



A CRITICAL LOOK AT THE CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE IN AFRICA

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Introduction

This paper provides a critical analysis of the recently adopted African Union (AU) Charter on Democracy, Elections and Governance in Africa (the Charter). It identifies issues that pose a threat to stability and democracy in Africa. It provides an analysis into the root causes of unconstitutional changes of government including human rights violations and suggests appropriate measures that can be taken to prevent as far as possible unconstitutional changes of government from reoccurring. It concludes that there are various provisions and references to African realities that could make the Charter a stronger defender of human rights and one that protects peoples rather than regimes. These would include provisions relating to the abuse of emergency powers and recommendations on measures that member states can adopt to act as deterrent to potential or existing abusers of human and peoples rights. However to the extent that the Charter is a consolidation of efforts by African leaders to entrench a much-needed culture of democracy and a vibrant civil society and public participation in Africa, it should be applauded for making such a commitment.

Unconstitutional changes of government

Unconstitutional changes of government are, with good reason, described in the Charter's Preamble as one of the essential causes of insecurity, instability and violent conflicts in Africa.¹ They have also been raised as a matter of concern in other African treaties, such as the Protocol on Democracy and Good Governance of the Economic Community of West African States (ECOWAS),² as well as the AU Constitutive Act itself.³ In two cases brought by the former president of the Gambia, Dawda K. Jawara, the African Commission on Human and Peoples Rights stated that unconstitutional changes of government violate the individual rights of people to free expression, assembly and participation in their government, as well as the collective right of peoples to self determination.⁴

There can be no uncertainty as to the serious threat that unconstitutional changes of government pose to democracy in Africa: between the time of the Egyptian revolution in 1952 until 1998, the continent witnessed 85 violent or unconstitutional changes in government,⁵ 78 of which took place between 1961 and 1997.⁶ However, this paper sets out to demonstrate through examples of African realities and common experiences, that a mere reference to unconstitutional changes of government as being a source of instability without

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¹ Preamble to the Charter on Democracy, Elections and Governance: 'Member States are concerned about the unconstitutional changes of government that have generated profound insecurity, instability and violent conflicts'.

² Article 1 (c) ECOWAS Protocol on Democracy and Good Governance, signed December 2001.

³ Article 4 (p) African Union Constitutive Act.

⁴ Communications 147/95 and 149 /95, *Sir Dawda K. Jawara v The Gambia*, 13th Annual Activity Report of the African Commission on Human and Peoples Rights AHG/222 (xxxvi), finding violations of the African Charter on Human and Peoples' Rights (ACHPR) Articles 10, 11,13 and Articles 20 (1) h.

⁵ See Morne van der Linde, 'Emerging electoral trends in light of recent African elections', *African Human Rights Law Journal (AHRLJ)*, Vol.1, No.1, 2001.

⁶ D. Adeyanju, 'Africa records 78 coups in 30 years', *The Guardian*, Lagos, 9 February 1997.

addressing the root causes will negate the purpose and main principles of the Charter — which is to promote democracy and respect for human rights on the continent.

These root causes of instability include human rights violations, bad governance, abuse of presidential powers, and corrupt and undemocratic governments, which provide reasons for people to resort to violent measures in order to bring about change.

The Charter essentially fails to make that vital connection between human rights violations and conflict as a main ingredient for instability in Africa and a root cause of unconstitutional changes of government.⁷ If this link was expressly acknowledged in the Charter it would affirm that this is a Charter designed to protect people rather than regimes. The Charter's failure to acknowledge this link is one of its major weaknesses.

'Democratically elected' governments

Article 23 (1-3) of the Charter deals specifically with what constitutes an unconstitutional change of government. The common theme in all three clauses is to prevent the illegal removal of democratically elected governments, such as by the activities of mercenaries or armed dissidents. As important as this is, it must be noted that the question of governments that are democratically elected is in itself a controversial one, particularly where the legitimacy of the elections is in dispute.

This is an issue that the Charter tries to address in Article 17 (4), by stipulating that disputes over election results can only be contested through legal means. However, this does not in itself deal with the question of why elections in Africa are often marred in the first place by claims of fraud and violence⁸ and unequal and unfair access to media coverage⁹ that bring the legitimacy of election results into total disrepute.

Clearly, something more is needed. Measures to entrench a culture of democracy and peace that would create an unlikely environment for allegations of rigged elections would include, for example, ensuring respect for the right to participate in one's own government,¹⁰ establishing and strengthening national human rights institutions as part of a process of delivering justice and ensuring accountability, and creating constitutions and bills of rights which fully respect international law and are free of oppressive provisions, whether originating from the colonial era or not.

Article 10 of the Charter refers to entrenching the principle of the supremacy of the constitution — but this would be a senseless effort where the constitution itself is flawed in terms of respect for fundamental freedoms. A particularly recurring example is the requirement for licensing of political speech and assembly, which has been the subject of repeated litigation around Africa. Variants of this legislation have been challenged in different places including Zimbabwe, Zambia, Tanzania Mainland, Kenya and Ghana.¹¹ In

⁷ See Rachel Murray 'Prevention of Conflict in Africa', *Journal of African Law (JAL)* Vol. 45 No.1, 2001, for a more detailed exposé of the link between human rights violations and conflict.

⁸ See, for example, reports of various election observation missions to the Nigerian elections of April 2007, as well as other reports by the National Democratic Institute, Carter Center and other non-governmental election observation specialists, and human rights reports by Amnesty International and others.

⁹ The report of the AU observer mission to 2004 elections in Malawi, for example, noted that the public media were biased towards the ruling party: see http://www.africa-union.org/Official_documents/reports/offreports.htm.

¹⁰ See Universal Declaration of Human Rights Articles 24 and 21, and ACHPR Articles 24 and 14.

¹¹ Chidi Anselm Odinkalu, 'Back to the Future: The imperative of prioritizing for the protection of human rights in Africa', *JAL*, Vol.47, No.1, 2003, p. 16.

short, where people's basic fundamental civil and political rights are respected the possibility of peaceful and transparent elections is greatly increased.

Amendments to extend power

Article 23 (5) of the Charter prohibits 'amendment or revision of constitutions and legal instruments, which is an infringement of the principles of democratic change of government'. This is a very broad clause and can become subject to abuse in that manipulative, corrupt governments can easily circumvent it. To guard against this, the Charter should have in unequivocal and unambiguous terms specifically referred to the types of constitutional amendments that would be regarded as violations of democratic principles, such as amendments to extend the presidential term of office. Amendments to extend power, especially to extend constitutional terms, pose a serious threat to Africa's democratic transition. In view of the chronic inability of African leaders to leave office when their time is due, the Charter should have made specific reference to this issue; its failure to do so is another point of weakness.

Former President Nujoma of Namibia and President Obasanjo of Nigeria proposed amendments to extend their tenure in office to a third term. President Biya of Cameroon has been in power since 1982. He amended the constitution to extend his term of office to seven years, and wanted to extend it beyond that period.¹² President Mugabe of Zimbabwe announced his intention to postpone the 2008 elections to 2010, and many saw this as an attempt to cling to power until his deathbed. In early 2001, former President Chiluba was eager to amend the Zambian Constitution to seek another term in office but after pressure from not only the opposition and international donors but also from members of his own cabinet he had to walk away from an unconstitutional third term.¹³ In March 2003, President Museveni of Uganda proposed extending his presidential term to run for a third 5th year term in office, and this was rejected.¹⁴ The same year, President Muluzi of Malawi suffered a humiliation by the National Assembly when proposals to amend the constitution to allow him to run for another term were rejected.¹⁵

Some may venture to point out that there ought to be no objection to a president's proposal to extend his term of office as long as it is approached in a constitutional manner. This view undermines the fact that term limits are essential because they help to ensure democracy and facilitate peaceful, political transition and foster new ideas and reforms that come with a new administration. Yet state parties to the Charter are not being asked to guard against this particular type of unconstitutional amendment; rather, Article 14 urges them to take 'legislative and regulatory measures' and to 'co-operate' with each other to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law.

Amendments to exclude individuals from power

The Charter should include a clause on non-recognition of legislative or constitutional instruments that unfairly prejudice the rights of individuals to participate in political affairs. This would be in line with the principles of Article 3 (11), which refers to the need to

¹² *New African*, July 2005, No.442, p.33.

¹³ *Attacks on Justice 2002 – Zambia*, International Commission of Jurists, available at: http://www.icj.org/news.php3?id_article=2694&lang=en.

¹⁴ *Attacks on the Press in 2003*, Committee to Protect Journalists, chapter on Uganda available at: <http://www.cpj.org/attacks03/africa03/uganda.html>.

¹⁵ *Ibid.*, chapter on Malawi, at <http://www.cpj.org/attacks03/africa03/malawi.html>.

strengthen political pluralism and recognises the role, rights and responsibilities of legally constituted political parties, including opposition political parties. However, the term ‘legally constituted’ begs the question as to whether one can have illegal political parties and if so under what circumstances and in accordance with whose rules? The state’s ability to decide which political opponent or political party is ‘illegal’ poses a threat to democracy, particularly where such powers are supported by legislation.

Many African countries have historically been one-party states: in Côte d’Ivoire, for example, the PDCI-RDA was the only ‘legal’ political party from 1960 to 1993.¹⁶ Even though a strict one-party rule is rare in Africa today, Uganda’s ‘no-party’ system in place to 2005 appeared in practice to mean that the ruling ‘movement’ was the single legal party.¹⁷ In the (misnamed) Democratic Republic of Congo, a ban on political activity was lifted in 1999, but President Laurent Kabila introduced a new law on political parties allowing for their registration provided they met a number of onerous and costly requirements.¹⁸

Similarly, laws have been used to exclude individuals. In Botswana, John Modise was declared an undesirable immigrant after forming a political opposition movement in 1978.¹⁹ In Zambia, legislation clearly aimed at former President Kenneth Kaunda attempted to exclude persons other than those whose parents were both Zambian by birth from running for the presidency.²⁰ Similar exclusionary tactics were also used in the Côte d’Ivoire 2000 elections, where legislation was introduced providing that presidential candidates had to be Ivorian by birth, of direct Ivorian descent, and have lived continuously in Côte d’Ivoire for ten years.²¹ In Equatorial Guinea, after making way for political pluralism, Obiang Nguema introduced a new constitution in which Equato-Guinean citizens who held foreign passports and who had not been continuously resident in the country for ten years were barred from standing as election candidates.²²

Abuse of emergency powers

The Charter makes no reference to the use and abuse of emergency powers, which has been described as ‘a phenomenon common to both democratic and undemocratic governments, the only difference between the two being the presence or absence of checks and balances to prevent the abuse and arbitrary use of the most fundamental human rights under the pretext of overcoming emergencies and restoring order’. Furthermore, ‘the consequences of a declaration of a state of emergency are usually very serious. Not only is there a threat to basic fundamental human rights, such as freedom of expression, restrictions on movements and

¹⁶ ‘Côte d’Ivoire’, in *Africa South of the Sahara* (32nd Edition), Europa Publications Ltd, 2003, p.307.

¹⁷ See *Hostile to Democracy The Movement System and Political Repression in Uganda*, Human Rights Watch, 1999, and subsequent reports by HRW and Amnesty International.

¹⁸ ‘Democratic Republic of Congo’, in *Africa South of the Sahara*, op. cit., p.253. Virtually all opposition politicians rejected this as unacceptable.

¹⁹ See Communication 97/93, *John Modise v Botswana*, *International Human Rights Reports (IHRR)*, Vol.9 (2002) and Odinkalu, ‘Back to the Future’, *JAL*, 2003. The Botswana government then offered Mr Modise its nationality by registration. He was registered in 1995 under a registration certificate issued by the president. The commission declared the communication settled amicably but later reconsidered after the request from the author as it transpired that citizens are not eligible for election to Botswana presidency.

²⁰ Odinkalu, ‘Back to the Future’, *JAL*, 2003. It was alleged that this legislation was made to specifically exclude the former President Kenneth Kaunda from contesting in the 1996 elections. Both the complainant and respondent state conceded that this measure seeks to exclude a section of the citizenry from participating in the democratic process is discriminatory and falls foul of the Charter.

²¹ ‘Côte d’Ivoire’, *Africa South of the Sahara*, op. cit., p. 310.

²² ‘Equatorial Guinea’ in *ibid.*, p.350. This requirement effectively excluded all exiled political opponents from participating in national politics.

interference with the right of a fair trial but its effect on ordinary everyday life, whether economic social or political is considerable'.²³ In such circumstances the fundamental freedoms and human rights referred to in Article 6 of the Charter become non-existent.

In Cameroon, for example, frequent invocation of emergency powers were used by presidents to rule without reference to the normal constitutional processes. These powers were widely used to silence critics of the government and eventually led to the elimination of all political opposition in the country by 1966.²⁴ Similarly during Egypt's longstanding 'state of emergency', amendments to the Criminal Procedure Code introduced in July 1992, granted the police additional powers of arrest and increased the length of time a detainee could be held by the police before referral to the prosecution service. Following the outbreak of political violence, the People's Assembly (the national legislature) passed several amendments to the Penal Code, which broadened the definition of terrorism to include 'spreading panic' or 'obstructing the work of the authorities'. The amendments allow the police to hold suspects for 24 hours before obtaining arrest warrants and prescribed the death penalty or life imprisonment for membership in a terrorist group. Under authority of the emergency law, the minister may detain a person without indictment for 90 days. These provisions are extensively used against political opponents of the government.²⁵

The role of armed and security forces in promoting democracy

Article 14 of the Charter calls for the civilian control of armed and security forces, which is similar to Article 20 of the ECOWAS Protocol on Democracy and Good Governance. However unlike the AU Charter, Article 22 of the ECOWAS Protocol prohibits the use of arms to disperse non-violent demonstrations and forbids degrading treatment.²⁶ In addition, it provides for the armed forces to receive training in the constitution of their country and democratic principles. It would have strengthened the AU Charter's call for democracy and peace had it included this clause, particularly in view of reports in most African countries of gross violations committed by police and armed forces.

The role of election observers in promoting democracy

Similarly to the ECOWAS Protocol, the Charter provides for an exploratory mission to be sent before elections in member states; however, no time frame is provided. According to the SADC Principles and Guidelines Governing Democratic Elections, election observer missions should be deployed at least two weeks before the voting day. It is my contention that this period is insufficient to assess with any accuracy and to fulfil the mandate of the mission, which in terms of Article 20 of the Charter is to establish whether the environment is conducive to the holding of free and fair elections. An example (although certainly not an isolated one) is the Zimbabwean 2000 elections where it was widely reported that the period preceding the elections was marked by a four-month campaign of violence, allegedly unleashed by the governing party and aimed at members of the opposition party.²⁷

²³ Charles Manga Fombad, 'Cameroon's Emergency Powers: A recipe for (un)constitutional dictatorship', *JAL*, Vol 48, No.1, 2004, p.62-81, at p.62 & 69.

²⁴ *Ibid.*

²⁵ At the end of 1993 3,000 persons were detained for political reasons and at least 14,000 held without charges, others had been held as long as 3-4 years. Peter Baehr et al, (eds), *Human Rights in Development, Volume 3, Yearbook 1996*, p.142.

²⁶ See *New African* July 2005, No.442, p.33, reporting on student protests which were brutally clamped down by security forces with live ammunition, followed by mass arrests and detentions. Please note also brutal police beatings of political opposition recently in Zimbabwe

²⁷ See generally, van der Linde, 'Emerging electoral trends in light of recent African elections', *AHRLJ*, 2001.

For these reasons, the work of electoral observers should not be restricted to events that occur immediately before, during and after elections. A time frame in which observer missions begin to assess and report on political situations must be set, for example six months before the start of elections.

In addition, the Charter provides no mention of the way forward should an election observation mission find that the environment is repressive and not conducive to the holding of free and fair elections. This is a serious omission. The Charter provides an obligation on African governments to ensure free and fair elections, and intrinsic to that requirement is that the environment in which the elections took place must have been conducive to a fair vote. If not, the political legitimacy of the elections must be questioned.

Effective sanctions

Article 25 (1) of the Charter gives the Peace and Security Council (PSC) powers to suspend member states of the AU that are directly or indirectly involved in unconstitutional changes of government. The suspended member state is, however, expected to continue to fulfil its obligations to the Union in respect of human rights. Suspension on the same grounds is also provided for in Article 30 of the AU Constitutive Act, where other sanctions including punitive economic sanctions are also elaborated. How successful the PSC will be in enforcing compliance is certainly a question for debate.

Article 25 (5) provides for perpetrators of unconstitutional government to be prosecuted before ‘the competent court of the Union’. Yet at present there is no provision for a criminal forum within the AU. The recently established African Court on Human and Peoples’ Rights, which will have the ‘potential to place the issue of human rights more firmly on the African agenda and to add teeth to the idea that human rights should be protected on the continent’ is an important new institution, but does not have this jurisdiction.²⁸

Perhaps the solution could be found in Article 25 (9), which also provides for perpetrators of unconstitutional changes of government to be brought to justice at national level, or extradited to another jurisdiction. However, most national criminal codes would not include provisions likely to enable a prosecution of this kind relating to another country; while prosecutions at national level for unconstitutional change of government (treason) would by definition only be possible after the unconstitutional seizure of power had been overturned.

The question of enforceability and compliance of the Charter’s principles therefore remains a challenge, and mechanisms need to be provided to deal with this gap effectively. The African Peer Review Mechanism (APRM) could play a role, but is unlikely to be effective in this regard, as it is acceded to on a voluntary basis and is not concerned with sanctions but with learning from best practices with the occasional reprimanding speech. The role of the African Commission on Human and Peoples’ Rights in relation to the Charter is also not clear, since it is a free-standing treaty and not a protocol to the African Charter on Human and Peoples’ Rights.

It is disappointing to note that, despite the provision for prosecution in the case of unconstitutional changes of government, there is no reference to prosecution of perpetrators

²⁸ See Christof Heyns, ‘South Africa and a Human Rights Court’, *Occasional Paper No. 6*, Centre for Human Rights, University of Pretoria, August 1994, p.3; Robert W. Eno, ‘The jurisdiction of the African court of human and peoples rights’, *African Human Rights Journal*, Vol.2, No.2, 2002, and Kevin Hopkins, ‘The effect of an African court on the domestic legal orders of African States’, *African Human Rights Law Journal* Vol.2, No.2, 2002.



of human rights violations, particularly in respect of heads of state and government officials. When one considers the history of African leaders in providing sanctuary to fellow leaders wanted for war crimes and other similar charges — such as Nigeria’s protection of former Liberian President Charles Taylor (even though he was eventually handed over) and Robert Mugabe’s sanctuary of ex-President Mengisutu of Ethiopia — one sees why the omission is a cause for concern.

As mentioned earlier, human rights violations are a cause of instability and insecurity in Africa and hence Article 25 of the Charter should be amended to include holding violators accountable for criminal conduct. As a result of its failure to do, so there is a definite feel of Article 23 and 25 being more directed towards the protection of regimes and not the people.

Conclusion

The Charter is a culmination of a series of initiatives to create stability and prosperity in Africa. The success of the Charter will be determined by the political will of Member States to participate in a more effective African human rights system. To the extent that the Charter has condemned unconstitutional changes of government in terms of Article 23 and promoted the ideals of democracy with an inclusive approach to political dialogue, one can suggest with caution that it does reflect a better understanding of African realities and the need for political transformation. However, there is a lack of collective accountability and responsibility made conspicuous with the omission of provisions to deal with the issues mentioned in this paper. On a close examination of this Charter, it is obvious that the Charter is an initiative by African leaders to provide African solutions to African challenges whilst ensuring that they do not unwittingly and simultaneously portray themselves as part of the African problem.