because constitutionalism implies that citizen's representatives are recognised and protected by national constitutions, party constitutionalisation provides legitimacy and protection to political parties that may otherwise be banned for their undemocratic and unconstitutional aims.

### **5.2.2 Party constitutionalisation: prescriptive or permissive regulation**

The previous chapters also established that the existence (or non-existence) of constitutional and legal regulation of political parties affects the status and operations of political parties. This is because party regulation, especially party constitutionalisation, implies positive and negative intervention of the state in political parties' affairs. Using Janda's<sup>417</sup> party regulation models, it appears that the trend of party constitutionalisation in CAR, Senegal and South Africa can be divided into two specific models, namely the promotion model, which aims to encourage the formation and activities of political parties, and the prescription model, which prescribes and prohibits certain behaviours and operations of political parties. From this perspective, party constitutionalisation therefore entails both positive and negative interventions in political parties' affairs. In this regard, Janda argues that party constitutionalisation is

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<sup>416</sup> The Mouvement de la réforme pour le développement social is led by Imam Mbaye Niang, and the Parti de la Vérité pour le Développement is led by the founder of the Mouride brotherhood (Sufi order).

<sup>417</sup> Janda (n 32) 8.

the most durable and authoritative method of regulation<sup>418</sup> of political parties. The model of party constitutionalisation will consequently have an impact on the promotion of constitutionalism, since political parties will be performing based on how closely national constitutions will regulate them. In other words, the more prescriptive and protective party constitutionalisation might be, the less freedom political parties are likely to enjoy. In this context, the prospects for constitutionalism will be reinforced as long as the prescriptive model of party constitutionalisation leads to the advancement in practice of citizens' free and fair participation in public affairs. The relationship between party constitutionalisation and the promotion of constitutionalism revolves around the issue of the appropriate degree of political parties' regulation, which balances the protection of political parties' rights on the one hand, while fostering political parties' obligations on the other hand. Literally, the question is how free political parties should be to promote constitutionalism.

In South Africa, for instance, the model of party constitutionalisation seems to be non-prescriptive. There is limited constitutional regulation of state party funding, and no regulation of private funding of political parties, party formation or intra-party democracy. In the context of one-party dominance where party constitutionalisation may be used as a shield for protecting the rights of opposition and minority parties against the supremacy of the dominant party, a non-prescriptive method of party constitutionalisation may jeopardise the promotion of multiparty democracy and affect the entrenchment of constitutionalism. For instance, the regulation of private sources of party funding would contribute to mitigating any risk of political corruption and patronage, as witnessed in recent years in South Africa.<sup>419</sup> Similarly, a form of regulation of intra-party democracy would promote intra-party opposition and possibly prevent democratic centralism in which political parties can suppress or punish internal opposition forces that challenge the party leadership.<sup>420</sup>

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<sup>418</sup> Janda (n 32) 14.

<sup>419</sup> The Gupta family who owned a wide range of businesses in South Africa was reported to have access to state contracts and exert undue influence on both the presidency and the ruling party, the ANC. During the ANC's fifth national policy conference in June 2017, President Jacob Zuma called on the ANC to "cleanse itself" of "corruption, social distance, factionalism (and) abuse of power" (<https://citizen.co.za/news/south-africa/1556729/live-report-2017-anc-national-policy-conference/>) (accessed 21 September 2017).

<sup>420</sup> For instance in August 2017, President Jacob Zuma and his allies called for disciplinary action to be taken against ANC MPs who supported a vote of no confidence in him.

Although there are no international standards or evidence-based analysis calling for compulsory constitutional or legal regulation of political parties, it could be argued that the risk of promoting party interests – as opposed to voters’ interests – might be mitigated should there be clear party constitutional or legal regulation from the outset. Similarly, in Senegal, it is also argued that the permissive regulation pertaining to party formation has promoted party fragmentation that is a proliferation of minor political parties.<sup>421</sup> This phenomenon has subsequently affected the credibility of political parties among citizens and reinforced the power of the ruling parties. Hartmann<sup>422</sup> argues that it is not in the interest of strong executive powers to build up a strong government party. They would rather rely on small parties and networks so that political parties lose influence within the political system as well as in the decision-making process. Hartmann therefore highlights the limitations of party constitutionalisation and its beneficial effects in managing state-society relations in Senegal.<sup>423</sup> In this regard, as opined by Janda, a more prescriptive model of party constitutionalisation would deter the creation of political parties and control the development of parties that are created.<sup>424</sup> In other words, it could be said that the model of party constitutionalisation – whether prescriptive or permissive – will shape a country’s political landscape, including dominant parties and strong opposition parties, and will ultimately promote political alternation, the rule of law and constitutionalism. In sum, one of the major lessons that can be drawn from the previous chapters is that the model of party constitutionalisation is a key component that determines citizens’ free and meaningful participation in public affairs and it is the implementation (or not) of such a model that will enhance the prospect of constitutionalism. Most importantly, the scope and extent of the entrenchment of constitutional principles and enabling institutions will be essential in ensuring the promotion and protection of a constitutional democracy.

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<sup>421</sup> In 2016, the Senegalese Interior Ministry officially registered 276 political parties. Senegal is said to have one of the highest number of political parties in the world. ([https://www.seneneews.com/actualites/contribution-chronique/276-partis-et-mouvements-politiques-au-senegal-trop-cest-trop-par-serigne-babacar-dieng\\_176399.html](https://www.seneneews.com/actualites/contribution-chronique/276-partis-et-mouvements-politiques-au-senegal-trop-cest-trop-par-serigne-babacar-dieng_176399.html)) (accessed 28 July 2018).

<sup>422</sup> Hartmann (n 60) 782.

<sup>423</sup> Hartmann (n 60) 782.

<sup>424</sup> Janda (n 32) 23.

### 5.3 Towards a sustainable framework for party constitutionalisation

Based on the experiences of party constitutionalisation in the three selected countries, it appears that there remain many challenges in the implementation of the constitutional rights and obligations of all political parties in these countries. While it is true that the wave of democratisation recorded in most African countries in the 1990s – including in the CAR, Senegal and South Africa – has led to constitutional recognition of multiparty democracy and respect for the rule of law, it should be pointed out that the actual implementation of party constitutionalisation is still facing challenges, jeopardising the prospect of constitutionalism.

The previous chapters have established that the main obstacles to the implementation of party constitutionalisation include issues of non-enforcement of existing regulations, lack of regulation, and lack of mechanisms and institutions for ensuring enforcement and full compliance with existing regulations. It therefore becomes necessary to suggest a framework for effective party constitutionalisation in order to promote constitutionalism. The first aspect is to highlight the crucial role of an independent judiciary in ensuring the enforcement of the constitutional rights and duties of political parties.<sup>425</sup> The second aspect will place emphasis on the existence of constitutionally recognised institutions that will be responsible for the implementation of constitutional provisions, including those pertaining to political parties. The third element to be highlighted will be the necessity of entrenching key principles and rights in national constitutions with a view to ensure that all political parties are treated fairly and equally and that they are accountable and transparent.

#### 5.3.1 Need for an independent judiciary

As established in the previous chapters, the concept of modern constitutionalism rests on different core elements<sup>426</sup> including the existence of an independent judiciary. In this regard, an independent judiciary is expected to protect the constitutional rights and

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<sup>425</sup> See *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC); also see *United Democratic Movement v Speaker of the National Assembly and Others* 2017 ZACC 21, para 80.

<sup>426</sup> See Henkin (n 81) 11. Henkin identified nine essential elements to constitutionalism, namely: 1. Government according to the constitution; 2. Separation of powers; 3. Popular sovereignty and democratic government; 4. Constitutional review; 5. An independent judiciary; 6. Controlling the police; 7. Civilian control of the military; 8. Individual rights; 9. Suspension and derogation. Also see Fombad (n 19) 416.

duties of all political parties regardless of whether they are majority or minority parties. Although reactive, the judicial role remains a critical actor in the promotion of party constitutionalisation and the entrenchment of constitutionalism. The experiences in CAR, Senegal and South Africa have demonstrated the crucial role played by judges in protecting the rights of political parties but also in ensuring that political parties fulfil their own constitutional duties. This is in line with the concept of constitutionalism, which requires both governments and citizens (including political parties that are their representatives) to operate within the limitations of the constitution and to be held accountable.

Fombad<sup>427</sup> suggests that it is essential to entrench judicial independence in the constitution. An independent judiciary is necessary to protect judges from possible interference with the functioning of the courts by the executive or any other organ of the state. In this context, independent judges should be able to render justice on all issues of substantial legal and constitutional importance fairly and impartially without undue influence or fear of reprisal.<sup>428</sup> This would include matters related to the constitutional rights and duties of political parties.

The constitutions in the CAR, Senegal and South Africa provide for separation of powers and judicial independence.<sup>429</sup> However the South African model of judiciary independence differs from the CAR and Senegalese models, which are both influenced by the French model of judicial independence. For instance, article 109 of the CAR Constitution of 2016 provides that the ‘President of the Republic is the guardian of the independence of the judiciary’<sup>430</sup>; this provision is the exact duplication of article 64 the French Constitution of 1958. It is argued that this provision may imply that the judiciary is subordinate to the President of the Republic.<sup>431</sup> Similarly, article 90 of the 2001 Senegalese Constitution provides that on the advice of the Higher Judicial Council, the President of the Republic appoints magistrates other than those of the Constitutional Council and the Court of Accounts. This provision is similar to the

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<sup>427</sup> Fombad (n 36) 15.

<sup>428</sup> Fombad (n 36) 15.

<sup>429</sup> See articles 107-110 of the 2016 CAR Constitution; see article 88 of the 2001 Senegalese Constitution; also see section 165 of the 1996 South African Constitution.

<sup>430</sup> Article 64 of the French Constitution of 1958

<sup>431</sup> C Fombad ‘Some perspectives on the prospects for judicial independence in post-1990 African constitutions’ (2012) *The Denning Journal* at 24.

French model, where the President of the Republic appoints, promotes and dismisses magistrates on the advice of the Higher Judicial Council. In the CAR and Senegal, although the Constitution provides that the Higher Judicial Council is responsible for matters related to magistrates' careers and independence, the composition and functioning of the Higher Judicial Council are regulated by organic laws.<sup>432</sup> In this instance, the judiciary is more vulnerable to partisan influence, since its functioning and composition are not directly protected by the Constitution. It could be argued that without constitutional provisions, members of parliament who are also party members might not be inclined to pass laws that will allow independent judges to review the internal affairs of political parties or seek to reinforce opposition parties that may ultimately threaten their dominant position.

### 5.3.2 Party constitutionalisation and the scope of constitutional review

The scope of and access to constitutional review are essential aspects that will enhance the prospect of constitutional justice and determine the scope for protecting the constitutional rights and duties of political parties. Concerning their model of constitutional adjudication, it can be noted that the CAR and Senegal have both adopted a model of constitutional review influenced by the French Fifth Republic Constitution, which primarily gives the Constitutional Council the power to review the constitutionality of statutes and settle constitutional disputes. For instance, in the CAR, the Constitutional Court is responsible for reviewing the constitutionality of laws and regulations (before and after promulgation, both *a priori* and *a posteriori*)<sup>433</sup> and it also has extensive powers in electoral matters as well as in matters related to constitutional reviews<sup>434</sup>. In addition to key individuals in the executive and legislative powers (including the President of the Republic and the President of the National Assembly), the CAR Constitution of 2016<sup>435</sup> provides that any person may directly or indirectly (from any other court) challenge the constitutionality of laws before the Constitutional Court. Similarly, in Senegal, the Constitution provides that the Constitutional Council decides on the constitutionality of laws (*a posteriori*) and international treaties, as well as in electoral matters<sup>436</sup>. However, unlike in the CAR, the list of those who are eligible

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<sup>432</sup> Article 109 of the 2016 CAR Constitution.

<sup>433</sup> Article 95 of the 2016 CAR Constitution.

<sup>434</sup> Article 95 of the 2016 CAR Constitution.

<sup>435</sup> Articles 97 and 98 of the 2016 CAR Constitution.

<sup>436</sup> Article 92 of the 2001 Senegalese Constitution.

(*locus standi*) to take matters before the Constitutional Council is limited to a group of key political figures, namely the President of the Republic and a certain quorum of members of parliament<sup>437</sup>. In other words, ordinary citizens cannot directly or indirectly refer matters to the Constitutional Council in Senegal. In the CAR and Senegal, the current frameworks of constitutional review, because of the restrictive rules for accessing the constitutional courts, make it impossible for ordinary litigants (including opposition political parties) to refer any matter pertaining to the rights and duties of political parties to a constitutional judge. In the CAR, any person willing to refer political party related matters to the Constitutional Court may do so on electoral grounds or in order to review the constitutionality of laws, while in Senegal, only a few selected members of the executive and legislative powers may challenge the constitutionality of laws before the Constitutional Council. In sum, the model of constitutional review in the CAR and Senegal and its restrictive access rules (*locus standi*) imply that matters related to the constitutional rights of political parties are unlikely to be brought before constitutional judges. This is because those who are in power and actually have *locus standi* to seize the constitutional judges, namely the President of the Republic and members of parliament, may not be inclined to do so, if the constitutional judges' decisions are likely to infringe their interests and ultimately jeopardise their dominant position. This approach is in line with the 'political insurance theory'<sup>438</sup>, which entails that stronger political parties are less attracted to an effective and independent constitutional review system than weaker political parties.

A proposed framework for constitutional review to achieve effective implementation of the constitutional rights and duties of political parties may be inspired by the South African model, which encompasses a relatively extensive scope for judicial review by the Constitutional Court.

As opposed to the restrictive CAR and Senegalese Constitutional Council model, the South African Constitution of 1996 recognises public interest litigation, which allows individuals or groups to refer a matter to the Constitutional Court without needing to

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<sup>437</sup> Article 74 of the 2001 Senegalese Constitution.

<sup>438</sup> C Fombad 'An overview of contemporary models of constitutional review in Africa' in C Fombad (ed) *Constitutional adjudication in Africa* (2017) 41.

prove that they have any personal interest in the matter.<sup>439</sup> Indeed, section 167(6) of the 1996 Constitution provides that national legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice, to bring a matter directly to the Constitutional Court or to appeal directly to the Constitutional Court from any other court. This constitutional provision means that in contrast to the Senegalese model of constitutional review, the South African Constitutional Court may be seized by ‘a person in the interest of justice’ for matters related to interpretation, protection and enforcement of constitutional provisions, including those concerning political parties. In practice, South African political parties have regularly been involved in litigation before the Constitutional Court regarding matters of public interest. For instance, in the case of *Economic Freedom Fighters and Others v Speaker of the National Assembly and Another*;<sup>440</sup> opposition parties sought the Constitutional Court’s opinion on the remedial action taken by the Public Protector against former President Zuma. In this case, the Court found that the remedial action against President Zuma was binding and his failure to comply with it was inconsistent with the Constitution and invalid. The Court also found that the resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector was inconsistent with the Constitution and should be set aside. Similarly, in the case of *United Democratic Movement v Speaker of the National Assembly and Others*,<sup>441</sup> the Constitutional Court held that the Speaker of the National Assembly had the power to prescribe that a motion of no confidence in the President be conducted by secret ballot under appropriate circumstances.<sup>442</sup> Based on the foregoing, it can be argued that political parties’ direct access to the Constitutional Court is essential in promoting the rule of law, accountability and compliance with the constitution. More than mere private associations, political parties contribute to the development of case laws pertaining to human rights, constitutionalism, good governance and the rule of law.

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<sup>439</sup> Fombad (n 438) 41.

<sup>440</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11

<sup>441</sup> *United Democratic Movement v Speaker of the National Assembly and Others* 2017 ZACC 21 para 80.

<sup>442</sup> In this case, opposition parties argued that in the absence of secret ballot vote, members of the National Assembly would not be able to vote according to their individual conscience without undue influence or intimidation.

However, there have been criticisms regarding the reality of direct access to the South African Constitutional Court.<sup>443</sup> Fowkes notes that in practice ‘it is usually preferable that important constitutional matters are first thoroughly ventilated in other courts’, before they are reviewed by the Constitutional Court.<sup>444</sup> Be that as it may, in line with the norm in common law systems,<sup>445</sup> the South African Constitution provides for individuals to raise constitutional complaints before the Constitutional Court. In addition, as in CAR, the South African Constitution provides for an abstract review of constitutionality (*a priori* and *posteriori*), which allows members of the legislature to challenge the constitutionality of an act of parliament before the Constitutional Court.<sup>446</sup> In comparison, the South African framework of constitutional review seems to confer more powers on the Constitutional Court, therefore enhancing the prospects of constitutional justice.

A framework in which independent constitutional judges have significant latitude in interpreting and protecting constitutional provisions is expected to be more conducive to the effective implementation of party rights and the entrenchment of constitutionalism. Ultimately, as pointed out in the previous chapters, since the constitution is considered a ‘living document’<sup>447</sup> that reflects changing realities, with a view to protect the democratic order and promote constitutionalism, the judge is equally expected to adapt to the changing realities and revitalise the provisions of the constitution. Judges can therefore play a crucial role in fostering the rights and duties of political parties.

## **5.4 Constitutionalisation of mechanisms of transparency and accountability for better implementation of political parties’ constitutional rights and duties**

### **5.4.1 Constitutionalisation of electoral management mechanisms**

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<sup>443</sup> J Fowkes (2017), ‘Constitutional review in South Africa: Features, changes, and controversies’ in C Fombad *Constitutional adjudication in Africa* (2017) 170.

<sup>444</sup> Fowkes (n 443) 170.

<sup>445</sup> Fombad (438) 33.

<sup>446</sup> See section 80(2) of the 1996 South African Constitution regarding members of members of parliament and section 122 (2)(a) regarding members if the provincial legislative council.

<sup>447</sup> C Fombad ‘Some perspectives on durability and change under modern African constitutions’ (2013) *Oxford University Press & New York University School of Law* at 385.

As citizens' representatives, political parties join citizens' various interests and propose a socio-economic programme accordingly. Because political parties aim to be in power in order to implement their programmes, they prepare and select candidates<sup>448</sup> and participate in democratic elections. National constitutions enshrine the rights of political parties to participate in elections. The organisation and management of elections are entrusted to independent accountability institutions, namely EMBs, which are supposed to ensure that the electoral process is conducted fairly and impartially. The EMBs are also known as 'hybrid independent institutions of accountability', which are enshrined in the constitution and whose role is to investigate and hold governments accountable for their actions or inaction.<sup>449</sup> Concerning political parties in particular, a framework for effective party constitutionalisation should provide for the protection of political parties' participation in elections through constitutionally recognised EMBs. Even though there is no international framework on electoral management with which states are required to comply,<sup>450</sup> at regional level, the ACDEG requires state parties to establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.<sup>451</sup>

In South Africa, chapter nine of the 1996 Constitution provides that the IEC – the national electoral management body – must be independent, and subject only to the Constitution and the law. According to the Constitution, the IEC must be impartial and must exercise its power and perform its duties without fear, favour or prejudice. The IEC is one of the six institutions enshrined in chapter nine of the South African Constitution that aim to support constitutional democracy and perform their constitutional duties with independence, impartiality, and dignity. These institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly on an annual basis.<sup>452</sup> The Constitution also requires other organs of the state to assist and protect these institutions in carrying

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<sup>448</sup> International Institute for Democracy and Electoral Assistance (n 299) 82.

<sup>449</sup> C Fombad 'The role of emerging hybrid institutions of accountability in the separation of powers scheme in Africa' in C Fombad (ed) *Separation of powers in African constitutionalism* (2016) 326.

<sup>450</sup> International Institute for Democracy and Electoral Assistance (n 307) 101.

<sup>451</sup> Article 17 (1) and (2) of the ACDEG provides that State Parties shall:

- (1) 'Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
- (2) Establish and strengthen national mechanisms that redress election related disputes in a timely manner.'

<sup>452</sup> Section 181 (5) of the 1996 South African Constitution.

out their duties. By contrast, in Senegal, the Independent National Electoral Commission is not enshrined in the Constitution and is only provided for by the law. Article 35 of the Constitution merely mentions the role of a National Commission as being in charge of vote counting, which is regulated by an organic law. In the CAR, article 143 of the Constitution provides for a National Elections Authority, an independent body that supervises the national electoral process. However, the Constitution provides that the organisation and functioning of the National Elections Authority is regulated by the law.<sup>453</sup> Hence, even though the CAR Constitution makes reference to a National Elections Authority, the fact that the Constitution remains vague on the modalities for protecting its independence makes it vulnerable to pressure and undue influence. The effective enforcement of the constitutional rights and duties of political parties should be supported by accompanying mechanisms equally recognised by the constitution.

The advantage of constitutional protection of EMBs is the understanding that such critical bodies for the functioning of modern democracies will be protected better against pressure or manipulation by politicians. For instance, the existence of the EMBs could be seen as an alternative to the restrictive rules for accessing Constitutional Courts, as citizens may be able to approach such institutions and bring matters relating to the infringement of their individual rights before them. With constitutionally protected EMBs all political parties are expected to enjoy equal treatment during elections and electoral disputes can be resolved impartially and without fear. This is in line with the concept of constitutionalism, which entails accountability and transparency for all parties, including decision makers. In South Africa, constitutional protection of the IEC has allowed the Constitutional Court to make major judgements protecting the IEC's constitutional rights and consequently those of political parties. For instance, in the case of *New National Party of South Africa v Government of the Republic of South Africa*,<sup>454</sup> the Constitutional Court ruled that the establishment of the Commission and the other institutions under chapter nine of the Constitution was a product of a new constitutionalism, with 'important implications for other organs of

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<sup>453</sup> Article 145 of the 2016 CAR Constitution.

<sup>454</sup> *New National Party of South Africa v Government of the Republic of South Africa & Others* 1999(3) SA 191.

state who must understand and recognise their respective roles in the new constitutional arrangement.’ The Constitutional Court recognised a constitutional obligation on state organs to assist and protect the Commission in order to ensure its independence, impartiality, dignity and effectiveness. In addition, the Court pointed out that the IEC was required to be financially and administratively independent. In sum, the South African model that consists of constitutionalising state institutions could be used as a framework to make the constitutionalisation of political parties effective and entrench constitutionalism. It gives effect to citizens’ right to participate in public affairs, prevents corruption and protects the constitutional order.

#### **5.4.2 Constitutionalisation of other accountability institutions**

In addition to the constitutionalisation of election monitoring bodies, which have a direct impact on the constitutional rights and duties of political parties, the existence of other accountability institutions in the democratic order may also promote constitutionalism and strengthen the effective role of political parties in modern democracies. In this regard, the 2016 CAR Constitution enshrines key institutions, which aim to support the democratic order. In addition to the National Elections Authority, these include the High Council of Communication and the High Authority for Good Governance.<sup>455</sup> As regards the latter, article 147 of the Constitution provides that it must be independent from political parties, associations and any pressure group. Its mandate is to ensure equal regional representation in state institutions, prevent partisan interests, protect the rights of minorities and disabled persons and ensure gender parity. It should be pointed out that the Senegalese Constitution does not provide for such institutions.

In South Africa, as mentioned above, chapter nine of the 1996 South African Constitution provides for ‘State Institutions Supporting Constitutional Democracy’.<sup>456</sup> Section 181 of the Constitution explicitly provides a list of six institutions that are supposed to strengthen South African constitutional democracy. Although both the CAR and South African constitutions make provision for independent accountability institutions, it should be noted that the South African model of constitutional regulation of accountability institutions seems to be more conducive to enhancing constitutional

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<sup>455</sup> Titles XII, XIII and XIV of the 2016 CAR Constitution.

<sup>456</sup> Chapter 9 of the 1996 South African Constitution.

democracy and therefore protect citizens' political rights. For instance, articles 148 and 149 of the 2016 CAR Constitution, which provide for the mandate of the High Authority for Good Governance, only refer to its prerogatives in general terms. The Constitution therefore stipulates that the High Authority for Good Governance ensures that the management of public affairs is free from family, clan and partisan influences. It also states that the High Authority is mandated to guarantee the protection of national assets and ensure transparency in the exploitation and management of natural resources. However, the CAR Constitution does not make any specific reference to the forms of regulatory functions that the High Authority is expected to undertake in order to fulfil its mandate. By contrast, the South African Constitution is more specific regarding the functions of the country's independent institutions. For instance, the South African Constitution provides that the Public Protector is mandated to investigate, report on and take appropriate remedial action on matters related to maladministration, unjustifiable exercise of power or prejudice. Equally, the South African Human Rights Commission has the power to investigate and to report on the observance of human rights. It must require state organs to report on measures that they have taken to realise citizens' basic human rights.<sup>457</sup> Moreover, concerning citizens' right to bring matters before these institutions, while section 181(4) of the South African Constitution provides that the Public Protector is accessible to all persons and communities, the CAR Constitution does not specify who may refer matters to its independent institutions. Hence it can be said that the constitutional regulation of the CAR hybrid institutions has not provided sufficient power to prevent misappropriation of national assets, maladministration and human rights violations. In contrast, the South African constitutional provisions in chapter nine represent a stronger opportunity for political parties to hold government authorities to account and challenge potential undue influence of the executive or dominant parties. This was evidenced in the case of *Economic Freedom Fighters v Speaker of the National Assembly and Others*,<sup>458</sup> in which the parliament failed to follow the Public Protector's recommendation and ask President Zuma to refund public money spent on non-security features at his residence. Political parties and the Public

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<sup>457</sup> Section 184(2) of the 1996 South African Constitution.

<sup>458</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

Protector therefore referred the matter to the Constitutional Court, which ruled that the President's failure to comply with the remedial action taken against him by the Public Protector was a violation of his duty under section 181(3). It also found that the National Assembly equally violated section 181(3) of the Constitution by not holding the President accountable. With the constitutional protection of the Public Protector and explicit constitutional provisions relating to its functions, political parties were able to challenge the National Assembly and thus combat improper use of public funds.

Unlike in the CAR model, a framework for effective party constitutionalisation should therefore provide for clear and unequivocal constitutional protection of such independent institutions and mechanisms as a way of ensuring the effective implementation of the constitution and promotion of constitutionalism. Ideally, the institutions should be accessible to all, including citizens across the country and political parties as their representatives. Moreover, the protection of the independence of these institutions should be supported by the promotion of their financial autonomy. This would avert any risk of undue pressure from funding departments that may influence the effectiveness of these institutions. Another crucial aspect that may strengthen these institutions concerns the modalities of appointment of their members. Ideally, members of these independent institutions should not be active party members in order to avoid any conflict of interest. It is important that members of independent institutions are able to investigate matters in the national interest without being influenced by party interests. The active role of the judges is expected to foster implementation of the Constitution with a view to promoting the rights of independent institutions that support democracy and the rights and duties of political parties, as well as constitutionalism.

### **5.5 Constitutionalisation of key principles to promote party constitutionalisation**

In the light of the experience of party constitutionalisation in the CAR, Senegal and South Africa, it has become essential to enshrine key principles in national constitutions with a view to enhancing the constitutional rights and duties of political parties. The right and the opportunity to vote, which are generally recognised by constitutions, should be protected to ensure that all persons who are entitled to vote are able to exercise that right. Equally, the right to state funding of political parties, as well as the

obligation to enforce internal party democracy, should be enshrined in all national constitutions as a way of ensuring the sustainability of all political parties on the one hand and promoting intra-party accountability on the other hand.

### 5.5.1 Constitutionalising the right to vote

Constitutionalisation of the right to vote means that every citizen should have the right and the opportunity to vote in equal conditions with other citizens. In its General Comment 25<sup>459</sup>, the Human Rights Committee indicates that the right to vote can only be restricted based on objective and reasonable criteria established by law. General Comment 25 provides that exercising the right to vote effectively entails that states take positive measures to overcome specific difficulties such as illiteracy, poverty and impediment to freedom of movement, which would prevent persons entitled to vote from exercising their right effectively. The South African Constitutional Court confirmed this principle in the case of *August v Electoral Commission*,<sup>460</sup> in which it ruled that in the absence of legislation to the contrary, the Electoral Commission had no right to indirectly disenfranchise prisoners by failing to take reasonable steps to enable eligible prisoners to register and vote. The constitutionalisation of the right to vote should be complemented by the constitutional right and opportunity to be elected. The constitutional right to be elected should not be unreasonably restricted by requiring candidates to be members of parties or of specific parties.<sup>461</sup> This would enshrine citizens' right to stand as independent candidates. In this regard, while the South African Constitution recognises citizens' right to form a political party, it is silent on independent candidates to elections. However, in practice, because of the country's electoral system, namely the party-list PR system<sup>462</sup>, membership of a political party is a prerequisite for standing in elections in South Africa. It should be noted that by contrast, the CAR and Senegalese<sup>463</sup> Constitutions enshrine citizens' right to form political parties on the one hand and their right to be independent candidates in elections on the other hand. In sum, an effective framework for party constitutionalisation should recognise citizens' constitutional right to choose not to be members of any political

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<sup>459</sup> CCPR/C/21/Rev.1/Add.7, General Comment No. 25.

<sup>460</sup> *August v Electoral Commission* 1993(3) SA1(CC)17.

<sup>461</sup> CCPR/C/21/Rev.1/Add.7, General Comment 25.

<sup>462</sup> Sections 46(1)(d) and 105(1)(d) of the 1996 Constitution of South Africa.

<sup>463</sup> Article 4 of the 2001 Senegalese Constitution states: 'The Constitution ensures that independent candidates participate in all types of elections under the conditions defined by law.'

party, since the primary goal of party constitutionalisation is to foster citizens' participation in public affairs and enhance the prospect of constitutionalism.

### **5.5.2 Constitutionalising state party funding**

Political parties need access to funds in order to campaign for elections, promote their programmes and participate in the political process. It is argued that unequal access to political finance contributes to an uneven political field.<sup>464</sup> The constitutionalisation of political parties' access to state funding is therefore expected to enable political parties to compete on more equal terms and to empower political parties and their candidates so that they can reach out to the electorate and ensure their party's sustainability and pluralism. The constitutionalisation of state funding of political parties may also avert the usual risks related to money in politics, including foreign donations to political parties leading to external interference<sup>465</sup>, large private donations to garner favours, as well as abuse of public funds by incumbent parties. The criteria for accessing public funds should be fair and equitable and should not give any party an advantage or disadvantage *vis-à-vis* others. One notable eligibility criterion is to allocate public funds in proportion to the support a party has received in elections. In its section 236, the South African Constitution of 1996 provides that national legislation must provide for the funding of political parties participating in the national and provincial elections on an equitable and proportional basis. It should be noted that in practical terms, the proportional allocation of public funds to political parties has contributed to maintaining government parties in power, as seen in South Africa.<sup>466</sup> Nonetheless, the constitutionalisation of state party funding should be enforced and should not be only symbolic constitutional provisions, as seen in the CAR and Senegal in the previous chapter.

### **5.5.3 Constitutionalising intra-party democracy**

The constitutionalisation of the principle of intra-party democracy constitutes a key element of party constitutionalisation. This is because citizens' participation in public affairs should not be limited to their right to vote, but also entail their right 'to influence

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<sup>464</sup> International Institute for Democracy and Electoral Assistance ( n 304) v.

<sup>465</sup> Fombad (n 5) 7.

<sup>466</sup> In South Africa, the largest amount of public funding has continuously been allocated to the ANC for more than 20 years.

the choices that parties offer to voters.’<sup>467</sup> Although political parties have been compared with private associations, in reality they play a key role in modern constitutional democracies. They represent citizens and are part of the power structure. It is in this context that the rights and duties of political parties are recognised by national constitutions. As most national constitutions enshrine provisions pertaining to political parties’ status and roles, it is important that internal democracy be given constitutional status. This is because considering their role in the political landscape, political parties are expected to conform to democratic principles by implementing principles of accountability and transparency while running their internal affairs. It should be noted that the South African Constitution does not provide for intra-party democracy, even though the Constitutional Court has stated that the constitutions of political parties must be consistent with section 19 of the Constitution (the right to form and participate in the activities of political parties).<sup>468</sup> The constitutionalisation of the principle of intra-party democracy will enable party leaders and members to abide by principles of accountability and transparency, to ‘practice internally what they preach externally’<sup>469</sup> and ultimately give primary consideration to citizens’ interests over party interests.

## **5.6 Role of international and regional human rights mechanisms in promoting constitutionalism and party constitutionalisation**

Although it is argued that the ownership and implementation of a constitution is essentially a national issue, which relies on the principles of sovereignty and non-intervention, it is also true that in the name of international peace and security, the international and regional community may intervene to foster the entrenchment of constitutionalism.<sup>470</sup> In this regard, Borz posits that when international actors become involved in national politics, ‘constitutional independence is ceded and sovereign equality is transformed.’<sup>471</sup> Regarding party constitutionalisation in particular, Borz is of the view that party constitutionalisation is to some extent influenced by international

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<sup>467</sup> Scarrow (n 309) 3.

<sup>468</sup> *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC).

<sup>469</sup> Scarrow (n 309) 3.

<sup>470</sup> C Fombad ‘Constitutional implementation in perspective: Developing a sustainable normative constitutional implementation framework’ in C Fombad *Implementation of modern African constitutions: Challenges and prospects* (2016).

<sup>471</sup> Borz (n 102) 4.

practice and can respond to the needs of the state as well as to the pressure of national and international political actors.<sup>472</sup> The influence of external actors on constitutional practices can be divided between the international community on the one hand and regional bodies such as the AU and regional economic communities (RECs) on the other hand.

### **5.6.1 International community intervention in promoting party constitutionalisation**

As mentioned in the previous chapters, the international community has significantly influenced the process of democratisation of African countries, which occurred mainly in the early 1990s. For instance, as the Bretton Woods institutions, namely the International Monetary Fund and the World Bank, engaged with African states to adopt structural adjustment policies, their interventions had an impact on national constitutional practices. The conditions attached to loans granted by the Bretton Woods institutions entailed political reforms, including good governance and the rule of law. In this context and in addition to mounting pressure from civil society, African states had to recognise multi-partyism and gradually amended their constitutions to enshrine the rights and duties of all political parties. Equally, as members of the United Nations, African states are bound by the UN Charter obligations, which include promoting human rights and fundamental freedoms. Adherence to UN treaty-based bodies and instruments and their subsequent human rights focused obligations should foster the protection of the constitutional rights and duties of political parties and promote constitutionalism.

The rationale of international intervention in promoting party constitutionalisation is based on the premise that while each country has the sovereign right to choose how to conduct its internal affairs, by adhering to the UN Charter and various international instruments, states agree to abide by a set of obligations and commitments to protect fundamental rights and freedoms, including citizens' right to participate in their country's public affairs.<sup>473</sup> In this regard, while highlighting the internationalisation of constitutional law principles and standards, Fombad posits that no government pursuing modern constitutionalism can ignore certain basic principles, standards and values that

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<sup>472</sup> Borz (n 102) 13.

<sup>473</sup> International Institute for Democracy and Electoral Assistance (n 299) v.

are considered essential in ensuring the rule of law, constitutional democracy and good governance.<sup>474</sup> The author argues that a dysfunctional constitution that results in political instability may adversely affect not only the state concerned and its neighbours, but also the international community.<sup>475</sup> UN treaties and resolutions, as well as relating jurisprudence, therefore provide universal benchmarks for state parties to promote constitutional democracy, good governance and respect for the rule of law. From this perspective, the concept of an ‘obligations-based approach’ to international treaties has been promoted as a way of ensuring that political parties, civil society groups and ordinary citizens are able to ‘debate and apply obligations from the same perspective, nationally and internationally.’ With the obligations-based approach, the prospects for promoting party constitutionalisation will be strengthened, as all stakeholders will be able to defend their rights to participate in public affairs using international instruments that their state has committed itself to abide by. This approach is confirmed by the fact that national constitutions often make specific reference to international and regional instruments, making them constitutionally binding. For instance, the CAR Constitution of 2016 and Senegalese Constitution of 2001 explicitly reaffirm the countries’ attachment to the principles of the UN Charter of 1945, as well as those of the Universal Declaration of 1948.

In sum, by adhering to international obligations, all state parties are committed to the promotion and realisation of human rights and fundamental freedoms, which include the enforcement of citizens’ political rights. In this regard, in its resolution on ‘Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratization’<sup>476</sup>, the UN General Assembly reaffirmed that ‘citizens, without distinction of any kind, have the right and the opportunity to take part in the conduct of public affairs, directly or through freely chosen representatives, and to vote and to be elected in genuine periodic elections.’ In practical terms, although the UN treaty bodies’ concluding observations and recommendations are coercive, rather than binding, there are examples of UN treaty bodies’ jurisprudence that require African state parties to ‘treat all political parties on an equal footing and offer them equal opportunities to pursue their legitimate

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<sup>474</sup> Fombad (n 101) 1093.

<sup>475</sup> Fombad (n 101) 1093.

<sup>476</sup> General Assembly Resolution A/RES/68/164 on strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratisation on 18 December 2013.

activities.<sup>477</sup> Through a combination of the UN treaty bodies' monitoring mechanisms and civil society advocacy activities, such decisions may be used to keep state parties in check. In addition, UN treaty bodies' mechanisms often include complaint procedures<sup>478</sup> that are accessible to any individual, including political parties. Such mechanisms should be promoted to ensure effective implementation of party constitutionalisation, especially when national remedies have been exhausted.

### **5.6.2 Regional and sub-regional intervention in promoting party constitutionalisation**

African regional institutions can contribute to the effective implementation of party constitutionalisation and the promotion of constitutionalism. Under the auspices of the AU, African states have subscribed to major regional instruments and mechanisms, which protect and promote civil and political rights among its member states, and consequently regulate the rights of political parties at national level. The AU framework promoting the rule of law and good governance includes the AU Constitutive Act of 2001, which enshrines the key principles of the AU, including respect for democratic principles, human rights, the rule of law and good governance,<sup>479</sup> the ACHPR of 1981, which provides for freedom of association and citizens' right to participate freely in public affairs through chosen representatives;<sup>480</sup> the Declaration of 2000 on the framework for an OAU (AU) response to unconstitutional changes of government, in which AU state parties recognise common values and principles for democratic governance, including the adoption of democratic constitutions and the promotion of political pluralism<sup>481</sup> and the Declaration of 2002 on the principles governing democratic elections in Africa, which lays down the principles of free and fair democratic elections in Africa.<sup>482</sup> Finally, the ACDEG of 2007 recognises the supremacy of the constitution and constitutional order in the political arrangements of its state parties.<sup>483</sup>

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<sup>477</sup> See Concluding observations on the Third Periodic Report of Rwanda, Human Rights Committee (31 March 2009), UN Doc CCPR/C/RWA/CO/3 (2009); Concluding observations on initial report of Equatorial Guinea, Human Rights Committee (13 August 2004), UN Doc CCPR/CO/79/GNQ (2014).

<sup>478</sup> For instance, Human Rights Committee Complaints Procedure.

<sup>479</sup> AU Constitutive Act of 2001, article 3 (m)

<sup>480</sup> ACHPR of 1981 articles 10(1) & 13(1)

<sup>481</sup> Declaration on the framework for an OAU response to unconstitutional changes of government 2000, paras (i) & (iv).

<sup>482</sup> Declaration of 2002 on the principles governing democratic elections in Africa, para II.

<sup>483</sup> Chapter 3 of the ACDEG (2007).

The ACDEG guiding principles, set out in chapter three, recognise the supremacy of the constitution and constitutional order in the political arrangements of its state parties. Chapter three is the cornerstone of the AU's vision of constitutionalism and rule of law, since it enshrines three main topics, namely democracy, elections and governance. The major role played by political parties is highlighted in article 3(11), which requires state parties to reinforce political pluralism and recognise the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law.<sup>484</sup>

There are also sub-regional instruments, which aim to promote the rights of political parties and promote constitutionalism. It should be noted that RECs also have the potential to play an active role in the implementation of political parties' constitutional rights and duties. For instance, in West Africa, the ECOWAS adopted a Protocol on Democracy and Good Governance in 2001, which enshrined major constitutional principles, namely the separation of power, the empowerment and strengthening of parliaments and the independence of the judiciary. The ECOWAS Protocol recognises political parties' freedom of operation and guarantees the freedom of the opposition.<sup>485</sup>

In light of these regional and sub-regional provisions, it can be concluded that African states are equipped with an adequate framework to entrench the rights of political parties constitutionally. Moreover, the fact that AU bodies and national courts have given primary consideration to international and regional instruments even if they have not been incorporated in domestic law constitutes clear evidence of the key role of international and regional instruments in protecting citizens' political rights. For instance, in two separate cases,<sup>486</sup> the African Court acted as 'supra constitutional court' by invalidating constitutional and legal provisions that were in breach of AU human rights instruments, including the ACDEG and the ACHPR. Similarly, in South Africa in the *Glenister* case,<sup>487</sup> the Constitutional Court ruled that new legislation was

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<sup>484</sup> Article 3(11) of the ACDEG (2007).

<sup>485</sup> Article 1(i) of the Protocol on Democracy and Good Governance (2001).

<sup>486</sup> See *Christopher R. Mtikila and others v Republic of Tanzania*, Applications 009/2011 and 011/2011, Judgment of 14 June 2013 and *Actions pour la Protection des Droits de l'Homme v The Republic of Cote d'Ivoire*, Application 001/2014, Judgment of 18 November 2016.

<sup>487</sup> *Glenister v President of the Republic of South Africa* 2011(3) SA 347 (CC).

unconstitutional because it was not compliant with international instruments. There are nevertheless indications that some African states still fail to implement their constitutional obligations and consequently violate their citizens' right to participate in public affairs independently or through political parties. For instance, in its Report on Freedom in the World in 2016, the research institute Freedom House found that Sub-Saharan African countries suffered from democratic setbacks and violence mainly triggered by African leaders' manipulation of terms limits, which denied citizens their right to choose their leaders freely.<sup>488</sup> The organisation only 12% of the Sub-Saharan population live in countries that are deemed free. Taking this into account, it becomes important to rely on other key players such as CSOs, which can contribute to the implementation of national constitutions.

### **5.7 Role of civil society as advocate of constitutionalism and rule of law**

As seen in the previous chapters, CSOs played a key role in the struggle for democratisation and adherence to a multiparty system. In South Africa, for instance, trade unions were critical to the development of political and economic resistance. South African churches also participated in the anti-apartheid struggle. They spearheaded the transition from a racist regime to an inclusive democratic government. Similarly, in Senegal, it was only following a wave of political and social unrest led by student movements, trade unions and clandestine political parties in 1974 that the government was forced to authorise the creation of a second political party, namely the PDS.<sup>489</sup> In CAR, the ban on a multiparty system was lifted following a civil society movement, which led to the adoption of the country's first Party Law in 1991.

The contribution of CSOs to the constitutional order is also evident in their capacity to promote peoples' views and participation. CSOs therefore foster citizens' participation in public affairs and offer a platform for holding government authorities to account. In South Africa, for instance, the *IDASA* case of 2005 is clear evidence of the active role that CSOs can play in promoting the rights and duties of political parties. In this case, the IDASA took legal action against four main South African parties<sup>490</sup> in order to

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<sup>488</sup> [https://freedomhouse.org/sites/default/files/FH\\_FITW\\_Report\\_2016.pdf](https://freedomhouse.org/sites/default/files/FH_FITW_Report_2016.pdf) (accessed 16 November 2017).

<sup>489</sup> The *Parti démocratique sénégalais* was founded by Abdoulaye Wade in 1974.

<sup>490</sup> African National Congress (ANC); Democratic Alliance (DA); Inkatha Freedom Party (IFP) and African Christian Democratic party (ACDP).

compel them to disclose their sources of funding. Even though the action was unsuccessful, it enabled the organisation to challenge political parties before the Constitutional Court and trigger a debate on party funding in South Africa.

A framework for enforcing the promotion of constitutionalism should therefore take into account the active and vibrant role that CSOs can play in voicing citizens' concerns and challenging any violation of their constitutional rights, be it by state actors or political parties, especially dominant parties. CSOs can take legal action, act as *amicus curiae* in court and make use of international and regional complaint procedures once they have exhausted all domestic remedies.

## 5. 8 Conclusion

In light of contemporary debates, this chapter investigated how effective party constitutionalisation can be implemented and how constitutionalism can best be entrenched. Firstly, it acknowledged that the primary purpose of constitutionalising the rights and duties of political parties is to promote citizens' human rights to participate in their country's public affairs and foster the principle of accountability and transparency. This is in line with the concept of modern constitutionalism, which not only imposes limitations on state actors but also promotes a rights-based approach where citizens – and political parties as their representatives – have constitutional rights and duties that decision makers should protect and enforce. It also found that the model of party constitutionalisation – whether prescriptive or permissive – plays a key role in implementing the constitutional rights and duties of political parties.

It is based on this premise that the chapter put forward a suggested framework for effective party constitutionalisation, which would promote the entrenchment of constitutionalism. Firstly, it was proposed that an independent judiciary is fundamental to the implementation of the constitutional rights of political parties, since it is one of the core elements of modern constitutionalism. The chapter highlighted the necessity of entrenching judicial independence in national constitutions as in the CAR, Senegalese and South African Constitutions. Specific references to the South African constitutional provisions were made with regard to ensuring judicial independence and setting the scope of judicial review by the Constitutional Court. In sum, the chapter

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argued that a framework in which independent constitutional judges have significant latitude in interpreting and protecting constitutional provisions is expected to be more conducive to the effective implementation of party constitutionalisation.

The chapter also highlighted the need for entrenching transparency and accountability institutions in constitutions as a way of protecting them against manipulation and pressure from state actors. This primarily concerns electoral institutions, which play a crucial role in modern democracies, particularly in facilitating political alternation and solving political dispute. However, it also concerns other independent institutions, which aim to support the democratic order. Although facing some challenges, the South African constitutionalisation model was used as an example for suggesting a framework for effective implementation of constitutional provisions on political parties.

The chapter also discussed the role of international and regional human rights mechanisms in promoting constitutionalism and party constitutionalisation. In addition to the main UN frameworks, it was acknowledged that the AU framework has developed a wide range of instruments that explicitly promote constitutionalism and foster the enforcement of political parties' constitutional rights and duties. Although not necessarily binding, they should provide African states with an adequate framework to enforce party constitutionalisation and entrench constitutionalism.

Finally, the contribution of CSOs to the enforcement of the constitutional rights and duties of political parties was acknowledged. It was argued that CSOs should be active and vigilant in holding decision makers and political parties to account.

The next chapter concludes this research by bringing together all the lessons learnt and recommending practical ways to improve the implementation of party constitutionalisation.

## Chapter 6

### Conclusion

6.1 Introduction

6.2 Key findings

6.3 Recommendations

6.4 Concluding remarks

#### 6.1 Introduction

This study analysed how the phenomenon of party constitutionalisation has contributed to the entrenchment of constitutionalism in the CAR, Senegal and South Africa. Party constitutionalisation and its impact on constitutionalism are of particular relevance considering the role of political parties as indispensable institutional components of constitutional democracy systems and factors of political stability.

The concept of constitutionalism entails not only the mere adoption of fundamental principles as guiding set of rules. Indeed, it also demonstrates the commitment and readiness of a government and its subjects to respect and protect its constitution.<sup>491</sup> Party constitutionalisation means that specific provisions on political parties' status, rights and duties are enshrined in a constitution. It sets the principles to be followed by ordinary laws and therefore provides stability to the legal status of political parties.

However, it is also recognised that although constitutionalism presupposes the existence of a constitution, the constitution itself does not necessarily imply the entrenchment of constitutionalism. This may mean that the constitutionalisation of political parties does not automatically lead to the entrenchment of constitutionalism. It is in this context that this study has investigated the constitutional and legal provisions

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<sup>491</sup> Fombad (n 19) 415.

on political parties in CAR, Senegal and South Africa and their impact on the effective entrenchment of constitutionalism.

## **6.2 Key findings**

In chapter one, the role of constitutions as instruments aiming to ensure the protection of fundamental and collective rights of citizens is highlighted. For instance, the relationship between individual citizens and various communities is expected to be protected by national constitutions and laws, without the direct interference of governments. Individuals should therefore enjoy a fundamental right to form any private association within the law, without state intervention. Political parties however seem to occupy a specific position with regard to state non-interference, since even though they are just private entities, they also aim to gain access to government power, which makes them major stakeholders in the sphere of national public policy and constitutional life. The constitutionalisation of political parties therefore implicitly recognises the dual status of political parties as private entities, but also key actors in a political system. This is particularly relevant as historically, African constitutions made implicit or explicit provision for the protection of the rights of political parties (namely multi-partyism) since independence.

Chapter one suggested emphasising the actual constitutionalisation of political parties in the CAR, Senegal and South Africa and the manner in which it promotes and protects the constitutional order and the rule of law. This approach is supported by the fact that there is a lack of up-to-date information on party regulation in Africa. The chapter found that the issue of party constitutionalisation is closely linked to the changing nature of constitutionalism over time. There are various theoretical approaches to constitutionalism, which in turn have an impact on the nature and scope of party constitutionalisation. The two theoretical models guiding this study are derived from various scholars and researchers who use similar concepts and definitions to explain party constitutionalisation and constitutionalism. Firstly, there is the concept of modern constitutionalism, which requires accountability as well as powerful and effective institutional structures. Secondly, based on previous research, various models of party regulation were used to evaluate the models of party constitutionalisation in the CAR, Senegal and South Africa and their impact on constitutionalism.

Finally, before examining the phenomenon of party constitutionalisation in Africa in chapter two, chapter one set out two key reasons for carrying out this study. Firstly, the need to ascertain that the democratisation of African regimes, coupled with the constitutionalisation of African political parties, has led to the emergence of a ‘culture of constitutionalism’<sup>492</sup> in Africa. Secondly, the enforcement of the constitutional provisions pertaining to political parties in the CAR, Senegal and South Africa is considered especially in the context of the three countries’ existing institutions and processes that aim to promote the rule of law and encourage political competitiveness.

Chapter two focused on the main reasons for the constitutionalisation of political parties, as well as the actors involved in the party constitutionalisation process. Different theoretical models of party constitutionalisation were examined, including the ways in which these can be adapted to the African context. In terms of party constitutionalisation and based on previous research findings, the chapter highlighted the importance of key selected elements of constitutionalism in Africa, including the recognition and protection of fundamental rights and freedoms, the separation of powers, the existence of an independent judiciary and the control of constitutional amendments. It established that even though the existence of these core elements makes the prospects for constitutionalism more likely, the inclusion of the core elements of constitutionalism in national constitutions does not guarantee actual constitutionalism (2.2.2). Chapter two also reviewed the key international and regional instruments regulating the rights of political parties in Africa (2.3). It investigated the various AU norms, standards and instruments that aim to strengthen Africa’s political and socio-economic integration and unity, including the promotion of democracy through the rule of law and constitutional order. These include the ACHPR of 1981, the AU Constitutive Act of 2000, the Declaration of 2000 on the framework for an OAU (AU) response to unconstitutional changes of government, as well as the ACDEG of 2007. In this respect, it established that national and regional judicial organs are key actors in ensuring that African states conform to international and regional normative frameworks to which they are parties. For instance, the role of the African Court on Human and People’s Rights, which serves as a ‘supra constitutional court’, implies that it can recommend that African states review their constitutions and laws in accordance with AU

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<sup>492</sup> Fombad (n 19) 430.

instruments. The chapter traced the history of political parties and the emerging patterns of multiparty systems in Sub-Saharan Africa (2.4).

Using examples across Africa, it appeared that from the mid-1960s, the constitutionalisation of political parties in Africa implied the constitutionalisation of single-party systems, comprising one political party, otherwise known as *de jure* single-party states (2.4.2). With the constitutionalisation of a single-party system, constitutions therefore became a political instrument in the hands of the elites, enabling them to monopolise power and prohibit any other form of political opposition. Indeed, with the *jure* single-party systems, apart from the ruling party, any other political party was not allowed. In addition to the *de jure* single-party states, Africa was also marked by *de facto* one-party states, in which ruling parties kept the monopoly of power even though their status was not formally enshrined in the constitution. In this instance, the predominance of the government party still prevented any form of political competition.

The emergence of multi-partyism in Africa in the 1990s ensured the promotion of civil and political rights, such as freedom of association and freedom of expression. Equally, it was necessary to put in place mechanisms to ensure genuine implementation of multi-partyism, especially in the context of party dominance where opposition parties are weak. It was therefore submitted that the constitutionalisation of political parties could constitute a protection mechanism for reinforcing political parties' role in 'democratic consolidation'. In this respect, the dimension and focus of the constitutional regulations of political parties are expected to define the degree of efficiency of a multiparty system in a given country.

Using a functionalist comparative approach aimed only at comparing the constitutional and legal regulation of political parties in the CAR, Senegal and South Africa, chapter three delved into the historical evolution of party constitutionalisation in the three countries. Considering the countries' dissimilar colonial histories and socio-political backgrounds, the objective of this thesis was to highlight the similarities and differences in the legal framework of each country. It was submitted that the French legal framework, including the Constitution of 1958, played a crucial role in the process of party constitutionalisation in the CAR and Senegal. In the CAR and Senegal, party laws have complemented and strengthened constitutional provisions pertaining to political

parties, regardless of the democratic or undemocratic nature of the regimes (3.2.2 and 3.3.2). However, during the apartheid period in South Africa, the legal regulation of political parties played a crucial role in repressing the black majority's struggle for political change. It was also observed that the South African party constitutionalisation pattern differs from that of the CAR and Senegal in the sense that it is less specific and the rights of political parties are provided for from a human rights perspective, while the CAR and Senegal, the two Francophone countries, have party laws that regulate issues relating to political parties in more detail. Overall, based on the experience of the *de jure* single-party system in the CAR, it was noted that party constitutionalisation could lead to the constitutionalisation of just one political party. Party constitutionalisation was therefore not synonymous with the existence of a democratic regime. Equally, in Senegal party constitutionalisation did not prevent the existence of a *de facto* single-party system, with the predominance of the ruling party.

Chapter four was particularly crucial to this thesis, since by examining the current regulations of political parties, it established the level of state intervention and control over political parties in the CAR, Senegal and South Africa. Based on the foregoing, it brought to light how much actual freedom or room for manoeuvring political parties enjoyed in the three countries. The chapter determined the extent to which party constitutionalisation has led to promoting equal participation and representation of political parties in the three countries, with a view to fostering citizens' free and fair participation in public affairs.

Chapter four placed emphasis on three key areas relating to the essence of political parties in modern democracies, namely the financing of political parties, internal democracy rules of political parties and the role of political parties in elections. In this respect, this study found that in practice, equal funding of political parties in the three countries remains a challenge (4.2.1). With the exception of South Africa, where public funding is established although it mostly benefits the dominant party, state funding of political parties in the CAR and Senegal is not implemented, even though the Senegalese Constitution explicitly provides for this resource. It was noted that in South Africa, the Constitution does not include specific provisions pertaining to political parties' behaviour and internal affairs. Although the Electoral Commission Act of 1996 provides for the condition of registration of political parties, it does not make any

reference to internal party democracy. Judgments of the South African Constitutional Court relating to political parties' internal functioning seem to suggest that the Court might be the last recourse for ensuring that all actors – including political parties – conform to the founding provisions of the Constitution. By contrast, internal democracy requirements of political parties – including compliance with the principles of good governance, respect for human rights and gender equality – are explicitly enshrined in the CAR and Senegalese Constitutions, although the enforcement mechanisms are yet to be established.

As regards the link between party constitutionalisation and citizens' electoral rights, the role assigned to political parties in the national electoral processes differ from one country to another. In the CAR and Senegal, the entrenchment of political parties in national constitutions does not imply that political parties are the only vehicles for citizens' participation in public affairs (4.4.2). The electoral code of the CAR and the constitution of Senegal provide for independent candidatures in any elections. South Africa, by contrast, uses a party-list PR system, which revolves exclusively around political parties. This means that citizens can only express their political choices through political parties. It is argued that the critical role played by political parties in the South African electoral system suggests that the non-prescriptive model of party constitutionalisation does not adequately reflect the actual role played by political parties in the South African constitutional order.

Based on the experiences and practices of party constitutionalisation in the three countries, it was found that the scope and nature of party constitutionalisation are key to the concretisation of the rights and duties of political parties. In other words, a weak constitutional framework would not be able to prevent the negative aspects of party-centred democracies in which ruling parties' control and influence all branches of government, leading to intimidation of political parties, electoral fraud and lack of political alternation. In South Africa, for instance, in the absence of regulation on internal party democracy, in the *Ramakatsa* case,<sup>493</sup> the Constitutional Court ruled that the constitutions of political parties must be consistent with the South African Constitution. Although not regulated, the Court expressed support for internal party

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<sup>493</sup> *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC).

democracy by emphasising that ‘success for political parties in elections lies in the policies they adopt.’<sup>494</sup> It was therefore submitted that the violation of political parties’ rights and obligations would jeopardise the prospects of promoting constitutionalism, which requires that the letter and spirit of constitutions are respected.

This thesis finally observed that in the CAR, Senegal and South Africa, party constitutionalisation is closely linked to the promotion of Borz’s concept of constitutionalism, which revolves around citizens’ rights to political participation and freedom of expression through political parties. In other words, the primary purpose of constitutionalising the rights and duties of political parties is to promote citizens’ human rights to participate in their country’s public affairs and foster the principle of accountability and transparency. This is in line with the concept of modern constitutionalism, which not only imposes limitations on state actors, but also promotes a rights-based approach where citizens – and political parties as their representatives – have constitutional rights and duties that decision makers should protect and enforce.

The final chapter of this thesis advanced a normative framework for effective party constitutionalisation that not only protects and promotes the rights of political parties, but also ensures that political parties’ obligations are equally implemented. Firstly, it was submitted that an independent judiciary is fundamental to the implementation of the constitutional rights of political parties, since it is one of the core elements of modern constitutionalism. It was observed in the CAR and Senegal that the judiciary is more vulnerable to partisan influence, since its functioning and composition are not directly protected by the Constitutions (5.3.1). In this respect, specific references to the South African constitutional provisions were therefore made with regard to ensuring judicial independence and setting the scope of judicial review by the Constitutional Court. The need for entrenching transparency and accountability institutions in constitutions as a way of protecting political parties against manipulation and pressure from state actors was also highlighted (5.4.1). This primarily concerns electoral institutions, which play a crucial role in modern democracies, particularly in facilitating political alternation and solving political dispute. Although facing some challenges, the role of the South African institutions supporting constitutional democracy (chapter nine

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<sup>494</sup> *Ramakatsa v Magashule* 2013 (2) BCLR 202 (CC) para 66.

institutions) was used as an example for suggesting a framework for effective implementation of constitutional provisions on political parties. Chapter five also discussed the role of international and regional human rights mechanisms in promoting constitutionalism and party constitutionalisation (5.6.2). For instance, in addition to the AU Constitutive Act of 2000, the ACDEG guiding principles set out in chapter three constitute the AU's vision of constitutionalism and the rule of law, since they enshrine three main topics, namely democracy, elections and governance. More relevant to Senegal, the ECOWAS Protocol recognises political parties' freedom of operation and guarantees the freedom of the opposition. Similarly, it was acknowledged that CSOs could contribute to the enforcement of the constitutional rights and duties of political parties. Examples in Senegal and the CAR have shown that pressure from civil society has led to the adoption of multiparty systems in the two countries (5.7).

## **6.3 Recommendations**

In the light of the various issues pertaining to party constitutionalisation and promotion of constitutionalism, the study recommends a series of measures as a way to achieve effective implementation of party constitutionalisation and entrench constitutionalism in the CAR, Senegal and South Africa. These measures are: the need to consider the enactment of party law; the need to strengthen the implementation of existing laws, policies and programmes on political parties; the need to ratify and domesticate international and regional human rights instruments; the need to adopt and implement sub-regional human rights standards; the need to have a proactive judicial system; the need for citizens to access constitutional courts directly; the need to build the institutional capacity of political parties; the need to study party systems in Africa; the need to analyse the link between political parties and electoral systems further and the need to develop a comprehensive guideline on private funding of political parties.

### **6.3.1 Need to consider the enactment of laws regulating political parties**

Although there are no international and regional instruments requiring African states to enact laws regulating political parties, the central role played by political parties in constitutional democracies suggest that their status and activities are regulated to ensure that citizen's human rights to participate in their country's public affairs are adequately protected. The Constitutions of the CAR, Senegal and South Africa all recognise the

right to form political parties as part of citizens' right to make political choices. However, unlike the CAR and Senegal, South Africa has not enacted a specific law that regulates political parties' formation and dissolution, their rights and duties and internal organisation.

This study did not establish that the absence of a law regulating political parties in South Africa has led to the violation of citizen's political rights or undermined the prospect of constitutionalism in South Africa. However, the research observed the key role played by political parties in the electoral process, especially in the context of the closed party-list PR system, whereby voters can only vote for political parties as a whole without exercising any influence in the choice of party candidates who are elected. In fact, the South African Electoral Commission Act of 1996 provides for the condition of registration of political parties (sections 15-17). It may therefore be argued that by imposing registration conditions on political parties before they participate in elections, the 1996 Electoral Commission Act affects the status of political parties in South Africa.<sup>495</sup> However the Act only regulates the modalities of political parties' participation in elections. It does not provide for any other aspect of political parties' activities. Similarly, the Public Funding of Represented Political Parties Act of 1997 that was enacted to provide for the funding of political parties participating in parliament and provincial legislatures does not regulate the mode of operation of political parties in South Africa. In the absence of a law regulating political parties that would promote and protect citizens' relationship with political parties (for example internal democracy), it may be feared that political parties have wide latitude to operate based on partisan interests and not those of the people. In this context, in the *Ramakatsa* case in 2012, the South African Constitutional Court did not explicitly recommend the adoption of a law regulating political parties in order to ensure that political parties comply with Section 19 of the Bill of Rights. However, in 1999, in the case of *August v Electoral Commission*,<sup>496</sup> the Court ruled that Section 19 of the Constitution imposed a positive duty on the legislature to pass legislation to give effect to it. This may therefore suggest that the Constitutional Court supports the need for the enactment of a

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<sup>495</sup> De Vos (n 346) 47.

<sup>496</sup> *August v Electoral Commission* 1999 (3) SA 1 (CC). The Court ruled that 'the right to vote by its very nature imposes positive obligations upon the legislature and the executive'.

law regulating political parties in South Africa in order to ensure compliance with the Constitution.

The CAR and Senegal have enacted laws regulating political parties in addition to party constitutionalisation. Party laws entail practical advantages, as they provide for specific rights and obligations that are otherwise not enshrined in the constitutions. For instance, the Senegalese Party Law of 1981 explicitly provides for the dissolution of political parties where a party has received funding directly or indirectly from foreigners or foreigners established in Senegal, while the CAR Political Parties Ordinance of 2005 requires that political parties declare private donations to government authorities, including details of the donors and the nature of the donation.<sup>497</sup>

The party laws of both countries regulate the status of political parties in a holistic manner that is not only in the context of elections, such as the Electoral Commission Act of 1996 in South Africa. The CAR and Senegalese party laws enshrine the role of political parties as key players in the political system, including during elections, as legal entities as well as citizens' representatives. They include general provisions on the status and functions of political parties, the powers entrusted to them as legal entities and their rights and duties in the constitutional order. By contrast, the South African Electoral Commission Act does not make any reference to any other aspect that does not concern elections. It does not impose a gender or regional representation quota, nor does it specify the modalities of leadership elections or appointment within a party.

Although it is true that the South African Constitution does not explicitly make reference to any party law, it may be argued that the adoption of a party law can only reinforce the political rights of citizens and those of political parties in South Africa. The fact that the South African parliament has been considering a Political Party Funding Bill<sup>498</sup> is further evidence that lawmakers have recognised the need to strengthen the rights and duties of political parties in the constitutional order, especially in the area of finance.

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<sup>497</sup> Article 42 of Ordinance 05.007 of 2 June 2005 on political parties and the statute of the opposition in the Central African Republic.

<sup>498</sup> The Bill aims to provide for and regulate the public and private funding of political parties, including the prohibition of certain donations made directly to political parties, the disclosure of donations accepted and the creation of offences and penalties.

Using the model of the German party law,<sup>499</sup> which comprehensively sets out statutory guidelines for political parties' democratic structures and the funding they receive from the state, this study recommends the enactment of a party law in South Africa that would cover issues such as general provisions on the status and functions of political parties, the powers entrusted to them as legal entities and their rights in the constitutional order. The proposed party law may include a section on the internal organisation of political parties. This would entail the organisational structure, the rights of members and party leadership and possible sanctions in case of violations. In order to ensure internal democracy within the party, provisions on decision-making and policy formation within the party may also be included. Ideally, once enacted, the Political Party Funding Bill may be merged with a general party law, for clarity and consistency.

### **6.3.2 Need to ratify and domesticate international and regional human rights instruments**

As observed in chapter two of this study, considering the significant role played by international and regional bodies in the protection of citizens' political rights, it is recommended that African states ratify and domesticate international and regional instruments. For instance, it was noted that the CAR and Senegal have not ratified important regional human rights instruments even though their respective constitutions proclaim the countries' adherence to key international and regional human rights treaties and conventions. In its preamble, the 2016 CAR Constitution specifically enshrines the country's adherence to the AU Constitutive Act of 2000 and to the ACDEG. However, in reality the CAR has not ratified the ACDEG.

The ACDEG is of particular significance for the promotion of constitutionalism and the rule of law in a democracy. Its objectives include the promotion and protection of the independence of the judiciary and the promotion of the establishment of the necessary conditions to foster citizen participation and transparency in the management of public

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<sup>499</sup> Described as the 'heartland of Party Law', Germany enacted its Party Law in response to international political pressure to convince the world of the country's objection to fascism and totalitarianism. See I van Biezen 'Constitutionalizing party democracy: The constitutive codification of political parties in post-war Europe' (2009) 3 *Working Paper Series on the Legal Regulation of Political Parties* at 2 and De Vos (n 354) 46.

affairs. The ACDEG principles specifically provide for citizens' effective participation in democratic and development processes and the governance of public affairs. They also require state parties to strengthen political pluralism and recognise the role, rights and responsibilities of legally constituted political parties, including opposition political parties, which should be given a status under national law.

The ratification and domestication of the ACDEG by the CAR and Senegal would constitute further incentives for both countries to take positive measures towards the promotion and protection of an independent judiciary. As highlighted in chapter five, the judiciary in the CAR and Senegal are vulnerable to the influence of the executive, since the presidents of both countries are directly involved in its functioning and composition. The ACDEG requires state parties to establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.<sup>500</sup> Its ratification and domestication may therefore lead the CAR and Senegal to ensure constitutional protection of their respective national electoral management bodies, which currently remain vulnerable to pressure and undue influence from the executive, as seen in chapter five. In sum, the ratification and implementation of the ACDEG is recommended to strengthen the promotion of constitutionalism and advance political parties' constitutional rights and obligations in African states.

### **6.3.3 Need to adopt and implement sub-regional human rights standards**

In chapter five of this study, the active role of RECs in the promotion of political parties' constitutional rights and duties was highlighted. In West Africa, ECOWAS adopted a Protocol on Democracy and Good Governance in 2001, which enshrined major constitutional principles, namely the separation of power, the empowerment and strengthening of parliaments and the independence of the judiciary. The ECOWAS Protocol recognises political parties' freedom of operation and guarantees the freedom of the opposition.<sup>501</sup>

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<sup>500</sup> Article 17 (1) and (2) of the ACDEG provides that state parties shall:

- (1) 'Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections.
- (2) Establish and strengthen national mechanisms that redress election related disputes in a timely manner.'

<sup>501</sup> Article 1(i) of the Protocol on Democracy and Good Governance (2001).

The ECOWAS Protocol on Democracy and Good Governance is used as reference for assessing West African states' compliance with principles of democracy, good governance and the rule of law. For example, as noted earlier in chapter two, in the case of *APDH v The Republic of Côte d'Ivoire*,<sup>502</sup> the African Court of Human and People's Rights invoked the ECOWAS Protocol on Democracy and Good Governance when it ordered the Republic of Côte d'Ivoire to amend its law regulating its IEC in order to make it compliant with relevant human rights instruments, including the ECOWAS Democracy Protocol.

While it is true that the existence of sub-regional instruments is not a panacea, considering the role that international and regional instruments already play, the impact of sub-regional institutions and mechanisms cannot be ignored. The role played by ECOWAS in solving political crises in West Africa is an excellent example of its added value in ensuring peace, stability and democracy in the region. The SADC region has developed instruments that entail issues of democracy and good governance, including the 2015 Revised SADC Principles and Guidelines Governing Democratic Elections; however, there is no instrument in the Central African sub-region that specifically provides for democracy, good governance and respect for constitutionalism.

This study therefore recommends the adoption of a protocol on democracy and good governance in Central Africa, as seen in West Africa. The adoption of sub-regional instruments is expected to promote cross-fertilisation in the sub-region and facilitate information sharing among stakeholders in the sub-region, including political parties. Using the model of the ACDEG objectives and principles, the protocol should firstly provide for member states' adherence to key democratic principles, including good governance, the rule of law and the entrenchment of constitutionalism. It should provide for sanctions in case of violation of these principles. Secondly, it should enshrine citizens' rights to participate in public affairs through the conduct of regular, free and fair elections, the promotion of political alternation and limitation of a presidential mandate, prohibition of unconstitutional change of government and the protection of

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<sup>502</sup> *Actions pour la Protection des Droits de l'Homme v The Republic of Cote d'Ivoire*, Application 001/2014, Judgment of 18 November 2016. Following a human rights organisation's legal action against the government of Côte d'Ivoire, the African Court of Human and People's Rights invoked the ECOWAS Protocol on Democracy and Good Governance when it ruled that the Republic of Côte d'Ivoire violated its commitment to establish an independent and impartial electoral body.

the rights and duties of political parties as stakeholders in constitutional democracies, including opposition parties.

### 6.3. 4 Need for a proactive judicial system to trigger changes

This thesis observed that the South African Constitutional Court has played a significant role in settling matters concerning the rights and duties of political parties. For example, in the *IDASA* case of 2005, the Court ruled in favour of the rights of political parties not to disclose details of private donations made to them; on the other hand, in the *Ramakatsa* case in 2012, the Court also stressed the obligations of political parties to comply with the Constitution while conducting their internal affairs. Based on the foregoing, and in line with the concept of ‘judicial activism’<sup>503</sup>, it is suggested that judges in the CAR and Senegal ‘go beyond their traditional role as interpreters of the constitution’<sup>504</sup> to adopt broad interpretative techniques and rights-sensitive approaches in interpreting the constitution. Judges would therefore trigger changes in society by initiating innovative interpretation of the constitution. In comparison to South Africa, there is a scarcity of case laws concerning the constitutional rights of political parties in the CAR and Senegal, except in electoral matters. In Senegal for instance, constitutional judges have rejected cases relating to the rights and status of political parties on the grounds that they did not have the constitutional mandate to rule on such cases.<sup>505</sup> It is in this context that judges are expected to act as catalysts in terms of progressive interpretation of constitutions. In this way, judges would ensure that the right of citizens to participate in public affairs is continuously enhanced through the protection of political parties’ constitutional status.

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<sup>503</sup> There are various definitions of judicial activism, including (i) a philosophy advocating that judges should interpret the constitution to reflect contemporary conditions and values; (ii) when courts do not confine themselves to reasonable interpretations of law, but instead create law. See C Fombad ‘Constitutional reforms and constitutionalism in Africa: Reflections on some current challenges and future prospects’ (2011) 59(4), *Buffalo Law Review* at 1067.

<sup>504</sup> Fombad (n 503) 1068.

<sup>505</sup> For instance, see case 11/E/98 of the Senegalese Constitutional Council in which political parties sought the Constitutional Council’s opinion about the need for the Ministry of Interior to share the electoral list with all political parties. The Constitutional Council rejected the case on the grounds that it did not have the constitutional mandate to issue ‘opinions’ on electoral matters. The unresolved matter of the electoral list later led major opposition parties to boycott the legislative elections of 2007 (see: [https://www.memoireonline.com/06/11/4561/m\\_Le-Conseil-constitutionnel-senegalais-et-la-vie-politique17.html](https://www.memoireonline.com/06/11/4561/m_Le-Conseil-constitutionnel-senegalais-et-la-vie-politique17.html)) (accessed 6 August 2018). Also see case 3/E/99 referred by the leader of the opposition, Abdoulaye Wade. The Constitutional Council declined to consider an electoral matter on the grounds that the matter was incompatible with its constitutional mandate.

Firstly, as mentioned in chapter one, it should be noted that constitutions are ‘living documents’, which evolve over generations and reflect changing realities.<sup>506</sup> It is therefore recommended that judges interpret the constitution in a manner that reflects the evolving context and trends. The evolution of the position of the South African judges regarding private funding of political parties is evidence of the need for judges to take into account contemporary debates and challenges. Indeed, in the *IDASA* case of 2005, the Constitutional Court ruled in favour of the rights of political parties not to disclose details of private donations made to them. However in the case of *My Vote Counts NPC v President of the Republic of South Africa and Others*,<sup>507</sup> in 2017, the Western Cape High Court ruled that information about the private funding of political parties was reasonably required for the effective exercise of the right to vote and to make a political choice.<sup>508</sup> The fact that the South African parliament has been considering a Political Party Funding Bill<sup>509</sup> is evidence of the role of independent judges in fostering the enactment of national legislation. In this context, it seems that the judges used the standard of ‘reasonableness’ to make their decision on the disclosure of private party funding. Indeed, the judges examined the case on the basis of ‘whether it was reasonable or not’<sup>510</sup> for a legislation (i.e. the Promotion of Access to Information Act of 2000) not to allow the recordal or disclosure of private funding information. The Court took into account the given circumstances and the need for effective exercise of citizens’ right to participate in public affairs. Such approach has been criticized since there is a risk that, through the “reasonableness” standard, judges might substitute their view to that of the original decision-maker.<sup>511</sup> However, it should also be pointed out that, in terms of administrative action, section 33 (1) of the Constitution enshrines the concept ‘reasonableness’ since it states that ‘[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair’. Nevertheless, such approach for judicial review is expected to add value only if it is

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<sup>506</sup> Fombad (n 433) 385.

<sup>507</sup> *My Vote Counts NPC v President of the Republic of South Africa and Others* 4 All SA 840 (WCC).

<sup>508</sup> *My Vote Counts NPC v President of the Republic of South Africa and Others* 4 All SA 840 (WCC) para 75.

<sup>509</sup> The bill aims to provide for and regulate the public and private funding of political parties, including the prohibition of certain donations made directly to political parties, the disclosure of donations accepted and the creation of offences and penalties.

<sup>510</sup> A Pillay ‘Reviewing reasonableness: an appropriate standard for evaluation state action and inaction’ (2005) 122 (2) *South African Law Journal* at 425.

<sup>511</sup> Pillay (n 510) 420.

established that it promotes constitutionalism and the rule of law. Authors have instead suggested a coherent framework for substantive judicial review based on intelligible and transparent methodology, which would be of real significance to a community or society as a whole – not just to the legal system.<sup>512</sup> Moreover, in the context of judges’ progressive interpretation of the constitution, it is suggested that they adopt a rights-based approach to citizens’ participation in their country’s affairs. They are expected to give primary consideration to the protection of individual rights and freedoms, even if it means protecting the rights of opposition and minority political parties. In this respect, political parties should be considered mere ‘representatives’ of citizens in a democracy, which would mean that judges have a duty to continuously interpret constitutional provisions related to all political parties, with a view to ensure that individual civil and political rights are protected and promoted.

### **6.3.5 Need for citizens to access constitutional courts directly**

In order to ensure the protection of their political rights and enhance the prospect of constitutional justice, all individuals should be able to have direct access to constitutional courts. This study stresses the need for African states to adopt a model of constitutional review that allows all individuals, as well as political parties, to refer matters to constitutional courts, which would review the constitutionality of statutes and settle constitutional and electoral disputes. In chapter five, it was observed that in the CAR and Senegal, because of the restrictive rules for accessing the constitutional courts, it is impossible for ordinary litigants (including opposition political parties) to refer any matter pertaining to the rights and duties of political parties to a constitutional judge. The CAR and Senegal have both adopted a model of constitutional review influenced by the French Fifth Republic Constitution, which – except in local election disputes – does not allow ordinary citizens to refer matters directly to the Constitutional Council.

This study recommends that where it is in the interests of justice, national constitutions should allow any person to bring a matter directly to the Constitutional Court or to

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<sup>512</sup> See Sirota, L <https://doubleaspect.blog/2018/02/20/the-return-of-correctness-in-judicial-review/> (accessed 4 November 2018).

appeal directly to the Constitutional Court from any other court. In this way, the protection of the constitutional rights of political parties will be guaranteed by the Constitutional Courts' judgements. As discussed earlier in chapter five of this study, political parties in the CAR and Senegal are currently in a paradoxical position where their status and rights are enshrined in the Constitutions, but they have limited options to ensure that these rights are protect by their respective constitutional courts. In Senegal, the list of those who are eligible to take matters before the Constitutional Council is limited to a group of key political figures, namely the President of the Republic and a certain quorum of members of parliament.<sup>513</sup> In CAR, any person willing to refer political party related matters to the Constitutional Court may do so on electoral grounds or in order to review the constitutionality of laws. This implies that matters related to the constitutional rights and duties of political parties are unlikely to be brought before constitutional judges by those who are in power and eligible to do so. This is because the constitutional judges' decisions can potentially infringe the interests of the rulers and ultimately jeopardise their dominant position. In the absence of judicial mechanisms to strengthen the constitutional status of political parties, opposition and minority parties are likely to remain weak, under the dominance of ruling parties.

### **6.3.6 Need to build institutional capacity of political parties**

This thesis examined the phenomenon of dominant party systems in Africa. It observed the dominance of the ANC in the South African political landscape over time, regardless of its performance. It was pointed out that even if the dominant party system occurs in a context of party competition, opposition parties tend to be weak, considering the prevalent and long-standing influence of ruling parties in the spheres of government. Scholars<sup>514</sup> have also argued that the mere presence of multiple parties does not ensure effective democracy. The weakness of African political parties and their inability to play an essential role in 'democratic consolidation'<sup>515</sup> has also been pointed out. This thesis therefore suggests a systematic and sustained approach to capacity building of African political parties.

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<sup>513</sup> Article 74 of the 2001 Senegalese Constitution.

<sup>514</sup> Randall & Svasand (n 202).

<sup>515</sup> A Randall & Svasand (n 202).

Political parties should be kept abreast of national, regional and international instruments pertaining to their activities. They should be able to operate and conform to the principles of accountability, transparency, democratic governance and inclusive participation. Although they are private entities, they ultimately aim to access political power and implement a pre-defined political and socio-economic programme for the wellbeing of the people. They should therefore familiarise themselves with democratic principles and implement these in their organisational structure in order to prioritise the interest of the people whom they aim to represent. One option would be for political parties to recruit experts such as accountants; finance managers would be more conversant with monitoring and evaluation, bookkeeping and financial management, especially as they receive public funds. Finally, political parties should be trained on regional litigation mechanisms and the possibility of referring matters to regional institutions once local remedies are exhausted. Such training and capacity-building could be carried out by independent and constitutionally recognised institutions, including human rights commissions, electoral commissions and the office of an ombudsman.

### **6.3.7 Need to study party systems in Africa**

This study noted the variety of changing party systems in the three selected countries and beyond. The pattern of party systems may change from one election to another. Although it is true that post-apartheid South Africa has continuously been marked by party dominance, the long period of party dominance in Senegal has come to an end since its presidential elections in 2000. By contrast, the CAR has not experienced party dominance, since the country adopted multi-party elections in 1993.

Except in a dominant party system, it is difficult to predict political parties' tendencies and patterns of coalition formation, especially during election periods. It is therefore important for researchers and academics to undertake more research on political party systems as these functioned in recent years, especially taking into account key aspects such as the geographic location (sub-region), the colonial influence and the countries' respective democratic trajectories. The link between former colonial powers and leaders of African states – especially in Francophone Africa – deserves to be examined in the context of promotion of constitutionalism and the rule of law. The fact that African Francophone countries, including the CAR and Senegal, have adopted a

‘majoritarian’ electoral system for their national elections has inevitably had an impact on the representation of small parties in parliament. It may be worth studying the adequacy of the French electoral system for the political realities and requirements in some African countries. Finally, it is important to study the phenomenon of party fragmentation further, in other words the proliferation of minor political parties and their impact on party competition and political alternation. One question to examine is how to promote constitutionalism in a changing political landscape where the sustainability of opposition and minority parties is not necessarily promoted by adequate national frameworks.

### **6.3.8 Need to analyse the link between political parties and electoral systems further**

In the light of the above, it is equally necessary to examine the role of political parties in elections. The constitutions of the CAR and Senegal explicitly recognise the role of political parties in expressing citizens’ political choices. However, it also appears that the constitutional recognition of the rights of political parties may be influenced by other constitutional provisions, namely the choice of national electoral systems. As noted in chapter four, whether the country adopts a majoritarian or PR system, the position of political parties in the political landscape will be affected. Constitutional order, peace and stability will be enhanced if a parliament is representative of the diverse interests and ideologies in the country. The choice of an electoral system is therefore essential in promoting a wide range of political parties and fostering their prospects of winning elections.

It is therefore important to examine the justifications for the choice of electoral systems, their impact on party constitutionalisation and the entrenchment of constitutionalism. The South African experience of PR (party-list PR system) involves the participation of political parties in elections, while the CAR and Senegal recognise independent candidates in national and local elections. It is necessary to find out if the adoption of a majoritarian system coupled with the acceptance of independent candidates can hinder the prospect of equitable representation of all political parties in parliament, and foster bi-partyism or the rule of bigger political parties. Similarly, using the South Africa example, it is essential to analyse the link between list PR and the longevity of party dominance further.

Overall, such an analysis would provide evidence on the effective enforcement of party constitutionalisation in relation to national electoral systems and the impact on constitutionalism.

### **6.3.9 Need to develop a comprehensive guideline on private funding of political parties**

Because of the risk of private funding affecting the integrity of political parties – especially the impact of large donations from corporations – it is recommended that a specific guideline be developed to provide guidance to political parties and private donors on ethical funding. Party laws and sometimes constitutions may provide for private funding requirements. However, these frameworks may not be sufficiently detailed to enable stakeholders to observe key principles of transparency, ethics and accountability. Some electoral laws may limit the amount that donors are allowed to give to political parties; however, such limitations are effective only if there is a monitoring system.

A national guideline on private funding would provide for social responsibility of corporations towards political parties and citizens at large. It would encourage private donors not only to consider compliance with party laws, but would also foster their awareness and social responsibility towards the advancement of political actors and the entrenchment of constitutionalism as a whole. This is based on the premise that the activities of the private sector can also have a negative impact on the constitutional order and the peaceful political and socio-economic development of the country. Businesses and private companies will be led to conform to ethical principles, including integrity and transparency, when funding political parties. If applicable, they will respect the donations limit, they will ensure that their contribution is ethical, that it benefits both political parties and society at large and that it originates from lawful and verifiable sources. The effective implementation of such a guideline will be based on the constitutional and legal requirements of disclosure through which all donations are published and accessible. The guideline on private funding may also provide mechanisms for reporting undue pressure on private companies by political parties and therefore prevent the phenomenon of forced donations to political parties. In terms of

enforceability, such a guideline would be a policy paper, which will complement existing legislation, notably party laws.

## 6.4 Concluding remarks

In conclusion, this thesis submits that the constitutionalisation of political parties has a significant impact of the realisation of citizens' right to freedom of association, freedom of expression and their right to participate in their country's public affairs. This is because, since the advent of constitutional democracy and multiparty politics in Africa, political parties have increasingly played a central role in representing citizens' aspirations, ideologies and views. In this context, pursuant to their respective constitutions, the CAR, Senegal and South Africa are expected to seek ways of ensuring that the constitutional status of political parties is consistently promoted and protected with a view to enhance the prospect of constitutionalism in the three countries. This thesis posed three main questions, namely: Is party constitutionalisation sufficient to facilitate the progress of constitutionalism in the CAR, Senegal and South Africa? If so, what level of constitutionalisation, if any, is needed? Finally, what are some of the crucial elements of party constitutionalisation in the CAR, Senegal and South Africa? Based on these questions, this thesis concludes as expounded below.

Firstly, the constitutional recognition of political parties contributes to a great extent to the enhancement of constitutionalism in the CAR, Senegal and South Africa. The constitutional status of political parties provides a framework with which the executive and organs of the state must comply. In this context, an independent judiciary is expected to protect the constitutional rights and duties of all political parties, regardless of whether they are majority or minority parties. The constitutional status of political parties has enabled them to be protected against the adoption of laws and policies that aim to promote the interest of dominant parties. For instance, as noted earlier, in its judgment 97/2007,<sup>516</sup> the Senegalese Constitutional Council ruled that a new law supported by the government, which aimed at imposing gender balance within all political parties, was unconstitutional on the grounds that it violated the principle of citizens' equal access to power. Similarly, in South Africa, as noted in the case of

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<sup>516</sup> Decision 97/2007 - Case 1/C/2007.

*Economic Freedom Fighters v Speaker of the National Assembly and Others*,<sup>517</sup> the Constitutional Court found that the ANC-dominated National Assembly violated section 181(3) of the Constitution by not holding the President accountable.<sup>518</sup> The constitutionalisation of political parties in CAR, Senegal and South Africa means that theoretically, political parties' status can only be amended through a formal procedure of constitutional amendments. This is in line with the notion of constitutionalism, which requires strict compliance to the letter of the constitution and control of the amendment of the constitution. Typically, the promotion of constitutionalism implies the existence of mechanisms that prevent unlawful constitutional changes and impose strict requirements concerning formal changes. This thesis therefore submits that party constitutionalisation is closely linked to the entrenchment of constitutionalism in the sense that the constitutional rights and obligations of all political parties – including minority parties – would be enforceable by the government as well as those who are governed (political parties, civil society and individuals). In cases where all parties are required to operate within constitutional limitations, the prospect of constitutionalism is consequently enhanced.

Secondly, this thesis concludes that party constitutionalisation alone is not a sufficient mechanism to foster the promotion of constitutionalism; it must be supported by other elements, including constitutionally recognised mechanisms and institutions. For instance, as noted in chapter four, the South African model of party constitutionalisation is non-descriptive. The Bill of Rights merely recognises citizen's rights to form, join and campaign for a political party. However, the Constitution also provides for independent institutions ('chapter nine institutions'), which aim to support constitutional democracy and perform their constitutional duties with independence, impartiality, and dignity. The Constitution requires other organs of the state to assist and protect these institutions in carrying out their duties. Such institutions are in a better position to promote the rights and duties of political parties, since they are protected against pressure or manipulation by politicians. In such cases, the prospect of promoting

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<sup>517</sup> *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* 2016 (3) SA 580 (CC).

<sup>518</sup> Seized by opposition parties, the Constitutional Court found that the parliament failed to follow the Public Protector's recommendation to ask former President Zuma to refund public money spent on non-security features at his residence.

constitutionalism is facilitated. In the CAR and Senegal, despite a more descriptive model of party constitutionalisation and the existence of comprehensive party laws, there are no constitutionally independent institutions that are supposed to protect and monitor the enforcement of these party regulations. This makes the existing provisions on political parties merely symbolic, with political parties not only vulnerable to undue pressure from the executive and other organs of the state, but also capable of violating their constitutional obligations with impunity and in violation of the principles of accountability, transparency and openness.

This thesis therefore submits that the descriptive model of party constitutionalisation is not necessarily synonymous with robust entrenchment of constitutionalism. It is also important to have adequate enforcement mechanisms in place. Similarly, the non-descriptive style of party constitutionalisation as seen in South Africa does not imply that political parties play a lesser role in the constitutional order. The phenomenon of party dominance, coupled with the adopted electoral system, may place political parties at the centre of the political system, therefore requiring strong constitutional mechanisms to mitigate dominant parties' undue influence.

Thirdly, the question was posed about key elements of party constitutionalisation in the CAR, Senegal and South Africa. Beside the descriptive model of party constitutionalisation observed in the CAR and Senegal, it was noted that initially, party constitutionalisation in both countries was undeniably influenced by the French Constitution of 1958. The earlier provisions on party constitutionalisation were duplicates of the French Constitution. However, national realities and challenges have eventually had an impact on the constitutional regulation of political parties in both countries. For instance, the special constitutional provision on the leader of the opposition in Senegal may denote the impact of a long period of party dominance and competition between two major political parties in the country (article 58). Similarly, the fact that the CAR Constitution of 2016 prohibits political parties from associating with any armed group (article 31) may reflect the conflict situation in which the Constitution has been drafted. In addition, it should be noted that in the CAR and Senegal party constitutionalisation is coupled with the constitutional recognition of independent candidates in elections. Party constitutionalisation therefore does not imply exclusive participation of political parties in elections. By contrast, this thesis

submits that the absence of comprehensive constitutional and legal regulations on the status of political parties in South Africa may be due to the fact that during the apartheid era, legal regulation of political activities was extensively used by the segregationist regime to suppress any resistance and liberation struggle. The fact that a comprehensive law on party funding is in preparation may be evidence that more regulation is needed to enhance constitutionalism.

Overall, the thesis concludes that party constitutionalisation remains essential in the entrenchment of constitutionalism. The onus is on African countries, based on their respective contexts, to put in place adequate constitutional provisions and mechanisms to make it a reality.

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