6

Tackling Winner-Takes-All Politics in Africa

Inclusive Governance through Constitutional Empowerment of Opposition Parties

Adem Kassie Abebe

6.1 INTRODUCTION

Constitutions set the fundamental ground rules for democratic contestation and therefore influence the nature and outcomes of the dispensation. It is no wonder that the ground rules can be a point of serious contest among political groups, with dominant groups at times seeking ways to alter or entrench rules that favour their chances of victory. To check this self-serving temptation, the broad recognition, internalisation, acceptance and entrenchment of the ground rules and their relative stability and insulation from undue alterations and manipulations is critical for the legitimacy of democratic political systems.

Central to these ground rules are constitutional provisions guaranteeing multi-party democracy, universal suffrage and the right to stand for elections, rules governing elections (for the executive and legislature) and those regulating the establishment, operation, and rights and obligations of political parties. In connection with these, constitutions in Africa also often provide for election management bodies and courts to ensure the integrity and protection of electoral rights and multi-party democracy, including constraints on self-serving and capricious constitutional reforms. The constitutional recognition of these fundamental aspects of constitutional democracy is founded on the realisation that constitutional designers cannot simply assume that fair rules would be adopted and maintained by players with direct interest in the outcome.

Virtually all African constitutions directly or indirectly guarantee multi-party democracy and provide for the right to vote of citizens – even the 2005 Constitution of Eswatini (Swaziland), Africa's only absolute monarchy, recognises the right to vote of all adult citizens (article 85).[1] Moreover, while the African Charter on Human and Peoples' Rights (African Charter), does not specifically

[1] Nevertheless, although parties exist based on the right to association, electoral competition is based on a no-party system.

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mention the right to vote, it guarantees the right to political participation (article 13), which has been interpreted to include the right to vote and stand for elections. The 2007 African Charter on Democracy, Elections and Governance (ACDEG) specifically recognises the right to participation through universal suffrage (article 4(2)).

To be sure, the right to vote has generated debates and litigation, particularly in relation to the right of prisoners to vote, which is increasingly recognised across the continent, on many occasions as a result of court decisions.[2] African constitutions also recognise the right of citizens to stand for elections, which often comes with more constraints in the form of citizenship, residency and other requirements. Notably, many constitutions in Africa still ban independent candidates, especially for presidential elections,[3] despite the fact that the African Court on Human and Peoples' Rights has found the ban on independent candidates incompatible with the African Charter.[4] Some constitutions in Africa also ban dual citizens or citizens of acquired nationality from running for certain high offices (e.g., 2016 Constitution of Cote d'Ivoire, article 55; 2010 Constitution of Angola, 110(2)), and in Muslim majority countries, candidates, particularly presidential candidates, are required to be Muslims (e.g., 2014 Constitution of Tunisia, article 74).

Perhaps more critical and contentious are provisions regarding the applicable electoral system and recognition and regulation of political parties. In general, African constitutions provide for key aspects of the electoral system for presidential elections. The detailed constitutional regulation of the electoral system for legislative elections is less prevalent, especially in Francophone Africa, where key aspects of the electoral system are left for legislative regulation. The recognition and regulation of political parties shows similar pattern to legislative election rules.

This contribution seeks to provide a broad overview of the constitutional regulation of the electoral system (Section 6.2) and political parties (Section 6.3) in African constitutions to identity any discernible patterns. Notably, it discusses how the relevant rules fared in times of democratic backsliding, using the example of Benin, one of the notable stories of democratic progress in Francophone Africa, which has recently witnessed downgrades in its democratic ranking (Section 6.4). The chapter also briefly discusses winner-takes-all politics (Section 6.5) as a fundamental scourge of both stability and democratisation in Africa and explores the importance of constitutional rules in ameliorating the challenge, with some examples. The Section 6.6 concludes.

[2] Adem Kassie Abebe, 'In Pursuit of Universal Suffrage: The Right of Prisoners in Africa to Vote', *The Comparative and International Law Journal of Southern Africa* 46: 410 (2013); African Criminal Justice Reform, 'The Right of Prisoners to Vote in Africa: An Update' (2020).

[3] Adem Kassie Abebe, 'Right to Stand for Elections as an Independent Candidate in the African Human Rights System: The Death of the Margin of Appreciation Doctrine?' *Africlaw* (2013).

[4] *Tanganyika Law Society and The Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania*, Applications 009 and 011/2011, Judgment of 14 June 2013.

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6.2 OVERVIEW OF ELECTORAL SYSTEMS IN AFRICA

The large majority of African countries have established presidential and semi-presidential systems of government, with only a handful of countries adopting a parliamentary system. Most Anglophone African countries have established presidential systems, with the exception of some, such as Namibia and Tanzania, which establish semi-presidential systems (president-parliamentary), and Botswana and South Africa, which effectively have a parliamentary system where the position of president and prime minister are fused in a unified presidential office. In contrast, Francophone and Lusophone African countries have predominantly established semi-presidential systems. The only formally parliamentary systems in Africa are Ethiopia, Lesotho (under a king) and Mauritius. While Morocco has a powerful government led by a prime minister akin to parliamentary systems, the king exercises tremendous powers and is therefore not seen as parliamentary.[5]

The rules governing electoral rules to the executive and legislature, as well as the institutions charged with managing elections, show similarities across the systems of government. This section briefly discusses the applicable rules regarding presidential and legislative elections. While discussing electoral rules, it is important to note the existence of supranational constraints on substantive, procedural and institutional aspects. Notably, the ECOWAS Protocol on Democracy and Governance prohibits members states from altering electoral rules within six months of elections, except through broad agreement of political forces (article 2(1)). Substantively, a panoply of instruments, notably the African Charter and the ACDEG, provide additional external constraint on the content and change of electoral rules.

6.2.1 *Electing Presidents*

The applicable rules regarding presidents (both directly elected or otherwise) are largely regulated at the constitutional level across Africa (as well as around the world)[6] and generally not controversial. In countries with directly elected presidents, the rule is either plurality (first-past-the-post) or absolute majority (with a second round when necessary), with the latter dominating since the 1990s. Reforms have occurred both ways, with, for example, The Gambia (2001) and the Democratic Republic of Congo (2011) moving from absolute majority to plurality, while Togo (2019) shifted to the two-round system (which it had abolished in 2002) . Kenya and

[5] Inmaculada Szmolka, 'Bipolarisation of the Moroccan Political Party Arena? Refuting This Idea through an Analysis of the Party System', *Journal of North African Studies* 26: 73–102 (2021).

[6] Adem Kassie Abebe and Elliot Bulmer, 'Electing Presidents in Presidential and Semi-presidential Democracies', International IDEA Constitution Building Primer (2019), https://constitutionnet.org/vl/item/electing-presidents-presidential-and-semi-presidential-democracies.

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Nigeria provide for a regional distribution of votes for winning presidential elections with a view to encourage inter-group/regional political formations. Accordingly, in Nigeria, a candidate must win both a plurality of the votes nationwide and at least 25 per cent of the votes in at least two-thirds of the thirty-six federal states (Constitution of Nigeria, 1999, section 134), and in Kenya a candidate must win an absolute majority nationwide and at least 25 per cent of the votes in at least half of the forty-seven counties (Constitution of Kenya, 2010, section 138). In both cases, if no candidate secures a win in the first round, a runoff is held where the regional distribution rule no longer applies.

In general, constitutions in Anglophone African countries include elaborate provisions governing presidential elections, largely avoiding serious controversies around the rules. An exception is Malawi. The Malawian constitution is not clear on whether the applicable rule is absolute majority or plurality. In practice, plurality was accepted as the rule, particularly following a decision of the highest court of the country.[7] Nevertheless, in 2020, the Supreme Court invalidated the May 2019 elections and crucially found that the applicable rule was an absolute majority, and not a plurality, effectively reversing its standing jurisprudence. In the absence of constitutional rules regarding the run-off election, the Court ordered parliament to clarify the applicable rules through reforms. Such reforms are yet to be enacted, and fortunately, the rerun election provided an opportunity for the second and third opposition candidates in the invalidated election to form an alliance, which secured a decisive absolute majority against the incumbent (who has been declared a winner of the invalidated election with a plurality of just over 38 per cent of the votes).

The constitutional rules for presidential elections are also generally broadly defined in constitutions of Francophone African countries, although the level of detail is comparably less than in Anglophone counterparts. Partly because of the relative constitutional minimalism, the rules in Francophone countries have been controversial in some cases. As indicted in Togo, the two-round system was restored in 2019 after persistent opposition demands and political instability. Perhaps most significantly, in Cote d'Ivoire, a rule that required presidential candidates to have both their parents born in the country proved extremely destabilizing, because most citizens in the north, who are also predominantly Muslims, often have cross-border links with people of Burkina Faso and other countries. The rule was ultimately abolished in constitutional reforms in 2016.[8]

[7] Mwiza Jo Nkhata, 'Malawi's Nullified Presidential Elections and the Plurality vs Majoritarian (Run-off) Debate', ConstitutionNet (2020), https://constitutionnet.org/news/malawis-nullified-presidential-elections-and-plurality-vs-majoritarian-run-debate.

[8] Pierre Olivier Lobe, 'Innovations of the Draft Constitution of Cote d'Ivoire: Towards Hyper-presidentialism?', ConstitutionNet (2016), https://constitutionnet.org/news/innovations-draft-constitution-cote-divoire-towards-hyper-presidentialism.

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Another important aspect of presidential elections that continues to be a recurrent source of controversy relates to term limits.[9] Changes to applicable rules to extend incumbent terms represent the starkest manifestation of a decline in democratic space and autocratisation.[10] Because term limits represent clear rules that are hard to bypass otherwise, incumbents often target their amendment – either directly or indirectly through the adoption of ostensibly new constitutions and, in certain cases, through questionable judicial interpretations.[11]

Term limits are particularly often altered or removed in countries where power is personalised with weak parties (such as Congo Republic, Djibouti, Cameroon, Uganda) and less likely to occur in countries with equally dominant but strong parties or in competitive contexts. In countries with dominant but strong parties (such as Tanzania, Botswana and South Africa), term limits have been consistently respected, despite the parties having the numbers to change the rules, implying the importance of term limits in regulating intra-party power dynamics and alternation of power. Indeed, Tanzania became the first African country to witness an alternation of power as a result of term limits in 1995, while the country was still practically a one-party state. Similarly, in countries with relatively competitive contexts, term limits have largely remained stable, with efforts at altering them defeated, such as in Nigeria, Malawi and Zambia.

Other constitutional aspects of presidential electoral rules are not frequent subjects of reform, mainly because incumbents find ways to rig the applicability of the rules, without the need to change them. Even reforms related to the electoral system, with some countries shifting from runoff to plurality, may partly be explained by cost and other inconveniences, rather than simply as the last nail on the democratic coffin, as are changes to term limit provisions.

Additional aspects that have often generated controversy relate to registration fees for presidential candidates, which are not always regulated at the constitutional level but can prove a major hinderance to some candidates. Most recently, Nigeria's main opposition parties introduced a nomination fee for presidential aspirants of up to 100 million Nira (about USD 250,000) and lower amounts for other offices.[12] Interestingly, these fees are set by the parties, rather than by law.

Perhaps most notably, the introduction of a 'sponsorship' systems has become controversial in recent years in Senegal, Benin and Burkina Faso. A 2018 Senegalese law established a 'citizenship sponsorship' requiring presidential candidates to

9 Joseph Siegle and Candace Cook, 'Circumvention of Term Limits Weakens Governance in Africa', Africa Center For Strategic Studies (2020, updated 2021), https://africacenter.org/spotlight/circumvention-of-term-limits-weakens-governance-in-africa/.

10 Joseph Siegla and Candace Cook, 'Presidential Term Limits Key to Democratic progress and Security in Africa', *Orbis* 65: 467–482 (2021).

11 Mauricio Guim et al., 'The Law and Politics of Presidential Term Limit Evasion', *Columbia Law Review* 120: 173–248 (2020).

12 Johnbosco Agbakwuru, '2023: NNPP Condemns APC N100m Nomination Fees', *Vanguard* (2022), www.vanguardngr.com/2022/04/2023-nnpp-condemns-apc-n100m-nomination-fees/.

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obtain the support of about 1 per cent of the voters in at least seven regions of the country.[13] While the law is intended to streamline electoral competition and ensure nationwide support for candidates (therefore reduce regionalised politics), it tends to benefit incumbent presidents and parties.

More seriously, in Burkina Faso, 2020 reforms to the electoral code require presidential candidates to be sponsored by at least fifty elected officials. When sponsors are municipal councillors, they must be located in at least seven of the thirteen regions of the country.[14]

Similarly, Benin introduced a party sponsorship system in 2018 requiring candidates to obtain endorsement of at least sixteen members of the National Assembly (of which there are eighty-three members) or mayors (of which there are seventy-seven).[15] While the number may seem relatively low, the requirement came after opposition parties boycotted the 2018 legislative elections because of alleged repressive tactics and changes to the electoral law establishing, among other rules, a requirement on political parties to receive a 'certificate of conformity' from the Ministry of Interior, to secure at least fifteen members from each municipality of Benin, as well as a ban on party alliances from presenting list of candidates for elections.

The rules in Benin were adopted ostensibly to stem the fragmentation and proliferation of candidates and parties (with the country of around 12 million people reportedly home to more than 200 parties before the changes) and encourage nationwide and ideological political formations, rather than regionalised identity-based parties. Nevertheless, in effect this meant that opposition candidates needed the endorsement of members of parliament and mayors aligned with the ruling coalition. These rules have proved extremely controversial partly because they are not regulated at the constitutional level and are therefore seen as unilateral and even opportunistic and capricious. Indeed, the Benin government has arrested and convicted key opposition leaders following instability after the latest elections where President Patrice Talon won re-election (despite promising during his presidential campaign not to run for re-election and even to amend the constitution to impose single terms on presidents).[16] Benin, once a paragon of democracy in Francophone Africa, is now classified as only partly democratic in all major democracy rankings.

[13] Paulin Maurice Toupane, Aissatou Kante and Adja Khadidiatou Faye, 'Suspicions Cloud Senegal's Upcoming Election', Institute for Security Studies (2019), https://issafrica.org/iss-today/suspicions-cloud-senegals-upcoming-election.

[14] Adewumi Mubin Bakare, 'Political Reforms and Implications for Democracy and Instability in West Africa: The Way Forward for ECOWAS Member States', ACCORD (2022), www.accord.org.za/conflict-trends/political-reforms-and-implications-for-democracy-and-instability-in-west-africa-the-way-forward-for-ecowas-and-member-states/.

[15] David Zounmenou, Jeannine Ella Abatan and Michael Matongbada, 'A Third Election without Main Opposition Parties in Benin', Institute for Security Studies (2021), https://issafrica.org/iss-today/a-third-election-without-main-opposition-parties-in-benin.

[16] Tim Hirschel-Burns, 'Benin's King of Cotton Makes Its Democracy a Sham', *Foreign Policy* (2021), https://foreignpolicy.com/2021/04/08/benin-election-democracy-sham-patrice-talon/.

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Overall, provisions such as term limits and the two-round system were largely adopted in the 1990s in African constitutions as major concessions at moments of incumbent vulnerability and democratic euphoria during the transition towards democracy. Old and new dominant leaders and parties have since then sought to alter the rules and, on key occasions, succeeded, often marking a significant point in democratic backsliding.

6.2.2 *Electing Parliaments (for First Chamber)*

Unlike electoral rules for presidential elections, many African constitutions leave key aspects of parliamentary elections for legislative regulation. Notably, constitutions in Francophone African countries rarely even determine the applicable electoral system for the legislature, instead leaving it to determination through organic laws (which often required an absolute majority to enact). For instance, the 2016 Constitution of Cote d'Ivoire, one of the latest in Francophone Africa, provides that an organic law determines 'the number of members of each house, the conditions of eligibility and appointment, the system of ineligibilities and incompatibilities, the methods of voting and the conditions under which new elections should be organised' (article 90). Compare this with the 2010 Constitution of Kenya where the Constitution specifically determines the number of members of the National Assembly as well as manner of their election, including representation of women, as well as qualifications and disqualifications (articles 97–99).

Most countries in Africa have adopted a list proportional system (particularly common in civil law countries [Francophone and Lusophone], first-past-the-post system [mainly common in Anglophone countries] and mixed electoral system [parallel].[17] Constitutional rules regarding legislative elections have generally stayed stable, although it is not clear whether the rules are results of accident and historical colonial diffusion, or deliberation, reflection and consensus. While the legislative framework for the electoral system has changed on occasions, particularly with the transition to proportional systems in Francophone countries, it is unclear whether changes to legislative electoral rules have been tampered with to distort outcomes. This may partly be because incumbency advantages and outright election rigging often deliver tolerable results, while electoral reforms may be seen as unnecessary and even undesirable and visibly capricious.

Nevertheless, there are cases where electoral reforms have proved extremely contested. For instance, in 2018, Benin changed the electoral code imposing among other things a 10 per cent threshold for winning seats in the National Assembly.[18]

[17] For a list of countries and their system of government, see the International Institute for Democracy and Electoral Assistance Database on electoral systems, www.idea.int/data-tools/continent-view/Africa/44.

[18] Hirschel-Burns, 'Benin's King of Cotton Makes Its Democracy a Sham'.

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While this was ostensibly intended to crack down on party fragmentation, it favoured the incumbent party and led to opposition boycott of the 2019 legislative elections. Indeed, following its observation of the elections, the African Union Election Observation Mission noted that the 10 per cent threshold 'appears to contradict the fundamental principles of fairness and equal suffrage'.[19] Regardless of the propriety of the applicable rules, the Benin experience shows that the lack of constitutionalisation of fundamental aspects of the electoral system could lead to unilateral alterations by incumbent parties without securing broad consensus. Indeed, in Benin, the incumbent party won all the legislative seats in 2019, which it then used to adopt constitutional amendments, without the need to submit them to a referendum – a referendum is only required if the proposed amendment does not secure a four-fifths majority in the National Assembly (Constitution of Benin, 1990, article 155).

6.3 POLITICAL PARTIES

Political parties are the principal engines of competitive democracy, straddling both the private and public spheres. The post-independence African constitutions largely left the issue of political parties unregulated. In any case, the post-independence period of multi-partyism was remarkably short and many of the countries, with the notable exception of Botswana, Mauritius and The Gambia, established de facto or de jure one-party systems.[20]

Multi-party politics returned in the 1990s as central to the waves of democratisation across Africa. Accordingly, the new constitutional frameworks recognised the right to political competition and opposition as critical to democratic dispensation and to peace and stability. Similarly, the ACDEG requires states 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' (article 3) . Fombad has argued that the constitutional recognition and regulation of political parties 'is not only imperative,

[19] 'Mission D'observation Electorale De L'union Africaine Pour Les Elections Legislatives Du 28 Avril 2019 En Republique Du Benin Conclusions Preliminaires', https://au.int/sites/default/files/pressreleases/36552-pr-conclusions_preliminaires_de_la_moeua_pour_des_elections_legislatives_du_28_avril_2019_au_benin.pdf.

[20] Fombad analyses constitutional recognition and regulation based on eight measures: formal recognition of multi-partyism, scope of rights and duties of political parties, principle of state-party separation, principle of free and fair political participation, internal party democracy principle, bans and regulatory restrictions principle, political party funding principle and compliance with democratic values and principles; Charles Fombad, 'Conceptualising a Framework for Inclusive, Fair and Robust Multiparty Democracy in Africa: The Constitutionalisation of the Rights of Political Parties', *Law and Politics in Africa, Asia & Latin America* 48: 3–27 (2015); Charles Fombad, 'Political Party Constitutionalization in Africa: Trends and Prospects for Deepening Constitutionalism', in *Comparative Constitutional Law in Africa* ed. Rosalind Dixon, Tom Ginsburg and Adem Abebe. Edward Edgar, 2022, 110–135.

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but its broad scope to avert or at least limit the risks of one-party dictatorship is crucial'.[21] In this regard, Chilton and Versteeg have found that constitutional rules with natural constituencies, such as those applicable to political parties, are systematically associated with better practices and compliance.[22]

The level of detail with which African constitutions recognise and regulate political parties varies. In general, more recent constitutions across the continent and constitutions in Anglophone African countries tend to have more elaborate provisions, while Francophone countries tend to leave the regulation of parties to organic laws. Fombad has provided a useful analysis of twenty-four African constitutions partly drawing on a framework developed by Khaitan.[23] Notably, constitutional regulations of parties in Anglophone countries seem to aim at ensuring the democratic character of political parties in view of their public function, while in civil law countries, where it exists, the aim is mainly to protect parties from the state, in view of their private character.[24]

Many constitutions provide for equality of treatment of parties, principally through equitable access to publicly funded media, often during electoral periods, but in some cases all the time (Constitution of Gabon [article 95], Ghana [article 55 (11)] and South Africa [section 197]). For instance, the Ghanaian Supreme Court has ruled that opposition parties have the right to be granted access to public media to respond to an annual budget presentation by the government.[25] At the continental level, the African Commission on Human and Peoples' Rights has called on member states to ensure that political parties, especially opposition parties, 'are given equitable access to state controlled media and resources'.[26]

6.4 ELECTORAL AND PARTY RULES DURING BACKSLIDING: EXAMPLE OF BENIN

In general, changing the rules is too visible a strategy that incumbents with other options are likely to avoid. All things remaining equal, incumbents would arguably tend to prefer irregular means to undermine opposition and other critical groups. Nevertheless, constitutional and legal changes have been used to promote ostensibly legitimate political goals, while in practice unduly undermining opposition parties.

[21] Fombad, 'Political Party Constitutionalization in Africa', 116.

[22] Adam Chilton and Mila Versteeg, *How Constitutional Rights Matter*. Oxford University Press, 2020).

[23] Fombad, 'Political Party Constitutionalization in Africa'; Tarunabh Khaitan, 'Political Parties in Constitutional Theory', *Current Legal Problems* 73: 89–125 (2020).

[24] Samuel Issacharoff and Richard H. Pildes, 'Politics as Markets: Partisan Lockups of the Democratic Process', *Stanford Law Review* 50: 643–717 (1998).

[25] *New Patriotic Party v. Ghana Broadcasting Corporation* [1993–1994] 2 GLR 354.

[26] Resolution on Elections in Africa, ACHPR/Res.174(xlvii)10 (2010), www.achpr.org/sessions/resolutions?id=352.

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Such changes are perhaps more likely in countries where irregular means are less readily acceptable, in view of the relatively open and politically competitive context.

Where constitutional rules exist, they can be effective even in largely authoritarian settings. For instance, in cases of presidential term limits, authoritarian incumbents often have no choice but to change the constitutional rules. Although term limit provisions have been bypassed in many countries, there are also cases where constitutional rules have worked in stymieing efforts at removing term limits – for example, Nigeria, Malawi, Zambia. Indeed, some incumbents opted to resort to courts (e.g., Senegal 2012) or simply delayed elections to practically extend their terms (DRC 2016), because of the political impracticality of constitutional change. In Burundi, the incumbent resorted to the constitutional court after failing to secure the numbers to amend the constitution to allow a third term.[27]

The limited scope or absence of constitutional regulation of key aspects of political parties, as well as broadly legislative electoral rules, means that they are rarely directly targeted through constitutional change. Instead, incumbents would either resort to irregular means or changes to the electoral laws to pursue their objectives. As a consequence, the political party and electoral rules tend to be relatively stable. But not everywhere.

In Benin, since 2018, a number of legislative reforms, noted above, were enacted, which the opposition objected to – including notably the requirement that political parties needed certificates of conformity from the Ministry of Interior, a duty to secure at least fifteen members from each municipality of Benin and a ban on party alliances from presenting list of candidates for elections. The law also exponentially increased the fee to field candidates.[28] This was in addition to reports of repressive government tactics.[29] Because of a combination of these tactics and legal changes, opposition parties boycotted the 2019 legislative elections, which contributed to a very low turnout of 27 per cent, but a total victory to the incumbent president's ruling coalition. The ruling coalition then used its dominance to adopt constitutional amendments through an accelerated/summary procedure, the first ever successful amendment since the adoption of the 1990 Constitution through a National Conference. Parliament adopted the amendments unanimously, which precluded the need for a national referendum, which is not necessary if the amendment receives a four-fifths majority in the unicameral National Assembly. While most of the amendments weren't too controversial – such as the establishment of position of vice president, increased quotas for women, banning of death

[27] Ken Opalo, 'Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lessons from Burundi', ConstitutionNet (2015), https://constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi.

[28] Olabisi D. Akinkugbe, 'International Decision Commentary: Houngue Éric Noudehouenou v. Republic of Benin', *American Journal of International Law* 115: 281–287 (2021).

[29] Sarah Maslin Nir, 'It Was a Robust Democracy. Then the New President Took Power', *New York Times* (2019). www.nytimes.com/2019/07/04/world/africa/benin-protests-talon-yayi.html.

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penalty, grouping of elections (holding them at the same time) – some were. Notably, the amendments effectively banned independent candidates from presidential elections, constitutionalising the party sponsorship system introduced in the earlier legislative reforms.

The amendments to the law and the constitution were challenged in the Constitutional Court but were approved. However, the Court was seen as captured by the incumbent president after he appointed his former personal lawyer as the chair of the Court. Two cases were then filed before the African Court on Human and Peoples' Rights challenging the reforms on both procedural and substantive grounds.[30] The African Court found that the constitutional amendments were not adopted through 'national consensus' as provided for in the ACDEG (article 10(2)). Interestingly, the principle was first formally propounded by the Constitutional Court of Benin[31] before its subsequent adoption as a continental standard in the ACDEG. Having found the entire amendment invalid on procedural grounds, the African Court did not deem it necessary to discuss the substantive compatibility of the amendments with continental standards. Nevertheless, the Court has ruled in another case involving Tanzania that a ban on independent candidates, even if done through the constitution, is incompatible with the African Charter.[32] While decisions of the African Court are technically only binding on the specific respondent state, they have crucial 'horizontal' importance in other contexts, especially when the decisions relate to the validity of legal and constitutional provisions, rather than merely their interpretation or application.[33]

Displeased with the cases before the African Court, Benin chose to withdraw the declaration allowing individuals and non-governmental organisations to submit cases before the Court – therefore preventing future cases against Benin – and has not implemented the decisions.[34] Interestingly, despite the fact that the African Union is required to enforce decisions of the African Court, the AU chose to send

[30] *XYZ v. Republic of Benin*, Application No. 010/2020, Judgment of 27 November 2020, https://africanlii.org/sites/default/files/judgment/afu/african-court/2020-afchpr-3//010-2020_XYZ_v_Benin_Judgment.pdf; and *Houngue Éric Noudehouenou v. Republic of Benin*, Application No. 003/2020, Judgment 4 December 2020, www.african-court.org/en/images/Cases/Judgment/003-2020-Houngue_Eric_Noudehouenou_v_Benin-_Judgment.pdf.

[31] Judgment No. DCC 06-074, 8 July 2006.

[32] *Tanganyika Law Society and the Legal and Human Rights Centre v. The United Republic of Tanzania*, application no 0009/2011, and *Reverend Christopher R. Mtikila v. The United Republic of Tanzania*, application No 011/2011, Judgment of 14 June 2013, www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%20009-011-2011%20Rev%20Christopher%20Mtikila%20v.%20Tanzania.pdf.

[33] Adem Kassie Abebe, 'Horizontal Compliance with Decisions of the African Court on Human and Peoples' Rights', in *Compliance with International Human Rights Law in Africa: Essays in Honor of Frans Viljoen* ed. Aderomola Adeola. Oxford University Press, 2022, 168–182.

[34] Nicole De Silva, 'A Court in Crisis: African States Increasing Resistance to Africa's Human Rights Court', Opinio Juris (2020). http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/.

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election observers to the 2021 elections held under rules that were found to be incompatible with the African Charter.

6.5 ADDRESSING WINNER-TAKES-ALL POLITICS THROUGH INCLUSIVE MAJORITARIANISM

Electoral and political party rules are foundational to democratic contestation. In a context where electoral contests are often perceived as high stakes winner-takes-all politics – as former Nigerian President Olusegun Obasanjo quipped ahead of the 2007 elections, 'a matter of life and death'– incumbents often resort to subtle and non-subtle oppressive tactics and in certain cases use or change the rules to increase their chances of victory and dominance.[35] Winner-takes-all politics involves not only the overbearing dominance of the incumbent leader and party over status, power, governance and distribution of economic rents but also the active 'marginalization of perceived political opponents and the feeling of exclusion from the governance process [and access to resources] by those who do not belong to the government/ruling party',[36] rendering them spectators, rather than critical partners in governance and development. Accordingly, winner-takes-all thinking could lead to a situation where 'opposition parties may end up becoming desperate to win power by all means and at whatever cost; whilst the incumbents, mindful of the cost of losing elections, may also prepare to maintain power by all means and at anybody's expense'.[37]

It would not be an exaggeration to suggest that the most central challenge to democratisation and peace, intra- and inter-group tensions, stability and development in Africa lies in winner-takes-all, zero-sum politics. Accordingly, to enable progress in constitutional democracy in Africa, ensure the stability of the rules of the game and preclude their abusive changes, constitution makers need to recognise the manifestations of and tackle head-on the scourge of winner-takes-all politics. This political culture coexists with the widespread public support in Africa for 'consensual democracy', one that 'places limits on the extent of political competition, but without compromising the principle of political accountability'.[38]

This support for 'consensual democracy' arguably requires the recognition and empowerment of opposition groups, including in constitutional and legal reform processes, as well as in the exercise of constitutional powers. The issue of opposition

[35] Dayo Bensen, Rotimi Ajayi and Ben Agande, 'Nigeria: April Polls Are a Matter of Life and Death, Obasanjo Insists', *Vanguard* (2007), https://allafrica.com/stories/200702260525.html.

[36] Ransford Gyampo, 'Winner-Takes-All Politics in Ghana: The Case for Effective Council of State', *Journal of Politics and Governance* 4: 17–24 (2015).

[37] Andrews Atta-Asamoah, 'Winner-Takes-All Politics and Africa's Future, Institute for Security Studies (2010), www.polity.org.za/article/winner-takesall-politics-and-africas-future-2010-10-25.

[38] Nic Cheeseman and Sishuwam Sishuwa, 'African Studies Keyword: Democracy', *African Studies Review* 64: 704–732 (2021).

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empowerment has received some scholarly attention,[39] broadly as necessary to encourage political moderation,[40] and also in the context of constitutional amendments.[41] Opposition empowerment not only enhances checks on the incumbent, it also increases the stakes for opposition groups in contributing to peaceful electoral and broadly democratic processes and accepting electoral outcomes – 'losers' consent'.[42]

This section briefly discusses existing mechanisms in African constitutions empowering the opposition, mainly using the implications of the principle of 'national consensus' as a precondition for legitimate constitutional amendments and the experience from Seychelles, which gives the opposition almost equal role as the incumbent in constituting courts and other democracy, rule of law and accountability promotion and protection institutions. In combination, the principle of national consensus and equitable role of the opposition in making key appointments reduce chances of abusive constitutional changes and incumbent capture of critical institutions and therefore can serve as a robust antibody against democratic backsliding. More positively, opposition empowerment rules necessitate a culture of regular engagement and cooperation among political rivals, which could enable trust, tame polarisation and winner-takes-all thinking and ultimately contribute to nurturing the legitimacy, stability and resilience of democratic systems. Normatively, as well, rules empowering the opposition 'ensure a more robust version of representation in politics, and hence a more robust version of legitimacy for democratic institutions'.[43]

The principle of national consensus in the adoption of constitutional amendments was formally adopted in the ACDEG[44] with a view to preclude opportunistic and abusive constitutional changes, mainly in view of a pattern of reversal of key concessions in the post-1990 democratisation and constitutional reform processes, notably presidential term limits. Nevertheless, the Constitutional Court of Benin

[39] David Fontana, 'Government in Opposition', *Yale Law Journal* 119: 384–647 (2008).

[40] Sumit Bisarya and Elliot W. Bulmer, 'Rule of Law, Democracy and Human Rights: The Paramountcy of Moderation', in *Constitutionalism and the Rule of Law: Bridging idealism and realism* ed. Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin. Cambridge University Press, 2017, 123–158.

[41] Adem Kassie Abebe, 'The Vulnerability of Constitutional Pacts: Inclusive Majoritarianism as Protection against Democratic Backsliding', in *Annual Review of Constitution-Building 2019*. International IDEA, 2019, https://constitutionnet.org/sites/default/files/2021-01/annual-review-of-constitution-building-2019.pdf.

[42] Christopher Anderson, *Losers' Consent: Elections and Democratic Legitimacy*. Oxford University Press, 2005.

[43] Fontana, 'Government in Opposition'.

[44] Adem Kassie Abebe, 'The (Il)legitimacy of Constitutional Amendments in Africa and Democratic Backsliding', *Asian journal of Comparative Law* (2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4008355; Micha Wiebusch and Christina Murray, 'Presidential Term Limits and the African Union', *Journal of African Law* 63: 131–160 (2019).

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had earlier adopted it as a fundamental principle of constitutional change, which likely inspired the drafters of the ACDEG.

The ACDEG requires state parties to 'ensure that the process of amendment or revision of their constitution reposes on national consensus, obtained if need be, through referendum' (article 10(2)). The principle of national consensus superimposes on the constitutional amendment procedures established in national constitutions.[45] Accordingly, countries cannot simply argue that they have followed the specific amendment procedures outlined in the respective constitutions to justify changes.

The principle of national consensus effectively empowers opposition groups beyond supermajority and other rules as it necessitates deliberation, dialogue and negotiation – and potentially consensus – beyond the four walls of parliament. The principle is particularly critical regarding electoral and party rules that should be protected from unilateral alterations, regardless of the dominance of any political group – considering that incumbent parties or coalitions have in many African countries secured absolute dominance in formal political institutions.

Indeed, in Benin after the 2019 legislative elections, the ruling alliance secured full control of the parliament. Nevertheless, arguably because of the principle of national consensus established by the Constitutional Court, and also because of escalating political tension, the president convened an ostensible national dialogue. The dialogue ultimately generated certain fundamental principles to provide the basis for reforms. Nevertheless, some opposition groups boycotted the dialogue and even some who attended complained that the unveiled outcomes did not reflect the deliberations in the dialogue. As noted above, although the Constitutional Court approved the amendments, the African Court found that the dialogue was insufficient to comply with the principle of national consensus.

The African Court – and broadly the African Union and the bodies monitoring compliance with the ACDEG – has not expounded on what national consensus exactly entails, particularly whether a critical mass of opposition groups should be on board with constitutional amendments. The 2000 Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government recognises as fundamental principles the promotion of political pluralism, the principle of democratic change of government and '*recognition of a role for the opposition*' (emphasis added).[46] The Declaration also specifically calls for 'guaranteeing access to the media for all political stake-holders'.

In view of these continental standards, the value of the principle of national consensus would be maximised in protecting constitutional provisions, particularly

[45] Adem Kassie Abebe, 'The (Il)legitimacy of Constitutional Amendments in Africa and Democratic Backsliding'.

[46] Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI), Principle V.

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those relating to the democratic electoral game, where no player is allowed to change on their own the rules by which they must play, regardless of their dominance. In a different article, this author has argued that moving beyond supermajority and/or referendum rules and requiring direct cross-party approval of the most abused constitutional rules may be necessary to lead to a form of democracy founded on inclusive majoritarianism.[47] The legitimacy and validity of amendments to the 'democratic core' should depend not simply on the size/quantity of the supermajority but its quality/inclusiveness (of more than one group's voice).

Beyond constitutional change, the Seychelles Constitution perhaps has the most progressive and comprehensive guarantees for the involvement of opposition groups in governance, effectively precluding any incumbent from capturing rule of law, accountability and democracy protecting institutions. The Constitution provides for a Constitutional Appointments Authority with the mandate to propose names for key appointments and removals, including the Attorney General, members of the Electoral Commission, highest judges and the Ombudsperson (articles 139–142). The Authority has five members: two each selected by the President and the Leader of Opposition and a chairperson selected by the four members. The members serve guaranteed seven-year terms (which does not overlap with presidential terms) and may only be removed under strictly defined processes. The Leader of Opposition is elected by National Assembly members who are not from the party of the incumbent president, hence could be from the legislative majority or minority (article 84 (5)). The salary, allowances, gratuity or pension payable to the Leader of the Opposition are determined through legislation but 'shall be not less than those payable to a Minister and shall be a charge on the Consolidated Fund'. While other African countries have recognised the role of the opposition in the appointment of a handful of members of election management bodies, Seychelles stands out in building a representative and impartial appointment process to courts and other rule of law, accountability and democracy promoting institutions.

In addition to the principle of national consensus and role of the opposition in the Seychelles, African constitutions are increasingly recognising the status and roles of the opposition. In Burundi, the 2018 Constitution requires that the President and Vice President must belong to different political parties/coalitions, as well as different ethnic groups, or are independents of different ethnicities (article 124). A 2016 amendment to the Constitution of Senegal introduced the position of Head of Opposition and requires the adoption of an organic law outlining the rights and duties of the opposition (article 58). The 2016 Constitution of Cote d'Ivoire guarantees the

[47] Abebe, 'The Vulnerability of Constitutional Pacts'. On the role of the opposition in relation to fourth branch institutions, see Tarunabh Khaitan 'Guarantor (or the So-called Fourth Branch) Institutions' in *Cambridge Handbook of Constitutional Theory* ed. Jeff King and Richard Bellamy (Cambridge University Press, 2024), https://ssrn.com/abstract=3997808 or http://dx.doi.org/10.2139/ssrn.3997808.

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parliamentary opposition the right for adequate and effective representation in all the bodies of Parliament (article 100). The now repealed 2014 Constitution of Tunisia assigned the chair of the Finance Committee and rapporteur of the External Relations Committee to the opposition (article 60). The Tunisian opposition is also entitled to establish and head a parliamentary committee of enquiry annually. The Constitution of Rwanda establishes a National Consultative of Forum of Political Organizations as a permanent forum to bring together political organisations for the purposes of political dialogue and building consensus and national cohesion (article 59). While the focus of this chapter is on constitutional rules, which provide the most effective protection, many countries in Africa also empower the opposition, particularly in leading and representation in parliamentary committees, in various ways through the standing orders of parliament.

Overall, there is increasing recognition in Africa that winner-takes-all politics poses a fundamental challenge, and innovative approaches both at the national and continental level have emerged to institutionalise antidotes to the winner-takes-all thinking, principally through the empowerment of the opposition. In a way, constitution makers are starting to imagine and craft constitutions from the perspective of electoral losers, rather than merely the winners. In view of these developments, a more systematic deliberation on the issue is critical at national, sub-regional and continental levels to identify the various modalities of opposition empowerment at the constitutional, statute and legislative standing order levels to assess their performance in enabling stable, legitimate and resilient democratic and constitutional systems.

6.6 CONCLUSION

In summary, constitutions in Africa, as elsewhere, regulate to a different degree key aspects of the rules of the democratic game – electoral systems, political parties, courts and democracy and accountability promotion institutions. Constitutions in Anglophone African countries tend to have elaborate rules on the rules regulating the terms of democratic political contestation. In contrast, Francophone African countries tend to be constitutionally minimalist, leaving large aspects of these key issues, even with presidential elections, to organic law. Despite the differences, however, the constitutional rules have largely remained relatively stable. In most cases, democratic backsliding often happens through irregular processes, in some cases through legal reform and rarely through constitutional change, with the notable exception of presidential term limits.

Where there has been constitutional change, the pattern is decidedly towards better guarantees and protection of electoral rules. This is not to underestimate the importance of constitutionalisation of the fundamental rules to reduce the chances of formal backsliding. Indeed, the trend is that newer constitutions tend to regulate more of these rules of the democratic game than their predecessors.

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Beyond the rules of contestation, this contribution argues that central to the battle against democratic backsliding may be the imagination of constitution design from the perspective of electoral losers, rather than merely electoral winners, more specifically, through ways of equitable participation of the opposition in governance, rather than merely opposing. The requirement of national consensus for the adoption and change of fundamental aspects of democratic competition ensures relative stability of the rules and prevents a dominant incumbent from self-servingly altering the rules of the game. The empowerment of the opposition in constituting the membership of the institutions central to rule of law, democracy and accountability – as in Seychelles – can reduce the chances of political capture, therefore enhancing the overall legitimacy of the political system, enhancing the stakes for all to accept electoral outcomes, enabling consistent engagement and dialogue and trust among rival political actors and, overall, building a stable foundation for constitutional democracy. This is not to say that the deliberate empowerment of the opposition is an unmitigated good. Such empowerment could potentially lead to political paralysis and deadlock. Accordingly, it is important to design systems that encourage deliberation, not blockade, which necessitates deadlock breaking mechanisms (European Commission for Democracy through Law [Venice Commission] 2018).[48] A balance must be struck to ensure that the desire to check the tyranny of the political majority through including the opposition in governance does not degenerate into the tyranny of the political minority.

Accordingly, constitutional designers in Africa (and beyond) should reimagine democracy beyond majoritarian conceptions and seek ways to empower the opposition through inclusive governance. Scholars should also explore ways through which countries in Africa and across the world have empowered the opposition, how particular approaches have operated in practice, and propose ways to refine the approaches based on comparative practice.

[48] Venice Commission, 'Compilation of Venice Commission Opinions and Reports Relating to Qualified Majorities and Anti-Deadlock Mechanisms'; CDL-PI(2018)003rev; 2018, www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2018)003-e.

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