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RESEARCH ARTICLE

Constitutionalizing dissent: The universe of opposition rules in African constitutions

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Abstract

Constitutions are the most important legal foundation of politics. At the same time, the existence of a viable parliamentary opposition has been regarded one of the most distinctive characteristics of democracy. Bringing the two perspectives together, the principle of opposition can be constitutionalized to gain the highest status. Importantly, we refer to norms recognizing the opposition as such. Such counter-majoritarian rules are distinct because they empower opposition forces irrespective of their seat share and explicitly acknowledge that power should not be monopolized. While our subject has attracted little interest from comparative constitutionalists, it is too important to be overlooked. This is particularly true for autocratizing regimes where incumbents seek to use legislative lawfare to repress their opponents. Empirically, the study focuses on Africa, which proves revealing for various reasons. Among others, it addresses the critique that constitutional law studies often concentrate on usual suspect cases used to reveal purportedly universal insights. Our exercise in comparative constitutional law leads to two main conclusions that go beyond the continent. First, while we find a high number of opposition-related rules, the variation in design details and scope suggests that referring to the principle of opposition in an abstract manner is somewhat obscuring. And second, the obvious virtues of constitutionalizing dissent face noteworthy pitfalls since pertinent rules can lack legal clarity and even suppress dissent. Hence, the dividends of nominally democratic rules might be smaller than expected even if constitutional designers sincerely intend to fully uphold them in practice.

Keywords: African constitutions; comparative constitutionalism; counter-majoritarian protection; dissent; constitutions; counter-majoritarian rule; opposition

Opposition rules as targeted counter-majoritarian protection

The existence of a viable opposition has been considered 'very nearly the most distinctive characteristic of democracy itself'.[1] While we can think of different forms of opposition, the previous sentence mostly refers to its institutionalized version within parliaments – that is, the parliamentary opposition that is also the subject of this article. For our

[1]Robert A Dahl, 'Preface', in Robert A Dahl (ed), *Political Oppositions in Western Democracies* (Yale University Press, New Haven, CT, 1967) 16.

purposes, it denotes all parties with seats in parliament that neither form nor permanently support the government. A second observation that has led to this study is that almost all countries rely on constitutions as their highest legal and political foundation.[2] The relevance of constitutional rules arises from their specific features. They trump other legal provisions and provide a guideline for all future legislation. Moreover, they do not depend on the whims of parliamentary majorities (like ordinary laws) since they are usually more entrenched.[3] This is particularly important in regimes where rulers seek to repress their opponents and to gradually erode democratic institutions through strategies of legislative lawfare.[4] Constitutional opposition rules can to some extent protect against such behaviour at the level of ordinary law. At the same time, they are more difficult to amend since changes usually require special procedures and supermajorities.[5] Moreover, a country's constitution is more visible to domestic as well as international audiences that can use it as a signal and reference point.

Bringing both angles together, this article investigates how the principle of opposition is constitutionalized to gain the highest status and visibility. Importantly, we deal with provisions recognizing the opposition as such but not with rights to be used by any parliamentary minority. The latter category of sub-majority rules – say, if one-third of MPs is required to act – is undoubtedly significant but also well studied.[6] Moreover, it only provides diffuse empowerment of opposition forces since the useability of rights is contingent on holding a certain share of seats. In contrast, counter-majoritarian provisions referring to the term 'opposition' mean something more. They imply targeted empowerment of opposition forces irrespective of their parliamentary size.[7] More generally, they explicitly acknowledge that power should not be monopolized by one party.[8] In sum, from a formal viewpoint, opposition empowerment is most important if it is explicit and emanates from a country's supreme law.

Our main aim is to develop a perspective on the universe of constitutional opposition rules (defined as provisions that explicitly refer to the term 'opposition'). This seems to be a valuable endeavour in many ways. First, our topic has been relatively ignored by political scientists and legal scholars. Second, it also contributes to the literature on electoral autocracies, which by definition hold multiparty elections but also use a highly uneven

[2]Dieter Grimm, 'The Achievement of Constitutionalism and Its Prospects in a Changed World', in Martin Loughlin and Petra Dobner (eds), *The Twilight of Constitutionalism?* (Oxford University Press, Oxford, 2010) 3.

[3]Charles M Fombad, 'Conceptualising a Framework for Inclusive, Fair and Robust Multiparty Democracy in Africa: The Constitutionalisation of the Rights of Political Parties' (2015) 48 *Verfassung und Recht in Übersee* 11; Elliot Bulmer, Opposition and Legislative Minorities: Constitutional Roles, Rights and Recognition (2021) 22 *International IDEA Constitution-Building Primer* 16.

[4]See, for example, Kim L Scheppele, 'Autocratic Legalism' (2018) 85 *University of Chicago Law Review* 545; Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 *Journal of Democracy* 5.

[5]On formal constitutional change to undermine democracy see David Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189.

[6]For example, Adrian Vermeule, 'Submajority Rules: Forcing Accountability upon Majorities' (2005) 13 *The Journal of Political Philosophy* 74; Carolyn Forestiere, 'New Institutionalism and Minority Protection in the National Legislatures of Finland and Denmark' (2008) 31 *Scandinavian Political Studies* 448.

[7]The distinction between diffuse and targeted counter-majoritarian rules follows Susan Alberts, Chris Warshaw and Barry R Weingast, 'Democratization and Countermajoritarian Institutions', in Tom Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press, Cambridge, 2012) 72.

[8]Bulmer (n 3) 6.

electoral playing field or blatant electoral fraud to reproduce incumbent victories.[9] Today, however, even democratic regimes are affected by a 'global expansion of authoritarian rule'[10] that is marked by weakening mechanisms of horizontal accountability. In both settings, opposition forces can be regarded as key actors to prevent or mitigate (further) autocratization.[11] A third contribution arises from this study's regional focus. Empirically, we focus on Africa, which does not belong to the usual suspects in constitutional analysis but presents an insightful sample for various reasons spelled out in the next chapter. To provide a full picture, we include all sovereign African countries, irrespective of regime type or model of government.

After making a theoretical case for why the African continent is a worthwhile object of investigation, we address two understandings of opposition advanced by Cancik:[12] an organization-like idea that considers opposition a fixed entity and a less actor-centred functional view. Building on that conceptional work, the empirical analysis comes in several parts.[13] Our exploration first concentrates on rules of opposition recognition. We differentiate between thick and thin acknowledgement and also look at legal definitions and the assignment of duties. Next, we shed light on ways to recognize the opposition leader. The last set of rules deals with opposition prerogatives, including general clauses and specific rights within the legislative arena, the selection of extra-parliamentary personnel and access to media and money. While the article largely uses a formalistic approach, it reveals a wide array of choices in constitutional design. Hence, referring to the principle of opposition in an abstract manner obscures the underlying complexity of the phenomenon. Finally, our comparative exploration asks for empirical patterns and possible explanations. Beside those descriptive, typological and (very modest) explanatory contributions, we offer some normative reflections on the potential merits of constitutionalizing the principle of opposition in the concluding chapter. Overall, the dividends of nominally democratic opposition rules might be smaller than expected, in Africa as everywhere else.

Under-representation, renewal and executive supremacy: The case of African constitutions

Drawing on African constitutions is revealing for three reasons. First, the continent has received scant attention in the literature on comparative constitutional design. Even though there are outstanding exceptions from a few scholars,[14] global research is still

[9]In political science parlance, such polities are also referred to as electoral authoritarianism or competitive authoritarism. See Andreas Schedler, 'The Menu of Manipulation' (2002) 13 *Journal of Democracy* 36; Steven Levitsky and Lucan A Way, *Competitive Authoritarianism* (2012).

[10]Sarah Repucci and Amy Slipowitz, *The Global Expansion of Authoritarian Rule* (Freedom House, Washington, DC, 2022).

[11]Luca Tomini, Suzan Gibril and Venelin Bochev, 'Standing Up Against Autocratization Across Political Regimes: A Comparative Analysis of Resistance Actors and Strategies' (2023) 30 *Democratization* 119, 123.

[12]Pascale Cancik, *Parlamentarische Opposition in den Landesverfassungen. Eine verfassungsrechtliche Analyse der neuen Oppositionsregelungen* (Duncker & Humblot, Berlin, 2000).

[13]The study draws on the most recent versions of African constitutions available in 2022 either by the Comparative Constitutions Project (<https://www.constituteproject.org>) or through the governments' official websites.

[14]Charles M Fombad (ed), *Separation of Powers in African Constitutionalism* (Oxford University Press, Oxford, 2016); Charles M Fombad and Nico C Steytler (eds), *Democracy, elections, and constitutionalism in*

characterized by a 'northern selection bias' that has left Africa understudied.[15] Hence, it is one of the key regions targeted by the call for a 'southern turn in comparative constitutional law' demanding a broader foundation of legal debates and epistemic justice.[16]

Yet focusing on Africa is not only a question of fair representation in a multipolar world, but also a fruitful endeavour since the continent has experienced the bulk of constitutional re-starts and revisions since the early 1990s.[17] At that time, rising domestic pressures[18] as well as external causes such as the demise of Soviet communism[19] introduced a promising period of transition. They paved the way for a 'third constitution-making revolution'[20] that included the legalization of multipartyism and some depersonalization of power – for example, through term limits[21] – as their most important consequences. In general, the liberal notion of constitutionalism has gained a foothold ever since,[22] while rulers previously were often committed to the idea of a document that organizes power but does not limit governmental authority.[23] Moreover, constitutions have been replaced or amended frequently over the last three decades.[24] This renewal in

Africa (Oxford University Press, Oxford, 2021); Henry K Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa' (2008) 35 *Hastings Constitutional Law Quarterly* 761.

[15]Ran Hirschl, *Comparative Matters*: *The Renaissance of Comparative Constitutional Law* (Oxford University Press, Oxford, 2014) 212.

[16]Philipp Dann, Michael Riegner, Maxim Bönnemann, 'The Southern Turn in Comparative Constitutional Law', in Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (2020) 1, 4. To be sure, my own position and particular perspective as a scholar socialized in the Global North have to be recognized in the hope for a truly global conversation. See also Dann, Riegner and Bönnemann (n 16) 37.

[17]Henry K Prempeh, 'Africa's "Constitutionalism Revival": False Start or New Dawn?' (2007) 5 *International Journal of Constitutional Law* 469.

[18]Michael Bratton and Nicolas van de Walle, 'Popular Protest and Political Reform in Africa' (1992) 24 *Comparative Politics* 419.

[19]It made Western aid conditionality more focused on democracy promotion and also more effective. Thad Dunning, 'Conditioning the Effects of Aid: Cold War Politics, Donor Credibility, and Democracy in Africa' (2004) 58 *International Organization* 409.

[20]Charles M Fombad, 'Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa' (2007) 55 *The American Journal of Comparative Law* 2. This third "revolution" has been preceded by the adoption of independence constitutions (largely imposed by colonial powers) and of post-independence constitutions (in which incumbents altered the liberal principles in the inherited frameworks under the pretext of the need for development and nation-building). Fombad (n 20) 2.

[21]Anne Meng, *Constraining Dictatorship*: *From Personalized Rule to Institutionalized Regimes* (Cambridge University Press, Cambridge, 2020).

[22]I do not enter the rich discussion on different forms of constitutionalism here. Beyond the liberal notion of limitations on the exercise of power, it might also be defined as the opposite of arbitrary rule. See for this debate, for instance, Mark Tushnet, 'Authoritarian Constitutionalism', in Tom Ginsburg and Alberto Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge University Press, Cambridge, 2014) 36; Turkuler Isiksel, 'Between Text and context: Turkey's Tradition of Authoritarian Constitutionalism' (2013) 11 *International Journal of Constitutional Law* 702.

[23]HWO Okoth-Ogendo, 'Constitutions Without Constitutionalism: Reflections on an African Political Paradox', in Douglas Greenberg (ed), *Constitutionalism and Democracy: Transitions in the Contemporary World* (Oxford University Press, New York, 1993) 65.

[24]For instance, by 2013 Niger had replaced its supreme law five times while Tanzania revised 100 articles of its 1977 constitution: Charles M Fombad, 'Constitution-Building in Africa: The Never-Ending Story of the Making, Unmaking and Remaking of Constitutions' (2014) 13 *African and Asian Studies* 429, 439.

the wake of legalized multiparty politics provided opportunities to constitutionalize opposition rules.

Third, our topic is highly relevant if we look at African polities more thoroughly. To begin with, we observe a diverse set of regimes with some democracies (such as Botswana, Ghana and Namibia) and various (semi-)autocratic countries that formally hold multiparty elections.[25] Yet it is of utmost importance that almost all regimes are marked by highly powerful executives collaborating with or controlling legislative majorities.[26] Accordingly, it has been regarded as 'the major challenge in Africa' that 'ruling parties with governing majorities are able to operate and abuse their positions, with little checks and constraints'.[27]

Executive supremacy emerges from various mutually reinforcing conditions. On the one hand, it is borne by hybrid constitutional designs that blend the pro-executive features of presidential systems (incumbents who cannot be unseated for political reasons can veto legislation) and parliamentary systems (members of parliament serve as cabinet members and executive heads play a key role in cabinet formation).[28] Beside such institutional features, patterns of one-party dominance restrict the use of formal parliamentary restraints on executive power.[29] In addition, executive dominance is reinforced by both formal rules and informal practices, the roots of which date back to colonial and post-colonial times.[30] As vividly worked out by Gebeye for the cases of Ethiopia and Nigeria, 'the African constitutional designs and practices incorporate and magnify the power-enabling aspects of executive power from diverse legal and political rules and experiences while relegating and deemphasizing the power-limiting aspects of executive power from these same diverse rules and experiences'.[31] Hence, executives benefit from various resources and advantages, such as a presidentialist orientation of parties and path-dependent patterns of dominant presidential behaviour, even in areas in which the constitution is silent.[32] If powerful executives dominate the parliament's majority, the assembly's capacity for being a check on power cannot unfold. This all boils down

[25]Our concern here is not how to classify regimes, given the challenges that come with operationalization and measurement. Yet only a minority of countries are categorized as free by Freedom House. See Freedom House, *Countries and Territories* (Freedom House, Washington, DC, 2023).

[26]Prempeh (n 14); Oda van Cranenburgh, "Big Men' Rule: Presidential Power, Regime Type and Democracy in 30 African Countries' (2008) 15 *Democratization* 952.

[27]Fombad (n 3) 4. From the literature on democratic backsliding, we can add that a stronger control over legislative majorities is a rational reaction of authoritarians to the push for stronger parliaments by democracy promoters. See Bermeo (n 4) 15.

[28]Prempeh (n 14) 814.

[29]Oda van Cranenburgh, 'Restraining Executive Power in Africa: Horizontal Accountability in Africa's Hybrid Regimes' (2009) 16 *South African Journal of International Affairs* 49, 63, 56.

[30]The history of colonialism, while a heterogeneous one, and persisting rules and practices led to a 'distinct constitutional experience' that is at the same time entangled with Western constitutionalism. While this experience comes with many variations that rule out linear explanations, it makes the continent a crucial subject for comparative constitutional scholarship. See Dann, Riegner and Bönnemann (n 16) 16f.

[31]Berihun A Gebeye, *A Theory of African Constitutionalism* (Oxford University Press, Oxford, 2021) 151. By developing a theoretical approach called 'legal syncretism', defined as 'the process and the result of adoption, rejection, invention, and transformation of diverse and seemingly opposite legal rules, principles, and practices into a constitutional state with imperial and colonial legacies' (Gebeye (n 31) 2), the author comprehensively demonstrates how precolonial, colonial and post-colonial experiences shaped the constitutional contours of federal structures, executive power and women's rights in three African countries: Ethiopia, Nigeria and South Africa.

[32]Prempeh (n 14) 817.

to the consideration that the constitutional strengthening of oppositional forces can help to ensure interbranch accountability. Fombad, for instance, argues for spelling out the status of the opposition leader as well as the rights and duties of opposition parties to foster fair party competition.[33]

Finally, the question of whether opposition is a concept appropriate for the African context deserves reflection. Some might consider it as Western principle that is alien to the continent. More specifically, one might argue that a recognized and empowered opposition is not what citizens want and care for (most). Another variant of critique is that dealing with the matter is to some extent inimical because countries first and foremost need stability, unity and economic development provided by strong leaders. Yet those objections rest on shaky foundations. To begin with, the rejection of the opposition as exclusively Western concept is mainly presented by autocratic rulers seeking to suppress dissent to hold their grip on power.[34] Next, the very concept is widely used within Africa countries. It is not only those opposing the current incumbents who refer to the principle of opposition. It has been recognized explicitly by the African Union in its Charter on Democracy, Elections and Governance. The document adopted in 2007 as one continental answer to challenges like the abuse of executive power affirms in Article 3 that all states shall strengthen 'political pluralism and recognizing the role, rights and responsibilities of legally constituted political parties, including opposition political parties'.[35] In line with that, the concept of opposition has been given constitutional status in several polities (see below). To mention a current example, Kenyan President William Ruto, in a memorandum on constitutional amendments, recently called for establishing the idea of official opposition, as this 'makes tremendous sense in terms of institutionalising governance, strengthening oversight and deepening democracy'.[36]

Going beyond elites and bringing in the citizens' views, surveys also revealed that democracy is truly valued and not imposed by the international community or a legacy of democracy promotion by the West. While the latter narrative 'is ahistorical, and misleadingly elides African ownership of political change', it goes back to racist colonialists and today mainly serves the interests of autocratic incumbents.[37] What Africans want, however, is a political system 'that combines a strong commitment to multiparty elections and accountability with a concern for unity and stability'.[38] Importantly, the emphasis put on unity and stability is not opposed to the principle of opposition. It rather arises from the understandable fear that too-competitive politics combined with a refusal to accept electoral defeat will lead to widespread violence.[39] To name an opposition-related example of citizen demand, in 2022 a presidential commission of constitutional review

[33]Fombad (n 3) 23.

[34]Nic Cheeseman and Sishuwa Sishuwa, 'African Studies Keyword: Democracy' (2021) 64 *African Studies Review* 704, 716f.

[35]As of the end of 2022, the charter had been signed by 46 countries according to the African Union's website.

[36]William Ruto, *Presidential Memorandum on Constitutional Amendments (9/12/2022)* 7, available at <http://www.parliament.go.ke/node/18673>.

[37]Cheeseman and Sishuwa (n 34) 716f.

[38]Ibid 707.

[39]Ibid 724f. One of several well-known examples is the Kenyan post-election crisis in 2007/2008, which led to hundreds of thousands of people being displaced and the deaths of more than 1000 people. It needed an African Union-led mediation process, international pressure and the formation of a grand coalition to return to peace. See Monica K Juma, 'African Mediation of the Kenyan Post-2007 Election Crisis' (2009) 27 *Journal of Contemporary African Studies* 407.

in Botswana held 132 meetings (*kgotla*) with more than 28,500 participants across the country to collect the citizens' views on how a new constitution should look. The final report also listed the proposal to constitutionalize the office of the opposition leader, which was not supported by the commission and hence did not end up as its official recommendation.[40]

Two conceptual understandings of opposition recognition

The article's empirical part analyses the shape of constitutional opposition rules and offers some tentative arguments about whether they might matter. Furthermore, in conceptual terms, we follow Cancik,[41] who distinguishes an organizational and a functional understanding of opposition. In the first case, the parliamentary opposition is treated as quasi-discrete and stable entity within parliament – that is, as institutionalized part of the legislative institution. This is first and foremost indicated by using the article 'the' to refer to the opposition (in singular). In contrast, the second understanding emphasizes opposition as behaviour or function within the constitutionalized procedures of politics. Rules might point to a right of exercising opposition and its significance for a viable democracy, but without implying that a specific, organization-like entity serves this purpose. Hence, opposition as a function is not assigned to some specific subject but can be performed by various actors in various ways. In that sense, the behavioural understanding of opposition is broader in scope.[42]

Notably, we are concerned with ideal-type concepts that can be reflected in constitutions to varying degrees. Taking further cues from Cancik's study, and going beyond wording, the following criteria can be applied as indicators reinforcing an organizational view. It might be explicitly defined who constitutes the opposition (there is no need to do so if we apply a functional concept). Next, specific tasks can be assigned to the organization-like opposition. Moreover, constitutions might install a leader of opposition who is considered its de facto representative in parliament and the public. Finally, the opposition is not only used as a sentence's subject but also as subject of rights. In contrast, adherents of a pure functional view might only codify that a right to oppose rulers exists, which is useable by every member of parliament (MP).

The pure organizational concept can be normatively criticized in some ways. In particular, it disregards the fact that the opposition can be a heterogeneous group of groups. Assuming that there is a unified political will is both empirically and legally questionable.[43] Moreover, the concept entails several challenging follow-up questions.[44] For instance, does it imply some pressure to coalesce among opposition forces? Does it

[40]Presidential Commission of Inquiry into the Review of Constitution of Botswana, *Final Report* (2022) 36, 137, available at <https://constitutionnet.org/vl/item/botswana-final-report-presidential-commission-inquiry-2022>.

[41]The author thoroughly investigated opposition-related provisions in German subnational level constitutions. Cancik (n 12) 20.

[42]Importantly, the scholarly debate in Germany has brought to light very different views about whether and how 'opposition' should be constitutionalized as a legal concept. See Cancik (n 12). This heterogeneity in positions within a Western democracy tellingly illustrates that it is hardly fruitful to strive for widely applicable blueprint solutions to the complicated legal issue of constitutional opposition rules.

[43]Stephan Haberland, *Die verfassungsrechtliche Bedeutung der Opposition nach dem Grundgesetz* (Duncker & Humblot, Berlin, 1995) 154f; Cancik (n 12) 126.

[44]Cancik (n 12) 126–39.

restrict the behavioural strategies of opposition MPs to solely oppose while at the same time excluding ad hoc opposition behaviour by government-affiliated parties? Most significantly, a unifying approach involves the risk of conflict if rights are assigned to the opposition without clearing a procedure for how a plural opposition camp can use such rights. We will return to such objections in the following sections.[45]

A pure functional view that merely guarantees a right to oppose executive behaviour avoids such problems. However, it also gives rise to some challenges. The most prominent one is that amorphous opposition forces cannot be vested with specific rights. If such rights are considered crucial for opposition viability (especially in less-democratic settings), the strict functional approach appears normatively inferior. One might think about combining a functional conception and sub-majority rights. Yet the latter only mean diffuse empowerment, depending on a certain share of seats (which might not be reached in autocratic regimes due to election rigging).

The empirical universe of opposition rules

Recognizing the opposition: Thick and thin acknowledgement

Exploring all African constitutions, more than half of all the documents (28) refer to the principle of opposition. However, rules guaranteeing the right (in singular) to exercise opposition exist in various guises. Broadly speaking, there are two groups of explicit recognition. The first provides the strongest form due to further mechanisms of protection. Taking a closer look, we observe three subtypes: A first variant can be found in the Democratic Republic of Congo (DRC). The DRC's provisions stand out due to their wording and prominent placement. Belonging to the first chapter (General Provisions) and first title (Of the State and Sovereignty), article 8 stipulates that 'political opposition is recognized' and 'the rights connected to its existence, to its activities and to its struggle for the democratic conquest of power are sacred'. The strong terminology corresponds to that one used in the human rights chapter.[46] In addition, the constitution determines that 'the status of the political opposition' is established by an organic law which requires adoption by an absolute majority of MPs in each legislative chamber and an obligatory Constitutional Court decision on its conformity with the constitution (art 124, art 160). This creates high hurdles given the strong wording of 'sacred rights'.

A second and potentially more robust subtype includes Mozambique and Cape Verde. First, both countries' documents render 'the right of democratic opposition' unamendable (art 300, art 290), which can be considered a safeguard against rulers willing and able to engage in 'abusive constitutionalism'[47] – that is, who seek to weaken the opposition through formal constitutional change. Second, both constitutions establish that the 'statute of the opposition' has to be approved by a two-thirds majority of MPs

[45]Interestingly, such arguments had already emerged among members of the British House of Commons when a salary was provided to the Leader of the Opposition through the *Ministers of the Crown Act* in 1937. Objections included that there is no such body as the opposition, that it is the opposition's own decision how to organize and that there maybe is more than one opposition. Dean E McHenry, 'Formal Recognition of the Leader of the Opposition in Parliaments of the British Commonwealth' (1954) 69 *Political Science Quarterly* 438, 441.

[46]For instance, 'the human person is sacred' (art 16) and 'private property is sacred' (art 34).

[47]Landau (n 5) 195.

(art 186, art 161).[48] Such a supermajority requirement favours the opposition in case ruling forces cannot go it alone but need the former's consent to get the statute passed.[49]

A third subtype is presented by the constitutions of Guinea-Bissau (art 130) and São Tomé and Príncipe (art 154), which also list a 'right of democratic opposition' among the issues that cannot be subject of a revision but, interestingly, mention the word 'opposition' nowhere else in the documents. In terms of consistency, a two-fold reference that establishes a principle before giving it a higher level of entrenchment might be considered superior. More importantly, an opposition statute is not stated in both countries, let alone tied to a supermajority requirement or constitutional review as in the aforementioned cases.

A second group of explicit protection includes ten supreme laws. Most of them point to 'the right to opposition' (Angola, art 17; Chad, art 32; Côte d'Ivoire, art 2; Guinea, art 3; Madagascar, art 14; Senegal, art 58). Two state that 'the opposition is recognized' (Comoros, art 36, Congo, art 63) while two further say it 'is an essential component' of the assembly (Morocco, art 60; Tunisia, art 60). Yet neither country incorporates any of the mentioned choices of special acknowledgement – that is, constitutional review, supermajority requirements or unamendability rules. Intra-group differences exist regarding the rules' embedding. Some constitutions, such as in Angola or Guinea, introduce such recognition in the document's first title even though its denotation varies (between 'fundamental principles' and 'of the sovereignty of the state'). In others, like that of Madagascar, rules are laid down in the second title prominently dedicated to citizens' rights. A few countries, such as Tunisia, also place recognition later in the documents. This is also true for the constitutions of Congo and Senegal – which stand out since they form an own opposition title equal to the one on citizen rights or the executive.[50] In five of the ten cases, the 'status of the political opposition' is determined 'by law'.[51]

Those varying forms of thick recognition already suggest that both conceptual approaches of opposition are covered by African constitutions. As an illustration, and subject to further analysis, we can juxtapose the rules in Chad and Madagascar with those in Congo and Tunisia. The former documents convey a behavioural understanding of opposition by stating that 'the constitution guarantees the right of democratic opposition'. Consequently, even government-affiliated MPs can oppose the executive by invoking this right. In contrast, the latter cases imply some definable entity by stipulating that 'the political opposition is recognized' (Congo) or 'an essential component of the assembly' (Tunisia). The Tunisian wording might even disqualify an all-party government of national unity since parliaments would lack 'an essential component' – that is, an indispensable part of its nature.[52]

Beside those constitutions explicitly recognizing a right to exercise opposition, two groups of implicit acknowledgment can be observed. The first group might be termed

[48]Both countries notably differ in one detail. In Mozambique, the right of opposition is not named as a specific right, but only listed among the issues denoted as unamendable. In contrast, and more consistently, Cape Verde refers to such a right twice (as a specific right in art 118 and as one of the issues not to change through amendments in art 290).

[49]It might be debatable whether both countries provide a stronger protection than in the DRC. On the one hand, we deal with a ban to amend the right of opposition and a supermajority hurdle for adopting an opposition statute. On the other hand, the plain text as sacred right and the requirement of constitutional review both carry weight.

[50]Senegal is also special, as it points to the opposition one more time in the constitution's preamble.

[51]Chad (art 32), Comoros (art 36), Congo (art 63), Côte d'Ivoire (art 110), Madagascar (art 114).

[52]For this argument, see Cancik (n 12) 138.

moderate acknowledgment. Again, it includes a few empirical variants. First, some constitutions (Algeria, art 121; Burkina Faso, art 96.1; Mauritania, art 81) do not refer to an abstract right of opposition but to specific rights for its forces. This might bestow a distinguished position to the latter, depending on the rights' content and scope. Sometimes, such rights also come in tandem with defining the opposition (Burundi, Art 178). Second, some supreme laws neither point to the right (in singular) nor rights (in plural) of the opposition, but explicitly highlight the office of the opposition leader (Uganda, art 82a). In Zambia and Mauritius, such a provision is again combined with defining the opposition (art 74, 266; art 73). A third and possibly stronger subgroup consists of the cross-border cases of South Africa (art 57) and the Seychelles (art 84, 94), where rights are enshrined and at the same time the opposition leader is recognized. As mentioned, all three features (opposition rights, definition, leader) might indicate an organizational view of the principle of opposition.

While the latter still features rather prominently in those cases, this does not hold true for a final group. To begin with, documents might only list the status of the opposition among the issues to be established by law, such as in Togo (art 84), where the word 'opposition' emerges nowhere else. This is a different constitutional design from those that fully recognize a right to exercise opposition or even include further acknowledgement, such as supermajority rules or amendment restrictions. In particular, the mere requirement to establish a statute may invite opportunistic behaviour or legislative lawfare by autocratically thinking incumbents. As a second sub-group, a few constitutions solely point to the leader of the opposition in passing but include no other mention of the leader or the opposition. In Lesotho, the office is listed among the members of the Council of State (art 95) and in Zimbabwe as a member of the Committee on Standing Rules and Orders (art 151). Again, there is a cross-border case as a third variant: in Niger, the leader of the opposition is named as member of the advisory Council of the Republic (but nowhere else), while at the same time – as in Togo – a 'statute of the opposition' should be established by law (art 69, 99).

In sum, constitutional design for recognizing the opposition differs widely – from establishing an unamendable right that has to be reflected in a supermajority statute to a vaguely worded recognition by mentioning the opposition leader in passing. Those differences might be particularly significant for countries ruled by autocrats or threatened by tendencies of autocratization. Forms of thin opposition acknowledgement cannot be considered protection in the full sense of the word. They neither prevent opposition-discriminating or anti-democratic change through subsidiary legislation nor through constitutional amendments. Regarding regime type, we find strong recognizers both among democratic countries (such as São Tomé and Príncipe) and autocracies (such as the DRC). The same holds for thin recognition (e.g. in rather democratic Lesotho and autocratic Zimbabwe).

Defining the opposition

While numerous constitutions refer to the opposition in one way or another, only six define who is meant by this term. Again, there is variation in terms of placement and clarity. The Zambian document includes an article for various definitions (art 266), which states, among others, 'opposition means a political party which is not the political party in government'. Cape Verde defines opposition ('political parties that are not part of the Government', art 118) while pointing to the right to exercise opposition. In Mozambique,

a similar definition is mentioned when referring to specific opposition rights ('parties that have seats in the Assembly of the Republic but are not members of Government', art 49). This is also the case in Burundi, which uses a negative definition: 'A political party providing a member of Government cannot claim that it is part of the opposition' (art 178). Using the criterion of not being part of the government presents a simple definition that provides legal clarity. Yet pitfalls occur when parties or independent MPs permanently support the government without belonging to it. Counting those actors as opposition might be against their will and run counter to the rules' purpose.[53]

Two other constitutions are more vague or even confusing. In Mauritius, the article on the opposition leader contains the description that '"opposition party" means a group of members of the Assembly whose number includes a leader who commands their support in opposition to the Government' (art 73). The point of reference again is the government, but it is not clear what opposition party as 'opposition to the government' exactly means. One might even consider this a tautological account. Another potentially confusing definition can be found in the Senegalese supreme law speaking of 'the political parties which are opposed to the policy of the Government' (art 58). Here the focus switches from lack of government membership to lack of policy support but it remains open what is necessary to qualify for this criterion. Do parties have to oppose the government's policy permanently, or is it okay to support it every now and then? Is there some tipping point, and do we have to engage in statistical analysis of behaviour to find out whether it is reached? In fact, opposition membership might only be identified ex post that way.

Against this background, Cancik proposes to rely on the groups' self-assessment to belong to the opposition which is indicated by public statements.[54] This is a highly practical solution, even though it cannot dispel all doubts. Statements by opposition figures at the very beginning of the parliamentary term might be brought into question by intra-party rivals. Confusion might also arise if parts of the party groups constantly vote with the majority forces or if opposition parties as a whole stand by the government in numerous cases.[55]

[53]Cancik (n 12) 116. Note that the definitions mentioned would be able to cope with the special case of a minority government or a minority president – that is, if the executive is confronted with a majority of opposition MPs. Such constellations are very unlikely, however, even in non-parliamentary systems. If the president's party holds less than half the seats, incumbents are usually able to build and maintain stable majority support. See Paul Chaisty, Nic Cheeseman and Timothy J Power, *Coalitional Presidentialism in Comparative Perspective*: *Minority Presidents in Multiparty Systems* (Oxford University Press, Oxford, 2018) for the phenomenon of coalitional presidentialism and the president's means to discipline the own coalition. Empirically, there are only very rare cases of African presidents who are unable to count on a parliamentary majority. See Jaimie Bleck and Nicolas van de Walle, *Electoral Politics in Africa Since 1990: Continuity in Change* (Cambridge University Press, Cambridge, 2019) 79.

[54]Cancik (n 12) 120.

[55]For the sake of completeness, we should not overlook rare exceptions of constitutions that make it difficult for opposition parties to exist according to the above-mentioned definitions. Ruanda's supreme law posits that 'cabinet members are selected from political organisations on the basis of seats held' in the Chamber of Deputies, 'with the majority party holding not more than fifty per cent of cabinet members' (art 62). A similar case is provided by Burundi's 2005 constitution, which codifies that parties receiving more than 5 per cent of the votes hold a corresponding number of positions in government (art 129). In both cases, we deal with power-sharing arrangements established after highly violent conflicts (the 1994 genocide in Ruanda; a civil war that raged in Burundi until 2005). Yet representation of almost all parties in government has been an interim solution in Burundi (no longer included in the 2018 constitution), whereas it has become a permanent device in Ruanda. While executive power-sharing can inherently promote peace and

To be sure, defining the opposition is an intricate legal issue. We should also note that it does not determine an organization-like understanding, but can be open to a more functional view. Take the example of Cape Verde, where 'parties that are not part of the government have the right to democratic opposition' (art 118). The wording does not restrict the opposition parties' strategies too much since they can still support the government. However, things get more complicated if constitutions also want to assign rights (in plural) to opposition forces (see below).

Bringing in our findings from the previous section, no country including a thin opposition recognition sought to define the opposition. Beyond, a clear pattern is lacking since the six definitions spread evenly over the types of strong and moderate opposition acknowledgement. The countries again include autocratic regimes (like Burundi) and democratic polities (like Cape Verde).

Assigning functions and duties

Only five constitutions refer to what the opposition has to do that is, its functions or duties. This does not come as a surprise since codification is no easy task. For one thing, views about the opposition's tasks might differ. A common scholarly conception, first described by Lord Bolingbroke,[56] holds that opposition forces should provide oversight (by carefully scrutinizing the government's actions), critique (by emphasizing its failures in public) and alternatives (by offering policy options and personnel options). Yet this might not be the view of constitutional designers. More importantly, there are twofold legal challenges:[57] references can prove too restrictive in that they leave out important issues, while at the same time, some responsibilities, such as government oversight, cannot be considered opposition-specific.

Empirically, all pertinent countries explicitly recognize the opposition, but the rules on its functions diverge substantially. Tunisia, Morocco and Senegal merely mention the opposition's duties in an abstract manner by referring to its rights or its status.[58] At the same time, Senegal's constitution delegates the matter to subsidiary legislation by pointing out that the opposition's duties are established by law. Such delegation can also be found in Chad (art 21). Only the documents in Guinea and Morocco address the opposition's functions in a concrete, though completely different, way. The latter's document holds that it 'participates in the functions of legislation and of control' (art 60). In contrast, Guinea stipulates that 'the rights of the political parties of the opposition … to propose alternative solutions are guaranteed' (art 3). This perfectly illustrates the legal challenge implied by a rather narrow codification. Does the Guinean example mean that little importance is attached to oversight? Both documents meet the second legal pitfall mentioned above. Providing alternatives (Guinea) is an opposition-exclusive responsibility. The Moroccan document sagely uses the words 'participates in', hence indicating that oversight and legislation are not opposition-specific duties.

democracy, scholars have also pointed to autocracy-maintaining effects if it is used to durably silence dissent. See, for Ruanda, Filip Reyntjens, 'Progress or Powder Keg?' (2015) 26 *Journal of Democracy* 19.

[56]Haberland (n 43) 40, pointing to Bolingbroke's Letter on the Spirit of Patriotism (1736).

[57]See, for a broader discussion on that issue, Cancik (n 12) 148ff.

[58]"The opposition shall enjoy the rights that enable it to undertake its parliamentary duties', (Tunisia, art 60). It is granted 'a status conferring on it the rights that will permit it to appropriately accomplish the missions that accrue to it in the parliamentary work and political life' (Morocco, art 10). The Senegalese document 'guarantees to the opposition a status that permits it to acquit its missions' (art 58).

Beyond the substance of tasks, Morocco and Tunisia also place upon the opposition obligations in terms of style. They almost identically point to 'an active and constructive contribution to the parliamentary work' (art 10) and an 'active and constructive participation in parliamentary work' (art 60). Such requests allude to the risk that opposition forces could engage in obstruction strategies that are applied in democratic as well as non-democratic regimes.[59]

Recognizing the opposition leader

The idea to have a formally recognized position of opposition leadership is widespread among Commonwealth countries. While Canada began to give statutory recognition (and a salary) to this position in 1905, the Union of South Africa was first in making constitutional provisions in 1909.[60] On the African continent, eleven supreme law documents include this topic today.[61] Among them, five make it a prominent position through an own article (Mauritius: art 73, Senegal: art 58, Seychelles: art 84, Uganda: art 82a, Zambia: art 74), which might be considered the strongest form of acknowledgement. A slightly less prominent version is provided by Madagascar, where the office is referred to in connection with the codification of the right of democratic opposition (art 14). In contrast to such explicit recognition, it is merely mentioned in passing by listing the officeholder as member of different bodies in Lesotho (Council of State, art 95), Niger (Conseil de la République, art 69) and Zimbabwe (Committee on Standing Rules and Orders, art 151). Similarly, the Mauritanian supreme law only names the office as one of those persons who can propose candidates for the Conseil Constitutionnel (art 81). South Africa is a borderline case with a rather weak rule: Its constitution requires that the assembly's provisions must provide for a recognition of the opposition leader (art 57). Overall, acknowledgement is not confined to former British colonies (as in the cases of Madagascar, Mauritania, Niger and Senegal). Regarding the different recognitions of the opposition as such (see above), there is no clear pattern, but notice that only two out of the fifteen supreme laws with strong opposition acknowledgement (Madagascar and Senegal) also deal with the office of the opposition leader. Apparently, the two issues are not constitutionally linked. The opposition leader is assigned a prominent position both in free countries (such as the Seychelles) and authoritarian regimes (such as Uganda).

Variation also exists in how office holders are selected. While the constitutions of Mauritania, Niger and Zimbabwe say nothing at all about this, Senegal and Uganda refer the matter to the level of ordinary law. The other documents use the mechanisms of size or of election. In Lesotho, South Africa and Mauritius, the leader of the strongest opposition party in parliament should be recognized as opposition leader.[62] Mauritius, however, deserves some more words as it provides a special case. Its supreme law stipulates that the President of the Republic not only appoints the opposition leader but also can revoke this

[59]See, for example, Lauren C. Bell, 'Obstruction in Parliaments: A Cross-National Perspective' (2018) 24 *The Journal of Legislative Studies* 499.

[60]McHenry (n 45) 443, 451. Constitutional provisions can also be found in Commonwealth Caribbean countries. See Hamid Ghany, 'The Office of Leader of the Opposition: An Examination of the Whitehall Version in the Commonwealth Caribbean' (2001) 7 *The Journal of Legislative Studies* 105.

[61]If we expand the analysis to constitutions that do not mention the word 'opposition' but include the term 'minority leader', the cases of South Sudan and Kenya could be added (art 71, art 108).

[62]This corresponds to the rule in the United Kingdom, according to the Ministers of the Crown Act of 1937. McHenry (n 45) 438.

appointment with some discretionary scope. Article 73 names two reasons for such dismissal: first, the president, 'acting in his own deliberate judgment, considers that a member of the Assembly, other than the Leader of the Opposition, has become the leader in the Assembly of the opposition party having the greatest numerical strength in the Assembly'; second, the incumbent considers that 'the Leader of the Opposition is no longer acceptable as such to the leaders of the opposition parties in the Assembly'. Both causes open the door for abusive use. On the one hand, the head of the executive can seek to divide the biggest opposition party by arguing that some fellow party member of the officeholder appears to be the leading person. For this purpose, internal policy disputes or competition between single individuals or intra-party groups can be exploited or even sparked. On the other hand, the president can plant seeds of division within the multiparty opposition by arguing that the other parties prefer anybody else as opposition leader. Since the opposition seldomly, if ever, acts as united body, but usually consists of parties competing for voters and offices (like the leadership position), giving the executive some leeway provides a viable gateway for manipulation strategies.[63]

Only two constitutions definitely require a formal election of the opposition leader, yet in different ways. In Zambia, the largest opposition party in terms of seats elects the leader of the opposition from among all members of the opposition parties (art 74). This likely results in choosing a person from the biggest group. According to the Seychelles' document, the opposition leader is elected by the National Assembly while only MPs not affiliated with the president's party can take part in that vote (art 84).[64] Consequently, a coalition of smaller opposition parties could outvote the opposition frontrunner. As a third country, Madagascar also relies on leader selection by all opposition members, yet it demands their consensus. If they do not reach an agreement on the person to lead, the position falls into the hands of the leader of the opposition party with the greatest numerical strength (art 14). This rule again strongly favours the party ranking first, as it can always draw on the latter option.

Constitutionalizing the office merits attention since an official opposition leader can be considered to 'represent the embodiment of democracy itself'.[65] Likewise, it should be appreciated that the stakes of elections are reduced by providing a reputation-rich consolation prize.[66] This is crucial, as Africa's (semi-)presidential systems favour a winner-takes all model of politics entailing the danger of highly divisive elections.[67] While those virtues carry weight, the provisions observed also raise some concern from a theoretical perspective. To start, little importance seems to be attached to the office if it is solely named in passing. Take autocratic Zimbabwe, where the opposition leader deserves

[63]In the UK House of Commons, the speaker decides on the opposition leader in case of doubt about the party with the greatest numerical strength (ibid at 440). Similar to Mauritius, some Caribbean constitutions refer the matter to the executive branch (president or governor-general). Yet they provide less scope for selection as they specify other selection criteria, such as seniority or the votes cast for a person at the general election. Ghany (n 60) 107.

[64]While the constitution also says the election takes place in accordance with the parliament's standing orders, the latter document does not include any pertinent rule.

[65]Ghany (n 60) 121.

[66]Danny Schindler, 'Keine Reform des konstitutionellen Parlamentsrechts: Kenias gescheiterte Building Bridges Initiative als eine institutionenpolitisch verpasste Chance?' (2023) 26 *Recht in Afrika – Law in Africa – Droit en Afrique* 23.

[67]Examples of post-election violence abound. See, for example, Hanne Fjelde and Kristine Höglund, 'Electoral Institutions and Electoral Violence in Sub-Saharan Africa' (2016) 46 *British Journal of Political Science* 297.

no further mention than being an ex officio member of the parliamentary committee on standing rules. Such sparse rule neither highlights the office's symbolic role for democracy nor serves the purpose of integrating electoral losers into the political system. Even if we encounter more substantial provisions, a key caveat is that a unified opposition bloc rarely exists. In general, only very few countries have some form of a two-party system.[68] Accordingly, the official opposition leader acts as representative of a heterogeneous group of parties that may, individually, oppose their statements and policy positions. Therefore, constitutionalizing dissent can monopolize dissent, or at least mute (opposition) pluralism. It is true, as Cancik observes, that here we face a general problem of representing plurality through one position that is ubiquitous in politics and hardly accessible by legal regulation.[69] However, office-holders in other pertinent cases are formally or informally obliged to refrain from party politics. A parliament's speaker or a committee's chairperson, for instance, are required to act as neutral as possible when representing the members of their institutional bodies. This necessity neither does nor can exist for the official opposition's leader.[70]

Yet Cancik rightly argues that recognizing the office is most difficult where the right to be the leader comes with specific accompanying rights.[71] This is illustrated by the Seychelles, where the officeholder is entitled to appoint half of the members of the commission proposing the Supreme Court candidates (see below). Such a prerogative might be regarded as unfair in case we deal with two almost equally strong opposition groups or a hugely fragmented opposition camp.[72]

Empowering the opposition

A multifaceted universe of rules also exists for specific opposition rights – that is, powers exclusively assigned to non-government MPs. Conceptually, we deal with four broad categories: general clauses of empowerment; rights regarding the inner workings of legislatures; selecting personnel for other government branches; and access to media and money.

General clauses

General clauses empowering opposition forces in an abstract manner can be found in only a few constitutions. The Tunisian supreme law stipulates that 'the opposition … shall

[68]Things depend on how to define this party system category. Following the definition by Cheeseman that the two biggest parties hold at least 85 per cent of parliamentary seats but the bigger group stays below the two-thirds threshold, Cape Verde can be counted as two-party system while Zimbabwe is a borderline case. Nic Cheeseman, *Democracy in Africa*: *Successes, Failures, and the Struggle for Political Reform* (Cambridge University Press, Cambridge, 2015) 188). Others are reluctant to use this category for African countries due to widespread multiparty fragmentation. Alexander Stroh, 'Political Parties and Party Systems', in Gabrielle Lynch and Peter VonDoepp (eds), *Routledge Handbook of Democratization in Africa* (Routledge, New York, 2020), 234.

[69]Cancik (n 12) 127.

[70]An apparent but unrealistic solution to this problem would be for the opposition leader to coordinate with all third-party leaders before acting.

[71]Cancik (n 12) 245.

[72]But note that the Seychelles is the only country where the challenge of a multiparty opposition is considered in a constitutionally consistent manner in terms of selection. As we saw, the leader is elected by all opposition members.

enjoy rights that enable it to undertake its parliamentary duties' (art 60). Its Moroccan counterpart guarantees 'a status conferring on [the parliamentary opposition] the rights that will permit it to appropriately accomplish the missions that accrue to it in the parliamentary work and political life' (art 10). Similarly, the Algerian document holds that 'the parliamentary opposition shall have rights enabling effective participation in parliamentary activities and in political life' (art 121). Noticeably, the provisions in all three Maghreb countries come together with a list of more specific rights in the very same articles. Such lists might provide hints for how to interpret the general clause. In particular, they put the organizational understanding carried by the general rights clauses ('the' opposition) into perspective. Algeria, for instance, assigns specific rights to single opposition groups (see below). Hence, rules for specific rights might also break with the idea of a homogeneous opposition entity. At the same time, given the meaning of a general clause, such lists could not be considered as an exhaustive enumeration.[73]

A different case is Senegal, which uses the unique wording that 'equal rights' are guaranteed to all parties including opposition parties (art 4). This is not an opposition empowerment per se. In fact, the reference to opposition parties is rather symbolic, since they are included in the group of all parties. Indisputably, an equal rights provision can be helpful if we think about parliamentary activities such as questioning the government in the plenary or about representation in a parliament's leadership body. Yet the Senegalese constitution lacks any more specific prerogatives. Thus, the matter is handed over to the area of sub-constitutional legislation. Moreover, it is not completely clear whether the general provision is aimed at the parties' behaviour in parliament or only refers to extra-parliamentary issues like party registration and campaigning. In sum, it is hard to tell how opposition forces in parliament profit from the guarantee of equal rights for all parties.

Parliamentary rights

The opposition is more specifically empowered by a bunch of rights to be used in the daily parliamentary business. Here we differentiate between four areas of parliamentary behaviour: agenda-setting, interpellation, representation in parliamentary proceedings and committees of inquiry.

Agenda-setting

First, the right to influence the assembly's agenda for debates and votes can not only be allotted to sub-majorities but also explicitly to opposition forces. This is true for four African states. In Madagascar, three sittings per month are reserved 'for an agenda ordered by each Assembly on the initiative of the groups of the opposition' (art 102). In comparative terms, three sittings are a relatively large number (see below). Yet the provision seems to imply a special right to propose topics only, given that the ordering is made by the parliament as a whole. More leverage is granted to opposition forces in Cape Verde: While the parliament's president usually determines the schedule for legislative sessions, 'the parliamentary groups shall have the right to set the agenda of a certain number of meetings, in accordance with the National Assembly Rules of Procedure, making exceptions at all times for the position of parties that are a minority or that are not represented in the Government' (art 155). Remarkably, neither country's provisions treat

[73]This becomes most obvious in the explicit wording of Morocco, whose constitution complements the general clause by saying that it 'notably' guarantees the rights that follow.

the opposition as homogenous entity, yet the rules suggest that opposition groups must reach some agreement about exercising their rights. This is indicated by the words 'the initiative' and 'the position' (singular in each case) of opposition parties.

The Moroccan supreme law reserves one day per month 'for the examination of proposals of law which are of the opposition' (art 82), which suggests an organization-like conception. But note that the constitution stipulates elsewhere that the assembly's internal regulations shall establish 'the specific rights recognized to opposition groups' (art 69). This refers the matter to sub-constitutional rules and also makes the specifics of empowerment subject to decisions by ruling majorities. Yet the majority's leeway is limited by the safeguard clause that the assembly's rulebook, in order to be implemented, has to be declared as conforming to the constitution by the constitutional court.

Algeria, in turn, uses a different approach by stating that parliament 'shall devote a monthly session to discuss an agenda presented by one or some parliamentary groups of the opposition' (art 121). This design choice stands out since single opposition groups are already treated as beneficiaries by the constitution. However, the wording is likewise confusing, as is it not clear which group prevails in case there are different proposals.

It is easy to infer from this overview that specific empowerment can raise concerns. In particular, no mechanism is provided for cases of intra-opposition conflict. To be sure, the four constitutions refer the modalities of how to exercise these rights to the sub-constitutional level, notably the parliament's rules of procedure.[74] But this puts the shape of opposition empowerment largely at the mercy of majority forces. As the devil is in the institutional details, opposition forces might not profit from constitutional rules to any great extent.

Interpellation

A related but different area of intra-parliamentary empowerment is rights of interpellation, which are mentioned in two supreme laws only. In Cape Verde, parties that are not part of the government shall have 'the right to be informed, regularly and directly by the Government, on the progress of the main matters of public interest' (art 118). Strictly speaking, the rule places an obligation on the executive rather than establishing a right of formal request. Yet the restriction to main matters of public interest leaves some scope for interpretation on the government's side. The Moroccan document guarantees opposition forces the 'effective participation in the control of the governmental work, notably by way of …the interpellation of the Government, [and] the oral questions addressed to the Government' (art 10). Again, the provision is rather vague and needs further specification, as also demanded by the constitution (art 10, art 69).

Representation in parliamentary proceedings

A third and more frequent choice for constitutionalizing opposition rights is representation and participation in the assembly's proceedings. Some constitutions introduce almost identical general clauses by granting 'the' opposition 'an adequate and effective representation in all bodies' (Tunisia, art 60 as well as Côte d'Ivoire, art 100),[75]

[74]Art 14 (Madagascar), art 155 (Cape Verde), art 69 (Morocco), art 121 (Algeria).

[75]The case of Côte d'Ivoire illustrates an unexpected way of different rules conveying different understandings: article 29 grants 'the right of democratic opposition', hence suggesting a functional notion at the level of general recognition. In contrast, article 100 contains an organizational understanding at the level of specific rights by guaranteeing 'the parliamentary opposition' adequate representation.

'an appropriate representation in the internal activities' (Morocco, art 10) or 'representation that ensures [the opposition] active participation in the organs' of the chamber (Algeria, art 121). Those clauses can be considered valuable since they ensure membership in all bodies irrespective of seat share. Accordingly, even tiny oppositions are guaranteed representation. Yet the organizational conception of opposition leaves open whether and how different groups (who individually compete for voters and parliamentary posts) are actually empowered. The South African document is more lucid by referring to 'the participation of minority parties … in the proceedings of the Assembly and its committees' (art 57). Opposition groups might be better off by such party-related rule.

A few supreme laws also include more specific rules on membership and leadership in parliamentary bodies. In Burundi, parties adhering to the opposition shall 'participate of right in all parliamentary commissions' (art 178). In Madagascar, 'the opposition' is included in the parliamentary leadership board as it shall hold the position of one vice-president. Irrespective of the known problem of position selection in cases of a multiparty opposition, such targeted provisions might be more favourable than rules requiring that assembly leaders shall belong to different parties only (like in Zambia, art 82).[76]

Regarding committee chairs (which provide some procedural prerogatives including agenda-setting), we basically find three approaches. First, the opposition is given a very small share of posts. In Madagascar, it shall 'preside over at least one of the commissions' (art 78). This might not add much strength to the opposition when its MPs lead committees with minor relevance in terms of oversight. Second, and more beneficially, opposition forces can chair committees crucial for parliamentary procedures and executive oversight. Morocco presents a case in point: while the chairs of 'one or two [permanent] commissions' are reserved for the opposition (art 69), 'the presidency of the commission in charge of the legislation' is explicitly mentioned (art 10). Similarly, the Tunisian constitution assigns the leadership of the hugely important Finance Committee to 'the opposition' (art 60). A third approach is applied by Algeria, where the opposition shall be represented in 'the presidency of the rotating committees' (art 121). While the specific regulation is left to the assembly's internal rules, the provision suggests that opposition forces chair committees in alternation with the majority, which might boil down to some sort of proportional distribution of chairs.

Committees of inquiry

A final field of empowerment inside parliament concerns committees of inquiry. They should be treated as separate issue since they present a powerful investigative tool that does not belong to the permanent structures of parliament. Pertinent rules occur in three African constitutions that confer leverage in different ways. Morocco's supreme law includes a rather abstract reference by guaranteeing the opposition 'the effective participation in the control of government work, notably by … the parliamentary commissions of inquiry' (art 10). Accordingly, sub-constitutional provisions (enacted by majorities) have to regulate the matter. A more specific but equally weak rule can be found in Burkina Faso, where 'the parliamentary opposition has the right, once a year, to introduce a bill of resolution in view of the creation of a parliamentary commission of inquiry and to preside over it' (art 96.1). The wording and other constitutional provisions[77] make clear that

[76]This makes opposition representation subject to the composition and fragmentation of the chamber.
[77]Article 113 plainly states that commissions of inquiry are formed by the National Assembly.

opposition forces can only propose such a commission; they need the support of government-affiliated MPs to set it up. In contrast to such window dressing, the opposition in Tunisia is assigned 'the right to establish and head a committee of enquiry annually' (art 60).[78] As a consequence, a powerful tool for investigating executive misconduct is in the hand of opposition forces. Nevertheless, no mechanism of intra-opposition coordination is mentioned.

Selecting members of constitutional courts and 4th branch institutions

Targeted empowerment also involves the selection of two kinds of extra-parliamentary personnel. First, four documents include provisions for deciding on supreme court judges or constitutional court judges. In Mauritania, opposition forces indirectly choose one-third of the nine members of the Constitutional Council since the constitutional reform of 2017. Among the five members appointed by the head of state, one is proposed by the leader of the opposition. Among three further judges selected by the National Assembly's president, two are proposed by the second and third largest opposition parties. Hence this is a choice of design that takes into account multiparty opposition. A ninth judge is chosen by the prime minister (art 81). Even more leverage, albeit indirect, exists in the Seychelles, where the opposition can shape the composition of the commission proposing the Supreme Court candidates to the president. The Constitutional Appointments Authority consists of two members appointed by the president and two members appointed by the leader of the opposition who by agreement appoint a fifth member (arts 140, 127). Such indirect bipartisan procedure might prevent courts from being too much under the executive's thumb – for example, by packing them with loyalists.[79] Hence, opposition power could really matter – even though it is given to a single opposition leader in this case.

The Moroccan supreme law establishes clearly less influence: The opposition is granted 'the contribution to the proposing of candidates and to the election of members of the Constitutional Court' (art 10). This might be a right without any substantial consequence in face of the selection procedure specified in article 130: while six court members are designated by the king, three are elected by each chamber through a two-thirds majority after they have been presented by the chambers' leadership. Only the supermajority requirement could give some leverage to opposition forces, but this is subject to their (volatile) seat share. Nor are appointments assigned de facto to the opposition (as in Mauritania), and majority and opposition forces are not required to agree to some extent (as in the Seychelles' case). A fourth and similarly weak rule is included in South Africa's constitution: judges are appointed by the president after consulting the Judicial Service Commission, which consists of 23 members, three of whom must belong to parliamentary opposition parties (arts 174, 178). Given its small share and the commission's consultative character, the opposition's interest is hardly protected.

[78]For the sake of completeness, the constitution in Burundi also refers to the opposition in connection with committees of inquiry. Yet it provides a very weak case by merely mentioning that parties adhering to the opposition shall participate in investigative commissions (art 178).

[79]Looking more specifically at non-democratic contexts, studies also found that de jure procedures to select supreme court judges actually enhance de facto judicial independence. See James Melton and Tom Ginsburg, 'Does De Jure Judicial Independence Really Matter?' (2014) 2 *Journal of Law and Courts* 205.

Second, the opposition can be involved in the selection of other independent oversight agents sometimes called 4th branch institutions.[80] Among the most important bodies are electoral management commissions, given their role for fair elections and their exposure to manipulation strategies.[81] In the Seychelles, the president appoints the seven members of the electoral commission from a shortlist of nine candidates proposed by the Constitutional Appointment Authority (art 115). As we saw, the latter's composition assures that the opposition indirectly has a say. A counter-example of merely consultative authority is presented by Mauritius. The Electoral Boundaries Commission and the Electoral Supervisory Commission consist of no less than three and no more than eight members appointed by the president after consultations with the prime minister, the leader of the opposition and the other party leaders in the assembly (art 38). This gives the opposition only a voice during the selection procedure.

Further rights exist for installing the ombudspersons (examining citizen complaints against the executive) and the auditor general (auditioning state finances) as extra-parliamentary agents of oversight. We again find references in the two supreme laws mentioned. The opposition is granted minor involvement in Mauritius: The ombudsperson is appointed by the president after consultations with the prime minister, the opposition leader and the other parties' leaders in the assembly (art 96); the Director of Audit is appointed by the Public Service Commission (selected by the president, art 88) after consultations with the prime minister and the opposition leader (art 110). More substantial influence on the selection procedure arises in the Seychelles, where the president appoints the person for both offices from candidates proposed by the opposition-influenced Constitutional Appointment Authority (arts 143, 158).

Media access and public funding

A final set of rights is aimed at media exposure and financial funding. Admittedly, access to media and money could also be granted to *all* parties. However, targeted design choices emphasize the opposition's role and significance. Both topics are particularly relevant in settings marked by an unlevel electoral playing field – such as when incumbents with ample access to state-owned media and public money confront the opposition under highly unfair conditions.[82]

Cape Verde's document includes the abstract provision that 'parties' not belonging to the government shall have 'the right to media broadcast' (art 118). While the wording favors opposition forces by not treating them as a unity, it is weak since qualifications such as equal, fair and adequate are lacking, so important specifications are left to further legislation. Morocco has chosen the opposite approach by enshrining that 'the parliamentary opposition' is granted 'air time at the level of the official media, proportional to its representation' (art 10). This is an unmistakable guideline for sub-constitutional rules necessary to establish 'the modalities of exercise by the groups of the opposition' (art 10). Clear provisions can also be found in Mozambique. The constitution includes a right to broadcasting time for all parties 'according to the degree of representation'. Reiterating this rule for opposition parties, it adds the crucial specification that this is to enable them

[80]Elliot Bulmer, 'Independent Regulatory and Oversight (Fourth-Branch) Institutions'. *International IDEA Constitution-Building Primer* 22 (2019).

[81]Schedler (n 9).

[82]Schedler (n 9) 43.

'to exercise their right of reply and the right to respond to the political statements of the government' (art 49).

Two African supreme laws have introduced a duty for funding opposition forces. Again, the Moroccan document guarantees to 'the parliamentary opposition' the 'benefit of public finance, conforming to the provisions of the law' (art 10).[83] While the beneficiary of this rule is not entirely clear (the party as organization, the parliamentary party group, its MPs), the Algerian provision is more explicit since 'the benefit of financial aid' is 'granted to the elected members of Parliament' of the opposition (art 121). To be sure, the worth of provisions for access to media and money hugely hinges on the specifics laid down in ordinary laws. Yet constitutional rules might still be helpful for opposition forces, given that executives in all regimes can exploit their incumbency in terms of resources and communication. In electoral autocracies marked by unfair access to money and the media, constitutional provisions do not level the playing field but may mean some piecemeal improvement.[84]

In search of empirical patterns

Even though opposition recognition and creating the office of opposition leadership are not linked empirically, one might wonder whether there is a relationship between recognizing and empowering opposition forces. However, with the plausible exception that weak acknowledgement goes with the absence of rights, no such pattern emerges (see Table 1). On the one hand, there are eight countries with thick recognition and two states with moderate recognition that lack any opposition prerogatives. They include the DRC, which verbosely cherishes the principle of opposition. On the other hand, some strong and moderate recognizers establish several such targeted rights. Cases for the table's other fields exist as well. Strikingly, and pointing to processes of regional norm diffusion, the three Maghreb countries of Algeria, Morocco and Tunisia feature strongly in terms of rights. Given that Morocco was the first one to constitutionalize targeted provisions in 2011 (Tunisia followed in 2014 and Algeria in 2020), it might have inspired its neighbours to adopt such provisions. The country is also telling, though, since the constitutional changes (implemented through a hasty referendum on 1 July 2011 after having been initiated by King Mohammed only a few months earlier) are considered 'a clever preemptive move, designed to break the protests' momentum' that captured the Arab world then.[85] The African early starters, however, seem to have been Cape Verde and Guinea-Bissau: their supreme laws of 1992 and 1996 already enshrined opposition rules.

[83]Beside financial funding, the document also grants the 'disposal of means appropriate to assume its institutional functions' (art 10). This is again a rather vague rule, but it seems to allude to the infrastructure necessary for its parliamentary work – for example, office spaces and technical equipment.

[84]To provide a complete picture of rights, a few other rules might be considered as opposition empowerment, albeit on a smaller scale. In Côte d'Ivoire, the president 'may solicit the opinions of opposing political parties' on matters of national interest (art 29). In Niger, the leader of the opposition is – along with the president, all former presidents, the prime minister and the parliament's president – part of the Council of the Republic that is to resolve crises by giving opinions on matters referred to it (art 69). The Algerian (art 121) and the Moroccan constitutions (art 10) further grant the opposition the right of 'participation in parliamentary diplomacy', in the case of Morocco by adding 'with a view to the defence of just causes of the Nation and of its vital interests'.

[85]Ahmed Benchemsi, 'Morocco: Outfoxing the Opposition' (2012) 23 *Journal of Democracy* 58. A promising avenue for further inquiry is to examine why incumbents (in particular, non-democratic incumbents)

Table 1. Opposition recognition and opposition rights in African constitutions

	Thick recognition	Moderate recognition	Weak recognition
Several rights (≥3)	*Cape Verde**, Madagascar, Morocco, Tunisia	Algeria, *Seychelles*+	
Few rights (<3)	Côte d'Ivoire+, Mozambique; Senegal	Burkina Faso, Burundi, Mauritania, *Mauritius**, *South Africa**	
No rights	Angola, Chad+, Comoros+, Congo+, DRC, Guinea+, Guinea-Bissau, *São Tomé and Príncipe*	Uganda, Zambia+	*Lesotho**, Niger, Togo, Zimbabwe+

Notes: Countries in italics are regarded as free (Freedom House 2023)
*political system based on parliamentary model of government
+political system based on presidential model of government

Moreover, the ways of constitutionalizing the principle of opposition are strictly connected neither to regime type nor to government type. The six countries considered as free by Freedom House in 2022 (Cape Verde, Lesotho, Mauritius, São Tomé and Príncipe, Seychelles, South Africa) can be found all over the table – that is, they include strong recognizers as well as weak recognizers and countries with several specific rights as well as those with no opposition rights. Even regimes deemed unfree strongly protect the opposition (as in the case of the DRC) or assign several rights (like in Algeria).[86] Likewise, the four parliamentary systems of government with opposition-related rules (Cape Verde, Lesotho, Mauritius, South Africa) are spread across the sample.[87] The same is true for polities based on the presidential system of government (Chad, Comoros, Congo, Côte d'Ivoire, Guinea, Seychelles, Zambia, Zimbabwe).[88] Yet the picture is slightly different for colonial rule. One noteworthy aspect is that states formerly controlled by the British government (Lesotho, Mauritius, Seychelles, South Africa, Uganda, Zambia, Zimbabwe) are less widely dispersed since none is marked by strong recognition. At the same time, they all refer to the position of opposition leadership. However, we should also bear in mind that there are several former British colonies without constitutional opposition

opt for constitutionalizing opposition rights. Is it, for instance, to appease radical opposition forces and to bolster one's reputation internationally, or do rulers who fear to lose elections act for reasons of strategic foresight? The latter argument alludes to the idea of constitutions as (power-based) insurance – that is, as mechanisms insuring today's leaders against a complete loss of power. See Rosalind Dixon and Tom Ginsburg, 'The Forms and Limits of Constitutions as Political Insurance' (2017) 15 *International Journal of Constitutional Law* 995, 999.

[86]See for the categorization of countries, Freedom House (n 25).

[87]More generally, other parliamentary systems in Africa that lack any provision (Botswana and Ethiopia) also indicate that the existence of opposition rules is not a phenomenon of the government model.

[88]The other systems can be regarded as semi-presidential (a prime minister accountable to parliament exists along with a directly elected president with genuine executive authority) or other forms of hybrid regimes. Importantly, the categorization of some countries is not always clear-cut, as they do not adopt pure forms of different types. For instance, Morocco is regarded a parliamentary constitutional monarchy in which the king holds considerable political power. Angola also follows a parliamentary logic insofar as the leader of the winning list of MPs automatically becomes the president and head of state (art 109). For a classification of African countries see, for example, van Cranenburgh (n 29) 52.

rules at all (such as Botswana, Ghana, Malawi, Nigeria and Tanzania).[89] Besides, the former Portuguese territories (Cape Verde, Guinea Bissau, Sao Tomé, Angola, Mozambique) belong to the strong recognizers, which is in sync with their past colonial power (see arts 114 and 188 of Portugal's constitution). In sum, the overview points to the need for in-depth studies analysing the historical genesis of constitutional opposition rules.

Promises and pitfalls of constitutionalizing dissent

Exploring whether and how African supreme laws give recognition to the principle of opposition, we found opposition-related rules in an unexpectedly high number of documents. However, the variation in design details and scope reveals that referring to the principle of opposition in an abstract manner lacks any analytical value. Almost half of the documents also include specific rights for opposition forces. This challenges the assumption that 'empowering the opposition remains a relatively rare design choice'.[90] The pertinent rules significantly diverge, though. Some provisions appear to offer a veneer of democratic fairness, while others truly transfer power. Once unpacked, we see that the principle of opposition is not strictly related to regime type.

Apart from substance, constitutions reflect both understandings of opposition to varying degrees (sometimes inconsistently within one document).[91] The supreme laws of Congo and Angola, for instance, tend towards different conceptions by recognizing 'the opposition' or the 'right to opposition' as the sole pertinent rule. Côte d'Ivoire's document includes both understandings by granting 'the right of democratic opposition' at the level of general recognition but guaranteeing the specific right of adequate representation in parliamentary bodies to 'the opposition'. While all the observed varieties deserve further attention in empirical studies, we finally seek to provide some brief reflections on the potential merits as well as pitfalls of constitutionalizing dissent.[92]

Thinking about what opposition rules add to the constitutional design in electoral autocracies and deconsolidating democracies, one of the most important virtues is a rather symbolic one: giving constitutional weight to those excluded from government power undermines a concept of politics put forward by Carl Schmitt, who considered the political as confrontation with an enemy who ultimately has to be eliminated.[93] Instead of being an existential threat, the opposition is highlighted as both a legitimate and indispensable part of politics. Invested with public authority, its forces can credibly act in the name of a plural citizenry.[94] Assigning some rights also emphasizes that politics is no zero-sum game. Hence, strengthening the principle of opposition might also help

[89]Given that some countries had more than one colonial power, those descriptions should not be taken at face value. The data on government type and former colonial rule are drawn from Christian Bjørnskov and Martin Rode, 'Regime Types and Regime Change: A New Dataset on Democracy, Coups, and Political Institutions' (2020) 15 *The Review of International Organizations* 531.

[90]Aziz Huq and Tom Ginsburg, 'Democracy Without Democrats' (2020) 6 *Constitutional Studies* 170.

[91]Investigating ten German state-level constitutions, Cancik arrived at the same finding. Cancik (n 12) 105.

[92]For reasons of space, we only provide a broad sketch of some general key points. A more thorough treatise had to look at single rules separately.

[93]Carl Schmitt, *The Concept of the Political* (University of Chicago Press, Chicago, 2007) 26–33.

[94]Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, Cambridge, MA, 2016) 34.

electoral losers to consent to their defeat – that is, it can foster the losers' consent[95] in settings prone to post-electoral violence. Also, a recognized and empowered opposition can be crucial when parliaments, through majorities captured by the executive, appear as weak institutions of horizontal accountability or even as stooges of the government. This is also true in deconsolidating democracies where institutional channels provide leeway to forestall the incumbent's plans for autocratic reforms.[96] In addition to scrutiny inside the assembly, its forces can perform the function of mobilizing popular dissent, thereby preventing political apathy among citizens.[97] In the end, acknowledging the value of opposition makes it more difficult for (would-be) autocrats to repressively target opponents in order to silence their critical voices. As guideline and guardrail for essential sub-constitutional rules, opposition provisions constrain strategies of legislative warfare. Assigning exclusive rights irrespective of seat share is in turn beneficial compared with sub-majority rules or super-majority requirements. Even if incumbents rely on subtly manipulated elections or simply a disproportional majoritarian electoral system to keep the opposition small, targeted counter-majoritarian empowerment provides some leverage and allows them to act autonomously. Moreover, as mentioned at the outset, constitutional provisions are more entrenched. They are less subject to the whims of majorities and, as we saw, might even be protected against constitutional lawfare in case of unamendable provisions.

Those normative promises of savvy constitutional engineering face some noteworthy pitfalls. Constitutionalizing the principle of opposition for the sake of plurality can undermine the idea of opposition heterogeneity. Usually, the opposition consists of different groups (and electoral rivals) that cannot be forced into a unitary entity. This, however, is a logical consequence if rights are assigned to 'the' opposition without specifying an intra-opposition conciliation procedure. Otherwise, many-voiced opposition forces could use their rights only together through a unified political will, which also infringes the freedom of MPs to choose different opposition strategies.[98] Similarly, the problem of unduly monopolizing opposition powers becomes evident if exclusive rights are given to the official leader of the opposition. To put it pointedly, constitutionalizing dissent can mean suppressing dissent (within the opposition).

Engaging in what Scheppele calls a forensic legal approach,[99] we might also ask a series of 'What if?' questions to assess how opposition rights work in practice. For instance, what if a mechanism designed for a two-party system, the official leader of the opposition, suddenly regulates a very fragmented opposition camp within a very fragmented parliament? Difficulties even arise when rights are assigned to single opposition party groups. What if some groups oppose the government only every now and again? Can they use

[95]Christopher Anderson, André Blais, Shaun Bowler, Todd Donovan and Ola Listhaug, *Losers' Consent: Elections and Democratic Legitimacy* (Oxford University Press, Oxford, 2005).

[96]Empirically, the power of opposition parties to prevent autocratization has been pointed out by Laura Gamboa, 'How Oppositions Fight Back' (2023) 34 *Journal of Democracy*. Comparing the cases of Venezuela and Colombia, she found that institutional strategies to fight anti-democratic measures are more effective than extra-institutional strategies (as boycotts) since they give leeway to opposition forces while at the same time increasing the costs of opposition repression. See Gamboa (n 96) 93.

[97]An empirical investigation on the matter is provided by Eloïse Bertrand, 'Opposition in a Hybrid Regime: The Functions of Opposition Parties in Burkina Faso and Uganda' (2021) 120 *African Affairs* 606.

[98]Cancik (n 12) 133.

[99]Kim L Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work' (2013) 26 *Governance* 562. This approach is also used by Cancik without terming it like that.

constitutionalized opposition rights? And what if MPs break away from the government for some time? Do they profit from opposition prerogatives immediately? A second challenge (in addition to the risk to undermine plurality) is hence that empowerment presupposes a stable opposition affiliation. Since such stability cannot be taken for granted, exclusive opposition rights lack legal clarity. In that respect, sub-majority rules or rights granted to all parliamentary party groups might be more appealing.

Overall, attempts to legally codify the principle of opposition can turn into a risky endeavour. Since opposition forces do not automatically profit from such efforts, advisers and designers intending to strengthen parliamentary institutions and the democratic order may do not succeed.[100] To be sure, this is a challenge in Africa as everywhere else, and here our topic enriches our discussion of constitutions around the world. The principle of opposition might be another political desideratum that, like the rule of law, 'compels so much agreement because it is a famously fuzzy concept'.[101]

A different and more general challenge in non-democratic regimes is that we might face constitutional entrenchment without enforcement. Autocrats can engage in 'sham borrowing' – that is, import democratic concepts (in our case opposition rights) in form without intention to give them any effect in practice.[102] Court packing may suffice to secure that opposition provisions are not upheld, but incumbents can also subtly exploit legal loopholes. They might also use the strategy of 'anti-purposive borrowing' – that is, they turn the democratic concept of opposition into an anti-democratic instrument.[103] Those challenges even exist in countries currently classified as free, such as Mauritius where the selection rule for the opposition leader authorizes the president to revoke the appointment in an abusive manner. Hence, a recognized or empowered opposition belongs to the realm of nominally democratic institutions, which are acceptable to the autocrat as long as their design hardly challenges the regime's survival.

At all events, the ambiguity of promises and pitfalls is another reason why opposition rules should become a key issue for comparative constitutional studies. Crucially, future research has to investigate how supreme law rules are actually applied. While it matters a lot what executive incumbents do, the state and behaviour of opposition parties should equally be given attention. Key questions might be whether weakly institutionalized parties can withstand executive cooptation strategies[104] and whether, in case of a multiparty opposition, competitors at the ballot box are able to cooperate in parliament to successfully challenge incumbents.[105]

[100]Cancik (n 12) 146, 243.

[101]Scheppele (n 99) 559.

[102]Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press, Oxford, 2021) 45. Those authors vividly show how autocratic-minded rulers borrow the liberal democratic constitutional ideas of human rights and judicial review to advance their authoritarian ends. It goes without saying that constitutional coups provide an even harsher reaction to make opposition rules useless. The example of Tunisia tells us that formally democratic settings can also be vulnerable to this danger. Termed by scholars as unconstitutional self-coup, president Kaïs Saïed in 2021 suspended parliament as well as several articles of the constitution to rule by decree. As a consequence, his 'main institutional resisters were blocked from engaging in real opposition'. Tomini et al. (n 11) 130.

[103]Dixon and Landau (n 102) 36f.

[104]Leonardo R Arriola, Jed Devaro and Anne Meng, 'Democratic Subversion: Elite Cooptation and Opposition Fragmentation' (2021) 115 *American Political Science Review* 1358.

[105]For the case of South Africa, see Robert A Schrire, 'Parliamentary Opposition After Apartheid' (2008) 14 *The Journal of Legislative Studies* 201.

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