

AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE: A CRITICAL ANALYSIS

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'Democracy is the worst form of government, except for all those other forms that have been tried from time to time.' *Sir Winston Churchill*

Introduction

During its Eighth Summit held in Addis Ababa, Ethiopia, on 29-30 January 2007, the Assembly of Heads of State and Government of the African Union (AU) adopted an African Charter on Democracy, Elections and Governance (African Charter on Democracy).¹ The adoption of that text was the culmination of a lengthy process, slow but irreversible, that began in the early 1990s.

For the smaller countries that espoused the ideologies of the former hegemonic powers of either bloc, the end of the Cold War spelled the end of unconditional support. Thus, at the traditional France-Africa Summit he hosted in June 1990 in La Baule, France, then French President François Mitterrand forsook the bureaucratic language that was generally the rule under such circumstances and told his African peers that French aid to African countries would henceforth be given out on a scale commensurate with their efforts at democratisation.² However, what would later be known as the 'Discours de la Baule' (the La Baule speech) should be placed in a broader historical context. During the same period, African populations were increasingly outspoken in their demands for greater democracy and stronger participation in the public affairs of their countries. In some cases, their efforts culminated in 'national conferences' organised in the early 1990s in half a dozen French-speaking African countries at the initiative – or the behest – of local forces for democratic change.

Caught between the demands of national public opinion and the new requirements of Western governments and organisations providing financing, African governments soon took the measure of the new international order. The Organisation of African Unity (OAU) summit held in Addis Abeba in July 1990 was largely devoted to the political and socioeconomic situation in Africa and the fundamental changes taking place in the world. In a declaration adopted at the outcome of the proceedings, the heads of state and government proclaimed

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¹ Assembly/AU/Dec. 147 (VIII).

² See F Mitterrand, 'Le discours de la Baule (1990)' (available on http://www.rfi.fr/actu/fr/articles/037/article_20103.asp). During the press conference at the closing of the summit at la Baule, President Mitterrand announced that France's 'Traditional and longstanding aid' would be 'cooler towards regimes that behave in an authoritarian manner' and 'enthusiastic towards those who move boldly forward' towards democratisation. (See the AFP dispatch, 'Quinze ans après la Baule, le bilan démocratique africain reste mitigé' published by *Le potentiel* in edition 3456 of 21 June 2005, available on http://www.lepotentiel.com/afficher_article.php?id_edition=&id_article=8858).

their support for democratic principles, while specifying that each state remained free to choose the form of democracy best suited to its realities.³

The next phase consisted of adopting a common policy towards the phenomenon of taking power by force, whose persistence in Africa threatened efforts (however feeble they may have been) towards political liberalisation. In a series of resolutions beginning in the latter half of the 1990s,⁴ the Heads of State and Government of the OAU condemned coups d'état, an issue that had previously been considered a matter of national sovereignty not subject to intervention by the continental organisation.

Reflecting this change, the Constitutive Act⁵ of the AU, which replaced the OAU, openly asserted its preference for democratic government and even provided for the possibility of sanctions in case of unconstitutional change of government.⁶

The African Charter on Democracy has drawn inspiration from all of the foregoing developments, of which it can be described as the culmination. The present analysis both salutes the adoption of the text as an innovative and relevant initiative, and draws attention to its shortcomings.

I. An innovative and relevant initiative

The innovativeness and relevance of the African Charter on Democracy arise from the fact that it is one of the rare instruments of its kind in international law, that it establishes democracy and popular participation as fundamental human and peoples' rights, and that it takes account of the governance issues faced by contemporary Africa.

A. An unusual approach in international law

International law has always been particularly cautious in its treatment of political regimes. The principle has been to avoid interference in the domestic affairs of states.⁷ Thus, political and ideological neutrality have often been invoked to unite states with different or even antagonistic regimes, as was the case during the so-called Cold War, when the capitalist and communist blocs fenced with buttoned foils in international meetings hosted by the United Nations, and occasionally faced off more heatedly and bloodily in the wars they waged against each other through smaller states.

³ Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World (AHG/Decl.1 (XXVI) 1990), adopted during the Twenty-sixth Summit of the OAU, in Addis Abeba, 9-11 July 1990 is available on http://www.chr.up.ac.za/hr_docs/african/docs/ahsg/ahsg33.doc (consulted on 17 April 2007).

⁴ Declarations of Harare in 1997, Algiers in 1999 and Lomé in 2000.

⁵ Adopted in Lomé, Togo, on 11 July 2000, it entered into force in May 2001.

⁶ Article 4(p) of the Constitutive Act: 'The Union shall function in accordance with the following principles: (...) (p) condemnation and rejection of unconstitutional changes of governments.' In addition, according to the terms of Article 30 of the Act, 'Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union'.

⁷ See Article 2(1) and (7) of the UN Charter. In 1960, the General Assembly of the United Nations adopted Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples, which recalled the right of peoples to self-determination, including two main aspects: the right not to be subjected to colonialism and the right to freely determine their political regimes or status. In Africa, the principle of non-interference in the domestic affairs of the States was one of the pillars of the OAU (Articles 2 and 3 of the OAU Charter of 1963).

With the end of the Cold War, a certain consensus seemed to be established, recognising democracy as the most appropriate form of government in the contemporary world.⁸ The adoption of a Protocol on Democracy and Good Governance by the Economic Community of West African States (ECOWAS) in 2001, was one of the first attempts to legislate on democracy through a binding act.⁹ Until that time, the practice in international law had been to include ‘clauses guaranteeing democracy’ in treaties whose primary objective was not always political, let alone aimed at guaranteeing democracy.¹⁰ Such clauses made democracy a condition for recognition or for admission into an international organisation, or established it as a fundamental principle whose violation could lead to sanctions that might include suspension.¹¹ Numerous treaties concluded within the Organization of American States (OAS), NATO, the Organisation for Security and Co-operation in Europe, the European Council, the European Union, ECOWAS and even the AU contain clauses guaranteeing democracy.¹²

Thus, the primary originality of the African Charter on Democracy resides in the fact that it is one of the rare binding international legal instruments that deals openly, as a priority and in detail with democracy, thereby pushing back the frontiers of sovereignty by addressing a subject that was long considered the exclusive preserve of the states: i.e. the nature of the political regime. With the African Charter, democracy appears as an essential principle of international law and international relations which shall be, if necessary, if not imposed then at least protected by coercion.

B. Democracy as a fundamental right

Certain aspects of democracy have long since acquired the status of fundamental rights, especially in the category of civil and political rights. Thus, participation in the management of public affairs¹³ and freedom of opinion and expression,¹⁴ inter alia, are recognised by virtually all international human rights treaties (or at least those dealing with civil and political rights). However, even the ECOWAS Protocol on Democracy and Good Governance, which was a pioneering international legal instrument in terms of the promotion of democracy, did not go so far as to establish democracy as a fundamental right. The

⁸ Since 1988, the General Assembly of the United Nations has adopted annual resolutions and declarations supporting the establishment, promotion and consolidation of democracy in the members States. Initially given the cautious title of ‘*Enhancing the effectiveness of the principle of periodic and genuine elections*’, following 1994, these Resolutions were more boldly entitled ‘*Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies*’. See Jan Wouters, Bart de Meester and Cedric Ryngaert, ‘Democracy and international law’, LIRGIAD, Working Paper No. 5, June 2004, p. 8.

⁹ The Protocol was signed in Dakar, Senegal, on 21 December 2001. The protocol is still struggling to collect the nine (9) ratifications needed to enter into force. The text of the protocol is available on the ECOWAS site: www.ecowas.int.

¹⁰ See Christof Hartmann, ‘Towards internationalisation of democracy? Regional organizations and the survival of democracy in Africa’, Paper for ECPR Conference 18-22 September 2003 in Marbury (Section No. 26), p.3, and Theodore J. Piccone, ‘International Rules and procedures for protecting democratic governments’, p. 1, available on www.cfr.org.

¹¹ See Jan Wouters, Bart de Meester and Cedric Ryngaert, ‘Democracy and international law’, LIRGIAD, Working Paper No. 5, June 2004, pp. 17-33.

¹² See for example Articles 9 of the OAS Charter; 6, 7 and 49 of the European Union Treaty; 4 (p) and 30 of the Constitutive Act of the AU; and 4 (j) of the ECOWAS Treaty.

¹³ Articles 13 of the African Charter on Human and Peoples’ Rights, 23 of the American Convention on Human Rights, and 25 of the International Covenant on Civil and Political Rights.

¹⁴ Articles 9 of the African Charter on Human and Peoples’ Rights, 9 and 10 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, and 13 of the American Convention on Human Rights.

recognition of democracy as a right, and as a fundamental right, in Article 4 of the African Charter on Democracy, is therefore even more innovative than the mere inclusion of democracy in a binding international legal instrument. According to the terms of Article 4 of the Charter:

1. State Parties recognize democracy as a basic right and are committed to promoting democracy, human rights and the rule of law.
2. State Parties recognize popular participation as a fundamental right of peoples.

C. Addressing the current challenges linked to governance in Africa

The African Charter on Democracy is a ‘contextualised’ instrument. It is relevant to the political situation prevailing in Africa at the time of its writing and takes account of the major challenges linked to governance in Africa, which it intends to help overcome. For that reason, the African Charter on Democracy necessarily takes a holistic approach to democracy. It addresses such issues as unconstitutional changes of government,¹⁵ corruption,¹⁶ gender balance,¹⁷ minorities and vulnerable groups,¹⁸ civilian control of the armed forces,¹⁹ etc.

It is true that these issues, and others, can undermine peoples’ efforts in the process of democratisation if they are poorly managed. For instance, since the constitution is the instrument whereby the sovereign people delegate power to their elected officials, prescribe how this delegation is to be executed and indicate how the power thus delegated is to be exercised, coming to power or exercising power in violation of the constitution can only be contrary to the will of the people and thus, antidemocratic. Corruption gangrenes democratic values by affecting the integrity of the expression of popular will, by placing the special interests of individuals, elected officials or lobbies ahead of those of the nation and by neutralising the sacrosanct principles of separation of powers and independent justice.²⁰ There can be no democracy when a portion of the people (i.e. women and minorities) is excluded from decision-making.²¹ Finally, the role of the armed forces is to ensure security and defend independence and territorial integrity and, to achieve this, they must remain politically neutral²² – it is therefore not up to them to impose political choices on the sovereign people.

II. The limitations of the Charter

After the first flush of euphoria has passed, it must be recognised that, beyond its innovativeness and relevance, we should not hold too many illusions regarding the scope of the African Charter on Democracy, as the text is limited both in its substance and in the mechanisms for its application.

¹⁵ Chapter VIII (Articles 25-28) of the Charter.

¹⁶ Article 2 (9) of the Charter.

¹⁷ Articles 3 (6) and 31 of the Charter.

¹⁸ Article 33 of the Charter.

¹⁹ Article 16 (1) of the Charter.

²⁰ See the opening address by Guy De Vel, presented at the Octopus Interface conference on ‘Corruption and democracy’, available on: http://www.coe.int/t/e/legal_affairs/legal_co-operation/combating_economic_crime/3_technical_cooperation/octopus/2006/143_2006_-if-repguyDeVel.pdf.

²¹ See Bookie Monica Kethusegile-Juru, ‘Intra-party Democracy and the Inclusion of Women’, available on www.eisa.org.za/PDF/Conference_DRC_Juru_eng.pdf.

²² S.P. Huntington, (1957) *The Soldier and the State. The Theory and Politics of Civil-Military Relations*. Cambridge, Mass.: The Belknap Press.

A. Substance

While we were pleased to note above (Section I (A)) that the African Charter on Democracy is infused with the political realities of contemporary Africa, we are however obliged to point out that numerous subjects, including many of considerable import, have been either eluded or dealt with superficially or in a way that reveals the will of certain African leaders to use the Charter as a means of strengthening the government in power rather than serving as an instrument for the consolidation of democracy in Africa, with the potential of achieving democratic change of government.

The Charter deals in detail with the issue of unconstitutional change of government. It condemns the taking of power by unconstitutional means and provides for protection in the form of sanctions for those taking or attempting to take power by such means²³ as well as for the governments formed through such changes.²⁴ It is true that unconstitutional change of government was long (and still is to a certain extent) one of the major characteristics of political life in certain African countries. It is also true that it is contrary to the principles of democracy to change an elected government by any means other than an electoral consultation of the sovereign people. However, respecting the constitutional order can only serve democracy if two other conditions are fulfilled: the constitution must be democratic and it must not be manipulated by the government in office as a means of remaining in power.

Regarding the first of these conditions, the failing of the Charter is that it places its trust too immediately and too fully in the constitution without first defining what it should signify or what should be its basic characteristics, so that the constitution could be anything at all as long as it is so named.

Concerning the manipulation of the constitution by the government in power, in most African countries, it is enough for the government to have a qualified majority in parliament to remain in power indefinitely by amending the constitution so as to deactivate the mechanism limiting the number of terms in office.

Furthermore, regarding the number of terms in office, in light of the practice in Africa whereby numerous heads of state have amended the constitution to remain in power, we could legitimately expect the African Charter on Democracy to opt clearly for a limitation of the number of successive presidential terms that may be held. As surprising as it may seem, the expression ‘term in office’ is completely absent from the text. Yet, it is no secret that amendment or attempted amendment of the basic Act for the purpose of remaining in power – as has been the case in Gabon, Nigeria, Chad, Togo, Tunisia, Guinea and Mauritania – has often been a source of serious political crises, and even military tensions.

B. Application mechanisms

The African Charter on Democracy provides for two kinds of application mechanisms for the principles it proclaims: a flexible mechanism for the text as a whole, and another, more coercive mechanism in the form of sanctions in case of an unconstitutional change of government.

For the text as a whole, application is organised at the national, regional and continental levels, with at each level an actor invested with specific responsibilities who serves as a focal

²³ Article 16 (2) and (3).

²⁴ Chapter VIII (comprising Articles 25 - 28) of the Charter is entitled ‘Measures to be Taken in Cases of Unconstitutional Changes of Governments’.

point: the state at the national level, the regional economic communities (RECs) at the regional level, and the AU Commission at the continental level.

The states have a duty to enforce the objectives contained in the Charter by bringing their legislation and regulations into conformity with the Charter, ensuring wide dissemination of the Charter and incorporating the objectives and principles contained in the Charter into their policies and strategies.²⁵ The RECs should encourage the states to become parties to the Charter and ‘designate regional focal points for coordination, implementation and monitoring of the commitments and principles’ of the Charter.²⁶

The AU Commission is the cornerstone of the system for upholding the Charter, since it is to ‘put in place (...) benchmarks for implantation of the commitments and principles of this Charter and (...) monitoring of compliance by State Parties’.²⁷ The Commission is also empowered to receive the biannual reports submitted by the state parties on the ‘legislative or other relevant measures taken with a view to giving effect to the principles and commitments (...) enshrined [in the Charter]’.²⁸ In light of their importance, the tasks vested in the AU Commission with a view to implementing the African Charter on Democracy would undoubtedly be better fulfilled by a group of independent experts. An expert group would have the advantage of working on a continuous basis, independently and more effectively than a political organ such as the AU Commission, particularly as the tasks are quite technical.

The AU Commission is a more or less administrative body in charge of executing the decisions taken by other organs such as the Assembly of Heads of State and the Executive Council, and which does not have the power to take decisions that are binding on the states.²⁹ The ideal, with a view to implementing and upholding the African Charter on Democracy, would therefore be to establish a specialised, independent organ along the lines of the African Commission on Human and Peoples’ Rights or the African Committee of Experts on the Rights and Welfare of the Child.³⁰

Finally, unconstitutional change of government is the focus of particular attention in the Charter, which, as we have noted above, foresees sanctions for both the individuals responsible for such changes and for the governments to which they give rise.³¹ Of all the criteria for democracy, the African States seem to consider coming to power by constitutional means to be the most important. Unless, of course, their true aim is to protect the governments in power, whose democratic nature is often debatable, particularly since the Charter does not impose a limitation on terms in office or condemn amendments of the constitution aimed at remaining in power.

²⁵ Article 46 (1) of the Charter.

²⁶ Article 46 (2) of the Charter.

²⁷ Article 46 (3) (a).

²⁸ Article 51 (1).

²⁹ Article 20 (1) of the Constitutive Act.

³⁰ Respectively created by Article 30 of the African Charter on Human and Peoples’ Rights, and Article 32 of the African Charter on the Rights and Welfare of the Child.

³¹ See Section II (A) above.



Conclusion

Despite its innovative nature, the African Charter on Democracy, Elections and Governance contains numerous shortcomings and in certain ways appears more as a means for the governments in office to stay in power than as a tool for establishing the fundamental principles of democracy and paving the way for democratic and peaceful change of government in Africa. However, as the old adage says, 'a bird in the hand is worth two in the bush'. An African Charter on Democracy, even imperfect, which will doubtless be improved through practice, is undoubtedly better than no Charter at all. Thus, the African Charter on Democracy should be appreciated for what it truly is, i.e. as a step forward and not as a finality.