Power, Party, and Post-Apartheid:

The Role of the Political Party in South Africa's Constitutional Law

Connor Akiyama

Tufts University

Spring 2021

Abstract

In 1994, South Africa held its first fully enfranchised election to usher in a new era and move away from the cruel Apartheid system of racial separation. This paper seeks to explain how political party-based constitutional negotiations in the final years of Apartheid influenced the country's structure of government. I first address the more philosophical debate regarding the role of political parties in a constitutional society and how different countries regard the proper role of parties as either free association organizations or core political elements. I then explain how these debates have forged systems of government that benefit different kinds of political parties depending on their popularity and the geographic distribution of support. Turning to South Africa specifically, the paper then covers the legal history of political organizing in South Africa before Apartheid and the negotiations that lead to its revocation. By addressing how the electoral math of the major political parties and their respective interests, this paper argues that the unique experiences of Apartheid are one of the driving causes for the high level of protections for political parties in the South African Constitution. Furthermore, the story of how South Africa's constitution came to be is a further argument for the need to view national constitutions in their own historical context rather than abstractly comparing different elements across vastly different histories as is done in the beginning of the paper.

1. Introduction

In 1994, South Africa finally removed its white-minority, Apartheid government through its first fully enfranchised election. The election not only decided a new national president and a new South African Parliament, but it also established a bold vision for a future of peace and equality for South Africans.[1] The new republic was declared to be a "society in which all South Africans, both black and white, will be able to walk tall, without fear in their hearts, assured of their inalienable right to human dignity—a rainbow nation at peace with itself and the world."[2] However, behind the scenes of the optimism and jubilation that swept South Africa was a gritty negotiation process of constitutional reform that struggled to unite the divided interests and welfare of the nation peacefully. In addition to establishing aggressive constitutional protections of equality and socioeconomic rights, South Africa's new constitution needed to establish electoral rules, provincial organization, rules for amendment, courts, and more.

The South African Constitution reflects a growing trend in contemporary constitutional law that recognizes the importance of political parties through explicit constitutional protection mechanisms. The inclusion of political parties in modern constitutions clashes with the high-minded, anti-factionalist approach of many classical constitutions, but better represents democracy in the era of mass politics. In South Africa, the direct experiences of Apartheid and the party-driven approach to the constitution's drafting were the primary drivers of the codification of broad protections for political parties and the establishment of a government with an independent judiciary and a hybrid model of Westminster parliamentary democracy.

---

[1] "Nelson Mandela's Inauguration Speech as President of SA," SAnews, May 10, 2018, https://www.sanews.gov.za/south-africa/read-nelson-mandelas-inauguration-speech-president-sa.
[2] "Nelson Mandela's Inauguration Speech as President of SA"

This paper has three main parts. First, this paper starts with a theoretical discussion about why constitutions have distanced themselves from their disdain of political parties and have instead embraced regulation of political parties as fundamental to democracy. Then, this paper will explore the different incentive structures that various constitutional democracies have established for the control of political parties. Finally, this paper will analyze how the unique circumstances of South Africa led to a special role for political parties in forging a new constitutional order. These unique circumstances and incentive structures helped push for the creation of a parliamentary republic with proportional voting, as well as strong protection for political organization within the constitution.

2. The Role of the Modern Political Party

Political parties, at their core, are groups of constituents and politicians who share similar political, economic, and cultural beliefs and work to obtain the power necessary to implement their plans.[3] Older generations of constitutional drafters decried this form of ideological factionalism, but political parties today have evolved beyond being mere factions.[4] Today, parties have become institutionalized structures of political power and a necessary element to the organization and efficacy of a modern state.[5] While political parties around the world exist in various stages of sophistication and sustainment, their importance to the maintenance of a healthy political system has become readily apparent, as have the dangers of a single party acquiring too much power.

Typically, parties are motivated by a self-serving rational choice theory, which posits that they have fixed preferences; use strategic decision-making to achieve these preferences; react

---

[3] "Political Parties," National Democratic Institute, August 4, 2016, https://www.ndi.org/what-we-do/political-parties.
[4] Yigal Mersel, "Hans Kelsen and Political Parties," *Israel Law Review* 39 (Summer 2006): 160.
[5] Ibid, 160.

heavily to expectations of other actors; and evaluate political systems based on benefits for their office-seeking tendency.[6] For a long time, Western political thought viewed political parties and their factionalism as a danger to thoughtful, democratic deliberation. Parties and inevitable factionalism, in their minds, created ideological groups capable of organized partisanship and strategic power moves that served their interests rather than those of the nation.[7] This view is evident in Federalist Papers No. 10, in which Alexander Hamilton, writing to advocate for the ratification of the new U.S. Constitution, argues that the Constitution's vision of a centralized Union is preferable because of "its tendency to break and control the violence of faction."[8] In his farewell address, President George Washington famously voiced his concerns regarding the "danger of parties" emerging in the nascent nation, especially those based on geography.[9] In Europe, the Rousseauean ideal of democracy as representing a singular will of the people rather than the divergent and contradictory views of the polity persisted.[10] In the 20th century, Hugo Preuß, the author of the Weimar Republic's draft constitution, and President Charles de Gaulle of France both rejected the notion that political parties were critical building blocks for a healthy, modern democratic state and believed that they existed in opposition to cooperative democracy or national unity.[11] As a result of the denigration of the critical roles that parties play, both President Paul von Hindenburg of the Weimar Republic and President de Gaulle emphasized

---

[6] Ainara Mancebo, "Parties' Motivations for Electoral Reform under the Democratic Transition in South Africa," *Revista Española de Ciencia Política*; Madrid, no. 50 (July 2019): 45.
[7] Mersel, "Hans Kelsen and Political Parties," 158-81.
[8] Alexander Hamilton, "Federalist Papers No. 10," November 22, 1787, https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-10/.
[9] George Washington, "President George Washington's Farewell Address," 1796, https://www.ourdocuments.gov/doc.php?flash=false&doc=15&page=transcript.
[10] Stephen Gardbaum, "Political Parties, Voting Systems, and the Separation of Powers," *The American Journal of Comparative Law* 65, no. 2 (June 2017): 237, https://doi.org/10.1093/ajcl/avx030.
[11] Ibid, p. 237.

their own presidential position above the squabbling of political parties and exercised power in such a way that minimized or bypassed the role of parties in the governing of the country.[12]

Despite early fears about their existence and power, political parties have become even more relevant and powerful in the modern century. As evidenced through analysis of modern constitutions, the political forces of the modern party system eventually overcame the attempts of political elites to discourage their presence in constitutional democracies.[13] Older constitutions like those of the United States and the Netherlands do not explicitly mention political parties, but newer constitutions and amendments like those of South Africa and Kazakhstan do outline significant protections for and from political parties.[14] In fact, mentions of political parties in constitutions increased dramatically in the post-war period. By 2000, more than 80% of current constitutions mention political parties, as does nearly every constitution in Africa, Latin America, and post-Soviet countries, which reflects the modern attitude towards organized politics.[15] Famed Austrian constitutional scholar Hans Kelsen wrote that political parties are "one of the most important elements of a democracy" and that it is inconceivable "to believe that democracy is possible without political parties."[16] Kelsen justifies the existence of political parties through four lenses: political parties as the vessel of political participation and freedom; political parties as pragmatic actors to make compromises; political parties as a bulwark against a single-opinion state; and political parties as the only real manifestation of modern

---

[12] Ibid, p. 237-8.
[13] "Political Parties" (Comparative Constitutions Project, 2008), http://comparativeconstitutionsproject.org/files/cm_archives/political_parties.pdf?6c8912.
[14] "Constitution of the Netherlands" (Constitute Project), accessed April 20, 2020, https://www.constituteproject.org/constitution/Netherlands_2008.pdf?lang=en., "Constitution of South Sudan" (Constitute Project), accessed April 20, 2020, https://www.constituteproject.org/constitution/South_Sudan_2011.pdf., "Constitution of Kazakhstan" (Constitute Project), accessed April 20, 2020, https://www.constituteproject.org/constitution/Kazakhstan_2011.pdf.
[15] "Political Parties" (Comparative Constitutions Project, 2008), http://comparativeconstitutionsproject.org/files/cm_archives/political_parties.pdf?6c8912.
[16] Mersel, "Hans Kelsen and Political Parties," 161.

representation.[17] As the world adopted frameworks for political parties into their constitutions, Kelsen applauded the new acknowledgment of the need to protect the functioning of parties in a democracy.[18]

Of course, different countries have different approaches to political parties, but the crux of the party regulation problem is that parties are more than just ideological labels for voters or politicians. Party organizations straddle multiple realms, from voter to elected politician and from party bureaucrat to government bureaucrat.[19] Those in the United States who subscribe to the Founding Fathers' fears of factions use documents like Federalist Papers No. 10 to criticize U.S. Supreme Court decisions that have granted greater liberties to political parties at the cost of individual liberties. Even in the United States, however, U.S. Supreme Court jurisprudence has evolved over time, from rulings that limited federal election law from applying to political party internal primaries as in *Newbury vs. United States* (1921) to a more interventionist state role that included the elimination of white-only primaries in *Terry v. Adams* (1953).[20] At the same time, in the 1975 ruling of *Cousins v Wigoda,* the Supreme Court stated that "any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."[21] Due to the United States' tradition of common law, the Constitution's lack of explicit regulations on political parties, and the difficulty of constitutional amendment, judicial precedent has been used to defend the rights of political parties on the grounds of the First and Fifteenth Amendments.[22] Even the United States Constitution, as the world's oldest, still-in-use constitutional,

---

[17] Mersel, "Hans Kelsen and Political Parties," 163-4.
[18] Mersel, "Hans Kelsen and Political Parties," 175.
[19] Wayne Batchis, "The Political Party System as a Public Forum: The Incoherence of Parties as Free Speech Associations and a Proposed Correction," 52 *U. Mich. J.L. Reform* 437," University of Michigan Journal of Law Reform 52 (2019): 454.
[20] Ibid, 437-84.
[21] Cousins v. Wigoda, 419 U.S. 477, 487 (1975).
[22] Batchis, "The Political Party...," 457.

demonstrates the evolution of the recognition that political parties are a fundamental element of a constitutional democracy.[23]

Newer constitutions have taken a more direct approach to the regulation of political parties such as party bans on political parties that openly intend to subvert the democratic system. The German Constitution took lessons from the Nazi Party's rise to power and inserted clauses of militant democracy that require political parties to be internally democratic, giving the Constitutional Court the ability to ban undemocratic parties.[24] In 2003, the European Court of Human Rights ruled that the Refah political party must be dissolved, its leaders banned from political activities for five years, and the party's financial assets returned to the state in its groundbreaking decision of *Refah Partisi (Welfare Party) and Others v. Turkey*.[25] Although the Refah party was not the first Turkish party to be dissolved, previously banned parties were small whereas the Refah party was the leading partner in the ruling government coalition.[26] The court decided that the Refah party, as an Islamic-inspired party, held beliefs about Islamic principles and shariah that would undermine democracy and threatened the Turkish Constitution's requirement of secular democracy.[27] While the basis and democratic implications of the ruling itself are controversial, the Refah case demonstrated an aggressive form of militant democracy that applies to explicitly anti-democratic parties. New threats to constitutionalism by political parties no longer require a direct challenge to democracy, but use amendments, electoral rule modifications, and appointments to entrench themselves in power while staying nominally

---

[23] "Timeline of Constitutions," *Comparative Constitutions Project*, accessed April 20, 2021, https://comparativeconstitutionsproject.org/chronology/.
[24] "Constitution of the German Federal Republic" (Constitute Project), accessed April 20, 2021, https://www.constituteproject.org/constitution/German_Federal_Republic_2014?lang=en.
[25] Kevin Boyle, "Human Rights, Religion and Democracy: The Refah Party Case," *Essex Human Rights Review* 1, no. 1 (2004): 1.
[26] Ibid, 4.
[27] Ibid, 3-4.

democratic to avoid any party bans, similar to Fidesz in Hungary.[28] Without any clear way to prevent all forms of constitutional retrogression, it is a constant struggle for democratic societies to use constitutions to regulate political parties and to strengthen civil society to prevent the ability of groups to slide into abusive constitutionalism.[29] Although political party bans comprise only a small selection of the range of constitutional prohibitions on political parties that exist around the world, they are the most explicit in their intent to specifically target the power of the party.

Of course, political parties are not only threats to the constitutional order; they can also be key players in the creation of a country or its type of government. When parties are major players in constitutional drafting, the constitution-making process often ends up reflecting the history, long-term strategy, and electoral prospects of the negotiating parties. Political elites in nascent democracies can set the foundations of party dominance through constitutional engineering, a critical path for parties reliant on the symbolism of liberation that understand their goodwill and popularity may one day run out.[30] Minority parties can simultaneously demand opposition protections if they understand they are unlikely to win a national election.

3. Political Party Incentives

Political parties have interests in a constitutional order beyond being protected from state retribution, namely the constitution's system of electoral mechanisms. After all, a party that cannot maximize its number of supporting votes cannot sustain itself. Moreover, there is a difference between political parties and the party system. Political parties operate between

---

[28] David Landau, "Abusive Constitutionalism," *UC Davis Law Review* 47 (April 3, 2013): 208.
[29] Aziz Z. Huq and Tom Ginsburg, "How to Lose a Constitutional Democracy," *UCLA Law Review* 65 (2017): 78, https://doi.org/10.2139/ssrn.2901776.
[30] Clemens Spiess, *Democracy and Party Systems in Developing Countries: A Comparative Study of India and South Africa* (Routledge, 2008): 87.

society and government, but countries only become a party system when there is regularity in patterns of party competition, stability of party roots, citizens accept the legitimacy of parties, and the party is organized.[31] Different electoral systems and balances of power between the various branches of government provide unique incentives for various political parties. These incentives of political power that come with different forms of separation of power or voting representation can encourage parties to push for systems that best benefit their electoral strengths when drafting a new constitutional order.

Unfortunately for classical political thinkers, the systems of government established to limit the power of faction have only empowered the rise of the political party. Initial designs that were intended to prevent unified government have created even stronger forms of unified government thanks to political parties. UCLA professor Stephen Gardbaum finds that in parliamentary systems, the rise of mass-participation party politics transferred the power from Parliamentarians to the party leaders by bringing about the need for strict party discipline.[32] The stricter party discipline allows for prime ministers to hold even greater power when the entirety of the party is behind them. Semi-presidential and presidential systems were introduced by leaders who wanted to curtail the factionalism of parliamentarianism and Prime Minister elections, but even in these systems, parties have organized to capture the executive and legislative branches knowing the power that unified government can bring.[33]

Voting systems, such as proportional representation (PR) voting or majoritarian voting, also affect the interests of political parties. In parliamentary systems with majoritarian, first-past-the-post voting, political parties have every incentive to maintain a robust internal organization

---

[31] Cindy Skach, "Political Parties and the Constitution," *The Oxford Handbook of Comparative Constitutional Law* (May 2012): 1–20, https://doi.org/10.1093/oxfordhb/9780199578610.013.0043.
[32] Gardbaum, "Political Parties, Voting Systems, and the Separation of Powers," 235.
[33] Ibid, 237-240.

to carry themselves to victory and prevent backbench revolts to avoid splitting the vote. At the same time, parties in contested districts are split between appealing to their activist wing and the median voter, both of which are critical in a winner-take-all district. Politicians and parties respond, however, by limiting electoral competitiveness through efforts like public funding, incumbency privileges, or blocking third-party activism to protect themselves from internal power struggles and third-party vote-splitters while maintaining the median voter.[34] For smaller parties, there are two competing interests. There is an interest in tying itself to a major party to have a say in policy implementation, but there is also a vested interest in ensuring they are not tying themselves to an unpopular, larger party that voters will blame them for come election time.[35] Either incentive pathway depends on the circumstances, but both require strengthening party leadership to make the necessary calculations. As witnessed in the United Kingdom, the introduction of strong, organized political parties to a majoritarian, first-past-the-post electoral system meant that individual MPs were no longer used to check back the government but were turned into disciplined members of the party's majority which turned the UK into a stronger unified government structure when a single party won the majority.[36]

There is typically not just one dominant party in parliamentary democracies with PR, but rather there is typically a divided government separated not by institutions but by the parties.[37] During minority government, the inherent instability of the ruling party's position means all parties must always be ready for another election lest the government fall or be ejected over a

[34] Samuel Issacharoff, "Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition," Columbia Law Review 101, no. 2 (2001): 303.
[35] Gardbaum, "Political Parties, Voting Systems, and the Separation of Powers," 246.
[36] Ibid, 243.
[37] Ibid, 246.

vote of no confidence.[38] With PR, there still remains an incentive for political parties to have centralized power structures, but instead of doing so to retain majority power, in this case it is so party elites can broker negotiations with other parties with full party loyalty.[39] This is why in a PR parliament with a coalition government, the governing parties must crackdown on party insubordination even more so than in a majoritarian system because every vote matters since margins are smaller. This is a necessary consideration for political parties in PR because of the significant bargaining costs and legislative costs of coalition-building and coalition-maintenance.[40] Smaller fringe political parties often have incentives and opportunities to make themselves critical partners to larger parties —in such a scenario —thus boosting their influence.[41] There is a further split in PR voting systems between closed list and open list systems of choosing which members will be selected to fill the seats won by the party. Closed lists give full power to the party to prioritize the members it wants and empower the party leadership by restricting voters' rights to choose their representatives who might buck the leadership.

In semi-presidential systems, there are different mechanisms that make prime ministers responsible and dismissible by either the legislature or by both the legislature and president. These systems provide for an extra layer of protection in countries that have suffered from authoritarian pasts and wish to have multiple checks on executive leadership.[42] In presidential systems, there will be periods of unified government when the same party controls both branches, but does not quite reach the unitary power in a parliamentary system, due to a

[38] Richard Albert, "The Fusion of Presidentialism and Parliamentarism," The American Journal of Comparative Law 57, no. 3 (2009): 566.
[39] Gardbaum, "Political Parties, Voting Systems, and the Separation of Powers†," 248.
[40] Albert, "The Fusion of Presidentialism and Parliamentarism," 568.
[41] Ibid, 567.
[42] Gardbaum, "Political Parties, Voting Systems, and the Separation of Powers†," 252.

slackened link between the electoral prospects of the executive and legislative branches.[43] However, in both cases, the strength of party politics can override these institutional checks when legislators are unwilling to exercise their power against the leader of their own party.

Similar to the considerations of proportional representation versus majoritarian voting, in parliamentary systems, broad parties will do better in majoritarian systems whereas PR will split the legislative branch into many parties.[44] Therefore, since the presidential race in both scenarios is a winner-take-all event and cannot be split proportionately, parties increase their control over candidate choice by hosting primaries, holding runoffs, or through straight plurality voting.[45] In countries with strong executives—independent of the legislature—the more individualistic nature of the office tends to encourage an expansion of power, and in semi-presidential systems, a tendency of presidents overruling their prime ministers emerges, especially in countries where parties have weak institutionalization.[46] A semi-presidential PR system gives parties the greatest headaches because of the increased possibility of a minority government in a legislature and an executive from a different party entirely. In all combinations however, there are different incentives based not only on electoral prospects, but also party strength and unity, for political parties to support different kinds of representation and voting to strategically position themselves. Such maneuvering was apparent during the party-led constitutional reform of post-Apartheid South Africa in the early 1990s.

4. South Africa

Today, the Republic of South Africa operates under a unique system of government shared only by Botswana, Myanmar, and a few Pacific island nations. This section will not only

[43] Ibid, 256.
[44] Ibid, 252.
[45] Ibid, 253.
[46] Skach, "Political Parties and the Constitution," 8.

look at the legacy of Apartheid on the formation of the new constitution, but also how different incentives and motivations of the parties influenced the structuring of the new government.

Under the current South African Constitution, every five years, the country holds national, provincial, and municipal elections, but municipal elections are staggered by two years. As aforementioned, South Africa follows a unique system of government that is not a pure Westminster model of parliamentary supremacy, the —"American" model of an executive president independent of the legislature—or even a semi-presidential model with both an executive and prime minister. Rather, South Africa is a form of presidential parliamentarianism, a fusion of executive power and parliamentary legislature, that is gaining greater attention in the realm of constitutional law.[47] More specifically, South Africa has an executive president who serves as the head of state, government, and commander-in-chief. The said president is elected by the lower house of the South African Parliament, the National Assembly. This individual must be an active member of the National Assembly and willing to resign their seat upon assuming the office of the presidency. The president still has a certain degree of legislative checks against them; however, including a parliamentary vote of no confidence. While South Africa's model shares many elements of the Westminster model, it differs because the head of government does not necessarily come from the governing party/coalition, but rather it is elected by the entire National Assembly, not the party. As for the South African Parliament, there is a 400-person lower house, the National Assembly, whose seats are distributed based on the percent of the vote achieved by each party in the election.[48] The upper house, the National Council of Provinces, has 90 seats with ten delegates for each province. These seats are chosen by the vote

[47] Albert, "The Fusion of Presidentialism and Parliamentarism," 531.
[48] "National Assembly," Parliament of the Republic of South Africa, accessed September 9, 2020, https://www.parliament.gov.za/national-assembly.

of their respective provincial legislators.[49] South Africa also has a strong Constitutional Court that has shown its willingness to utilize its power of judicial review to check back the other branches. Essentially, South Africa's government follows many core elements of Bruce Ackerman's proposed structure of constrained parliamentarianism that seeks to avoid the partisan gridlock of the United States and the parliamentary supremacy of the UK.[50]

This structure exists because of the incentives that drove the political parties which hammered out the initial interim South African Constitution. In order to understand the parties' historical and electoral motivations to craft such a government, a proper explanation of the role that political parties played in ending Apartheid and transitioning to democracy is first required.

5. History of the South African Legal System

The arrival of European colonizers, just like elsewhere in Africa, would launch centuries of new political developments across the continent that took little regard for pre-existing African political entities. Thus, even though there were people living in the area for millennia before Dutch settlers, the modern political identity of a South African nation-state and its history began in 1652 when Dutch colonizers set foot in South Africa. The Dutch would soon implement slavery in the Dutch Cape Colony. Even after the British takeover of the Cape and the abolishment of slavery, the system of racial hierarchy that had existed for centuries remained in place.[51] By the early 1900s, concerns about reductions in African laborers, for diamond mines and white-owned farms, due to new opportunities in urban areas and local agriculture, led to the Native Lands Act of 1913.[52] The law handed over 93% of the land to the white minority; forced

[49] "National Council of Provinces," Parliament of the Republic of South Africa, accessed September 9, 2020, https://www.parliament.gov.za/national-council-provinces.
[50] Bruce Ackerman, "The New Separation of Powers," Harvard Law Review 113, no. 3 (January 2000): 633–729.
[51] Daisy Jenkins, "From Apartheid to Majority Rule: A Glimpse Into South Africa's Journey Towards Democracy," Arizona Journal of International and Comparative Law 13 (n.d.): 467.
[52] Jenkins, "From Apartheid to Majority Rule: A Glimpse Into South Africa's Journey Towards Democracy," 469.

black South Africans into the remaining reserves; and criminalized their presence in white lands if they lacked permission.[53] In the 1948 election, the Reunited National Party, campaigning on a platform of greater independence from the British to protect Afrikaners and the domination of white South Africans, won through extensive gerrymandering.[54] Following its victory, the Reunited National Party merged with the Afrikaner Party in 1951 to become the National Party (NP) and proceeded to implement Apartheid by assigning African groups to tribal homelands; denying access to jobs; eliminating voting; and empowering the country's white minority.[55]

The National Party also set out to increase its control over the organs of government to solidify both its own power and the system of Apartheid. In 1951, the National Party seized its chance to take power from the South African courts in a battle over the removal of coloured voters (defined as a person with mixed European and African heritage) from the voters' roll. The problem for the NP was that the British Parliament's South Africa Act of 1909 that created the Union of South Africa guaranteed that coloured voters could remain on voter rolls unless it was overturned by a 2/3 majority in Parliament that the NP did not have. The NP argued that in *Ndlwana v. Hofmeyr* (1937), the Appeal Court of the Union of South Africa upheld the South African Parliament's sovereignty to pass laws that would supersede the 1909 South Africa Act.[56] Furthermore, it was argued that South Africa was allowed to pass its own laws because the 1931 Statute of Westminster decreed that no previous acts of the UK Parliament could void any new

---

[53] Ibid, 463–89.
[54] Berman, Dan. "Apartheid Was Helped by a Twisted Election System." FiveThirtyEight (blog), May 22, 2010. https://fivethirtyeight.com/features/apartheid-was-helped-by-twisted/.
[55] Jenkins, "From Apartheid to Majority Rule: A Glimpse Into South Africa's Journey Towards Democracy," 463–89.
[56] Griswold, Erwin N. "The 'Coloured Vote Case' in South Africa." *Harvard Law Review* 65, no. 8 (1952): 1361–74.

laws in the British Dominions of Ireland and South Africa.[57] However, in spite of the *Ndlwana* ruling and the 1931 Statute of Westminster, the Appeal Court struck down the Coloured Voters' cases unanimously, even though three of the five justices adhered to a judicial framework friendlier to the South African government.[58] The Appeal Court argued that the entrenched clauses of the South Africa Act were still valid, rejecting both its own, previous *Ndlwana* ruling and a separate government argument that coloured voters would have more rights on a voter role for a segregated constituency.[59] In response to the ruling, Parliamentarians of the NP formed a High Court of Parliament with the self-designated power to overrule Appeal Court decisions, a move that was rejected by even the most conservative justices of the court.[60] Following the rejections of the Appeal Court, the NP-led government enlarged the upper house of Parliament to get the 2/3 majority while also stacking the Appeal Court to convert it into a pro-Apartheid branch.[61]

Following South Africa's 1960 (all-white) referendum to become a republic and separate from the British monarchy, Apartheid South Africa operated similarly to a Westminster Parliamentary system with legislative supremacy, a ceremonial president, and an independent, but stacked, judiciary.[62] In spite of this, many black South Africans saw hope in the judicial branch and the rule of law as a way out of Apartheid. In 1971, Albie Sachs, a future justice of the South African Constitutional Court, quoted a South African ex-Chief Justice, "It is discriminatory legislation which prevents our Courts from dispensing equal justice under law; if

---

[57] Ver Loren Van Themaat, "Legislative Supremacy in the Union of South Africa," *University of Western Australia Law Review* 6 (1954): 61.
[58] Albie Sachs, *Justice in South Africa* (Berkeley: University of California Press, 1973): 143.
[59] Ibid, 143-4.
[60] Ibid, 144.
[61] Ibid, 144.
[62] "Constitutional History of South Africa," ConstitutionNet, accessed May 5, 2020, http://constitutionnet.org/country/south-africa.

that legislation were to be repealed our Courts would dispense equal justice… for our common law is colour-blind."[63] Sachs admitted that while many black South Africans at the time did not like lawyers, they still fought to be represented in court and to have lawyers to defend them in criminal cases.[64] In the 1961 Treason Trial, Nelson Mandela, himself a practicing attorney, attacked the administration of justice in South Africa on procedural and moral grounds.[65] It is thus very likely that Mandela's own respect for the rule of law but first-hand experience with the dangers of legislative supremacy and stacked courts influenced much of his political beliefs as he helped forge South Africa's constitution in the 1990s. Evidence of such thinking can be found three years after Mandela's release from prison. In a 1993 address to the Law Society of Transvaal, Mandela outlined his vision of a new judicial enforcement of human rights by declaring, "The restructuring of the judiciary must and will take place. The legal profession's participation and attitudes will play an important role in the process of restructuring."[66] In conjunction with Mandela's vision of a new South Africa, Albie Sachs also pushed for South Africa to be a nation guided by the rule of law by adopting a justiciable bill of rights.[67] Both men would be critical forces in the creation of the new constitution and laid the groundwork for the establishment of a strong and independent judicial branch in the new government.

Throughout the Cold War, South Africa upheld apartheid not only at home, but also within neighboring Rhodesia, within illegally occupied South West Africa (present day Namibia), and did so by assassinating opposition elements across Europe and Southern Africa.

---

[63] Sachs, *Justice in South Africa*, 160.
[64] Ibid, 202.
[65] Ibid, 218.
[66] "Nelson Mandela - Speeches - Opening Address by Nelson Mandela to the Law Society of the Transvaal." Accessed September 11, 2020. http://www.mandela.gov.za/mandela_speeches/1993/931029_law.htm.
[67] Sachs, Albie. "A Bill of Rights for South Africa: Areas of Agreement and Disagreement Human Rights in the Post-Apartheid South African Constitution." Columbia Human Rights Law Review 21, no. 1 (1990 1989): 13–44.

The Apartheid government's vicious oppression of minorities across the country and horrible track record on human rights sparked international pressure against the government. The only legal domestic opposition to the NP was a scattering of white, progressive and reformist anti-Apartheid parties that achieved no major electoral wins against the NP. South Africa became increasingly isolated as more and more rounds of government sanctions, private divestment, capital flight, economic instability, and international isolation hit the country. After winning his party's leadership nomination, President F.W. de Klerk continued the prior administration's secret negotiations with the banned African National Congress (ANC). Over the course of the next few years, the NP and ANC conducted extensive talks about negotiations that would eventually bring about the transition to a fully enfranchised democracy.

Throughout Apartheid, opposition forces had been engaged in anti-government struggle against the ruling party even going to the point of armed resistance, the most notable of which was the African National Congress (ANC). The ANC was founded in 1912 and pushed peacefully against white supremacy for decades, and initially peacefully resisted Apartheid as well. In 1960, a splinter group of the ANC, the Pan African Congress, gathered thousands at the Sharpeville police station to protest laws requiring black South Africans to carry pass cards. Without warning, South African police opened fire killing 69.[68] Following the Sharpeville massacre, the ANC and PAC turned to armed resistance and fled the country to conduct their operations from South Africa's neighboring states. After his famous Rivonia trial and subsequent 27 year long imprisonment on the grounds of sabotage, Nelson Mandela became the face of the ANC and would become the leading figure of the new South Africa following his release from prison in 1990. As the nation's oldest black political organization and longest opponent of

[68] McRae, Matthew. "The Sharpeville Massacre." Canadian Museum for Human Rights. Accessed September 11, 2020. https://humanrights.ca/node/501.

Apartheid, the ANC emerged as the primary representative for black South Africans. The other major party was the Inkatha Freedom Party which desired protections for the Zulu minority that was largely concentrated in the KwaZulu-natal province.[69]

6. The New Constitution for a New South Africa

In 1990, President de Klerk announced the unbanning of political organizations and the release of Nelson Mandela. The following year, he went further and announced that the legal groundwork for Apartheid would be repealed under his administration.[70] After the 1992 (white-only) referendum to negotiate a new Constitution, F.W. de Klerk was able to prove he had a popular mandate to continue negotiations with the ANC over the formation of a new constitution. With the understanding that South Africa would significantly increase the enfranchisement of its black majority, the political parties adjusted their strategies. The NP explicitly rejected any form of Westminster legislative supremacy in this new constitution and instead advocated a system of proportional representation to ensure it could consolidate power in a few strategic areas like the Western Cape.[71] The fringe elements of the far-right demanded a White homeland for only Whites and wanted to leave the rest of the country to a black majority government.[72] The NP and Democratic Party did not agree with this viewpoint —and knowing that the election was going to bring in an Black-majority victory —intended to push for rule of law protections such as a bill of rights, the devolution of power to regional governments, and

---

[69] "Inkatha Freedom Party." (Oxford, United Kingdom: Oxford University Press) https://doi.org/10.1093/oi/authority.20110803100003941.

[70] "Negotiations and the Transition," South African History Online, June 30, 2011, https://www.sahistory.org.za/article/negotiations-and-transition; Christopher S. Wren, "South Africa Moves to Scrap Apartheid (Published 1991)," *The New York Times*, February 2, 1991, sec. World, https://www.nytimes.com/1991/02/02/world/south-africa-moves-to-scrap-apartheid.html.

[71] Mancebo, "Parties' Motivations...," 47.

[72] Johan D. van der Vyver, "Constitutional Options for Post-Apartheid South Africa," *Emory Law Journal 40*, no. 3 (1991): 762.

checks and balances.[73] They, alongside the Inkatha Freedom Party, wanted to protect their parties in the expected outcome of an ANC victory and thus desired a consociational democracy (rather than a majoritarian one) with PR in both legislative and executive branches (the cabinet).[74] Such a voting system would ensure that they would receive representation even if they were in the minority in every province, because seats would be allocated by a national percentage of the vote. The Horowitz-Lijphart debate about intra-ethnic and interethnic political competition from the 1960's became a deeply contested point in the debate over whether or not proportional representation was a good system of representation or just a cover to maintain some form of white supremacy.[75] The NP, well-aware that the ANC was going to become the largest party in the National Assembly, also moved to increase the rigidity of the constitution. The ANC's ideal outcome, however, was a unitary state with majoritarianism, a position that they pushed for both because it would guarantee them the largest margins of victory and prevent racially-based representation.[76]

As for the role of the courts in a new South Africa, the NP followed the recommendations of the Olivier Commission to entrust ordinary courts with the enforcement of a bill of rights. The NP wanted courts that they already trusted and feared a special superior court charged with interpreting the constitution stacked with partisans of the ANC.[77] The Olivier Commission was also content with a more flexible interpretation of the bill of rights, but only for civil and political rights, akin to that in the United States.[78] Nonetheless, the ANC wanted a specialized constitutional court and a Human Rights Commission to monitor legislation. The ANC, wary of

---

[73] Mancebo, "Parties' Motivations...," 47.
[74] van der Vyver, "Constitutional Options for Post-Apartheid South Africa," 770.
[75] Mancebo, "Parties' Motivations for Electoral Reform under the Democratic Transition in South Africa," 52-53.
[76] van der Vyver, "Constitutional Options for Post-Apartheid South Africa," 766.
[77] Ibid, 802.
[78] Ibid, 811-819.

the dominance of white judges in ordinary courts, believed that such courts would be poorly suited for constitutional questions due to their adversarial nature and lack of a singular source for *stare decisis*.[79] Furthermore, the ANC also believed in the more formulaic elements of the common-law traditions of South Africa and wanted a precise bill of rights to ensure the judiciary followed a model of judicial restraint in their rulings and did not stray too far into the legislature's power.[80] The only way to reassure black South Africans that the courts were to be trusted and that the law would be applied equally would be by forming a high court with a representative body to provide one voice on the interpretation of the bill of rights.[81]

In the compromise that resulted, all parties agreed on the implementation of a bill of rights and the ANC put to rest any fears it would serve as an authoritarian-majoritarian ruling party by recommending a bill of rights replete with protections for all sorts of stakeholders.[82] This new bill of rights was not like others in the West because it provided more than individual and procedural protections, but went further to include socioeconomic rights as well as collective rights to ensure the new South Africa would be forced to address the inequalities caused by Apartheid.[83] The ANC was also willing to implement national PR voting despite the benefits a majoritarian vote would have for its office-seeking tendencies because it was convinced that the new state needed the full political participation to gain legitimacy.[84] However, the parties remained at a standoff about the implementation of the Constitution, so instead adopted an interim in 1994, right before the first fully enfranchised election.

---

[79] Ibid, 804.
[80] Ibid, 812-13.
[81] Ibid, 804.
[82] Ibid, 766.
[83] Ibid, 784-5.
[84] Mancebo, "Parties' Motivations for Electoral Reform under the Democratic Transition in South Africa," 48.

Legitimacy was key to the survival of the county, on the eve of the critical 1994 election. Although the ANC knew it was likely to win the 1994 election, opinion polls were varied and some NP politicians even believed the ANC would take under 50% of the vote.[85] The highly inclusive and proportional representation system adopted under the interim Constitution, however, gave all sides confidence leading into both negotiations and elections to push for policy wins while also minimizing the risks taken if they were to lose.[86] The dynamics of the two-way reassurance, between the ANC and NP, allowed the NP to accept their loss of power to the ANC without fearing a run-away majoritarian party. Of course, both sides also had their own tactics of consolidating support for their positions amongst the people rather than within the Multi-Party Negotiation Process (MPNP) negotiations. The NP conducted a referendum to respond to the Conservative Party's (a right-wing party established to oppose de Klerk's policies) argument that the NP no longer had the popular backing to conduct negotiations. De Klerk received an overwhelming victory, which strengthened the hand of the NP by demonstrating strong support amongst white South Africans for its positions rather than those of the Conservative Party. The ANC encouraged mass protests and street demonstrations, but the resulting violence and massacres between police forces, ANC supporters, and the Inkatha Freedom Party also pushed the parties to find a peaceful, political resolution quickly.[87]

The 1994 election had a massively expanded franchise and would set the strength of political parties for the next round of constitutional negotiating. Ultimately, the election was a success and the ANC dominated the election with 63% to the NP's 20%, Inkatha's 10%, and

---

[85] Ibid, 55.

[86] Ibid, 56.

[87] Catherine Barnes and Eldred de Klerk, "South Africa's Multi-Party Constitutional Negotiation Process," Accord, no. 13 (December 2002), https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/Accord%2013_5South%20Africa%27s%20multi-party%20constitutional%20negotiation%20process_2002_ENG.pdf.

Freedom Front's 2%. Following the election, the Government of National Unity was formed to continue the negotiations that would finalize the constitution. Because the interim constitution also allocated cabinet ministers in the unity government based on the vote proportion, the government was led by the ANC's Mandela, but included NP leader de Klerk as one of two Deputy Presidents and various Inkatha Freedom Party and NP politicians with portfolio powers.

The interim constitution that existed for the 1994 election was a compromise from the MPNP between the NP, who wanted the framework of the new government established before the elections, and the ANC who, knowing they would likely receive a large majority in a free election, argued that democratic legitimacy and a vote in the National Assembly was needed to implement a Constitution.[88] Now that the elections were completed, the final constitution was to be drafted along pre-agreed upon principles, informed by public suggestion, and then certified by the Constitutional Court.[89]

In the final 1997 constitution, the NP, Democratic Party, and Inkatha Freedom Party did not end up forming a purely consociational government, but the ANC did agree to formalize PR as the voting process with some loosely devolved powers to the provinces. Provinces were also given greater say in the selection of representatives to the upper house of the South African Parliament. The ANC also won on the matter of the establishment of a higher Supreme Court. On the issue of the rigidity of the constitution and its amendment, the compromise was a tiered constitution, with Chapter 1 rights over the fundamental nature of the state requiring agreement of both ¾ of the National Assembly and six of the nine provinces in the National Council of Provinces to amend.[90] Chapter 1 includes the four values of South Africa: human dignity, non-

---

[88] Christina Murray, "A Constitutional Beginning: Making South Africa's Final Constitution Essay," *University of Arkansas at Little Rock Law Review* 23, no. 3 (2001): 813.
[89] Murray, "A Constitutional Beginning: Making South Africa's Final Constitution Essay," 813.
[90] Constitution of the Republic of South Africa, 1996

racialism and non-sexism, the supremacy of the Constitution, and universal adult suffrage in a multi-party democracy. Beyond that, the Chapter also includes guarantees of citizenship, the national flag, protection of South Africa's linguistic diversity, The rest of the constitution —except for the rules about amending the constitution —can be amended however by both a 2/3 majority in the National Assembly with the agreement of six of the nine provinces in the National Council of Provinces.[91] The process was decided by a vote in the Constitutional Assembly rather than through referendum to avoid a partisan battle over specific features of the constitution that would become very divisive topics in a national referendum.[92] Issues that were divisive between members of the Assembly did not hold up the final passage of the constitution and were instead challenged in Court, moving the political dispute into the legal realm.[93]

In addition to heavily debating the structure of government, South Africa's political parties also included specific protections for parties in the Constitution. The Constitution explicitly mentions political parties in numerous contexts, most explicitly setting multi-party democracy as a founding value of the state. It also guarantees individuals the right to form a political party and the right to participate in the activities of a political party. Other party-specific references include allowing parties to recall their nominated permanent delegate on the National Council; adding multi-party Parliamentary oversight to restrict security services from targeting political parties; mandating the President terminate appointments if the party of the appointee requests it; and more.[94] Many of these protections are a direct result of the traumas of Apartheid. For example, the restrictions on the security services to not target political parties and requirement to have a multi-party oversight committee is a direct result of the violence the South

[91] Ibid.
[92] Murray, "A Constitutional Beginning: Making South Africa's Final Constitution Essay," 831.
[93] Ibid, 835.
[94] South Africa, The Constitution of the Republic of South Africa.

African Defense Force and intelligence had inflicted on ANC supporters and leaders both in and outside the country.[95] Such protections were also desired by the parties opposed to the ANC who likely feared the ANC turning the same weapons of state-violence against their political opponents as the NP had done for decades.

Furthermore, South Africa remains committed to its multi-party system through its nomination process of its Constitutional Court justices. The President can appoint the Chief Justice and Deputy Chief Justice while consulting the Judicial Service Commission and leaders of political parties in the National Assembly. All 11 judges cannot be members of Parliament, the government, or of political parties.[96] Aside from the Chief or Deputy Chief Justice, if one of the other nine judges' 12 to 15-year term expires, the president can only pick from a list provided by the Judicial Service Commission. This Commission includes the Chief Justice, practicing advocates representing their profession, a teacher of law, at least three members of opposition parties, and provincial delegates amongst others. The inclusion of opposition parties throughout the consultation and pre-selection process in addition to bans on those affiliated to parties from serving as justices both provide a check on any majoritarian tendencies that would significantly undermine the rule of law. Such concessions demonstrate the constitution's intent to maintain South Africa as a multi-party democracy, a legacy of the success of the party-led negotiations in the 1990s.

The enduring popularity of the ANC —and its continued control over government without serious opposition —revealed serious flaws with a system designed to empower political parties. Since 1994, South Africa has witnessed 26 years of ANC dominance and without any

---

[95] Murray, "A Constitutional Beginning: Making South Africa's Final Constitution Essay," 815.
[96] "How Judges Are Appointed," Constitutional Court of South Africa, accessed April 23, 2020, https://www.concourt.org.za/index.php/judges/how-judges-are-appointed.

opposition able to crack more than 25% in elections, has become a dominant party democracy. What is interesting is that despite South Africa's PR system that would allow parties with as low as 0.25% of the national vote to get a seat in the National Assembly, South Africa remains dominated by a single party and does not follow theoretical models of PR parliaments that split into many smaller parties.[97] This is in large part due to the legacy the ANC maintained as the Party of Mandela that ended Apartheid, but also due to its constitutionally-protected power to keep its members in line by punishing defectors.[98] This context also demonstrates why constitutions cannot be treated as purely theoretical exercises without considering their unique histories. By all theoretical models, the multi-ethnic and multi-lingual diversity and PR system in South Africa ought to result in a competitive, multi-party democracy, but instead South African politics remains dominated by the ANC because of its unique role in South African history.[99]

While South Africa does not follow a pure Westminster style of legislative supremacy, the election of the president from the lower house more resembles a closed-list, proportionally representative parliamentary system. The ANC has been able to centralize immense power because of this closed-list system that allows it to choose the most loyal parliamentarians. Unfortunately, this means that the primary check on the president from the legislature, the vote of no confidence, is rarely employed unless the president falls out of grace with the party leadership which is also rare. Even at the height of his unpopularity and corruption allegations, President Zuma's support from the ANC allowed him to survive repeated votes of no confidence from the opposition until he resigned due to public pressure. The sheer political dominance of the

---

[97] "Political Party Representation In National Assembly," Parliamentary Monitoring Group, May 13, 2019, https://pmg.org.za/page/political-party-representation.
[98] Karen E. Ferree, "Electoral Systems in Context," *The Oxford Handbook of Electoral Systems*, April 26, 2018, https://doi.org/10.1093/oxfordhb/9780190258658.013.38.
[99] Ferree, "Electoral Systems in Context."

ANC signifies the different incentive structures that presidential, semi-presidential, or parliamentary systems provide don't matter as much because it would win under any model.[100] However, the incentives of voting structure do matter and play a pivotal role in the party politics of South Africa. The constitutionalization of proportional representation and the 2/3 majority needed for amendment prevents the ANC from switching systems to grow its margins of victory, a testament to the foresight of the NP, DP, and IFP to protect themselves from even more ANC control. Stephen Gardbaum argues that in countries where there is a very clear dominant party, what matters more is federalism, electoral commissions, and the courts rather than the separation between legislative and executive.[101] This would appear to be the case in South Africa. The ANC's lack of significant electoral competition and ability to crush internal dissent while also holding onto a liberal system that grants a dominant party a lot of control has sparked concerns for the future of South Africa. In dominant party democracies such as South Africa, it is in the nature of the dominant party to capture independent institutions established to check the governing party.[102] Unfortunately, a number of court cases have revealed that the South African Supreme Court has rejected the notion that the ANC's dominant party position is relevant to constitutional challenges, and until this thought process is changed, further institutional capture is to be expected.[103] The longer such thinking persists, the greater the chance that even theoretically independent bureaucrats in the national government will begin to see themselves as elements of the ANC.[104] The broad party protections in the South African Constitution thus have

---

[100] Gardbaum, "Political Parties, Voting Systems, and the Separation of Powers†," 250.
[101] Ibid, 263.
[102] Sujit Choudry, "'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy," Constitutional Court Review, 2010: 3, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651332.
[103] Choudry, "'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy," 5.
[104] Ibid, 16.

a dual effect of protecting minority party representation but also allowing for the consolidation of immense bureaucratic power by a majority party with no significant competition.

Despite the power of the ANC, the landscape is slowly shifting, and perhaps the court's belief that the ANC dominance is not relevant may prove to be correct. Just as the Indian National Congress lost its commanding grip of the Indian political system, the ANC may face the same fate. The ANC remains at the center of South Africa's political system, but opposing parties are beginning to grow in support. The ANC's majority holds despite persistent allegations of corruption, and as of the 2019 national election, was still able to win 58% of the vote. However, the share has been dropping since 2004 against the primary opposition of the Democratic Alliance (DA) and the Economic Freedom Fighters (EFF), who won 21% and 11% of the vote respectively. Economic anger at the lasting effects of Apartheid continues to drive the EFF's every growing vote share causing concern to the ANC, whose voter base is most at risk. The NP, after briefly becoming the New National Party in 1997, no longer plays an active role in South African politics, and its support has largely been absorbed by the DA who also enjoys support from mixed-race South Africans. If trends continue and the ANC loses its majority status, the real test of South Africa's party-based provisions of its constitution can finally be realized.

7. Conclusion

Political parties in South Africa played a vital role in the creation of the country's constitution; and today, political parties enjoy strong protections in the Constitution. More so than in other countries, the explicit party-based negotiation element of the South African Constitution has directly contributed to not only the electoral system and government structure, but also to the protections and privileges extended to political parties in the Constitution. The

unique nature of South Africa's Apartheid legacy of lasting socioeconomic and political rifts continue to provide a very explicit incentive to codify these protections, but has also resulted in a distribution of party power that has challenged certain expectations. Constitutions cannot be viewed in isolation from the historic and political currents of the nations they claim to represent, and to do so would hinder any attempt to understand the nature of the South African Constitution. South Africa's Constitution reflects the changing norms in constitutional law, while representing the necessity of viewing and understanding constitutions through the lens of history and politics, rather than a purely legal framework.

Bibliography

Ackerman, Bruce. "The New Separation of Powers." *Harvard Law Review* 113, no. 3 (January 2000): 633–729.

Albert, Richard. "The Fusion of Presidentialism and Parliamentarism." *The American Journal of Comparative Law* 57, no. 3 (2009): 531–630.

Barnes, Catherine, and Eldred de Klerk. "South Africa's Multi-Party Constitutional Negotiation Process." Accord, no. 13 (December 2002). https://rc-services-assets.s3.eu-west-1.amazonaws.com/s3fs-public/Accord%2013_5South%20Africa%27s%20multi-party%20constitutional%20negotiation%20process_2002_ENG.pdf.

Batchis, Wayne. "The Political Party System as a Public Forum: The Incoherence of Parties as Free Speech Associations and a Proposed Correction." 52 U. Mich. J.L. Reform 437. *University of Michigan Journal of Law Reform* 52 (2019): 437–84.

Berman, Dan. "Apartheid Was Helped by a Twisted Election System." *FiveThirtyEight* (blog), May 22, 2010. https://fivethirtyeight.com/features/apartheid-was-helped-by-twisted/.

"Boipatong Massacre - 17 June 1992," (South African History Online, 2012), https://www.sahistory.org.za/article/boipatong-massacre-17-june-1992.

Boyle, Kevin. "Human Rights, Religion and Democracy: The Refah Party Case." *Essex Human Rights Review* 1, no. 1 (2004): 1–16.

Campbell, John. "The Economic Freedom Fighters, South Africa's Enfant Terrible." Council on Foreign Relations. Accessed April 23, 2020. https://www.cfr.org/blog/economic-freedom-fighters-south-africas-enfant-terrible.

Choudry, Sujit. "'He Had a Mandate': The South African Constitutional Court and the African National Congress in a Dominant Party Democracy" Constitutional Court Review, 2010. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1651332.

Comparative Constitutions Project. "Timeline of Constitutions." Accessed April 20, 2021. https://comparativeconstitutionsproject.org/chronology/.

"Constitution of Kazakhstan." Constitute Project. Accessed April 20, 2020. https://www.constituteproject.org/constitution/Kazakhstan_2011.pdf.

"Constitution of the German Federal Republic." Constitute Project. Accessed April 20, 2021. https://www.constituteproject.org/constitution/German_Federal_Republic_2014?lang=en.

"Constitution of the Netherlands." Constitute Project. Accessed April 20, 2020. https://www.constituteproject.org/constitution/Netherlands_2008.pdf?lang=en.

"Constitutional History of South Africa." ConstitutionNet. Accessed May 5, 2020. http://constitutionnet.org/country/south-africa.

Cousins v. Wigoda, 419 U.S. 477 (1975)." Accessed September 7, 2020. https://supreme.justia.com/cases/federal/us/419/477/.

Ferree, Karen E. "Electoral Systems in Context." *The Oxford Handbook of Electoral Systems*, April 26, 2018. https://doi.org/10.1093/oxfordhb/9780190258658.013.38.

Fombad, Charles M. "Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa." *American Journal of Comparative Law* 55, no. 1 (2007): 1–46.

Gardbaum, Stephen. "Political Parties, Voting Systems, and the Separation of Powers†." The *American Journal of Comparative Law* 65, no. 2 (June 2017): 229–64. https://doi.org/10.1093/ajcl/avx030.

Griswold, Erwin N. "The 'Coloured Vote Case' in South Africa." *Harvard Law Review* 65, no. 8 (1952): 1361–74. https://doi.org/10.2307/1336655.

Hamilton, Alexander. "Federalist Papers No. 10," November 22, 1787. https://billofrightsinstitute.org/founding-documents/primary-source-documents/the-federalist-papers/federalist-papers-no-10/.

Constitutional Court of South Africa. "How Judges Are Appointed." Accessed April 23, 2020. https://www.concourt.org.za/index.php/judges/how-judges-are-appointed.

Huq, Aziz Z., and Tom Ginsburg. "How to Lose a Constitutional Democracy." *UCLA Law Review* 65 (2017): 78–169. https://doi.org/10.2139/ssrn.2901776.

Ingrid Woolard. "Economists Think South Africa's Persistent Inequality Should Be Tackled with a Wealth Tax." Quartz Africa. Accessed April 22, 2020. https://qz.com/africa/1610723/south-africas-inequality-can-be-fixed-with-a-wealth-tax/.

"Inkatha Freedom Party." Oxford, United Kingdom: Oxford University Press, https://doi.org/10.1093/oi/authority.20110803100003941.

Issacharoff, Samuel. "Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition." *Columbia Law Review* 101, no. 2 (2001): 274–313.

Issacharoff, Samuel. "Judicial Review in Troubled Times: Stabilizing Democracy in a Second-Best World." *North Carolina Law Review* 98. Accessed May 6, 2020. https://scholarship.law.unc.edu/nclr/vol98/iss1/3

Jenkins, Daisy. "From Apartheid to Majority Rule: A Glimpse into South Africa's Journey Towards Democracy." *Arizona Journal of International and Comparative Law* 13 (n.d.): 463–89.

Klug, Heinz. "Transformative Constitutions and the Role of Integrity Institutions in Tempering Power: The Case of Resistance to State Capture in Post-Apartheid South Africa The Baldy Center's 40th Anniversary Conference: Tempering Power." *Buffalo Law Review* 67, no. 3 (2019): 701–42.

Landau, David. "Abusive Constitutionalism." *UC Davis Law Review* 47 (April 3, 2013): 189–260.

"List of SADF Raids into Neighbouring Countries." (South African History Online, 2011), https://www.sahistory.org.za/article/list-sadf-raids-neigbouring-countries.

Mancebo, Ainara. "Parties' Motivations for Electoral Reform under the Democratic Transition in South Africa." *Revista Española de Ciencia Política*; Madrid, no. 50 (July 2019): 43–67.

McRae, Matthew. "The Sharpeville Massacre." Canadian Museum for Human Rights. Accessed September 11, 2020. https://humanrights.ca/node/501.

Mersel, Yigal. "Hans Kelsen and Political Parties." *Israel Law Review* 39 (Summer 2006): 158–81.

Murray, Christina. "A Constitutional Beginning: Making South Africa's Final Constitution Essay." *University of Arkansas at Little Rock Law Review* 23, no. 3 (2001 2000): 809–38.

National Democratic Institute. "Political Parties," August 4, 2016. https://www.ndi.org/what-we-do/political-parties.

Parliament of the Republic of South Africa. "National Assembly." Accessed September 9, 2020. https://www.parliament.gov.za/national-assembly.

Parliament of the Republic of South Africa. "National Council of Provinces." Accessed September 9, 2020. https://www.parliament.gov.za/national-council-provinces.

South African History Online. “Negotiations and the Transition,” June 30, 2011. https://www.sahistory.org.za/article/negotiations-and-transition.

“National Party.” (Chicago, United States of America: Encyclopedia Britannica) https://www.britannica.com/topic/National-Party-political-party-South-Africa.

“Nelson Mandela - Speeches - Opening Address by Nelson Mandela to the Law Society of the Transvaal.” Accessed September 11, 2020. http://www.mandela.gov.za/mandela_speeches/1993/931029_law.htm.

National Public Radio. “Zuma Survives (Another) No-Confidence Vote In South Africa’s Parliament.” Accessed May 6, 2020. https://www.npr.org/sections/thetwo-way/2017/08/08/542183252/zuma-faces-another-no-confidence-vote-in-south-africas-parliament.

SAnews. “Nelson Mandela’s Inauguration Speech as President of SA,” May 10, 2018. https://www.sanews.gov.za/south-africa/read-nelson-mandelas-inauguration-speech-president-sa.

Parliamentary Monitoring Group. “Political Party Representation In National Assembly,” May 13, 2019. https://pmg.org.za/page/political-party-representation.

“Political Parties.” Comparative Constitutions Project, 2008. http://comparativeconstitutionsproject.org/files/cm_archives/political_parties.pdf?6c8912

Sachs, Albie. “A Bill of Rights for South Africa: Areas of Agreement and Disagreement Human Rights in the Post-Apartheid South African Constitution.” *Columbia Human Rights Law Review* 21, no. 1 (1990 1989): 13–44.

Sachs, Albie. *Justice in South Africa*. Berkeley: University of California Press, 1973.

Skach, Cindy. "Political Parties and the Constitution." *The Oxford Handbook of Comparative Constitutional Law*, May 17, 2012, 1–20. https://doi.org/10.1093/oxfordhb/9780199578610.013.0043.

South Africa, South Africa, and Department of Justice and Constitutional Development. The Constitution of the Republic of South Africa, 1996: As Adopted on 8 May 1996 and Amended on 11 October 1996 by the Constituent Assembly., 2015.

Spiess, Clemens. *Democracy and Party Systems in Developing Countries: A Comparative Study of India and South Africa*. Routledge, 2008.

Van Themaat, Ver Loren. "Legislative Supremacy in the Union of South Africa." *University of Western Australia Law Review* 6 (1954): 59–66.

Vyver, Johan D. van der. "Constitutional Options for Post-Apartheid South Africa The Randolph W. Thrower Symposium: Comparative Constitutionalism." *Emory Law Journal* 40, no. 3 (1991): 745–836.

Washington, George. "President George Washington's Farewell Address," 1796. https://www.ourdocuments.gov/doc.php?flash=false&doc=15&page=transcript.

Wren, Christopher S. "South Africa Moves to Scrap Apartheid (Published 1991)." The New York Times, February 2, 1991, sec. World. https://www.nytimes.com/1991/02/02/world/south-africa-moves-to-scrap-apartheid.html.