

## Ethnic Party Bans In Africa: A Research Agenda

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### A. The Research Problem

The wave of democratization that has engulfed African countries since the 1980s has been characterized by the establishment of or return to multi-party politics. This has mostly happened in political systems with a long history of de facto and de jure constraints on the ability of political parties to function effectively. While few countries today (examples include Eritrea and Swaziland) continue to deny the principle and legitimacy of a pluralistic organization of political associations and parties, many political parties in “new democracies” still face insurmountable obstacles in creating a level playing field and have to cope with legal and administrative provisions that severely restrict their free operation.

In recent years experts and practitioners have analyzed many aspects of this phenomenon, including especially the role of political parties during elections and electoral campaigns and aspects of party organization and finance. Quite surprisingly, the more basic problem of banning specific categories of political parties has been neglected in previous research even though a simple preliminary overview of African countries shows how widespread these practices are. Ethnic, religious and regional parties are illegal in a large number of African states. A Christian-Democratic Party like the German CDU or a regional party like the Bavarian CSU would not be allowed to register as a party and compete in elections in many African democracies today. While democratization is normally equated with multi-party politics, in Africa frequently explicit exceptions are made for

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parties based on clan, community, ethnicity, faith, gender, language, region, race, sect and tribe.

In light of the prevalence of party bans in contemporary Africa, it is astounding how little attention has been paid to this phenomenon among the general public, international organizations and aid donors, as well as scholars. There exists no research on party bans, their origins, practice or effects. No attempt has been made to explain the adoption of party bans by so many new democracies. Nor has the question been raised whether party bans are compatible with democracy and whether the a priori prohibition of political organization along meaningful socio-cultural differences does not undermine the democratic legitimacy of the new multi-party systems.

This main question translates into four sub-questions: 1) Which empirical phenomena might be defined as party bans and which main types of party bans do exist? 2) What are the effects of formal bans? Why have ostensibly so few of the countries that adopted party bans actively enforced them? And to what extent are formal bans on ethnic parties an effective instrument in ethnic conflict management? 3) Why have so many new democratic regimes in Africa adopted party bans? And which variables explain that other countries did not? 4) Given that party bans pose limits to political liberty, how can their existence be squared with the democratic aspirations of new or consolidated constitutional regimes? What are the strategies and legitimations used in order to integrate party bans with the democratic self-understanding of the respective polities? Compared with how OECD countries justify bans on political parties, how do these justifications stand up?

Ethnic and religious party bans are not an exclusively Sub-Saharan African phenomenon. They have been imposed in several countries in post-communist Eastern Europe, are part of many constitutions in Asia, have been included in the new constitutions of Afghanistan and Iraq, and have been enforced in Turkey and Algeria. While it would be very interesting to broaden the scope and to include into the analysis other countries and regions, at this stage a focus on Sub-Saharan Africa recommends itself, the main reason being the shared experience of the politicization of ethnicity and the longstanding and continuing attempts at ethnic conflict management through institutional engineering in that region. This provides the common background against which the recent spread of party bans in Africa needs to be analyzed.

## **B. Previous Contributions of Political Science and Constitutional Theory**

While a preliminary investigation of the empirical situation on the ground (see C(I) below) shows that various types of party bans have been adopted by at least

twenty-two African countries (six other countries have adopted clauses that could be used to the same effect and a full search for party bans in Africa would likely yield even more cases), no systematic analysis of the phenomenon has been done so far. The planned research may draw on three broad strands of literature: the research on parties and party systems (I); the broader body of theoretical arguments about the new institutionalism, especially with regard to the institutional management of political conflicts (II); and the rich research tradition on the limits of political association in constitutional law and normative political thought (III).

### *I. The Object of Party bans: Ethnic Parties*

While party bans are clearly one institutional device among a broader set of instruments to regulate party competition, they are directed against specific types of parties. But how do these banned types feature among the party types that exist within the literature?

As such party bans clearly embrace more than ethnic groups in a narrow sense, we either have to employ a broad notion of 'ethnic party' in which ethnicity refers to any perceptible inherited social characteristic<sup>2</sup> or use the generic term of 'particularistic parties'<sup>3</sup>. The term 'particularistic parties' was first employed by Coleman to designate parties "having an ethnic, racial or tribal basis".<sup>4</sup> Almond notes how "the 'particularistic' party is limited in its aggregative potential by being identified completely with the interests of a particular ethnic or religious group.....the particularistic party is more of an interest articulator than an aggregator".<sup>5</sup> Already around the time of decolonization, it was noted how "in the electoral struggle candidates find it advantageous, if not necessary, to manipulate local issues in order to establish the most secure political base possible, which is normally their tribal, communal, or religious group of origin."<sup>6</sup> In this view democratization and multi-party politics spell the politicization of ethnicity, but there is hardly any systematic empirical account of ethnic parties since the re-emergence of pluralist party

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<sup>2</sup> See Robert Jackson, *Ethnicity*, in *SOCIAL SCIENCE CONCEPTS: A SYSTEMATIC ANALYSIS*, 205 (Giovanni Sartori ed., 1984) and Crawford Young, *Nationalism, Ethnicity, and Class in Africa: A Retrospective*, 26 *CAHIERS D'ÉTUDES AFRICAINES* 421 (1986).

<sup>3</sup> GABRIEL ALMOND & JAMES COLEMAN, *THE POLITICS OF THE DEVELOPING AREAS* (1960).

<sup>4</sup> *Id.*, 556.

<sup>5</sup> *Id.*, 44.

<sup>6</sup> *Id.*, 554-555. For an early and careful analysis of this process in Zambia see Robert Molteno, *Cleavage and Conflict in Zambian Politics: A Study in Sectionalism*, in *POLITICS IN ZAMBIA*, 62 (William Tordoff ed., 1974).

politics in the forty-something African countries since the early 1990s. More recently, Gunther and Diamond have proposed comprehensive typologies of political parties that comprise the type of ethnic party which is marked by specific organizational features and specific modes of interest aggregation.<sup>7</sup> Gunther and Diamond write about “ethnicity-based parties” distinguished by their political and electoral logics: “the principal goal of the ethnic party is not any universalistic program or platform, but rather to secure material, cultural, and political benefits and protections for the ethnic group in its competition with other groups”.<sup>8</sup> The electoral logic of an ethnic party is “to harden and mobilize its ethnic base with exclusive, often polarizing appeals to ethnic group opportunity and threat, ... electoral mobilization is not intended to attract additional sectors of society to support it”.<sup>9</sup> There has so far been little theoretical and empirical research to try to apply these concepts to Sub-Saharan Africa and to understand the logics behind the emergence of such ethnic parties, or the specific consequences for the dynamics of the party systems.<sup>10</sup>

Trends towards the political organization of ethnicity were and are still seen by many as undesirable, for several reasons.<sup>11</sup> First, in case of a majority ethnic group, ethnic politics is likely to lead to the political, social, cultural and economic suppression and exclusion of minorities. Second, to counter a majoritarian tendency of a dominant ethnic majority or majority coalition, ethnic minorities may resort to non-democratic and even violent means to protect their interests. Ultimately, this may lead to the minority establishing its own repressive, non-democratic regime against the majority. Third, irrespective of the particular constellation of ethnic groups in a society, ethnic politics is likely to raise the stakes in the political game, fanning emotions and increasing the likelihood of disturbances of public order (witness the experience with

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<sup>7</sup> Richard Gunther & Larry Diamond, *Types and Functions of Parties*, in POLITICAL PARTIES AND DEMOCRACIES, 3 (Larry Diamond/Richard Gunther eds., 2001). See, for the South Asian debate, KANCHAN CHANDRA, WHY ETHNIC PARTIES SUCCEED: PATRONAGE AND ETHNIC HEADCOUNTS IN INDIA (2004).

<sup>8</sup> *Id.*, 23.

<sup>9</sup> *Id.*

<sup>10</sup> See further, Michelle Kuenzi & Gina Lambright, *Party System Institutionalization in 30 African Countries*, 7 PARTY POLITICS 437 (2001); Vicky Randall & Lara Svasand, *The Contribution of Parties to Democracy and Democratic Consolidation*, 9 DEMOCRATIZATION (2002); Gero Erdmann, *Party Research: Western Bias and the “African Labyrinth”* 11 DEMOCRATIZATION 63 (2004); and Oda Van Cranenburgh, *Power and Competition: The Institutional Context of African Multi-Party Politics*, in AFRICAN POLITICAL PARTIES: EVOLUTION, INSTITUTIONALISATION, AND GOVERNANCE (M. A. Salih ed., 2003).

<sup>11</sup> See DONALD HOROWITZ, ETHNIC GROUPS IN CONFLICT (1985); DONALD HOROWITZ, A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY (1991); SALIH ED. (note 10); and Edward R. McMahon, *Catching the ‘Third Wave’ of Democratization? Debating Political Party Effectiveness in Africa since 1980*, 3 AFRICAN AND ASIAN STUDIES 295 (2004).

communal riots). Fourth, ethnic political parties entrench societal divisions and serve to keep people apart in their own groups instead of bringing people together in pursuit of the common good. In sum, the politicization of ethnicity in Africa is associated with ethnic conflict, ethnic violence (even civil war), human rights violations, repression (even genocide), political instability, democratic erosion, and the establishment of non-democratic regimes.<sup>12</sup> Unfortunately, there are many instances in modern African political history to demonstrate the perils of ethnic politics. It is thus a conventional wisdom that the prohibition of particularistic parties does indeed serve to block the political organization and expression of socio-cultural differences in order to secure social peace and democracy. The proposed research aims to put these assumptions to an empirical test.

### *II. Institutional change, design and conflict management*

Post-independence Africa has a long history of “political engineering” and experimentation with institutional design. Many students of African politics question the relevance of formal rules and institutions<sup>13</sup> and stress the extent to which the dynamics of the political process and the behavior of actors are effectively shaped by informal institutions. Constitution-makers and political engineers have nevertheless persisted in their attempts to revise and manipulate formal institutions, and international scholarship has contributed recommendations about the design of institutional alternatives as well as empirical evidence about their likely consequences.<sup>14</sup> Scholars interested more specifically in the management of ethnic conflict have analyzed the role of selected institutions such as electoral systems,<sup>15</sup> federalism,<sup>16</sup>

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<sup>12</sup> See James Scarritt et al, *The Interaction between Democracy and Ethnopolitical Protest and Rebellion in Africa*, 34 COMPARATIVE POLITICAL STUDIES 800 (2001); and Matthijs Bogaards, *Electoral Systems, Party Systems, and Ethnic Conflict Management in Africa*, in VOTES, MONEY AND VIOLENCE: POLITICAL PARTIES AND ELECTIONS IN AFRICA: CONCEPTUAL PROBLEMS, EMPIRICAL FINDINGS AND THE ROAD AHEAD (Matthias Basedau et al eds., 2007).

<sup>13</sup> See, for example, JEAN-FRANCOIS BAYART, *LA POLITIQUE DU VENTRE, L'ÉTAT EN AFRIQUE* (1989); and PATRICK CHABAL & JEAN-PASCAL DALOZ, *AFRICA WORKS: DISORDER AS POLITICAL INSTRUMENT* (1999).

<sup>14</sup> DEMOCRACY AND DEEP-ROOTED CONFLICT: OPTIONS FOR NEGOTIATIONS (Peter Harris/Ben Reilly eds., 1998).

<sup>15</sup> ELECTIONS AND CONFLICT MANAGEMENT IN AFRICA (Timothy Sisk/ Andrew Reynolds eds., 1998); ANDREW REYNOLDS, *ELECTORAL SYSTEMS AND DEMOCRATIZATION IN SOUTHERN AFRICA* (1999); BEN REILLY & ANDREW REYNOLDS, *ELECTORAL SYSTEMS AND CONFLICT IN DIVIDED SOCIETIES* (1999).

<sup>16</sup> See BERTUS DE VILLIERS, *LOCAL AND PROVINCIAL INTERGOVERNMENTAL RELATIONS: A COMPARATIVE ANALYSIS* (1997); Eghosa Osaghae, *Democracy and National Cohesion in Multiethnic African States: South Africa and Nigeria Compared*, 5 NATIONS AND NATIONALISM 259 (1999); and NORMAN LEVY & CHRIS TAPSCOTT, *INTERGOVERNMENTAL RELATIONS IN SOUTH AFRICA: THE CHALLENGES OF COOPERATIVE GOVERNMENT* (2001).

and decentralization.<sup>17</sup> However, the significance of party regulation, and party bans in particular, has so far attracted little interest within this debate, although constitutional limitations on the number of parties in Nigeria (3<sup>rd</sup> Republic) and Senegal (during the late 1970s) have been analyzed by Bogaards<sup>18</sup> and McMahon.<sup>19</sup>

The analysis of party bans in Africa has to be seen within the broader agenda of institutionalist political science theories.<sup>20</sup> The main idea in these approaches is that institutions matter as they shape the behavior, attitudes and role-perception of actors. The new institutionalism is both interested in institutions as independent and dependent variables.

Institutions as independent variables may explain various aspects of political behavior and aggregate outcomes as stability and democratic consolidation.<sup>21</sup> Knowledge of the effects of institutions could then be used deliberately and purposely to design institutions that help shape desirable behavior and bring about socially optimal outcomes. Concretely, ethnic party bans appear to be in most cases a form of political engineering, an instrument in ethnic conflict prevention and management. Whether party bans do serve socially optimal outcomes is, however, an empirical question. The project is intended to collect reliable and scientific evidence about the effects of the institution of the party ban that might assist law-makers and political engineers in their attempts to influence institutional change.

Of course, why African countries adopted a party ban is an equally interesting question and one that might restrict the likelihood of a socially optimal institutional outcome. The second research tradition within the new institutionalism sees institutions as dependent variables and looks for the critical variables and factors

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<sup>17</sup> See Andreas Mehler, *Dezentralisierung und Krisenprävention*, in *DEZENTRALISIERUNG IN ENTWICKLUNGSLÄNDERN* 391 (W. Thomi et al eds., 2001); and Christof Hartmann, *Local Government and the Management of Conflict in Fragmented Societies: South Africa, Namibia and Mauritius Compared*, in *MANAGING AND RESOLVING AFRICAN CONFLICTS: CONFLICT RESOLUTION AND POST-CONFLICT RECONSTRUCTION. VOL. 2* (Alfred G. Nhema/Paul Tiyambe Zeleza eds., 2007).

<sup>18</sup> Matthijs Bogaards, *Prefabricated Party Systems: Imposing Ideological Cleavages in Africa*, 1<sup>st</sup> ECPR General Conference, Canterbury, United Kingdom (2001); Matthijs Bogaards, *Creating an Ideological Space: The Experience of Nigeria's Prefabricated Party System*, 2<sup>nd</sup> ECPR General Conference, Marburg, Germany (2003), BOGAARDS (note 12).

<sup>19</sup> MCMAHON (note 11).

<sup>20</sup> B. GUY PETERS, *INSTITUTIONAL THEORY IN POLITICAL SCIENCE: THE NEW INSTITUTIONALISM* (2001).

<sup>21</sup> See AREND LIJPHART, *PATTERNS OF DEMOCRACY* (1999); ADAM PRZEWORSKI ET AL, *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950-1990* (2000); and JOSEP COLOMER, *POLITICAL INSTITUTIONS, DEMOCRACY AND SOCIAL CHOICE* (2001).

that drive institutional emergence and change.<sup>22</sup> Rational-choice based approaches interpret institutional change as the reflection of changed interests of main actors. We would thus realize that in addition to a legitimate desire of preventing violent ethnic conflict (or even a lack of such an attempt) party bans may be the result of the more narrow self-interested motives of decision-makers. For example, there is little doubt that in some cases - like Kenya, where long-time president Daniel Arap Moi belonged to a minority tribe - sub-national party bans served the interests of the incumbents (as they hindered the political organization of the two major ethnic groups as political parties), and party bans were used as one element on the "menu of manipulation" in the hands of self-serving elites.<sup>23</sup> In contrast to rational choice analysis, historical institutionalism sees change determined and restricted by past trajectories (path dependency) and decisions taken at critical junctures that subsequently shaped the preferences and strategies of collective actors. Party regulations as an institution would thus mirror less the rational interests and relative bargaining power of decision-makers than reflect the historical path of party (and maybe also political) competition within a given country.<sup>24</sup>

### *III. Party Bans in Constitutional and Normative Political Theory*

Traditionally, research into bans on political associations within constitutional and normative political theory has been conducted against the backdrop of the European experience with its two versions of totalitarianism. The concept of militant democracy was coined to cover fascism and communism as the two main challenges to democratic rule.<sup>25</sup> In its most ambitious constitutional constructions, militant democracy was symmetrically directed against political totalitarianism from the right and from the left. It is characteristic of the anti-totalitarian understanding of party bans that they do not depend on violent behavior or its advocacy on the part of political actors, but are directed against the threat of a "legal" anti-democratic takeover of the state apparatus.<sup>26</sup> This is why, although

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<sup>22</sup> See DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990); Barry R. Weingast, *Political Institutions: Rational Choice Perspectives*, in *A NEW HANDBOOK OF POLITICAL SCIENCE* (Robert E. Goodin/H. D. Kingemann eds., 1996); and Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 2 *ANNUAL REVIEW OF POLITICAL SCIENCE* 369 (1999).

<sup>23</sup> Andreas Schedler, *The Menu of Manipulation*, 13 *JOURNAL OF DEMOCRACY* 36 (2002).

<sup>24</sup> RUTH COLLIER & DAVID COLLIER, *SHAPING THE POLITICAL ARENA: CRITICAL JUNCTURES, THE LABOR MOVEMENT, AND REGIME DYNAMICS IN LATIN AMERICA* (1991).

<sup>25</sup> Karl Loewenstein, *Militant Democracy and Fundamental Rights I and II*, *AMERICAN POLITICAL SCIENCE REVIEW* XXXI 417 and 638 (1937).

<sup>26</sup> See CARL SCHMITT, *LEGALITÄT UND LEGITIMITÄT* (1932); and *Bundesverfassungsgericht* (Federal Constitutional Court - BverfGE) 2, 12f.

most commentators state that party bans within democracies constitute a lasting “dilemma”, “paradox”, or “antinomy”, constitutional theory has found restrictions on anti-system parties on the whole to be compatible with democratic government.<sup>27</sup> Still, the overall compatibility with democratic rule and the rule of law requires that stringent justifications be given for any infringement of political liberty. In today’s OECD democracies, under conditions of relative consolidation where neither neo-fascist nor neo-communist parties pose credible threats of a takeover of the political system, party bans have faced much criticism for their lack of effectiveness,<sup>28</sup> their lack of democratic legitimacy,<sup>29</sup> and their lack of political wisdom.<sup>30</sup>

Obviously, the traditional European perspective on party bans, that of anti-fascist and anti-communist militant democracy, will only be of limited help if applied to the major developments in Africa’s contemporary constellation. However, recent developments and research on European party bans have increasingly broadened and/or corrected our understanding of militant democracy’s standard anti-totalitarian rationale. Although bans on ethnic parties have not been central to these developments, five major trends in the recent history of (research on) party bans can be identified which should contribute to a more helpful heuristic for the African constellation. These concern fighting Islamism, regionalism/secessionism, or the supporters of terrorism. They reflect a growing international pressure towards the installation of party bans, and an awareness of the symbolic role that party bans play within a politics of memory and, more generally, the political identity of a democratic collective.

(1) *Islamism* is a political challenge to democracies to which a relatively straightforward application of militant democracy appears possible. The recent decision by the European Court of Human Rights against the Turkish Refah Party documents that the traditional anti-totalitarian paradigm can be extended from fascist and

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<sup>27</sup> Martin Morlok, *Parteiverbot als Verfassungsschutz – Ein Unauflöslicher Widerspruch?*, 54 NEUE JURISTISCHE WOCHENSCHRIFT 2931 (2001).

<sup>28</sup> Michael Minkenberg, *Repression and Reaction: Militant Democracy and the Radical Right in Germany and France*, 40 PATTERNS OF PREJUDICE 25 (2006).

<sup>29</sup> CLAUS LEGGEWIE & HORST MEIER, REPUBLIKSCHUTZ. MASSSTÄBE FÜR DIE VERTEIDIGUNG DER DEMOKRATIE (1995) and VERBOT DER NPD ODER MIT RECHTSRADIKALEN LEBEN (Claus Leggewie/Horst Meier eds., 2002).

<sup>30</sup> Ulrich Preuss, *Die Empfindsame Demokratie* in LEGGEWIE/MEIER EDS. (note 29), 104.



communist parties to theocratic parties.<sup>31</sup> Scholars have separately argued that an anti-totalitarian understanding of party bans can and should be broadened to include threats of a religious fundamentalist takeover of democratic systems.<sup>32</sup> Fox and Nolte, in a rare study that covers the constitutions of at least some African democracies, have thus seen the dissolution of the Islamist FIS in Algeria, directed against a party about to abolish democracy by electoral means, as a paradigm case for a traditionally conceived militant democracy.<sup>33</sup> As several African states have installed bans against parties along religious lines, the relevance of an amended conception of militant democracy will have to be investigated.

(2) *Regionalism/Separatism*. Another major trend in the European discussion of party bans derives from the fact that after the collapse of Communism, the constitutions of many new Eastern European democracies incorporated new types of party bans. Apart from a concern about a resurgence of totalitarian movements, several constitutions display a prohibition on regional and ethnic parties.<sup>34</sup> One obvious explanation for this is defense against separatist or irredentist endeavors. In the political-institutional categories of anti-system party research, however, separatist opposition has been notoriously hard to conceptualize.<sup>35</sup> For example, the European Council's Venice Commission, which advises Eastern Europe's transitional countries on questions of democracy and the rule of law, has not so far been able to integrate the threat posed by regionalism into its moderately anti-party ban Guidelines on Prohibition and Dissolution of Political Parties.<sup>36</sup> Also, there is no consensus on the admissibility of separatism and secession in constitutional and

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<sup>31</sup> Eur. Court H.R., *Refah Partisi and others v. Turkey*, Judgement of 31 July 2001. See also Peter Niesen, *Anti-extremism, Negative Republicanism, Civic Society: Three Paradigms for Banning Political Parties*, in 3 GERMAN LAW JOURNAL 7, 2002.

<sup>32</sup> See Dieter Grimm, *Wieviel Toleranz verlangt das Grundgesetz?*, in DIETER GRIMM, *DIE VERFASSUNG UND DIE POLITIK*, 118 (2001); and Uwe Backes & Eckhard Jesse, *Islamismus – Djihadismus – Totalitarismus – Extremismus*, in *JAHRBUCH EXTREMISMUS UND DEMOKRATIE*, 14 (Uwe Backes/Eckhard Jesse eds., 2002).

<sup>33</sup> Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARVARD INTERNATIONAL LAW JOURNAL 1 (1995).

<sup>34</sup> Matthijs Bogaards, *Electoral Systems and the Management of Ethnic Conflict in the Balkans*, in UNDERSTANDING POSTCOMMUNIST NATIONALISM: LESSONS LEARNED, 247 (Alina Mungiu-Pippedi ed., 2004).

<sup>35</sup> Giovanni Capoccia, *Anti-System Parties: A Conceptual Reassessment*, 14 JOURNAL OF THEORETICAL POLITICS 9, 12 (2002).

<sup>36</sup> European Commission for Democracy Through Law (Venice Commission), *Guidelines on prohibition and dissolution of political parties and analogous measures*, 10 January 2000; Peter Niesen, *Zwischen Pfadabhängigkeit und Kommensuration. Verbote politischer Parteien in Europa* in "SCHMERZLICHE ERFÄHRUNGEN" DER VERGANGENHEIT UND DER PROZESS DER KONSTITUTIONALSIERUNG EUROPAS. (Christian Joerges et al. eds., 2007 forthcoming).

normative political theory today, and a narrow focus on consolidated democracies like Canada is of limited relevance for democracies in transition.<sup>37</sup> Though the defense against regionalism and/or secessionism clearly appears relevant to the motivation and justification of contemporary African party bans, at present we lack a convincing analytical and normative framework for it.

(3) *Terrorism and civil society.* In contrast to banning non-violent agitation for fundamental political change, banning violent political action appears not only not in conflict with democratic procedures, but positively required by it. The legitimacy of persecuting terrorism hardly raises interesting questions for political theory; banning political associations that harbour terrorists appears unproblematic. This justification, however, does not extend to banning political associations that do not sponsor, but condone terrorist activity, e.g. by welcoming violent attacks or by not dissociating from them (e.g. the IRA-Sinn Fein, ETA-Batasuna). The latter has proved a decisive argument in a recent Spanish constitutional amendment, as the rationale for banning the Basque nationalist party Batasuna centered not so much on any formal patronage extended to ETA terrorism, but on the *contempt* for the victims of ETA bombings and assassinations expressed by non-dissociation.<sup>38</sup> It is clear that this justification cannot be subsumed to the militant democracy paradigm, but rather concerns the conditions for civic relations among democratic citizens, especially against the background of a history of violent strife. Parties that celebrate terrorist activity may undermine reconciliation and the evolving of public trust among citizens, and thereby sabotage the evolving or working order of civil society; thus party bans appear to play a functional role in the protection not of state apparatus, but of civil society.<sup>39</sup> (As several African post-conflict societies have become involved in ambitious reconciliation projects, it should be investigated as to how far party bans are meant to secure respectful, non-intimidating and non-contemptuous relations between citizens as a precondition for meaningful political exchange.

(4) *Internationalization.* Fox and Nolte's trailblazing study is further instructive in that it views party bans not only from the perspective of domestic constitutional law, but also from the vantage point of the law of nations. They argue that international law imposes on countries a duty to uphold democracy.<sup>40</sup> The precise

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<sup>37</sup> SECESSION AND SELF-DETERMINATION (Stephen Macedo/Allen Buchanan eds., 2003).

<sup>38</sup> Miguel Revenga Sanchez, *El Tránsito Hacia (y la Lucha por) la Democracia Militante en España*, 62 REVISTA DE DERECHO POLITICO 11 (2005).

<sup>39</sup> NIESEN (note 31).

<sup>40</sup> FOX (note 33), 59-68.

motivation of that duty can variously appeal to democracy's credentials in awarding political rights, securing human rights, protecting from famine,<sup>41</sup> or securing outwardly peaceful relations. In any case, the presence of party ban provisions in a democratic constitution would then appear to constitute the normal case, not the exception: under international law, democracies are not to be allowed to enter into a domestic "suicide pact". Viewed from outside, it may seem that a country that does not envisage banning problematic parties is insufficiently committed to democracy, to the civil rights of its inhabitants and to the security of its neighbors. This represents a major shift in democratic theory and is clearly relevant for researching the motivations and justifications of party bans in Africa. As international organizations, foreign codification experts and international NGOs have been intimately involved in the drafting of many constitutions, it is not unlikely that a "militant" understanding of international law, human rights and democracy may have had a major impact on emerging African constitutional regimes.

(5) *Memory and Political Identity*. One manifest but under-theorized feature of party bans is their symbolic function. Many European countries that have installed party bans have done so against the backdrop of a national history of violence and injustice (e.g. Italy, Germany, Poland).<sup>42</sup> They have thereby publicly sided with the victims against (domestic or foreign) criminal perpetrators, which has played a major role for the respective countries' politics of memory. Historical research has pointed out, for example, the catalytic function the ban against the neo-National Socialist SRP had on the politics of memory in Germany.<sup>43</sup> Studies on transitional justice have stressed the pivotal influence of demarcation from the *ancien régime* for political integration in East European post-communist democracies.<sup>44</sup> The dissociation from a past regime of injustice seems to provide an uncontroversial and vivid option for a society's democratic self-understanding. Obviously, the attempts of young democracies to define their republican project through the symbolic negation of unjust predecessor regimes can be related to the experience of many African states in transition, and it should be investigated whether such motives have played a role in the installation and justification of party bans.

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<sup>41</sup> AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

<sup>42</sup> See NIESEN (note 31).

<sup>43</sup> NORBERT FREI, *VERGANGENHEITSPOLITIK. DIE ANFÄNGE DER BUNDERSREPUBLIK UND DIE NS-VERGANGENHEIT* (1999), 326-360.

<sup>44</sup> Claus Offe, *Democracy and Trust*, 96 *THEORIA* 1 (2000).

Altogether, several innovative shifts have thus been introduced recently into constitutional and political theorizing on party bans. These developments indicate that a normative evaluation of party bans in Africa should not subsume the variety of perspectives within the preexisting paradigm of militant democracy, but develop new normative frameworks for party ban provisions.

### **C. Research program, project activities and methodology**

As there exists hardly any research on party bans in Africa, and no research whatsoever on ethnic party bans, the project will develop its own analytical tools, including a novel framework for classifying party bans. The project activities consist of data collection, analysis, and the formulation of policy recommendations.

#### *I. The Concept and Types of Party Ban*

The first important component of the project is the elaboration of a typology of party bans in Africa in order to make sense of the empirical variety of legal bases, and the extent and object of bans. Our tentative overview of the empirical situation in Africa leads us to propose a research agenda around a number of analytical categories: Particularistic party bans can be classified on the basis of three criteria: the legal form of the party ban, the proscribed facet(s) of party-political organization, and the proscribed social basis/cleavage. Party bans can be found in a country's constitution, electoral law, law on political parties, or law on voluntary associations, and it can be administered by administrative decree and/or review by a judicial process. The facets of party-political organization that have been targeted are the party program, party symbols, party organization, and membership, either in combination or separately. Almost any social basis for organization of parties has been the subject of a ban in Africa. These include brotherhood, clan, community, ethnicity, faith, gender, language, region, race, sect, section, tribe, and even gender and professional group.

*Legal form:* Most often, party bans are explicitly provided for in the Constitution. An exception is Namibia, where a prohibition on party membership that is restricted on the grounds of sex, race, color, ethnic origin, religion, creed or social or economic status only emerges in the "Regulations for Registration of Voters and Political Parties" (1992).

Where appropriate, under the heading of "legal form" a further distinction can be made between party registration and party dissolution. In most cases, the rules for registration appear to apply also to a party's dissolution. That is to say, a party can lose its registration when it is found by the proper authorities that it has violated the requirements for registration. Mauritania may be an exception, in that its

Constitution of 1991 does not mention sub-national identification of a party (article 6) among the grounds for its dissolution (article 25). Finally, under the heading of "legal form" we need to include the question of whether there exists a judicial review procedure for party bans, as the latter is today viewed by many commentators as a minimum requirement of the rule of law.<sup>45</sup>

*Proscribed dimension of party politics:* Most often, a party ban is stated in general terms. For example, in the Democratic Republic Congo, article 22 of the Constitution states: "L'identification d'un parti ou d'un regroupement politique à une race, à une ethnie, à un sexe, à une religion, à une secte, à une langue, ou à une province, est prohibée". How such "identification" of a political party with one ethnic group, religion, language, etc. manifests itself and can be verified is left open. Less frequently, the ban addresses a specific aspect of party political organization. At least four 'targets' of party bans can be identified: Party Program, Party Symbols, Party Organization, and Party Membership. This list is not exclusive and more targets can be thought of, for example electoral campaigning. The 1992 Madagascar Constitution forbids associations or parties "which preach totalitarianism or segregation of an ethnic, tribal, or religious nature" (article 14(1)). Party bans can be directed at any one of these aspects separately or in combination, as is evident when we look at some examples below.

*Social basis of prohibition:* Finally, we can distinguish party bans on the basis of the grounds on which a party is banned. In Germany, the Basic Law prohibits extremist and undemocratic parties. In Africa, there is a wide range of grounds on which parties are banned. The most important are, in alphabetical order: Brotherhood, Clan, Community, Ethnicity, Faith/Religion; Gender, Language; Professional group; Region; Race; Sect; Section; Social condition / social or economic status; Tribe. Even though this is not an exhaustive list it serves to display the astoundingly wide range of grounds for party prohibitions in Africa. The specificity of the concepts, such as sect and brotherhood, also indicates that countries do not simply adopt a blanket ban on ethnic parties but consciously address the particular forms of ethnicity that affect their societies.

Normally, the grounds for party prohibition are identical over the four aspects of party political organization. That is to say, if a country prohibits religious parties, religion is prohibited in the party program, membership, symbols, and organization. Liberia is an exception. In Liberia, different grounds for different aspects of party political organization are stipulated. Party membership should be open irrespective of sex, religion or ethnic background; party symbols should be free of

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<sup>45</sup> Venice Commission (note 36); FOX (note 33).

“religious connotations or divisive ethnic implications”; the election of party officers should “ensure the election of officers from as many of the regions and ethnic groupings in the country as possible”, and the “activities” of the party should not be limited to any “special group” or to a particular geographic area of Liberia (Constitution of Liberia). Why such a differentiation is deemed necessary is not clear from the document itself. In the Ivory Coast, the grounds for party prohibition differ not according to aspects of party political organization but according to the legal basis. Whereas the constitution prohibits ethnic, racial, regional, religious, and tribal parties, the Law on Parties and Political Associations goes further and prohibits in addition parties based on gender, sect, language, and profession.

The first ban on particularistic parties in an independent African state was probably adopted by president Nkrumah of Ghana in the 1960s. At present, at least twenty-two African countries have bans on particularistic parties. These are Benin, Burkina Faso, Burundi, Cape Verde, the Central African Republic, the Democratic Republic of Congo, Djibouti, Equatorial Guinea, Ghana, Guinea, Ivory Coast, Kenya, Liberia, Mauritania, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Tanzania and Togo. Several more countries have less explicit laws that could conceivably be used to ban particularistic parties (Angola, Cameroon, Chad, Gabon, Madagascar, and Mozambique).

## *II. Enforcement and Effects of Party bans*

We have also to understand the consequences and effects of party bans (as an independent variable). This part of the research agenda has two main facets: One is concerned with enforcement, the other with the effects.

*Enforcement of party bans:* To what extent are rules about party bans actually enforced? On the basis of our assessment and analysis of legal bans (see C.I above) we will investigate how many parties have been actually banned under this type of rule. What kind of parties have been banned? Under what circumstances? And what happened next? Did these parties disband, reform, or join other political forces? Was the party ban accepted or contested? In case the matter went to court, is there jurisprudence?

Little is known about how countries implement party bans. The precise formulation of the prohibition of party-political organization on a sub-national basis differs and is often open to interpretation. The Constitution of Burkina Faso of 1997 simply outlaws parties or any “political organization” that is “tribalist, regionalist, religious, or racist” (article 13), leaving open the question how this is to be established and by whom. What does it mean to “identify” with an ethnic group,

religion, or language? Many French-speaking African countries have this clause, including Djibouti, Mauritania, and Senegal. In some cases, it is not even clear whether the constitution or party law prohibits sub-national parties as such. Gabon, Cameroon, and Chad prohibit particularistic “propaganda” or “discrimination” by political parties. The Constitutions of Mozambique (1990) and Angola (1992) require parties to be “national in scope”, among other things. By itself, this does not constitute a ban on sub-national parties, even though the clause could conceivably be used to that extent. The Rwandan Constitution of 2003 requires that parties reflect national unity, e.g. in attempts at recruitment and leadership selection, though no attempt is made to specify quotas or other details. Clearly, more detailed information is needed to answer these vexing questions.

Preliminary investigations discovered several cases in which parties were officially banned because of a formal ban on ethnic and religious parties. In Rwanda, the *Mouvement Démocratique Républicain* (MDR), a Hutu dominated political party, was banned in April 2003 on the ground of « divisionisme » which translates in an accusation of “tribalism” in this trouble ridden country.<sup>46</sup> In Kenya, the Islamic Party of Kenya (IPK) was refused registration in the early 1990s, whereupon Islamic politicians then decided to run for one of the opposition alliances, FORD-Kenya. In Mauritania, a movement of ex-slaves joined with two other ethnic groupings to form the *Parti du Centre Démocratique Mauritanien* in a deliberate attempt to circumvent the ban on ethnic parties.<sup>47</sup> One could argue that both the latter cases show how easy it is to get around a ban on ethnic parties, but one could also, and more appropriately, conclude that in both cases the ban served its purpose, as politicians were compelled to build or join a broader political platform. No doubt, our investigation will reveal other instances of banned parties that until now have remained in the dark.

*Effects of party bans:* A slightly different, but even more important question concerns the effects of party bans. In case party bans are enforced, to what extent do they have an impact on political and social outcomes? Do they promote inter-ethnic/inter-religious harmony, political stability and the consolidation of fragile new democratic dispensations? Or is ethnicity more powerfully regulated by other institutions (such as electoral or governmental systems) and variables?

Could it be that party bans have a strong preventive effect discouraging the formation of ethnic parties? If this were the case we would expect to see fewer ethnic parties in countries with a party ban than in countries without. This can be established through comparative research.

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<sup>46</sup> See POLITICAL PARTIES OF THE WORLD, 6<sup>th</sup> edition, (Bogdan Szajkowski ed., 2005), 501-503.

<sup>47</sup> Anthony Pazzanita, *The Origins and Evolution of Mauritania's Second Republic*, 34 THE JOURNAL OF MODERN AFRICAN STUDIES 575, 593 (1996).

We may also ask for other likely outcomes at macro-level. Have party bans in Africa helped to prevent ethnic conflict? To what extent do we observe the adverse effect, that the legal party ban itself becomes the object of contestation and even of international intervention, as happened in Bulgaria and Albania around the time of the first post-communist elections?<sup>48</sup>

### *III. Explaining the variance and change of party bans*

Besides investigating the institutional provisions of African democracies and their varying experience with the implementation of party bans, in a third step we systematically analyze reasons that led to the introduction or not, of party bans as well as the reasons behind the change of the institution of party ban over time. How can we explain the fact that so many new democracies introduce party bans or specific types of party bans while others are allowing the free aggregation and political representation of all social interests within the population?<sup>49</sup>

Are there certain systematic patterns which can be discovered, such as previous experience with ethnic parties, a history of ethnic conflict, civil war or even genocide, a history of injustice and racial or ethnic discrimination? How broadly and how intensely has ethnic or religious diversity figured in the history of the respective countries? What are the particular conditions and trajectories of democratization, how do they relate to the nature of the previous regimes? And how did previous rules concerning party regulation shape the current provisions?

### *IV. Party Bans and Democratic Self-government: Normative Aspects*

In a fourth step we want to investigate the justifications put forward in the introduction of party bans into democratic constitutions in Sub-Saharan Africa. We have seen that the existence and implementation of party bans at least *prima facie* appear to indicate a violation of democratic commitments. Also, we have seen that the traditional rationale for their introduction, militant democracy, will not be easily or completely transferable to bans on ethnic parties in the African countries under investigation. The questions therefore are: How do political actors justify the limits to political liberty introduced by party ban provisions? How do they try to overcome the obvious charge of their inconsistency with democratic principles?

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<sup>48</sup> BOGAARDS (note 34).

<sup>49</sup> For a similar argument on the change in electoral systems, see Christof Hartmann, *Paths of Electoral Reform in Africa*, in VOTES, MONEY AND VIOLENCE: POLITICAL PARTIES AND ELECTIONS IN CONTEMPORARY AFRICA: CONCEPTUAL PROBLEMS, EMPIRICAL FINDINGS AND THE ROAD AHEAD (Matthias Basedau et al eds., 2007).



And how far do their arguments stand up when confronted with contemporary approaches in constitutional and normative political theory?

The political theory component of the project will collect, excerpt, classify and examine the normative arguments that have been employed in the course of introducing or consciously avoiding party ban provisions in the setup of democratic institutions. This component will take its cue from the arguments actually developed within legal and political discourses of the respective countries. We will concentrate on periods of constitution-making and of major institutional change, on "constitutional moments" in the sense of Ackerman,<sup>50</sup> in which the introduction or change of party ban provisions is being proposed and contested. We will look at interventions by members of constitutional conventions, other political actors, external constitutional and political advisors as well as by political intellectuals within civil society. Although the arguments advanced may serve a rationalizing, ideological function, they still contribute to the public political self-understanding of citizenship and political institutions in the emerging democracies. Often such arguments will be formulated in completely general terms, while sometimes they will link up with the historical situation of the country in question and its specific path toward democracy. The collection of the latter type of arguments can be developed in intensive cooperation with the historical inquiries carried out in this project (see III above) and will be able to draw on its results.

Based on recent developments in constitutional and normative political theory (see B(III) above),<sup>51</sup> we propose to provisionally classify justifications for party bans along the fivefold distinction presented in B(III):

- (1) *militant democracy;*
- (2) *regionalist/separatist challenge;*
- (3) *civil society;*
- (4) *obligations of international law;*
- (5) *memory and political identity.*

The classifications proposed are not mutually exclusive, yet their respective dominance can be taken to designate various paradigmatic understandings of the dangers and chances for democratic self-government provided by the institution of party bans.

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<sup>50</sup> BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991).

<sup>51</sup> See also NIESEN (notes 31 and 36).

In addition to collecting and classifying those arguments, we propose to subject them to a discussion of their merits within normative political theory. This discussion will focus on the fragile compatibility of such arguments with ideas of democratic self-government. In giving a normative reconstruction of the arguments adduced, however, we will not attempt to measure their strengths and weaknesses exclusively against the pre-existing standards of militant democracy. The aim will be to find out whether the categorial frameworks established or presupposed by the political actors involved fit into a broader, more nuanced understanding of democratic self-government than the paradigm of militant democracy allows for.

Finally, on the basis of this historical and normative reconstruction, it will be attempted to develop a number of normative criteria that constitution-drafters and policy-makers in Africa could use in reforming their institutional provisions. While no attempt will be made to work out blanket recommendations for all countries within the scope of our project, we will aim at making clear which criteria are to be taken into account in opting for specific provisions in specific cases.