

Don't Touch My Constitution! Civil Society Resistance to Democratic Backsliding in Africa's Pluralist Regimes

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Abstract

Analyzing civil society resistance to elite-led democratic backsliding in Africa, the article argues that the non-militant, civil society-based transitions experienced in the 1990s left a legacy of a pro-democracy cleavage that is mobilized when central constitutional rights are threatened. Building on insights from social movement theory, the paper argues that the conduct of multiparty elections at regular intervals provides an *opportunity* for contestation over constitutional rules, and the historical legacy of pro-democracy movements provides a *mobilizing structure* for civil society to organize for the protection of constitutional rights. The theoretical argument is illustrated by a comparison of the democratic trajectories in Zambia and Malawi. In both countries, incumbent elites' have attempted to remain in power through constitutional revisions. However, processes of executive aggrandizement have been stalled by civil society mobilization that again have resulted in incumbent defeat and electoral turn-overs. Recent waves of democratic backsliding suggest that the autonomy of civil society from political parties may be a key factor for the ability of civil society to challenge autocratization. Malawi's civil society has maintained a high degree of autonomy but in Zambia, the close cooperation between civil society and the Patriotic Front (PF) and the resulting cooptation of key civil society actors have resulted in a process of autocratization.

Policy recommendations

- Civil society's autonomy from political parties is essential for its ability to challenge democratic backsliding.
- Reduced focus on democracy promotion from international actors has eased the pressure on elites seeking to undermine democracy.
- The responses of foreign governments, international non-governmental organizations (NGOs) and transnational civil society organizations (CSOs) alliances to democratic backsliding are not well understood and should be incorporated into analyses of civil society resistance to democratic backsliding.
- International and transnational collaborators should emphasize innovative and flexible ways to support local NGOs and civil society networks by investing in new platforms for information sharing and institutional learning, expanding country-level networks.

1. The role of pro-democracy movements in Africa's democratic trajectories

Three decades into the multiparty era in Africa, the democratic transitions have not evolved in a linear process towards institutionalized democracies (Bleck and van de Walle, 2018; Crawford and Lynch, 2011). Africa's political transitions display a wide range of political outcomes ranging from democratic regimes to authoritarian break-downs and a multifaceted group of countries stuck in various mid-positions between authoritarian and democratic systems. Now, as part of the recent global autocratization trend (Lindberg and Lührmann, 2019), the democratic gains achieved in the early 1990s are challenged across the continent as citizens face mounting legal restrictions on freedoms of speech and association (Brenchenmacher, 2017; Dupuy et al., 2016; Rakner, 2019). Notably, recent global

trends of democratic backsliding increasingly happen within the law and through law – often reinventing extant legal provisions, altering their meaning or application (Bermeo, 2016; Hug and Ginsberg, 2018; Hyde, 2020). Across the world, processes of democratic backsliding invariably include legal restrictions on freedom of association. These restrictions constrain the right of citizens to form and sustain civil society organizations (CSOs), what types of issue areas and activities they can engage in, and how associations can receive foreign-sourced resources (Dupuy et al., 2016; Mendelson, 2015).

Yet, incumbent elites' attempts to manipulate the law for their own electoral benefit are sometimes met with resistance and coordinated protest. While civil society and the opposition may not always succeed in their attempts to protect constitutional democratic guarantees and curb executive aggrandizement, civil society mobilization formed

around central constitutional issues is often instrumental for electoral turnover in proceeding elections. Seeking to explain successful civil society resistance to elite-led democratic backsliding and autocratization, this paper focuses on a particular cluster of cases, where the democratic transitions in the 1990s resulted in new governments coming to power; where the multiparty systems have endured; and power has transferred to another party at least one more time. Malawi and Zambia, together with Benin, Cape Verde, Ghana, Mauritius, Kenya, and Senegal are the only African countries that meet the so-called Huntington test (1991), according to which a country can be considered a consolidated democracy when two incumbents have lost power through competitive elections.¹ However, after assuming office, newly elected incumbents have attempted to regress democratic constitutions through a broad range of legal mechanisms. Thus, Africa's competitive electoral regimes do not distinguish themselves due to the nature of their political elites or the strength of constitutional guarantees. Rather, the key characteristic is that these pluralist regimes have sustained a reservoir of opposition in civil society with links to the pro-democracy movements that existed at the time of transition from one party rule to multiparty rule. Building on key insights from social movement theory, the paper argues that the conduct of elections at regular intervals provide an established focal point for collective action by civil society and opposition actors to defend democratic rights when these are threatened. While elections provide the *opportunity* for contestation over constitutional rules, the historical legacy of pro-democracy movements provides the key *mobilizing structure* for civil society and the political opposition to organize for the protection of constitutional rights. The analysis suggests that where democracy movements have retained a higher degree of autonomy and an ability to mobilize and organize, civil society is able to challenge incumbent elites seeking to manipulate constitutional rules.

The theoretical argument is illustrated by a comparison of democratic trajectories in Zambia and Malawi. Both countries form part of the small cluster of country cases on the continent where at least two incumbents have lost power through competitive elections. In both countries, incumbent elites' have attempted to remain in power through attempts at constitutional reform but executive aggrandizement have been stalled by civil society mobilization that again has resulted in incumbent defeat and electoral turn-overs. Recent waves of democratic backsliding suggest that the autonomy of civil society from political parties may be a key factor in understanding the ability of civil society to challenge autocratization. Malawi's civil society have maintained a high degree of autonomy but in Zambia, the close cooperation between civil society and the Patriotic Front (PF) and the resulting cooptation of key civil society actors, has resulted in a process of autocratization.

The article's main unit of analysis are elections – and the constitutional battles unfolding between civil society and the political opposition on the one hand, and incumbent governments on the other hand, around key electoral

contestations. Underscoring the critique of outcome-oriented definitions of democracy (Huntington, 1991), Malawi and Zambia exhibit differences in terms of levels of democracy and institutionalization of key democratic institutions.² Based on data from Freedom House's annual country reports (1998–2019), Table A2 in the Appendix details the incumbent party and party elites' use of a wide range of legal instruments to undermine the democratic contest in the years leading up to national elections. As the list of events indicate, opposition leaders, once in government, display a degree of intolerance for accountability and rule of law similar to the political elites they replaced. Mobilization by civil society has resulted in protest and electoral turn-overs.

The article is structured as follows. Following this introduction, the next section elaborates on the role of multiparty elections as key opportunities both for executive aggrandizement and civil society mobilization. Based in the literature on civil society and pro-democracy movements on the continent, pro-democracy movements are depicted as key mobilizing structures from which civil society may organize to protect constitutional rights. In the third section, the theoretical argument is illustrated by a comparison of civil society responses to incumbents' use of legal mechanisms to maintain power in Zambia and Malawi. A fourth and concluding section discusses the findings against ongoing debates on civil society responses to democratic backsliding.

2. Multiparty elections and pro-democracy movements: opportunities and mobilization

In sub-Saharan Africa, the potency of social movements as democratizing forces was demonstrated in the early 1990s when a variety of movements, comprising women's groups, trade unions, university students and faculty, farmer associations, consumer groups, civil servants, political exiles, business and professional associations, lawyer associations, among others, came together and campaigned for the reform of the authoritarian regimes and their replacement with plural democracies (Branch and Mampilly, 2015; Nkiinyangi, 1991). Bratton and van de Walle (1997) note that two-thirds of African democracy transitions between November 1989 and 1991 were initiated by pro-democracy protest movements.

Following the return to multiparty democracy in Africa, non-governmental organizations (NGOs) grew rapidly across Sub-Saharan Africa as part of western governments push for democratization (Ottaway and Carothers, 2000). The share of foreign aid channeled to Africa through NGOs rose from 1 to 20 per cent from 1990 to late 2000 (Englebert and Tull, 2008). With the entry of a professionalized NGO sector depending on funding from international donors, civil society came to be regarded by scholars and development agents both as spaces for autonomy and political opposition, and as agents of modernization (Eckert, 2017). Despite the key role played by civil society in the democratic transitions, a critical scholarship emerged seeing the professionalized NGOs as forces of status quo and questioning the

potential of civil society to actively engage political elites in battles for democratic expansion (Hern, 2007; Ottaway and Carothers, 2000). In part because the donor-assisted pro-democracy NGOs were considered to be isolated from society at large, more recent literatures on social movements and protest have largely overlooked the more formal aspect of civil society. However, the tendency to differentiate actors operating in the formal political arena from those operating in the streets, that is, as being either inside or outside the formalized political system, overlooks significant synergies. Analyses of civil society resistance to democratic backsliding suggest that civil society groups have taken an active role in the defense of constitutional guarantees for freedom of association and speech (Rakner, 2011; Wienkoop, 2020). Wienkoop's (2020) analysis of protest movements linked to constitutional battles in Benin and Senegal reveals distinct cross-movement mobilization and that a large number of actors from civil society were involved in the protests. As the empirical analysis of Malawi and Zambia will reveal, the spontaneous protest movements formed to challenge constitutional processes have often depended on the more institutionalized civil society organizations to maintain pressure on governments and to move the struggle over constitutional rights from the streets to the courts and legislatures.

Civil society and democratic backsliding

Democratic backsliding is characterized by incumbent governments rescinding or restricting key democratic rights such as access to information, various forms of political participation, or the rights of the political opposition. A distinctive feature of the current wave of attacks on democracy is its piecemeal and gradual nature (Bermeo, 2016; Hug and Ginsberg, 2018). The literature is unanimous in considering the repression of civil society an important expression of democratic backsliding (Dupuy et al., 2016; Gyimah-Boadi, 2015; Rakner, 2019). Increasingly CSOs across the continent are facing deteriorating legal and operational environments as governments pursue regulatory, administrative and extra-legal strategies to impede their work (Dupuy et al., 2016; Mendelson, 2015). African civil society's responses to legal actions limiting democratic space are framed around formal institutions such as elections. In order to understand why and how civil society mobilizes against incumbent governments' attempts to shrink the democratic space for civic engagement, two factors appear critical: the routinization of multiparty elections and previous experience with civil society mobilization and a pro-democracy movement legacy.

Windows of opportunity: The power of elections

Once introduced, regular elections provide an established focal point for collective action to enforce democracy when it is threatened (Bealieu, 2014; Yarwood, 2016). From this perspective, the 1990s transitions to multiparty rule represented watershed moments in Africa's political trajectory as they provided regular, periodic and anticipated

opportunities for citizens coordination and participation. Whereas only a handful of countries maintained their multiparty constitutions after independence, post 1990, only two countries on the continent still outlaw multiparty elections (Bleck and van de Walle, 2018). Since the reintroduction of multiparty elections, incumbent leaders have sought to manage contestation without losing their hold on power, leading scholars to argue that elections provide authoritarian-minded governments with stability and information (Brownlee, 2007; Gandhi and Lust-Okar, 2009; Morse, 2018). The narrative of elections as a tool of regime maintenance is helpful for understanding the longevity of regimes such as NRM and Museveni in Uganda.

But multiparty elections also provide real moments for power alterations. In competitive electoral regimes, elections present discrete windows of opportunity during which political change becomes more likely (Bleck and van de Walle, 2018). Debates around term-limits as well as open seat elections provide political momentum and critical junctures that may push politics in different directions (Cheeseman, 2015). Competitive electoral regimes, such as Zambia and Malawi, are characterized by weakly institutionalized parties, and non-transparent decision-making processes driven by individual ambition and intra-party factionalism. The resulting uncertainty is particularly threatening in times of succession or elections, when party unity and discipline is undone by the multiple factions within each party, all vying for the only important seat, the Presidency.

Tools for mobilization: the legacy of pro-democracy movements

A key insight from the social movement literature is that waves of protest do not happen in a vacuum, they happen in inherited contexts of earlier mobilizations (Chalcraft, 2016; Mueller, 2018). Most groups that mobilize during new waves of protests are preexisting organization such as mosques, student associations and labor unions (Goldstone, 1994). Bratton and van de Walle's (1997) analysis of Africa's democratic transitions underscores the continuities across waves of African protests, arguing that participatory forms of authoritarian rule were more likely to foster strong civil society groups. Dulani (2011), underlining the pro-democracy legacy, shows that the associations that were central in the 1900s transition, took on an active role in the campaigns attempts by incumbent elites to remove term limits. Similarly, in her analysis of post 2000 political protests in Africa, Mueller argues that: 'particularly in Africa's third wave of protest, many social movement organizations owed their existence to democratic openings achieved during the second wave (Mueller, 2018, p. 123, see also Branch and Mampilly, 2015).

Summarizing the argument, the conduct of multiparty elections provides an *opportunity for contestation* over constitutional rules. Uncertainty about the electoral outcome elicits attempts by incumbent governments to change the rules in order to maximize their chances of re-election. Efforts to shrink the space for democratic contestation, here

under the right to freedom of speech and association, form a central part of the incumbents' efforts to control electoral outcomes. But in cases where pro-democracy movements were decisive factors in the initial democratic transitions, the movements provide a *mobilizing structure* for civil society to organize for the protection of constitutional rights that are threatened at times of election. Now turning to illustrate the link between elections as opportunity and a pro-democracy legacy as a mobilizing structure, the discussion moves to the cases of Malawi and Zambia. The two countries belong to the select group of African multi-party systems that have experienced two peaceful electoral turnovers. Through six electoral cycles since the return to multiparty democracy in 1991 (Zambia) and 1994 (Malawi), protests and civil society mobilization have occurred as a response to undemocratic practices by the ruling elites attempting to prolong their stay in office. The analysis identifies key electoral 'moments' that have resulted in major pro-democracy protests and electoral turnovers.

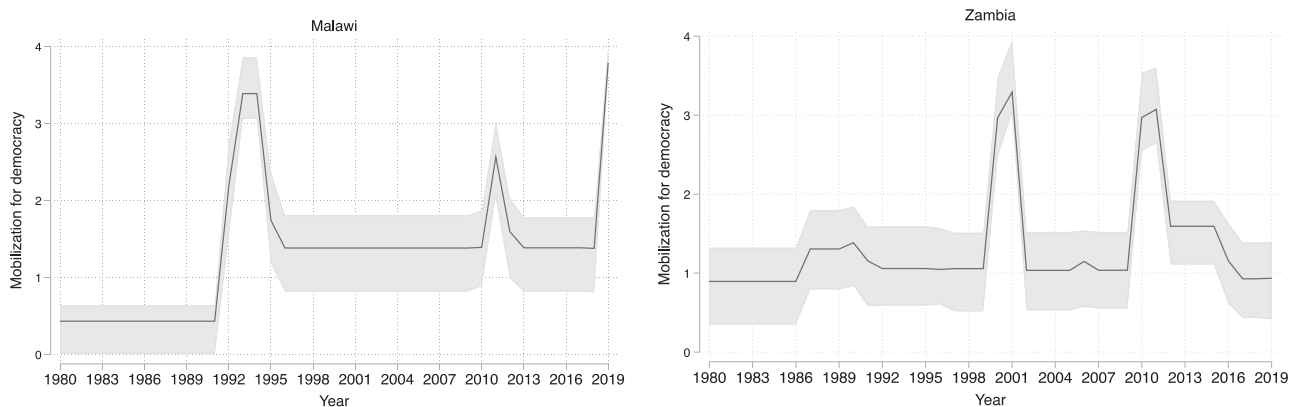
3. Civil society resistance to democratic backsliding in Malawi and Zambia

Experiencing a peaceful transfer of power from the one-party government of the United National Independence Party (UNIP) in the 1991 multi-party election, Zambia was depicted as a model of African democratization (Ihonvebere, 1995). The Movement for Multiparty Democracy (MMD) staged an electoral turnover without violence, in which the incumbent party was replaced by a cross-ethnic pro-democracy movement. Since then, Zambia has held five multi-party parliamentary and seven presidential elections. After 20 years in power, in the September 2011 elections, Patriotic Front (PF) and its presidential candidate Michael Sata removed MMD from power. Similarly, in 1994 Malawi's 1994 founding elections Kamuzu Banda and the Malawi Congress Party lost to the opposition candidate Bakili Muluzi from the United Democratic Front (UDF). The seven

parliamentary and presidential elections held since demonstrate the competitiveness of presidential and parliamentary elections in Malawi (see Table A1 in the Appendix). When the incumbent president Joyce Banda and her People's Party (PP) was voted out of power in the 2014 elections, and Peter Mutharika of the Democratic Progressive Party (DPP) replaced her, this was the second time an incumbent president was defeated. In an unprecedented turn of events, after months of protest, the 2019 presidential elections were annulled by the Constitutional Court in February 2020 over irregularities. The incumbent Peter Mutharika who was pronounced the winner had to re-contest in fresh elections held on 23 June 2020 and subsequently lost to the MCP presidential candidate Lazarus Chakwera who also came close to being declared the winner in the 2019 (Dionne and Dulani, 2020). Table A2 lists the key mechanisms employed by incumbent governments to extend executive power and weaken the opposition and civil society in the year prior to elections. The data from the Freedom House yearbook suggests that in both Malawi and Zambia's new incumbents have sought to regress or stall democratic institutions and legal provisions after assuming office. Faced with increasing challenges to their power, incumbent governments in both Malawi and Zambia have resorted to the practices they themselves confronted while being in opposition.

But, when incumbents attempt to expand their hold on power by pushing for constitutional changes and other means to control and weaken the opposition, electoral politics tend to shift from a contestation of position to a constitutional battle. Thus, by shifting the electoral debate to issues of democracy and the protection of the constitution, the incumbent offers civil society and the opposition opportunities for mobilization. Turning now to analyze the nature of civil society resistance to the episodes of contention identified in Table A2, the tendency to legally challenge constitutional guarantees for the freedom of the media and civil society appears pronounced in both countries. Figure 1 depicts the frequency and size of mass mobilization for pro-

Figure 1. Mobilization for democracy. Notes: The data show, in each given year, how frequent and large events of mass mobilization for pro-democratic aims have been. The measure ranges from 0: virtually no events; 1: several small-scale events; 2: many small-scale events; 3: several large-scale and small-scale events; to 4: many large-scale and small-scale events. It includes events such as strikes, sit-ins and demonstrations. Source: Coppege et al. (2019)



democratic aims. In the case of Zambia, the spikes in protest activity is linked to the protests against constitutional amendments in prior to the 2001 elections and to the constitutional battles in 2010, leading up to the 2011 turnover election, where the MMD government is replaced by Patriotic Front (PF and Michael Sata). Protests in Malawi peak in relations to the 1994 turn-over elections. The next distinct increase in protests occurs in 2011 as a reaction to President Mutharika's deepening authoritarianism and arbitrary power. The last spike in 2019 follows the fraud allegations following the 2019 election.

Zambia

The collapse of the economy undermined the support of the one-party state of the United National Independence Party (UNIP) and President Kaunda. The Movement for Multiparty Democracy (MMD) evolved from a pro-democracy movement uniting students and academics, churches, business interests, and most prominently, the trade unions around calls for democratic reforms and the introduction of multiparty system, in addition to economic reforms (Bartlett, 2000; Ihonvbere, 1995; Rakner, 2003). Riots swept Lusaka and spread to the Copperbelt, and throughout the country large opposition rallies called for a National Convention and the end to one-party rule. Responding to the economic crisis and collapse of the commodity-based economy, MMD successfully integrated marginalized businessmen, farmers and unemployed city-based youths (Cheeseman, 2015). Opposition to austerity measures and the authoritarian rule of the one-party regime united under the opposition party Movement for Multiparty Democracy (MMD), with former trade union leader Frederick Chiluba as leader. Appointing the union leader meant that MMD could utilize the Zambia Congress of Trade Union (ZCTU) powerful organizational structures (Cheeseman, 2015; Rakner, 2003).

Already the second multiparty elections in Zambia (1996) indicated to local and international observers that the Chiluba government was willing to compromise rule of law to exploit its majority position to undermine its opponents (Rakner, 2003). These tensions subsequently came to a head five years later when President Chiluba expressed his intent to stand for a third presidential term in 2001. The attempt to change the constitution to allow a third term triggered a highly coordinated response from civil society (Gould, 2006). Signaling a notable shift from an economic interest-based civil society to a third sector dominated by professionalized non-governmental organizations, this time, a coalition of non-governmental organizations, church groups and the Law Association of Zambia spear-headed the campaign to protect the constitutional term limit provisions. Between February and March 2001, public demonstrations took place across Zambia, and citizens wore green ribbons to show their opposition to the amendment. The opposition united under an umbrella organization, the *Oasis Forum* that relied on public pressure and awareness campaigns. Chiluba was forced to appoint Mwanawasa as successor, securing MMD a victory in the 2001 presidential and parliamentary elections.

The mobilization of civil society in 1991 and 2001 in Zambia signals a capacity to mobilize when key constitutional rights are threatened and the *Oasis Forum* continued as a movement to push for the constitutional reform process past the 2001 elections (Gould, 2006). Remaining in power, the MMD government, on its side, continued to manipulate legal instruments to secure electoral gains and undermine civil society and the opposition. Application of the Public Order Act to ban demonstrations grew in intensity after the 2008 presidential by-elections that saw Rupia Banda replace the late Mwanawasa. In 2009, MMD passed an NGO Act that restricted activities of NGOs through demands for regulation and increased ability for deregistration. In addition, new legislation was passed allowing the executive to increase the number of judges in the Supreme and High Courts (Freedom House, 2020; Sishuwa, 2020). Former MMD politician, Michael Sata, had formed the Patriotic Front in 2001 around an agenda on pro-poor reforms and the promise of a more democratic constitution based on broad participation (Resnick, 2014). The promise of constitutional reform gained Sata and PF support among the urban middle-class and civil society. Mobilizing against the implementation of the 2009 NGO Act and the increasing use of the Public Order Act to stifle civil society, the Patriotic Front and Michael Sata was able to unseat the MMD government in the 2011 elections.

In the new PF government, key actors from civil society and media were given central government positions. However, the new incumbent government soon copied authoritarian practices associated with the MMD, and began a constitution-making process aimed at removing clauses checking executive dominance. Zambia's political trajectory since the 2011 elections suggests a slow, incremental process of autocratization that has accelerated since the 2016 elections. Sata's death in 2014 brought Edgar Lungu to the helm of PF, first in the 2015 presidential by-election and later in the 2016 general elections that Lungu and PF won with a slim majority. Since the 2016 elections, the PF government has sought to weaken civic institutions by way of co-optation, and the use of legal instruments. With some of the most important watch dogs having left their positions in civil society, increased political competition in 2015 and 2016, and a sharp decline in donor funding, civil society leaders have become effectively neutralized.

Malawi

Following a similar trajectory as Zambia, in 1994 Malawi reinstated multiparty elections. Despite being subject to severe repression during 30 years of one-party rule, Malawi's civil society were active participants in the 1992–94 transitions. In 1992, Malawi's Catholic bishops issued a pastoral letter criticizing the one-party system and called for far-reaching economic and political reform (Dwyer and Zeilig, 2012; Ross, 1995). Student marches and workers' strikes demonstrated popular support for the bishops' initiative. The detention of the Catholic bishops caused a campaign for multi-party democracy, an objective reached in the June 1993 referendum. The Public Affairs Committee (PAC)

formed in 1992 became one of the early groups seeking to pressure Kamuzu Banda's regime to open up to a multiparty political system (Dulani, 2009; VonDoepp, 2005).

However, while campaigning for judicial independence and democracy in opposition, when in office former Malawian opposition leaders found ways to amend constitutional provisions to secure their time in office. After the 1994 transition, civil society institutions in Malawi faced significant challenges linked to its poor organization and ad hoc character (Dulani, 2009; Ross, 1995). But, after President Muluzi secured a second term in office for himself and his party in 1999, he embarked on a process to alter the constitution to allow himself a third term in office. Again, civil society in Malawi was able to mobilize in support of the constitution. As in 1994, Malawi's church-based organizations played a major role, and the various church organizations united under the PAC umbrella. In addition, the national NGO coordinating body – the Council for NGOs in Malawi (CONGOMA) became a key organizing unit (VonDoepp, 2005). Due to considerable civil society mobilization and dissent within the ruling party, Muluzi's final effort to secure a parliamentary vote for the 'Open term bid' failed in January 2003.

Popular protest reappeared in late 2000s as a response to an economic crisis brought by fuel and foreign currency shortages. As Bingu wa Mutharika began planning his prolonged stay in office in his second electoral turn (this time not through a term bid, but by handing over power to his brother), civil society organizations and the independent press began to criticize the Mutharika administration's economic policies and political maneuvering. In July 2011, the country experienced the most significant political violence since the 1992–94 transition. On 20 July 2011 Malawian civil society organizations submitted a petition to the president's office. Protests in support of the petition took place nationwide, resulting in the death of 19 protestors as President Mutharika ordered the security services to quell the protests. Peaceful protests against Mutharika's deepening authoritarianism and arbitrary power started in cities led by NGOs, faith-based organizations, opposition leaders and student groups going by the name of the 'Red Army for Democracy and Peace' (Cammack, 2012).

Mutharika died while in office in 2012 and the Malawi courts ruled that the elected vice-president Joyce Banda was the successor, despite her having formed a new party while under house arrest. Joyce Banda ultimately lost the 2014 election to Bingu wa Mutharika's brother, Peter. The government's NGO Board, established in 2012, became fully operational in 2015 and publicly called on all CSOs to register and comply with all provisions of the NGO Act of 2000 threatened with court action if they do not, and at the same time publicly singled out and threatened 'noisy' CSOs. The NGO Board also specifically threatened to close down CSOs because of their advocacy on behalf of lesbian, gay, bisexual, and transgender people. In September 2014, Mutharika announced a review of the 2000 NGO Act, sparking fear among civil society groups that the government would tighten restrictions on civil society groups, including increasing surveillance and monitoring of foreign funding.

New election related riots occurred after the 2019 elections, narrowly won by Peter Mutharika. Following allegations of electoral fraud, the Malawi Human Rights Defenders Coalition organized mass demonstration in all major cities lasting for months. In December 2019, the Malawi High Court annulled the 2019 elections (Dionne and Dulani, 2020). A key factor in Malawi's two most recent protests around elite contestation is the interaction between civil society, media, and the courts. Civil society-government contention in 2003 saw church groups leading the opposition in support of the constitutional provisions. In 2011–12, university student and staff played a central role (Dionne and Dulani, 2013). The intervention of the courts in 2012, following Bingu wa Mutharika's death and again in 2019, annulling the 2019 elections, suggest a democracy institutionalizing as civil society pressure is complemented with an institutionalized response.

Elections as opportunities for civil society resistance: Malawi and Zambia

The constitutional battles over executive third terms re-mobilized civil society in Zambia and Malawi. In Zambia (2001) and Malawi (2003), the incumbent abandoned their attempts to alter the constitution to allow themselves to stay in office after substantial civil society mobilization. Their picked candidates won the following elections. The pro-democracy protest movements dominated the following electoral campaign and the two incumbent presidents were defeated. While students and churches remained key actors in Malawi, in Zambia the key organizational unit of the pro-democracy movement shifted from trade unions to a coordinated body of non-governmental organizations established after the return to multiparty democracy a decade prior (Rakner, 2011). While the Malawi case displays a persistent civil society pressure that is complemented with an institutionalized response when key constitutional rights are threatened, the case of Zambia now displays a more challenging scenario. Despite two electoral turnovers, since the 2011 elections, Zambia's democracy had experienced a considerable decline. The mobilization of civil society in 1991 and 2001 suggested that society has the capacity to mobilize when key constitutional rights are challenged. Both the 1991 and, 2011 transitions reveal a low degree of autonomy for civil society, as key societal actors became part of the new governments (Dwyer and Zeilig, 2012). The space for civil society in Zambia to influence government on major policy issues has considerably shrunk, in particular because the PF have, since Lungu's re-election, sought to weaken civic institutions by way of co-optation, and the use of legal instruments. The enhanced role of NGOs in Zambia may be significant as NGOs in particular have been targets of government suppression as part of the recent global democratic recession (Brechenmacher, 2017; Dupuy et al., 2016).

4. Elections, democracy and civil society in Sub Sahara Africa

The literature on democratic backsliding has not yet systematically investigated how civil society influences backsliding

processes but it is generally assumed that civil society acts as a counter against backsliding. Moving beyond elite level politics, this paper has addressed civil society responses to incumbents' application of authoritarian tools and constitutional engineering. The focus of analysis has been a cluster of African country cases where civil society successfully have resisted attempts to limit democratic space through legal mechanisms with the aim of enhancing executive power and altering constitutional guaranteed rights of contestation and civic participation. The analysis has suggested that pro-democracy coalitions have been successful in creating and sustaining a democratic legacy that promotes the development of competitive democratic systems. The pro-democracy cleavage, though sometimes dormant, is effectively mobilized by civil society and opposition forces when democracy is threatened. Based in social movement theory, the analysis suggests that elections at regular intervals provide a central opportunity structure and focal point for civil society to highlight and resist attempts at constitutional coups and executive aggrandizement. Moreover, the existence of a pro-democracy cleavage based on a civil society legacy of mobilization provides the key mobilization structure. The paper's theoretical claim is illustrated through a comparison of the democratic trajectories in Malawi and Zambia.

When incumbents' attempt to regress democratic rights, the electoral competition becomes a battle over constitutional issues. The title of the paper, 'Don't touch my constitution' refers to campaigns by civil society organizations in Benin and Senegal in support of key civil and constitutional rights that incumbent governments attempted to change in order to maintain power ('Touche pas à ma constitution'). Similar campaigns formed in Malawi in 2002 (Forum for the Defence of the Constitution), and in Zambia in 2001 (The Oasis Forum). These broad-based coalitions of civil society organizations suggest an ability to mobilize when key constitutional interests are threatened. The comparative analysis of Malawi and Zambia's political trajectories since the 1990 democratic transitions shows that civil society have continued to respond effectively when democratic rights are threatened by incumbents. Constitutional issues and proposed amendments affecting democracy or human rights have mobilized the electorate, civil society and opposition politicians to act in consonance, confirming a continued democratic legacy from the pro-democracy movements.

The analysis has focused on the constitutional battles between local political elites and civil society. It is not possible to fully adjudicate among competing explanations of how and when civil society is able to resist elites' attempts at democratic backsliding based on the paper's inductive reasoning and the limited number of cases explored. The main contribution of this paper is therefore its theoretical argument and the suggested link between multiparty elections as an opportunity structure and a pro-democracy legacy as a key mobilization structure. The argument should be tested on a larger set of cases in future analyses. Furthermore, the links between local pro-democracy movements and international actors should be further explored. As

Berger-Kern et al. in this issue show, a multitude of external actors are involved in the response to democratic backsliding from civil society actors such as foreign governments lending financial support and leverage on the political regimes, as well as international NGOs and transnational CSO alliances. Further analyses should carefully include the international actors. While domestic factors are important, the international pressure on international leaders to democratize and adhere to international democratic norms has often been overlooked. In the post-Cold War period, Western bi- and multi-lateral donors provided large amounts of financial support to CSOs to promote and strengthen democratic rule. However, in the past decade, civil society organizations linked to human rights, governance and gender have come under financial and legislative attack. Civil society actors and international donors in Africa are currently facing a number of challenges. Many CSOs shift their attention *away from* issues related to advancing human rights and good governance. Associations that continue to work on topics related to accountability and human rights increasingly find that they have to operate 'from below', as grassroots networks of activists from local civil society groups, or through social movements focused on the protection of civil liberties. As such work ultimately challenges the legitimacy of repressive governments, human rights activists, lawyers, journalists and academics, are often targeted for politically motivated trials or violent or economic persecution by government agents. On their side, international donors are left with fewer options to support human rights and governance as NGOs have traditionally been a favored vehicle for this type of support.

Data availability statement

Data sharing not applicable to this article as no datasets were generated or analysed during the current study.

Notes

1. See Table A1 for a breakdown of the various sub-Saharan African countries that experienced a democratic transition in the 1990s.
2. Score on the electoral democracy index from V-Dem in 2019: Malawi 0.5; Zambia 0.37. The score ranges from low to high (0-1) (Teorell et al. 2019; Coppedge, et al. 2019).

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Appendix

Table A1. Turnover of incumbent party since introduction of multiparty rule

County	Incumbent party preceding multiparty transition	1 st incumbent party	2 nd incumbent party	3rd incumbent party	Current incumbent party (2017)	Turnovers
Malawi	H. Banda/ Malawi Congress Party (1994)	Muluzi/ United Democratic Front (Two terms: 1994-2004)	B. Mutharika/ /United Democratic Front/Democratic Progressive Party (Two terms: 2004-2012)	J. Banda/ People's Party (2012-2014)	P. Mutharika/ Democratic Progressive Party (2014-2019 2010-2020) ^a	Chakwera Malawi Congress Party 2020- 5
Zambia	Kaunda/ United National Ind. Party (1991)	Movement for Multiparty Democracy/ Chiluba (1991-2001)/ Mwanawasa (2000-2008)/ Banda (2008-2011)	Sata/ Patriotic Front (2011-2014)		Lungu/ Patriotic Front (January 2015- September 2016 September 2016-)	2

^aNotes: Peter Mutharika was re-elected May 2019, but the election result nullified by the Malawi Constitutional Court (Freedom House, 2020). New election 23 June 2020 saw the losing candidates in 2019, Chakwera from Malawi Congress Party (MDC) win 58 per cent of the vote.

Table A2. Actions by incumbent political elite during their last year in office

Country/ Election year, President/ Party	Attempts to stall/regress democratic constitutional provisions and parliamentary acts/bills		
	Successful	Failed	Undemocratic practice
Zambia			
1991: Chiluba, MMD	-new constitution shaped to bar the election of Kaunda (1996) -passing of law allowing executive to increase number of judges in Supreme/High Court (when?)	...	-intimidation of independent media and press -initially attempted to declare former president Kandura a noncitizen -incomplete voter lists, estimate of 2 million disenfranchised in 1996 election
1996: Chiluba, MMD	-passing of State Proceedings Act, which remove judicial checks on the decisions and actions of the government	-removal of third term limit	-political violence against opposition and civil society groups and detainments -fraudulent campaign and election, including vote rigging and biased media coverage -intimidation of independent media and press through The Preservation of Public Security Act of 1960
2001: Mwanawasa, MMD	-electoral law empowering the president to set the date for elections and preventing the media from publishing 'speculative analyses and unsourced opinion polls' in the run-up to the elections (2006) -stalled progress new constitution -stalled progress on access to information bill	-Harassment of journalists through Public Order Act and libel/defamation suits -bans on demonstrations and arrests of protesters through Public Order Act -arrest of opposition candidate in Sata (Patriotic Front) ...

(continued)



Table A2. (continued)

Country/ Election year, President/ Party	Attempts to stall/regress democratic constitutional provisions and parliamentary acts/bills		
	Successful	Failed	Undemocratic practice
2006: Mwanawasa, MMD		-NGO bill to increase government controls over NGOs	
2008: Banda, MMD	-passing of 2009 NGO Act restricting activities of NGOs through (deregistration/regulation		-Harassment of media
2011: Sata, PF	-implementation 2009 NGO Act -violation of judicial independence through the creation of tribunals and judge appointments -stalled progress new constitution (w provisions for 50+ rule; strengthened bill of rights; EC-independence) -stalled progress on access to information bill	-surpass rule to hand overdraft of constitution to government and public simultaneously	-harassment and arrests of opposition through Public Order Act -extralegal intimidation of media, arrests and blocking of websites -filing of multiple legal cases against UPND opposition leader -extralegal intimidation of civil society
2015/2016: Lungu, PF			-ban of peaceful demonstrations and meetings -laws used to curb freedom of speech -Public Order Act used to restrict opposition events -opposition parties face harassment, arrest, prosecution for alleged defamation -biased Constitutional Court ruled Lungu can run for third term in president election of 2021
Malawi 1994: Muluzi, UDF	...		-media outlets associated with political opposition experience government harassment, close-downs and arrests -police killing two youths protesting the death of an opposition sympathizer, arbitrary arrests and detentions common (when?)
1999: Muluzi, UDF	-constitutional amendment allowing expulsion of legislators that defect to another party after being elected -ban to broadcast news for community radio	- ban on demonstrations against third-term issue (2002) -local government bill giving the President sole authority to appoint city and other municipal or district majors (2002) - removal of two-term limit for the presidency (2003) -shortening of registration period from 14 to 7 days; limit the no of party representatives at voter registration sites; presidential powers to determine null-and-void votes (2003)	-libel laws used to harass journalists - 'state sponsored violence', including four people on trial on treason accused of plotting a coup (2001)
2004: B. Mutharika, UDF			-attempt to impeach the President after his resignation from incumbent UDF party and formation of a new party: DPP -intimidation of political opposition

(continued)

Table A2. (continued)

Country/ Election year, President/ Party	Attempts to stall/regress democratic constitutional provisions and parliamentary acts/bills		
	Successful	Failed	Undemocratic practice
2009: B. Mutharika, DPP (died 2012)	<ul style="list-style-type: none"> -passing of Penal Code to prohibit news stories deemed contrary to public interest -passing of legislation to increase executive control over local government (2009) -ban on advertising in largest independent daily (2010) 	<ul style="list-style-type: none"> -change of rules for selecting the leader of the opposition in parliament 	<ul style="list-style-type: none"> -arrests of four incumbent party members after President accuse them of plotting to kill him, released few days later -violent harassment of journalists, arrests and shut-downs of radio stations -violent suppression of anti-government protests, killing 18 people; harassment, death threats and arrests of civil society actors -government intervention in academic freedom, firing lecturers and closing university -expelling of British Ambassador for criticizing President in leaked document -dismissal of whole cabinet, and appointment of wife and brother -expelling vice-president from incumbent party and attempt to un-constitutionally install deceased president's brother as president
2012: J. Banda, PP			<ul style="list-style-type: none"> -incidents of government harassing or assaulting journalists - incidence of riot police using tear gas against protestors
2014: P. Mutharika, DPP	<ul style="list-style-type: none"> -delay of Access to Information Act, signed into law 2017 but not implemented -cybersecurity law criminalize posting 'offensive' content online (2016) 		<ul style="list-style-type: none"> -minister threatening ban on 'noisy' NGO if they fail to register with the NGO Board -delayed registration of new political parties -24 university students arrested in peaceful protest (2017) -temporarily shut-down of media headquarter and attack on journalists
2019: P. Mutharika, DPP ^a			<ul style="list-style-type: none"> -harassment, threats and violence against organizers and demonstrators of regime protests

^aResult nullified, new election 23 June 2020