

# Legal Framework Regulating Switching and Disciplining of Members of Political Parties:

*Tanzanian and South-African view-point*

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## **Abstract**

Globally, political parties seem to be common vehicle through which general public participates in governmental decision-making. This is influenced by the increased democratization evidenced by many countries' adoption of multipartyism. Consequently, South Africa's (SA) and Tanzania's legal frameworks are not exception. Despite such influence Tanzania in particular, improperly regulate switching and disciplining of members of political parties. Through a human right approach this paper carries out a comparative review of SA and Tanzanian legal frameworks on regulation of switching and disciplining of members of political parties. The qualitative analysis of documents reviewed shows SA has adopted constitutional principles the basis of which regulation of political parties contribute to popular participation and elimination of improper switching and disciplining of members of political parties. Tanzania's legal framework is informed by SA on; cessation of political party membership while retaining the membership in decisions making organs and disciplining of members of political parties.

**Keywords:** *Regulation; switching; disciplining, members of political parties*

## **1. Introduction**

Public participation in decision making is one of the fundamental human rights with global recognition. International, regional, sub-regional and national legal frameworks do recognize this principle in various ways (Convention on the Elimination of All Forms of Discrimination against Women, 1979), (Universal Declaration of Human Rights, 1948), (African Charter on Human and Peoples' Rights, 1986), (Social Charter of the Americas, 2012). Manifestation of this right may take various forms inclusive the environmental, political and or other forms (International Covenant on Civil and Political Rights, 1966), (Rio Declaration on Environment and Development, 1992) (UN, 2012); (AU, 2015). The right of public participation guarantees accountability and preservation of public interest from being derailed by other motives of those in the government. According to Manin *et al.*, (1999) politicians who are elected representatives do have their own goals and

interests, if unchecked may affect the public interests. Notably, political parties seem to be common vehicle through which the general public participates in governmental decision making in many countries (Kosiara *et al.*, 2017). This is even true with the increased democratization as a result of adoption of multipartyism in many parts of the world, that witnessed the end of dictatorship (Barry, 2002), (Pearce, 2010a). African countries had long experienced dictatorship and military *coup de tat* that did not respect the peoples' choice through elections (Dieng & Majinge, 2011). However, African countries too experienced similar trend of democratization, where multiparty system seems to be incorporated into their domestic laws (Fimbo, 2013). Multipartyism therefore, dominated a number of African countries, evidenced by the increasing number of political parties contesting for elections and legislation relevant to regulation of financing of political parties (Rashkova & Biezen, 2014). Such

evidences are found in South Africa and Tanzania too.

Notably however, most African countries, exhibit weak legal framework that hampers effective public participation in decision making through political representation. Uwizeyimana, (2012), in his article titled, *Democracy and pretend democracy in Africa: Myth of African Democracies* seems to conclude that, few African states do exhibit liberal democratic characteristics while the rest practice pretended democracy. In some African countries, the constitution had clear provision recognizing only one party (Fimbo, 2013). Yet at the time of changing the law, the oppositional parties were not among the consulted stakeholders (Fimbo, 2013). This signifies weak legal-framework derived from non-compliance with the internationally recognized principles, public participation inclusive. There is a public outcry concerning Tanzania's non-compliance with the international principles that would have unveiled the enjoyment of public participation in decision making. These are inclusive the non-ratification of the (African Charter on Democracy; Elections and Governance, 2007) and the narrowing of the public participation into the political representations (Msuya, 2018), (Msuya, 2018); (Mwandishi wetu, 2018).

In particular, this paper concerns inability of elected members of political parties to switch from one political party to another without loss of their membership into the National Assembly and or Local Government Councils. Such inability to switch from one political party to another, seems to narrow the participatory rights in Tanzania. The narrow view becomes apparent when the freedom to participate in public affairs in Tanzania is limited to the political representation of the only party that sponsored the candidate during election (United Republic of Tanzania Constitution,

1977), (Fimbo, 2013). Consequently, switching of a member of National Assembly or Local Council from one political party to another, results to loss of his/her representative right. In addition, improperly regulated switching of members of political parties seems to be exacerbated with the penalties and severe disciplinary procedures from the respective political parties which scares members to exercise such a right freely. Absence of proper regulation and therefore limited freedom in switching from one political party to another hinders not only the freedom of association and the right to participate in decision making but also the potential growth of sound oppositional parties that would provide alternative government to the one in power.<sup>1</sup> The discussion in this paper focuses on the period between the years 2015-2020 where switching was so apparent as explained in section 2 below.

In order to arrive at the logical conclusion, this paper is organized into seven sections. Section one is formed of this introduction. Section two presents the background information while section three provides for the methodology of the study. Part four covers conceptual aspects of public participation, essence of regulation of switching and disciplining members in political parties and country profiles; part five covers regulation of members switching and disciplinary measures in political parties while part six provides for the differences distilled from the discussion in part five. Part seven provides the conclusive remarks with the call for Tanzania to consider wider scope in order to guarantee proper regulation of switching and disciplining of members of political parties for effective government accountability.

## 2. Theoretical Perspectives

Available literature indicates that African countries do limit switching of members from one political party to another (Goeke & Hartmann, 2011). In particular, despite restrictions under the constitution, Tanzania has witnessed a number of members from various political parties switching their membership. Of recent the alarming rates of the members of the oppositional parties resigning from their political parties and joining the ruling party was an order of the day. According to the media, a total of about 138 members of the opposition parties joined the ruling party within the period ranging from 2016 to 2018 (VOA, n.d.) The recent records indicates that about ten members of the National Assembly and 146 Councilors from oppositional parties joined the ruling party by January 2019 (Mwandish Wetu, 2019). To be noted in this is the fact that, firstly the number is from oppositional parties to the ruling party and not otherwise although their number is far less few than those of opposition joining ruling party; Secondly, Tanzania had conducted its most current general election in the year 2015. Consequently those who switched their membership did so whilst they are members either of the Local Government Councils and or National Assembly (Dunsen, 2017). As will be revealed in the discussion hereunder, Tanzania restricts members switching from one political party to another. In doing so, it does not recognize the right to retain membership to neither the Local Government Council nor National Assembly (which are the decision making organs [DMOs] in Tanzania) upon change of membership of parties.

In the light of the above, the manner in which the freedom of association is being practiced in Tanzania, seems to be attributable to violation of the right to participation in public affairs but also adds on the governance issues owing to the cost

incurred during conducting by-elections. Consequently, borrowing examples from South Africa on proper regulation of switching and disciplining of members of political parties will not only address the switching and disciplining but also the potential expenses for by-elections.

## 3. Method

Methodologically, this paper adopts a human rights based approach. According to (UN, n.d.) all countries are required to ensure that in all their programmes, such as governance and administrative actions aimed at development adhere to human rights principles at all stages. UN further understands that human rights are universal, inalienable, indivisible, interdependent and inter-related, in a manner that caution need be taken, when effecting one human right, other human rights should not be infringed. At the African regional level, African countries through the Kigali Declaration, (2003) committed themselves towards similar commitments as those of UN. The declaration requires AU members to guarantee adherence to human rights principles in all their actions, governance and policy from initial plan, implementation and assessment levels. In order to guarantee universality and inter-dependency of human rights, AU member countries are also required to accord equal value to all the categories of human rights namely economic, social, cultural civil and political at all levels

In addition, this paper is a product of review of the existing literatures and the primary sources such as conventions, statutes, constitutions from South Africa and Tanzania. Moreover, few randomly selected constitutions of political parties in Tanzania are also reviewed to reflect the aspect of disciplining of members of political parties. In particular, this paper is a result of comparison between the South African and Tanzanian legal frameworks on regulation of

switching and disciplining of members of political parties. The choice of the two countries is based on the following but not limited reasons; Both the two countries as noted below have relatively similar large population hence the need for representation becomes obvious in national organs like the National Assembly and the local councils; both countries are common law countries in which principles of precedence influences each other decisions in the legal arena (Nkobogo, 2012); according to the Transparency International, South Africa seems to have good record in fighting against corruption than Tanzania. While South Africa is the 71 Tanzania is 103 in the record out of 180 countries (Transparency International, 2017a),(Transparency International, 2017b). Consequently; South Africa's record seems to be a sign of government accountability through effective political party and other means of holding the government into account; it is also worth to point out that Tanzania recently, amended the Political Parties Act, which signals potential reform that may be compared to the best practices from South Africa.

Also, Goeke & Hartmann, (2011) in their article titled; *The regulation of party switching in Africa*, seem to indicate the scarcity of studies on the area under the investigation, among African countries and hence the need for further research say for example comparing the practice of the African countries on members switching between political parties. This study tries to respond to such a call with the view to comparing South Africa and Tanzania on the two key aspects namely, switching and disciplining of members of political parties.

#### **4. Results and Discussion**

##### **Conceptual aspect of the principle of public participation; essence of regulation of switching of members and country profiles**

##### ***Public Participation***

Public participation in decision making is a principle which guarantees all the people to be involved in the affairs of their country with specific regard to the major decisions that affects their daily lives. As such the public participation principle requires everyone to be part of the decision that may affect his life, without which the decision may be challenged. According to Pearce, (2010a), public participation may either be direct where the whole members participate or indirect, where few are elected to represent others. Indirect representation may also be categorized into political representation and expert-based models (John, 2009), (Font et al., 2015). Unlike political representation, expert-based decision making model centers on the use of technocrats in making scientific decision on behalf of ordinary citizens on scientific issues say for example climate change (Font et al., 2015). In addition, Knights, (2009) shows that even before democracy, there had been representation through unions, associations, clubs and petition in United Kingdom. Notably, the representative model through democratically elected representatives from political parties is generally common around the globe, and is the focus in this paper.

In addition to the forms in which public participation may take, (Renn *et al.*, 1993) seem to identify key steps through which public participation may be realized. They show that public participation begins with the identification of the concerns or issues, commonly done through inquiring from the stakeholders. For example if the concern is inequality leading to poverty, according Pearce, (2010a) then "the 'poor' must be part of the solution." When the concerns are

identified, the next stage involves determination of available options obtained from the stakeholders and lastly is the evaluation of the options with the view to measure potential consequences of the decisions to be arrived at. Such stages are relevant even in the political representation form of public participation.

Notably, Rowe & Frewer, (2000) have shown that there are various methods through which public participation may take place. They have shown about eight methods in which public participation may take form. While all the methods are relevant and applicable in various ways, they seem silent on political representation which is common in democratic states. According to Anthony & Hilderman, (2016) political representation is one of the many platforms through which public voices may be heard. Public participation also offers the public an opportunity to scrutinize the manner their government utilizes the public assets; put forward their interests for consideration and set their own future through governance (Pearce, 2010b), (Olaniyan, 2016). According to Bratton, (2008) one third of the surveyed group in African countries shows that they would like to hold their leaders into account as opposed to those who views holding leaders into account as disrespectful. The (African Charter on Human and Peoples' Rights, 1986), for example, describes the principle of public participation as here below:

Every citizen shall have the right to participate freely in the government of his country, either directly through freely chosen representatives in accordance with the provisions of the law.

According to the Legal and Human Right Center,(2018) similar provisions requiring the public to form part of the decisions and affairs of their government are also noted in other international instruments. While this

part highlighted aspects of public participation, the next part, shows that political representation is a segment of such a right and ought to be respected and protected as well.

### **Political Representation as Sub-set of Public Participation**

Political representation stems from the general right of public participation in decision making. According to Nyati, (2008) there is a nexus between public participation and democratic representations. According to Pearce, (2010a) participation in a form of representation is based on factors such as size of the group and time to be allocated to every member of the group. In order to circumvent the difficulties to deal with a large group and time to be allocated to every member, representative democracy seems ideal. A large group's interests and or concerns may be represented by elected few. Consequently, the use of representative democracy emanates from members in constituencies being assigned right to represent interests of others mostly through political parties. It is argued that, political parties as organizations unlike individuals adds a chance of their views to influence the policy making in a country (Schwartz & Grilily, 2017), (Hamad, 2019). The representation is done either in the National Assembly or Local Government/Township Councils which are decision making organs (DMOs). Despite criticisms (Pearce, 2010a),(Pearce, 2010b) that democratic representation might result into undemocratic situation as the few rule on behalf of others, experience show that, the public retains the mandate to recall those they underperform.<sup>ii</sup> According to Dieng & Majinge, (2011) the right to democratic governance, which includes the democratic representation, is part and parcel of international human rights that countries have to abide to.

In particular, since the constitution allows for political parties, then members do contest for such position through the respective political parties. At the end of election however, the elected person represents not the interest of his political party but the interest of those who elected him or her. It is through this sort of election where both the oppositional and ruling party co-exist in the DMOs. Depending on the nature of the constitution and the electoral system the party that has majority of the members in the DMOs will be the one to run the government. However, in the most democracies with the head of executive as the president, the government is run by the president irrespective of the majority members in the DMOs. According to Warioba, (2012) African countries prefer the simple majority principle where the winner becomes the elected representative commonly referred to as the first past, the post electoral system. While she seems to indicate the system as being good to guarantee accountability, she also pointed the impact of the system on weak political parties which do not gain large representations (Warioba, 2012), (Svasand, 2014). The roles of the DMO's are not only to pass the decisions but also to hold the government into account. While the ruling party members may tend to be loyal to their party and thus not that much expected to hold their own government into account, oppositional members are not.

According to Regan, (2010) multiparty system is vital in guaranteeing existence of real democracy in any country. According to Kelly, (2016) increased political parties participation in the National Assembly helps to influence the government attention on key areas without which may have not been noticed. To put it more clear, Fimbo, (2013) shows the role of political parties in providing alternative government to the one in power in a number of African countries; a

means to bring to an end military ruler-ship; and a means to abet public protest through provision of the multiparty as a guarantee of representative government. However, it is argued by (Kanyehamba, 2006) that;

In real democracies, it is opposition political parties and groups which keeps the government in checks and criticize the executive failure or excess. To do so they, must be principled themselves, constitutional and vigilant in the affairs of the state, such opposition offers itself and behaves just like the incumbent government, in waiting. It has counterpart structures and credible leaders and is seen as a possible .... next government...

In particular, the above view is more apparent in indicating that oppositional parties are alternative government on hold when this view is looked consonance with the definition of the term political party provided under section 3 of the Political Parties Act where its states as below;

...any organised group formed for the purpose of forming a government or a local government authority within the United Republic through elections or for putting up or supporting candidates to such election...

Uwizeyimana, (2012) is of the view that real democracy where there is full accountability of those in power by the representatives of political parties may not exist unless there is a fully functioning oppositional parties. According to Manin *et al.*, (1999) oppositional political parties plays a role of holding the government into account by informing the public how the incumbent government performs. This is because at times the government decisions may grossly impact the citizens welfare that may compel the need for change of government through vote in the next election (emphasis added) (Manin *et al.*, 1999). In

particular, Kazoba, (2013) states that, the right to public participation may not be isolated from the right to information which is guaranteed under article 18 of the (URT Constitution 1977). This stems from the fact that human rights are indivisible and inter-related as noted in para three above. Kazoba, (2013) further shows that, right to information helps the public to hold the government into account on issues such as corruption irrespective of potential secrecy in handling its affairs.

Notably, however, most governments in African and elsewhere have a tendency of weakening the opposition as a means to reduce their accountability to their peoples (Mwangulumbi, 2017); (Kanyeihamba, 2006). Despite these efforts to weaken the oppositional parties, it is seen that, globalization and the increasing trend of social media platforms exert a great influence on the changing the governments (Mubangizi, n.d.). Sharma, (2014) is of the view that political sovereignty of states is now influenced by the international, regional and sub-regional rule making organs. Consequently, one may not ignore the African Court on Human and Peoples Rights (ACrthPR) decision(s) which found Tanzania to have violated the right to freedom of association which indirectly impacts the democratic representation (*Tanganyika Law Society and the Legal and Human Right Center v Tanzania and Rev. Christopher R. Mtikila v Tanzania; ACHPR Consolidated matter*, 2011). According to Makulilo, (2013) the ACrthPR decision is an indicator of its mandate to defend human rights inclusive the right to participate in the affairs of ones' government. Tanzania may also gain potential lessons from her fellow sub-regional member countries in East Africa and Southern Africa Development Community, and South Africa in particular.

### **The Essence of Proper Regulation of Switching and Disciplining of Members of Political Parties**

In this paper proper regulation means and include a system of rules which provides for steps; procedures and guarantee to a member of political party to freely plan; and actually effectively switch from one political party to another while retaining his membership into the DMOs without fear of being punished by his political party. It will be shown in this part that proper regulation of switching and disciplining of members of political parties is vital in realization of the right to public participation.

To begin with, the essence of regulation of members of political parties switching and or disciplining is founded on the principle of public participation in decision making and governance issues. On the first hand the public participation issue, the member of DMOs is elected to become a member of therein not representing the interest of his party but the interest of those who for the reasons of their number, they could not attend there. Consequently, the political party is just like a platform upon which he identifies him/herself and holds out the extent to which he/she is to represent the rest of the electing members. Article 104 of the Kenyan Constitution, in recognition of this reality, has accorded the public in respective constituencies a right to recall back their representative who in their view is under performing. Tanzania however, adopted a party loyalty system where members of the public do not have such mandate as in Kenya (Msekwa, 2000). Switching from one political party to another, ought not to impair the right to represent the others, provided that one still is a member of another party. Withholding the representative right when a member of DMOs opts to switch to another party rather denotes as if initially the public elected the party not the person. In this sense it attaches more weight to the party than the

person who actually is going to represent the rest.

On the second hand, proper regulation of switching is vital owing to the enormous powers of the political parties they exercise on their members. These powers range from admission to suck out and other forms of disciplining procedures. Given such powers, members tend to become loyal to the party instead of defending the real interest of those who elected them into the DMOs. Members of political parties therefore, fear the potential whip from the party especially where disciplining procedures are not properly regulated. Among the potential consequence, could be either provisional disciplinary measures and or dismissal from the party. As already pointed in the previous paragraph above, loss of membership impairs greatly not the interest of the party but of those who elected such a member to the DMOs. According to Fimbo, (2013),

...restrictive provisions on floor-crossing over-emphasis party discipline at the expense of the electorate...

Lastly, on governance issue is noticeable especially with the impact of improperly regulated switching and disciplining of members of political parties. The epicenter of all this being the loss of the representative rights that leads to the need for by-election (Dunsen, 2017). According to Dunsen, (2017) the fact that in Tanzania the members opted to switch parties after the election, it necessitates conducting by-election. He further notes that, such cost incurred is burden to the taxpayers in Tanzania (Dunsen, 2017). With the increased democratization, acts of switching of members from one political party to another are inevitable. Equally are issues of mergers of political parties, and division of political parties. Carrying out by-election in every instance where there are switching and or disciplining

of the members of the political parties cost the government dearly. It is the same government that struggles to provide for social services like free education; access to clean water and health to name but a few. Such funds could have been utilized elsewhere had the issue of switching and disciplining of members of political parties been properly regulated. This part has highlighted on the rationale for proper regulation of the members of political parties' switching and disciplining. The next part provides the country profiles of Tanzania and South Africa.

### *Countries' profile*

#### **South Africa Country Profile**

South Africa is a country located in the Southern Africa; it borders Botswana and Zimbabwe to the north, Mozambique and Swaziland to the North East; Lesotho and Indian Ocean to the East; Indian Ocean and Pacific Ocean to the South; Pacific Ocean to the west and Namibia to the North West (SADC, 2012). Legally South Africa is a constitutional democracy adhering to separation of powers between the three organs of the state. This fact is also stated by the Constitutional court in the case of (*Merafong Demarcation Forum and 10 others vs President of Republic of South Africa and 15 others*, 2008). Politically, according to the (Electoral Commission of South Africa, n.d.), South Africa has about 285 political parties that are registered and participate in the general election at the national level. It has a population of about 50 million people by 2012(SADC, 2012). Her economy is estimated to have the GDP of about 349 Billion USD (World Bank, 2017). South Africa is also endowed with variety of natural resources such as minerals; forests; wild life to name but a few (Smith, n.d.).



### **Tanzania Country Profile**

Tanzania is one among the 15 member states of SADC. Geographically it borders with the Indian ocean to the east, Kenya and Uganda to the North; Rwanda, Burundi, DRC Congo and Zambia to the west and Malawi and Mozambique to the South (SADC, n.d.),(EAC, n.d.). It has population estimated to be 50.5 million people (SADC, n.d.), (World Bank, 2018). Tanzania is a constitutional democracy respecting the separation of power. According to the Office of the Registrar of Political Parties up to July 2020 Tanzania had 19 registered political parties, although few are active than others. Tanzania is endowed with variety of natural resources inclusive the ocean and the great lakes of East Africa, forests and mineral resources which support her economy (SADC, n.d.). Currently Tanzanian economy is said to be estimated at GDP of 49.2 Billion USD (EAC, n.d.). Recently, there has been media outcry that Tanzania exhibit poor democratic tolerance owing to ban by the government on political parties holding meetings and increasing arrest and trials of oppositional party members (Legal and Human Right Center, 2018).

This part has identified the aspects of the right to public participation and its sub-set political representation as crucial in holding the government into account. It is also shown in this part that, there is a need to properly regulate the switching and disciplining of members of political parties as a means not only to guarantee effective public participation but also assure governance aspects. It is also shown that despite Tanzania has almost similar population and resources like South Africa, yet the number of political parties are fewer in Tanzania than in South Africa. Economically though South Africa seem to be advanced than Tanzania. The next part in this paper analyses and discusses the framework for regulation of members

switching and discipline in South Africa and Tanzania.

### **Legal framework for regulation of switching and disciplining of members of political parties in South Africa and Tanzania**

It is noted above that, the focus of this paper is on regulation of switching and disciplining of members of political parties in Tanzania and South Africa. This section provides for the discussion of such frameworks in both countries. Structurally, it begins with the South African perspectives which is used as benchmark to compare the extent to which Tanzania properly regulates switching and disciplining of elected members of political parties. As will be noted below, it is worth to properly regulate both switching and disciplining of elected members of political parties since it may impact their representative rights in DMOs.

#### ***Regulation of switching and disciplining of members of political parties in South Africa***

This part discusses the regulation of switching and or disciplining of members of political parties in South Africa. It first high light the regulation of switching of members from one political party to another then highlights on the disciplining mandate and or limitation provided in the second place. It will be vivid in this part that, members of political parties are free to switch from one party to another and that; political parties are limited in terms of disciplining their members. Limitations on disciplining of members of political parties resonates to widening the right to participate in decision making in the government.

#### **Regulation of switching of members of political parties in South Africa**

The discussion in this subsection is organized into two sub sections, all of which analyses statutes and case law with respect to

switching of members of political parties in South Africa. The discussion reviews; the constitution, electoral and case law on the same. The review shows that, registered political parties nominates their members to contest in various political posts leading to their membership in DMOs. It further shows that, despite of silence nature of electoral laws with respect to switching of members of political parties, the constitution guarantees the same.

### **Regulation of switching of members of political parties under the South African Constitution**

Switching of members between political parties under the South African Constitution unlike Tanzania is allowed and properly regulated. Evidence of such a permission and regulation is seen on guarantee of the right of the retention of membership to the legislature upon members of political parties changing of parties. Rule 3 (2) of the schedule 6A reads;

If a party merges with another party or subdivides into more than one party or subdivides and any subdivision merges with another party in terms of sub-item (I), the members concerned remain members of that legislature and the seats held by them are regarded as having been allocated to the party which they represent pursuant to any merger, subdivision or subdivision and merger contemplated in sub-item (1).

As evidenced from the foregoing quotation, members changing of parties may take various forms under the South African Constitution, such forms are inclusive; mergers, division and or subdivision of political parties. Notably, the Constitution requires a threshold of not less than 10% of the members move for either mergers; division and or subdivision to take place.

### **Regulation of switching of members of political parties under the South African the Electoral Act 1998.**

Apart from the South African Constitution discussed immediately above, other laws regulate issues related to political parties and members of such parties. For example, political parties are registered under section 15 of the Electoral Commission Act 1996. Among other documents to be relied by the registrar in the process of registration of political parties is the Political Parties' constitution. Political Parties' constitution is relevant to regulation of internal affairs of such parties. Notably, political parties which intend to participate in any election are required under section 27 of the Electoral Act 1998 to submit list of its members who will contest in various posts. According to the case of *Mcoyi and Others v Inkatha Freedom Party, Mgwaza-Msibi v Inkatha Freedom Party*, (2011) the relation that subsist between members of political parties and the party itself is contractual based. Presumably, any rights accruing from such a contract is supposed to cease once the contract is revoked by the party say for example.

However, the contractual right arising from political parties' sponsorship of elected representative in DMOs does not vitiate their membership in such organs. It is above (para 5.1.1.1) noted that, elected members of political parties representing their constituencies remain unaffected even upon revocation of their membership with the party which sponsored them. In particular, both the Electoral Commission Act (1996) and the Electoral Act (1998) do not regulate issues related to switching of members from one political party to another. Such a silence resonates to the fact that; the South Africa's constitution seems very clear on the matter. The discussion below expounds disciplining of members of political parties in South Africa.

### **Regulation of disciplining of members of political parties under the South African Constitution**

Under the South African Constitution political parties are regulated in the manner to discipline their members. The regulation seems to be capable of being explained in twofold; on the one hand there seems to be a strict prohibition on the mandate of the political parties to deal with their members especially those who are representatives in DMOs. Political parties are therefore prohibited from either suspending and or dismissing from membership all members who represent the party and respective constituency in the National Assembly. In particular, the constitution protects the member who represent the constituency and the party from being disqualified from holding the office he has as a result of being elected. Under rule 4(ii) of the Schedule 6A to the Constitution states that;

No party represented in the legislature may, perform any act what so ever which may cause such a member to be disqualified from holding office as a member without the written consent of the member concerned.

On the second hand, the Constitution also seems to suggest regulation of the discipline of members of the political parties on periodic basis. This inference is derived from the specific period of time members of political parties are given for them to exercise their right to switch from one political party to another. A closer review of the Schedule 6A of the Constitution indicates that members are given a period of 15 days in their second year after election and 15 days in their fourth year of their election to exercise such a right. This inference is even much louder in the provisions allowing members to join unregistered political parties as provided

under rule 4 (4) of the Schedule 6A. The recognition of political parties in shadow as a gear first of all to give effect to the right to freedom of association, and secondly to warrant potential new parties to be formed and merge with a group or sub-group of members from existing political parties, or even existing political parties themselves. In absence of this legal freedom, political parties will always remain the same with the fear of the whip by the political parties against the potential members who desire to join other political parties and or establish a new party. Given the task of establishing a new party, the Schedule 6A seems to favor establishment of new parties through the moratorium within which the parties' mandate to suspend or disqualify their members are frozen.

Notably, this part has shown that, there exist a constitutional regulation on how elected members of political parties may be disciplined. The discussion is relevant as it shows that, elected members of political parties who are also members of various DMOs have a guarantee to retain their membership to DMOs even when they are expelled from their parties. The discussion below, which analyses randomly selected South African political parties' constitution exposes the extent to which their members may be disciplined.

### **Selected Aspects of Political Parties' Constitutional Regulation of Members' Discipline in South Africa**

The discussion in this part presents the South African experience with respect to regulation of political parties disciplining of its elected members of DMOs. In order to achieve this goal a review of randomly selected political parties' constitutions from two parties namely African National Congress (ANC) and Economic Freedom Fighters (EFF) is carried out. On the first hand under the EFF Constitution (2014), a

number of institutions have been established which may discipline its members. Since disciplining of members of political parties reflects the internal affairs of such political parties, rules and procedures for disciplining members are provided for under the EFF Code of Conduct and Revolutionary Discipline (CCRD). Consequently, the provision of the CCRD will be invoked if an EFF member committed misconducts provided under regulation 1.1-1.28. According to regulation 1.4 of the CCRD among conduct(s) relevant to this paper in which EFF members are prohibited form, includes joining other political parties.

In particular, there are a number of potential sanctions that may be issued against a member of the EFF who has been found guilty of misconduct. According to regulation 22.3-4 of the CCRD convicted members may either be suspended and or expelled from membership of the party. Notably, according to regulation 24 of the CCRD when such a sanction is issued by the respective organ in the party, they do not become binding unless approved by the Central Command Team and is also appealable to the National Peoples' Assembly. In addition, the EFF constitution and the CCRD seem to be silent on the legal implication of expulsion of a member from their party. The issue here is whether the elected members of such a party who are peoples' representatives in DMOs will cease therefrom. In the light of foregoing discussion on constitutional regulation of disciplining of members of political parties in South Africa, cessation membership in a political party does not affect their representative rights in all DMOs.

On the second hand under the ANC Constitution as amended in 2017 a number of institutions are also established that have mandate to discipline its members. According to rule 25.3 of the ANC Constitution (2017) any member of the ANC who contravenes the constitution and standing orders is liable to

be disciplined in accordance with the established institutions and rules there too. The National Executive Committee (NEC) which is established under rule 12.1 for example has the power to institute disciplinary proceedings of its members. Similar to the EFF approach above, the ANC Constitution provides for misconducts that all its members should refrain from. According to rule 25.17 ANC members are called to refrain from indulging into prohibited conducts. According to rule 25.17.13 of the ANC Constitution (2017), among relevant prohibited conducts to the discussion at hand is joining another political party.

In particular, where a member of the ANC is found guilty in the disciplinary proceedings against him/her several sanctions may be imposed upon him/her. The relevant sanction to be discussed her is the expelling such members from the party. According to rule 25.21.7 of the ANC Constitution (2017) a member who has been found guilty may be expelled from the party and that the party may withdraw the deployment contract which entitles him/her to represent the party in DMOs. Unlike the EFF legal position above, the ANC approach seems to attach other consequences upon expelling a member from the party. Notably, since political parties are limited with respect of the powers over its members who represents such parties in the DMOs even the cancellation of the deployment contract does not harm the representative rights.

The discussion in this part shows that, political parties in South Africa through their established constitutions and codes of conducts enjoy a limited mandate to discipline their members. It is shown for example that, all selected parties, once a member of political party switches to other political parties, his/her original party retains power to expel him/her. It is also shown that members of political parties are free to switch from one political party to another subject to

providing information to the speaker of the National Assembly. It is also vivid that, to guarantee such freedom, political parties mandate to discipline their members are limited. The discussion below analyses the two key aspects of members of political parties switching and disciplining in Tanzanian perspective.

### ***Regulation of switching and disciplining members of political parties in Tanzania***

#### **Regulation of switching of members of political parties**

This part is dedicated for the discussion of the extent of regulation of the switching of members of political parties in Tanzania. It shows that both the Constitutional and the legislative approach seem wanting owing to the fact that, the current regulation does neither guarantee fully enjoyment of the right to public participation in decision making nor freedom of association.

#### **Regulation of switching of members of political parties under the Tanzanian Constitution 1977**

The United Republic of Tanzania Constitution 1977 (URT Constitution 1977) provides for the right to public participation in decision making by everyone. Such a guarantee however, seems limited in the scope owing to the requirement of one being a member of a political party for him/her to be able to participate in public decision making organs like the National Assembly and the local government councils. Article 67 (1) of the URT Constitution reads:

Subject to the provisions contained in this Article, any person shall be qualified for election or appointment as a Member of Parliament if he –

(a)...

(b) is a member and a candidate proposed by a political party.

Notably, however, some of the lowest organs such as the Village Assembly, the right to participate in decision making is guaranteed to all the adult men and women under section 55 of the Local Government (District Authorities) Act 1982. The requirement for one to be a member of political party in Tanzania resonates to the political representation noted above. Dieng & Majinge, (2011) seem to conclude that despite many African countries adoption of the multiparty system, yet still they are restricting the democratic right to public participation through the political parties.<sup>iii</sup> As noted above, such a legal position has not been free of criticisms and challenges. Court decisions have been issued condemning Tanzania of limiting the right to public participation in decision making through a narrow gate of political representation (*Tanganyika Law Society and the Legal and Human Right Center v Tanzania and Rev. Christopher R. Mtikila v Tanzania; ACHPR Consolidated matter*, 2011).

Commentator(s) are also of the view that Tanzania's approach requiring representation to be done only through political parties undermines not only the right to public participation but also the right to freedom of association. Fimbo, (2013) for example seem to call for recognition of private candidates in Tanzania. Notably, recognition of private candidate will guarantee freedom of association as one will not be compelled to become a member of political party for him/her to be elected. In this case one is compelled to associate with others, he might not wish to, for him to be able to exercise the right to public participation. According to the ACHPR Guideline, both the legislative and the administrative framework should not only be supportive of the right to freedom of association but also in compliance with the human rights obligations assumed by the

countries (African Commission on Human and Peoples Rights, n.d.).

### **Regulation of switching of members under the Tanzania Political Parties Act CAP 258 R.E 2019**

The political Parties Act Cap 258 R.E 2019 (Political Parties Act) is a law that regulates the process of registration of political parties in Tanzania. The Act provides for conditions and procedures to be adhered in order to establish a political party in Tanzania. It thus requires all the political parties to be registered with the registrar of Political Parties. Consequently, no organization will be recognized as a political party unless it is either provisionally or fully registered under the conditions and procedures of sections 7 (3) and 8 (4) the Political Parties Act. In particular, this article is not about the registration of the political parties but rather regulation of change of members from one party to another and the mandate of political parties in disciplining their members. Registration however, highlights the aspects of when is a political party recognized as a political party in Tanzania, a point that may be contrasted with South African position above. According to Fimbo, (2013), the Political Parties Act and the Constitution seem too lenient in the regulation of political parties. Such leniency is seen from their establishment process where the conditions do not guarantee the inner democracy of to be established in such parties. It is also worth to mention here that neither are the disciplinary procedures in these parties are limited. Such a silence under both the Constitution and the Political Parties Act signify that parties are at liberty to discipline their members as long as the provisions for disciplining the members are contained under their registered constitution. As noted above, wide discretion on parties disciplining mechanisms converts the members' loyalty to their party and not to

their electorates. Notably, political parties' inner democracy is vital in enhancing the right of participation in decision making (Kivoi, 2014).

Moreover, the amendment of Political Parties Act in 2019 brought with it new legal provisions granting political parties permission to merge. According to online (*Collins English Dictionary*, n.d.) the term merge is defined to mean; to blend or to cause to blend; fuse. As a result, the parties will be allowed to join together and form another new party. Notably, the forming of new party as a result of merger has an impact of the joining party to cease to exist. Members of the merging parties therefore become members of the newly established party. In an approach kind of similar to South African the Political Parties Act introduced a period of 21 days instead of 15 before parties opt to nominate candidate for the general election to merge. This seems a unique approach owing to the fact that under article 65 (2) of the Constitution of Tanzania the life of the parliament lasts only for five years before another general election is held. As a results the 21 days prior to nomination of the candidates for general election is a period within which the parliament life is likely to have come to an end. It is also unique in the sense that it does not guarantee political parties to merge while the members of the national assembly still hold their offices. Section 11 A of the Act reads as hereunder provided;

political party fully registered in accordance with this Act may, within twenty-one days prior to nomination of candidates for general election, be entitled to merge with another fully registered political party.

It may be seen that, the time provided in the Act and silence part as to whether when one switches to another party retains his membership to the National Assembly seems to be intended to minimize chances of

switching after one is elected. This provision therefore, seems to resonate to the cessation of membership upon change of political party after the election is done which is common in Tanzania. In particular, what is at stake here is however, loss of representative rights upon cessation of membership of a given political party

This part has noted that, political parties have to be registered for them to be recognized. It also notes the gap under both the constitution and the Political Parties Act on regulation of inner democracy which seem to have relegated the disciplining mandate to the political parties with no any limit. Also, it is shown that, the rights of the members of political parties to switch to other parties are confined to the only party that sponsored him/her during election. Any attempt to switch to another party after election is done, though not prohibited, amount to loss of the membership to the DMOs. In order one to regain his membership he has to contest afresh in the by-election this time with a different party. Chances for him/her to win are not guaranteed however. The discussion below highlights on the regulation of disciplining of members of political parties. The discussion below highlights on the disciplining of member of political parties

### **Legal Framework for Regulation of Disciplining of Members of Political Parties in Tanzania**

Generally, both the Constitution and the Political Parties Act seem silent on the aspects of regulation of disciplining of members of political parties. No specific provision that address the regulation of how and when should the political parties discipline their members or otherwise. In its generality however, under article 13 (6) (a) of the URT Constitution, does contain provision on fair hearing and rule against bias. Under the principle of fair hearing for example, everyone is entitled to the right to be heard

before being condemned as guilty. On the other hand, the rule against bias, dictates that, no one may become a judge in his own case. This rule aims to protect an accused person from potential victimization in a situation where one person is both the accuser and actually the decision maker. Allowing such a situation the accused verdict will be prejudicial owing to the fact that parties were not neutral to the case presented. Consequently, affected person is given a right to apply for review of the decision in the High Court of Tanzania. The court is mandated to quash the decision as it was the case of (*Abadian Salehe v Dodoma Wine Co.Ltd*, 1990)

Notably, incidences of members of political parties being dismissed by their parties in Tanzania while still they are representatives of respective constituencies as per the respective parties' constitution are less uncommon. Of recent about eight members of parliament with special seat from CUF were evicted from the National Assembly owing to their party's decision to strip off their membership. Unsatisfied with this decision, the members challenged their party's decision in the High Court. The High Court issued a ruling that warrant their reinstatement to the membership pending the final determination of their fate in court (*Maziba Bakari Haji and others v The Registered Trustees of the Civic United Front and the Chairman of the Civic United Front (CUF)*, 2017). According to media report despite such a ruling, the National Assembly had sworn in other members in their place, a fact which brings challenge in implementing the court ruling (All Africa, 2017).

In particular, the Political Parties Act Cap 258 R.E 2019 seems to regulate the disciplining of the members of the political parties in Tanzania. Unlike the South African approach, the Act seems to propose for disciplining of members of political subject

to the political parties' constitution. Under its section 6 C (5) the Act reads;

A member of a political party shall not be expelled from the party unless due processes prescribed in the party constitution have been complied with.

In addition, the Act seems to provide for criminal sanctions under section 6 C (6) in case of breach of the provision of the Political Parties Act. This suggest that, in case a member of the political party is to be expelled contrary to the constitution establishing the party itself, then the individuals or the party so involved may be fined or imprisoned.

Moreover, the Political Parties Act CAP 258 R.E 2019 empowers the registrar of political parties in disciplining the members of political parties. Notably such a mandate seems to be limited only to suspension of membership. Section 21 E of the Act reads;

Without prejudice to the generality of the power conferred by this Act, the Registrar may suspend any member of a political party who has contravened any provision of this Act from conducting political activities.

It would appear however, that it is not very clear upon which grounds the registrar should be exercising such mandate. According to the provision of section 5(B) (1-4) political parties may be required to furnish some information to the registrar of political parties. Consequently, assuming that the information is withheld by a member and thereby he refuses to issue the same, then such a penalty may be applied. As such this sort of regulation is yet to guarantee fully the right to freedom of association and participation in decision making. It is more to do with the administrative regulation of political parties than regulation of members switching from one political party to another.

This para has addressed the constitutional and legislative regulation with respect to disciplining of members of political parties. It is shown in this part that disciplining of members of political parties is left to the respective political parties. Both the constitution and legislative arrangements seem to give primacy to the political parties' constitution. No any limitation what so ever (either based on time or specific duration or nature of the penalty to be offered by the political parties against their members) is placed in the political parties mandate to discipline their members. The immediate para below discusses the same aspect as reflected under a few of randomly selected political parties' constitutions in Tanzania. It will be evident in this paragraph that political parties exercise a great influence on disciplining of their members.

#### **Selected Aspects of Political Parties Constitutional Regulation of Members' Discipline in Tanzania**

As shown above, the Constitution and the Political Parties Act hardly do they regulate disciplining of the members of political parties. Much is thus left to the respective political parties. In contrast however, as already noted above, South Africa exhibit a different trend. In this para, constitutions from the three randomly selected political parties in Tanzania are analyzed with specific reflection on the disciplinary mandate. To begin with *Chama cha Demokrasia na Maendeleo* (CHADEMA) under paras 7.7.7 and 9.2.5 of their constitution, members are disciplined by the National Executive Committee (NEC) of the party. Grounds for disciplining its members are provided under para 5.4.3 of the CHADEMA Constitution. Among the grounds that may subject a member into the disciplinary proceedings are: where a member is dismissed from membership by the party organs at the grassroots level or



where he was admitted; upon a member being subsequently disqualified by any law; and wherever it is established that a member is acting contrary to the parties' manifesto, philosophy, aims and regulations.

Notably, under the CHADEMA constitution, the highest penalty the NEC may issue is to do with the dismissal of a member from the party. In particular, this task is mandated to the NEC under para 7.7.16 (u) of the CHADEMA Constitution (2006). The CHADEMA Constitution (Swahili version) on dismissal of a member from membership of the party reads as para 5.4.3 is hereunder quoted;

*Kuachishwa ama kufukuzwa na tawi lake ama ngazi nyingine ya Chama, kwa mujibu wa Katiba kwa kukosa sifa za kuendelea kuwa mwanachama ama kuwa na mwenendo usioendana na Itikadi, Falsafa, Madhumuni, Kanuni, Maadili na Sera za Chama. Mwanachama atakuwa na haki ya kukata rufaa kwa ngazi ya juu kama hakuridhika na adhabu hiyo.*

A similar trend of the parties mandate to discipline its members with the dismissal from membership as the top most penalty a member may be faced with is noted in ACT-Wazalendo. The abbreviation ACT stands for the Alliance for Change and Transparency. In this party for example, ones' membership may either be provisionally withheld pending investigation in case of any allegations or dismissed according to para 11 (1) (vi) and (2) of their constitution. The grounds for one being dismissed from the party's membership are stipulated under para 11 (3) of the ACT-Wazalendo Constitution. Among the reasons for the dismissal of a member from the party are inclusive; any act in contravention of the party's regulation and any act indicating supporting other parties other than ACT in the general election.

In addition, a similar trend of the parties mandates to deal with disciplining of the

members is also exhibited under the CCM Constitution. The recently revised version of the CCM Constitution contains similar provisions which mandates the party to deal with the members and where necessary to discipline by dismissing them from party. Para 13 of the Constitution reads:

*Uanacham wa mwanachama utakwisha kwa: kujiuzulu mwenyewe; kuachishwa kwa mujibu wa katiba and kufukuzwa kwa mujibu wa katiba.*

In literal translation the passage means, membership of any member shall come to end upon either, self-resignation and dismissal from membership in accordance with the constitution. According to Gherghina, (2014) the number of members in a political party is dependent among other factors, on the regulation of the political parties inner democracy.

It is noted in this part that Political parties in Tanzania exercise a great influence on their members' discipline. As already noted by Fimbo, it is this influence that derails the members' loyalty to the party while weakening their accountability to those who elected them into their position. Such mandates of the political parties seem to be derived from the constitutional and legislative weaknesses noted above.

### **Differences noted in the regulation of switching and disciplining of members of political parties between Tanzania and South Africa**

Four key differences may be spotted in the area of regulation of switching and disciplining of members of political parties in Tanzania and South Africa as follows below;

On the first hand of switching of membership from one party to another, it is noted in the discussion above that; South African legal framework firstly recognizes political parties in shadow. These are groups of people with intention to file for registration as political party. As such this

recognition allows members in the already established parties to join and form part of the potential party to be established. However, in Tanzania, a party has either to be provisionally, or fully registered for it to be recognized. It is for this variation in the law, South Africa exhibits a large number of political parties than Tanzania. It is indicated above that more than 200 political parties participated in the election at the national level in South Africa. Tanzania only seems to have 19 fully registered political parties most of which are weak with no prospects of participating in the future general elections, a fact which diminishes government accountability.

Secondly, the South African legal framework regulating the switching of members of political parties provides a moratorium that permits members of political parties to switch from one political party to another not only before the election but after the election is carried. However, in Tanzania, switching of members of one political party to another seems not properly regulated. The moratorium provided under the 2018 amendment seems to be only before the election is carried, and after the expiry of the National Assembly's term a fact which limit members' switching after election.

Lastly, the South African legal framework discussed above, guarantees members of political parties to retain their membership into the DMOs even after switching to another party. In Tanzania once the elected member of one party switches to another party, his/her membership to DMOs, ceases. Such a practice subject Tanzania into unnecessary cost for by-election, upon a mere switching of members to other political party. Indeed, such expenses could have been used for other public services such as access to clean water, education to name but a few.

On the second hand of disciplining of members of political party one major difference is noted under the South African

legal framework. In South Africa, political parties through their constitutions influences the discipline of its members. As noted above, both South African and Tanzanian experience if elected member of one political party switches to another party it warrants disciplinary proceedings. In both countries, South Africa and Tanzania, political parties may expel their members if they will switch to other political parties. However, in South Africa, political parties are limited in terms of their ability to discipline their members. They are not allowed to do anything that would make their member lose their representative right once elected.

Notably, one may argue that, the South African legal framework places primacy to the electorate and not the parties which sponsored the representatives. However, in Tanzania both the constitution and political parties Act seem silence on aspects of disciplining of elected members of political parties who are representatives in DMOs. The silence of the law, allows the political parties to assume wider mandates under their constitutions. Notably, dismissal from political party's membership bears the same impact to switching parties for the members of the DMOs. In recognition of such a silence under both the Constitution and the Political Parties Act, seems to place the mandate to discipline the members to the respective political parties.

Generally, the noted differences and the discussion above implies that Tanzania will experience a limited growth in political parties owing to improperly regulated switching and disciplining of members of political parties. Even few newly (to be) established parties will hardly gain enough experience to compete with the well-established parties owing to party loyalty among the members. Given the flow of oppositional members joining the ruling party, though they are exercising their right of freedom of association, it signals a crack

in the efforts to strengthen oppositional parties. As noted above, weakening of opposition parties resonates to lesser information to the public and hence lesser accountability on the part the government. In addition, differences in regulation of switching and disciplining of members of political parties signifies a challenge on budgetary allocation for by-elections in every event of dismissal of a member who is a representative in the DMOs. This is a concern in developing countries where financial resources are scarce.

Notably, however, since South Africa is shown to have a much better legal framework on regulation of switching and disciplining of members of political parties, Tanzania may learn and improve on the same. In order to achieve this, there is a need of political will and convictions to fully guarantee the right to public participation in decision making in our electoral laws. The last part of this article concludes our work.

## 5. Conclusion

The constitutional guarantee of the public participation through political representation in South Africa seems to guarantee not only human rights but good governance issues. With regard to human rights, both the right to public participation and freedom of association seems to be protected through recognition of the right of elected member of political parties to switch from one party to another without loss of their membership of the DMOs. With regard to governance, the right to retain the political position despite of switching of political party reduces the potential government expenditure that would have otherwise be spent in the by-election had the Constitution not so guaranteed title retention. Governance may also be vivid in terms of active political parties and their strength in the parliament in holding the government into account.

In Tanzania however, the discussion above entails a state of wait and see. The ACrtHPR have ruled out with regard to the violation of the right to public participation. Since the case was not about switching between political parties and or retention of one's membership to the DMOs, this study adds on the call for the need to recognize such a right under the laws. It is evident that, if the court would take a bold interpretative approach, the constitution has not prohibited such a right, neither does the Political Parties Act. As a matter of fact, the current amendments seem to widen the potential gap of a broad interpretation of such a right. Evidence of this truth lies on the provisions on merging of parties under the Political Parties Act Cap 258 R.E 2019. Beyond, that, South Africa saves as a good example on the switching and disciplining of members of political parties. In order to have effective political representation that may effectively hold the government to account, the powers of political parties too have to be controlled against their elected members. Tanzania may adopt and learn from South Africa on this. For effective results; Tanzania may take both the disciplining moratorium and the guarantee of switching political parties with the retention of membership to the DMOs.

## 6. References

### End Notes

<sup>i</sup> It will be seen below that the oppositional parties are expected to be the alternative governments to the very one in power.

<sup>ii</sup> The experience from Kenya as discussed under page 7 of this work shows that, non-performing members of the National Assembly may be recalled through a petition of the prescribed number of the members from his/her constituency. This move signifies the fact that the few who rule on behalf of others are also accountable to them

<sup>iii</sup> In Kenya for example, despite recognition of private candidate under Article 85 and 99 (1) (b) of the (Constitution of Kenya, 2010) yet switching from one political party is restricted with the impact of loss of

membership of the National Assembly as provided under Article 103(1) (e) (i) of the same Constitution.

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