

**The African Charter on Democracy, Elections and Governance:  
A Normative Framework for Analysing Electoral Democracy in  
Africa**

**Submitted in partial fulfilment of the requirements of the degree LLM  
(Human Rights and Democratisation in Africa) Faculty of Law, Centre  
for Human Rights, University of Pretoria**

**By**

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## Declaration

I, Tikikel ALEMU, declare that the work presented in this dissertation is original. It has never been presented to any other university or institution. Where other people's works have been used, references have been provided, and in some cases, quotations made. In this regard, I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LLM Degree in Human Rights and Democratisation in Africa.

Signed.....

Date.....

Supervisor: Professor Nico Steytler

Signature.....

Date.....

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## ACRONYMS

ACHPR	African Charter on Human and Peoples' Rights
APRM	African Peer Review Mechanism
AU	African Union
AUC	African Union Commission
CIP	Complaints Investigation Panels
CSO	Civil Society Organization
CUD	Coalition for Unity and Democracy
ECOWAS	Economic Community of Western African States
EPRDF	Ethiopian People Revolutionary Democratic Force
EU	European Union
FDC	Forum for Democratic Change
FDRE	Federal Democratic Republic of Ethiopia
ICCPR	International Covenant on Civil and Political Rights
IDASA	Institute for Democracy in South Africa
INEC	Independent Electoral Commission
LGA	Local Government Areas
NEBE	National Electoral Board of Ethiopia
NEPAD	New Partnership for Africa's Development
NGO	Non Governmental Organization
NRM	National Resistance Movement
OAU	Organization of African Union
PDP	Peoples' Democratic Party
REC	Regional Economic Community
UPDF	United Peoples Democratic Force

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## Chapter One

### Introduction

#### 1.1. Introduction

Democratisation is an ongoing process, with elections being vital and regular events.<sup>1</sup> In Africa, elections, as tools of democratisation have become common phenomenon with the wave of democratisation that hit the continent in the early 1990s.<sup>2</sup> In particular, the move from single party and authoritarian system to a competitive multi-party system realized through elections has become the order of the day.<sup>3</sup> However, the elections served to legitimise incumbent regimes, heralding the relapse of authoritarianism;<sup>4</sup> characterised by patrimonialistic and clientelistic regimes which are void of accountability, thus eroding the qualities of democracy.<sup>5</sup>

Freedom and fairness in elections are essential elements of constitutional democracy and must be administered according to each country's constitution and well defined electoral laws.<sup>6</sup> However, literature reveals that most elections have been replete with controversy, intimidations, and violence thus putting in question multiparty democracies in contemporary Africa.<sup>7</sup> Generally, the frequent collapse of democracy in Africa has created a continent that is less stable, economically crippled, and incapable of resolving conflicts in a peaceful manner.<sup>8</sup>

The right to participation under international law asserts that citizens are the ultimate repository of the sovereignty.<sup>9</sup> Thus, the true depiction of the will of the people can be reflected if only the requirements of free and fair elections are fulfilled.<sup>10</sup> Presently, given the fact that the number of electoral democracies are increasing, ensuring free and fair elections is the issue at stake.

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<sup>1</sup> R Austin 'Democracy and Democratisation' in W Maley, C Sampford and R Thakur (eds) *From civil Strife to Civil Society: Civil and Military Responsibilities in Disrupted States* (2003) 180 189.

<sup>2</sup> S Adjeumobi 'Elections in Africa: A Fading Shadow or Democracy' (2000) 21:1 *International Political Science Review* 59 64.

<sup>3</sup> N Van De Walle 'Presidentialism and Clientelism in Africa's Emerging Party systems' (2003) 41:2 *Journal of Modern African Studies* 297 298. See also Staffan I Lindberg 'The Power of Elections Revisited conference paper in the theme Elections and Political identities in New Democracies' Yale University (2007) 2 <<http://www.yale.edu/macmillan/new-democracies/lindberg.pdf>> (accessed 16 August 2007).

<sup>4</sup> D Nohlen M Krennerich and B Thibaut *Elections in Africa: A Data Handbook* (1999) 12. See also Adjeumobi (n 2 above) 66.

<sup>5</sup> S I Lindberg 'The Democratic Qualities of Competitive Elections: Participation, Competition and Legitimacy in Africa' (2004) 41:1 *Commonwealth Journal* 61 65. See also Van de Walle (n 3 above) 299.

<sup>6</sup> M Ndulo 'The Democratic State in Africa: The Challenges For Institution Building' (1998) 16:1 *National Black Law Journal* 70 79.

<sup>7</sup> G Geisler 'Fair? What Has Fairness Got to Do With It? Vagaries of Election Observations and Democratic Standards' (1993) 31:4 *Journal of Modern African Studies* 613 613.

<sup>8</sup> O Oko 'Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa' (2000) 33 *Vanderbilt Journal of Transnational Law* 573 578.

<sup>9</sup> G Fox 'The Right to Participation in International Law' in G Fox and B R Roth (eds) *Democratic Governance and International Law* (2000) 50.

<sup>10</sup> N Steytler, J Murphy, P de Vos and M Rewlamira *Free and Fair Elections* (1994) XXI.

## 1.2. Free and Fair Elections as the Foundations of the Democratic Process

Sandbrook defines liberal democracy as:

a political system characterised by regular and free elections in which politicians organised into parties compete to form the government, by right of virtually all adult citizens to vote and by guarantee of a range of familiar political and civil rights.<sup>11</sup>

This and other discourses on democracy position elections as a core element of liberal democracy.<sup>12</sup> Dahl's theory of polyarchy emphasises three aspects of democracy: organized contestation through regular, free, and fair elections; universal suffrage, and civil liberties.<sup>13</sup> Hence, the issue of elections comes out as only one, but very visible aspect of democracy in conferring legitimacy to political regimes.

Scholars, like Dahl, agree that elections by themselves are not an end in the democratisation process but certainly an essential one.<sup>14</sup> Cowen and Laakso also assert that they provide a means of pre-empting the prospect of a violent change through a revolution or *coup d'etat*.<sup>15</sup>

Democratic transition is among others measured by two crucial indicators namely; "freeness" and "fairness". Though the phrase "free and fair" is foundational to democracy, no single and universal formula exists to define the terms and use them as evaluation standards.<sup>16</sup> Carothers maintained that the absence of a single standard as well as the complexity of electoral process render any attempt to come up with a simple formula unrealistic.<sup>17</sup>

It is argued that free and fair elections are the culmination of the democratisation process and not the beginning, and hence other prerequisites for democracy should be fulfilled including the entrenchment of fundamental rights and freedoms.<sup>18</sup>

### 1.2.1. Freeness

Freedom, according to Dahl, contrasts with coercion.<sup>19</sup> Steytler et al noted that, a free election refers to '...the ability of people to associate in political parties and to propagate policies of their

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<sup>11</sup> (n 2 above) 60.

<sup>12</sup> As above.

<sup>13</sup> H J Wiarda 'Democracy and Democratisation-Product of Western Tradition or Universal Phenomenon' in H J Wiarda *Comparative Democracy and Democratisation* (2002) 7.

<sup>14</sup> J Elklitt and P Svensson 'What Makes Elections Free and Fair' (1997) 8:3 *Journal of Democracy* 32 34.

<sup>15</sup> M Cowen and L Laakso 'An Overview of Election Studies in Africa' (1997) 35:4 *Journal of Modern African Studies* 717 718.

<sup>16</sup> Elklitt and Svensson (n 14 above) 37.

<sup>17</sup> T Carothers 'The Observers Observed' (1997) 8:3 *Journal of Democracy* 17 24.

<sup>18</sup> D Nupen Defining 'Free and Fair Elections - the Jury is Out' <<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo14/electiona.html>> (accessed 2 September 2007) 4.

<sup>19</sup> Nupen (as above, 2).



choice without the interference from the state or any other party or individual.<sup>20</sup> It also refers to the rights of the voters to express their choice of a party or a candidate freely.<sup>21</sup>

The assessment of the freeness of elections necessitates the fulfilment of the minimum requirements to include the realization of freedom of speech, freedom of assembly, freedom of association, freedom from fear in connection with elections, equal and universal suffrage at the pre-election stage.<sup>22</sup>

Notwithstanding the possibilities of limitations of the freedoms within the bounds of permissible infringement, polling day should be preceded by repeal of repressive legislation.<sup>23</sup> Here, the rights to hold marches, meetings, rallies are envisaged within the rubric of freedom of speech.<sup>24</sup> Polling day should be characterised by the opportunity to participate in the election and the absence of intimidation of voters.<sup>25</sup> At last, post-election periods should allow for possibilities of complaint mechanism as well as adequate means for resolution of election related conflicts.<sup>26</sup>

### 1.2.2. Fairness

Elkilit and Svensson argue that fairness of elections implies impartiality characterised by unbiased application of rules, and reasonableness in terms of access to resources amongst competitors.<sup>27</sup> In essence, it is an attempt to ensure the equality between parties in election processes. Fairness can be manifested at the different stages of election. According to Nupen, pre-election period should be characterised by:

a transparent electoral process, impartial voter education programmes, an election Act and a system for seat allocation which grants no special privileges to any party, group or person, an independent and impartial electoral commission, absence of impediments to inclusion in the electoral register, adequate provisions for checking the provisional electoral register, an orderly election campaign, equal access to public mass media and absence of the misuse of government facilities for campaign purposes.<sup>28</sup>

On the other hand, polling day should ensure the-

Secrecy of the ballot and avoidance of double voting, well designed ballot paper without serial numbers, the proper treatment of void ballot papers, access to the polling stations for accredited party representatives and election observers, and impartial assistance to incapacitated voters.<sup>29</sup>

Lastly, the assessment of elections as “fair” would see, among other things:

[t]he Proper counting, transportation of election materials, ensuring security of polling stations, impartial reports of election results by the media, impartial treatment of election complaints and acceptance of election results by all involved.<sup>30</sup>

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<sup>20</sup> Steytler et al. (n 10 above) XXI.

<sup>21</sup> As above.

<sup>22</sup> Nupen (n 18 above) 17.

<sup>23</sup> Steytler et al. (n 20 above).

<sup>24</sup> As above.

<sup>25</sup> Nupen (n 18 above).

<sup>26</sup> As above.

<sup>27</sup> Elkilit and Svensson (n 16 above) 37.

<sup>28</sup> Nupen (n 18 above) 5.

<sup>29</sup> Nupen (as above).

The state is in a better position to ensure fair elections to all competing parties.<sup>31</sup> While ideally there no such a thing as an entirely clean election, the essence of “freeness and fairness” allow for the identification of democratically acceptable and non-acceptable processes.<sup>32</sup> According to Lindberg, there is a slightly upward trend in the share of elections that have been free and fair on the continent.<sup>33</sup>

Recent trend in elections in Africa exhibit traits that severely undermine the freeness as well as fairness jeopardizing the civil and political rights of people as well as the democratization project. In so doing, this paper assesses five key problems on the basis of recent elections held in Ethiopia (2005), Uganda (2006) and Nigeria (2007).<sup>34</sup> However, it is not implied that previously held elections are free from any of the deficiencies identified in this research.

Erstwhile commitments such as the AU constitutive Act emphasise respect for democratic principles, human rights, the rule of law and good governance as the applicable principles of the African Union.<sup>35</sup> In the same stance, it affirms the need to condemn and reject unconstitutional change of governments laying down the foundation for democratic transition of regimes.<sup>36</sup>

Such efforts have crystallized into handful of commitments translating the mentioned principles. Among them is the recent adoption of the African Charter on Democracy, Elections and Governance in January 2007.<sup>37</sup> It is the assessment of the strengths and weaknesses of the provisions in dealing with the electoral problems that form the essence of the present research.

### 1.3. Research Question

The paper addresses the question whether the Charter would effectively address the identified electoral problems at a substantive as well as implementation levels.

### 1.4. Problem Statement and Aims of the study

Despite the array of issues that undermine elections in Africa, this paper addresses key electoral problems that are evident in recent elections on the continent. In so doing, it explores the

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<sup>30</sup> Nupen (as above).

<sup>31</sup> Steytler et al. (n 20 above).

<sup>32</sup> Van de Walle (n 3 above) 61.

<sup>33</sup> (n 3 above) 15. See also S I Lindberg *Democracy and Elections in Africa* (2006) 71.

<sup>34</sup> The analysis is based on international observers reports, mainly that of the European Union (EU) observation mission. Effort is made to keep consistent use of sources.

<sup>35</sup> Constitutive Act of the African Union OAU Doc. CAB/LEG/23.15, entered into force May 26, 2001 <<http://www1.umn.edu/humanrts/africa/auconst-act2001.html>> Article 3(m).

<sup>36</sup> Article 3(p).

<sup>37</sup> The Charter was adopted at the eighth Ordinary Session of the Assembly and comes to enforcement 30 days after the 15<sup>th</sup> ratification. So far, only ten countries signed namely Benin, Burkina Faso, Burundi, Rwanda, Nigeria, Congo, Djibouti, Mali, Namibia <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>> (accessed 20 August 2007).

effectiveness or otherwise of the new Charter as a tool in addressing the listed key problems bedevilling elections in Africa.

Accordingly, the aim of the study is two fold. This paper analyses the key electoral problems in Africa by analysing trends in recent elections that jeopardise democratic consolidation. Secondly, it evaluates the Charter in addressing the identified problems at normative as well as practical levels. It will be argued that the substantive provisions of the Charter are not able to fully address the issues as the commitment of states falls short of expectations in relation to the key electoral problems making the document deficient; hence making the Charter idealistic and incapable of solving the subtle and calculated manipulations occurring in the region. On the other hand, it would also establish the undeniable ideals that will be promoted by having such a value laden instrument.

It will also be argued that there is a lacuna in the implementation mechanism of the Charter. Given the absence of a complaint or robust reporting mechanisms, it leaves compliance to states' discretion. To this end, it will be argued that the full commitment and political will of the states in Africa remains to be, at best, a panacea to address the problems and ensure the implementation of the Charter.

### **1.5. Significance of the study**

This paper gives an insight into the novelties as well as the deficiencies of the provisions related to democratic elections and their implementation framework. It examines the potential effectiveness or otherwise of a binding treaty which is not yet enforced on the basis of past experience. In effect, it sheds light on the possible measures that could be taken to guarantee its realisation and to circumvent the shortcomings in ensuring its effective implementation.

In the course of the description of the arguments, the paper would also expose the possible challenges that may come across the implementation of the provisions of the Charter. This will help to identify the problems as well as the solutions to remedy them.

### **1.6. Methodology**

This research is desk based whereby a review of published as well as unpublished materials such as books, journal articles, research papers, reports, internet sources is made. Primary sources to include regional instruments would also be analysed.

### **1.7. Limitations**

Although much literature exists exposing the nature of electoral democracies in the continent, owing to the newness of the Charter, an in depth study exposing electoral problems on the continent in light of the charter is lacking. This would in turn impact on this research as the present

analysis is the projection of the fate of the Charter on the basis of past trends and may not give an accurate picture of the future scenario.

It would not exhaustively deal with the issues due to its limited scope. However, it is believed that it will contribute something to an extent it attempts to address the aforementioned problems.

## **1.8. Literature Review**

Most works in relation to the issue at hand focus on the discourse of the wider notion of democracy in general and specifically in Africa. Hence, it inevitably reduced the analysis of elections as a means to democratisation and the controversies surrounding them. Literature dealing with African elections addresses specific issues making broader analysis difficult.

The researcher is able to find literature that may closely be used for the present work such as the AfriMap sponsored article on the salient features of the Charter in comparison with the Protocol on Democracy and Good Governance (the ECOWAS Protocol).<sup>38</sup> Its scope is limited to the comparison of the normative framework of the two instruments by highlighting some of the gaps and the strengths of the new Charter in light of the ECOWAS Protocol. Other AfriMap sponsored articles have attempted to provide a highlight of the features of the Charter in relation to selected issues.<sup>39</sup> For the purposes of the intended work, these articles can be informative but by no means exhaustive of the issues. As the Charter is new, this paper will be able to present a new dimension of the issues in the objective context of the continent and the possible recommendations thereto.

## **1.9. Overview of Chapters**

The paper comprises five chapters. Chapter one outlines the rationale for the research and the manner in which the study is conducted. In so doing, it gives a brief background of the study by highlighting the reality at hand in relation to the election trends in Africa. It also presents the research questions and the hypothesis to be argued about.

Chapter Two discusses the salient problems of recent elections in Africa and provides a broad exposition of case examples cited from the elections in Ethiopia, Uganda and Nigeria.

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<sup>38</sup> S T Ebobrah 'The African Charter on Democracy, Elections and Governance: A New Dawn for the Enthronement of Legitimate Governance in Africa?' *Open Society Institute, African Governance Monitoring and Advocacy Project (AfriMAP)* <http://www.afriMAP.org/english/images/paper/ACDEG&ECOWASEbobrah.pdf> (2007) (accessed 15 May 2007).

<sup>39</sup> N F Ngarhodjim 'African Charter on Democracy, Elections and Governance: A Critical Analysis' (2007) <[http://www.afriMAP.org/english/images/paper/ACDEG Ngarhodjim\\_EN.pdf](http://www.afriMAP.org/english/images/paper/ACDEG%20Ngarhodjim_EN.pdf)> (accessed 2 August 2007) ; S Saungweme 'A Critical Look at the Charter on Democracy, Elections and Governance' (2007) <[http://www.afriMAP.org/english/images/paper/ACDEG Saungweme.pdf](http://www.afriMAP.org/english/images/paper/ACDEG%20Saungweme.pdf)> (accessed 2 August 2007) ; E R McMahon 'African Charter on Democracy, Elections and Governance : A Positive Step on a Long Path' (2007) <[http://www.afriMAP.org/english/images/paper/ ACDEG&IADCMcMahon.pdf](http://www.afriMAP.org/english/images/paper/ACDEG&IADCMcMahon.pdf)> (accessed 22 July 2007).

Chapter Three deals with evaluation of pre-existing commitments in dealing with the identified problems at regional as well as sub-regional levels.

Chapter Four exposes the legislative background and the justifications for the adoption of the Charter and assesses the substantive as well the enforcement provisions of the Charter in addressing the key electoral problems identified.

Finally, Chapter Five culminates in conclusions and the possible recommendations that will ensure the effective implementation of the Charter and the promotion of democratic elections on the continent.

## Chapter Two

### Salient Problems of Recent Elections in Africa

#### 2.1. Background of the Elections

The paper briefly analyzes three elections that took place on the continent with the view to answering the research question. Accordingly, the recent elections held in Ethiopia, Uganda and Nigeria give a good picture of the trends in the electoral politics of Africa. Moreover, these countries play an important role in African politics in different ways with the influential leaders in power. Most importantly, however, the electoral trend in these countries shows that repeated elections are being used to legitimise the continuation in power of incumbent regimes. The key problems exhibited in the elections need to be addressed if democratic transition is to succeed in Africa.

#### 2.2. The Ethiopian Elections

Beginning on 15 May 2005, Ethiopia conducted the third national parliamentary election. It was the first genuinely competitive multi-party elections and by comparison with previous elections, it was characterized by greater political inclusiveness.<sup>40</sup> In fact, the assertion such as the one made by Abbink that '...the elections were among the best organised in Africa' would not amount to an exaggeration.<sup>41</sup> From the high voter turn out, it was clear that many people wanted a change, sometimes even without knowing much about what the opposition parties would bring.<sup>42</sup>

The elections were generally held in a peaceful and orderly manner, with the exception of some isolated incidents.<sup>43</sup> However, the results that affirmed the incumbency of the ruling regime, the Ethiopian People's Revolutionary Democratic Front (EPRDF),<sup>44</sup> had its majority in parliament dropped opening a space for two main opposition coalitions and a range of independent candidates.<sup>45</sup>

However, observers' reports show that elections and post-election periods were characterised by a number of shortcomings such as vote riggings, human rights violations, unfair use of the media,

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<sup>40</sup> EU Election Observation Mission in Ethiopia, Preliminary Statement, 17 May 2005 <[http://ec.europa.eu/external\\_relations/human\\_rights/eu\\_election\\_ass\\_observ/ethiopia/pre\\_stat\\_17-05-05.pdf](http://ec.europa.eu/external_relations/human_rights/eu_election_ass_observ/ethiopia/pre_stat_17-05-05.pdf)> (accessed 20 August 2007) 1.

<sup>41</sup> J Abbink 'Interpreting Ethiopian Elections in Their Context- A Reply to Tobias Hagmann' (2006) 105:421 *African Affairs* 613 615.

<sup>42</sup> E Pettersen and E Salvesen 'Ethiopia: Parliamentary Election May 2005' The Norwegian Centre for Human Rights/NORDEM (2006) <<http://www.humanrights.uio.no/forskning/publ/nr/2006/0906.pdf>> (accessed 1 September 2007)16.

<sup>43</sup> As above,17.

<sup>44</sup> J W Harbeson 'Ethiopia's Extended Transition' (2005) 16:4 *Journal of Democracy* 111 144.

<sup>45</sup> As above.

partial electoral commission and weak complaints mechanism. As a result, they fell short of the standards of free and fair elections.

While the pre-elections period exhibited commendable atmosphere, credible allegations of voter intimidation and violence were confirmed.<sup>46</sup> Although minor procedural irregularities were observed in the capital city, Addis Ababa, allegations of multiple voting, underage voting, unsecured ballot boxes and barring of party agents at polling stations from watching ballot counts were evidenced in other parts of the country.<sup>47</sup> In addition, evidence of vote inflation, unauthorized and early announcement of results both by the ruling regime as well as the main oppositions,<sup>48</sup> delays in counting and incompetent electoral officials who could have contributed to the mishaps mentioned above were also observed.<sup>49</sup>

New restrictions were introduced into the overall legal framework through an amendment of the Penal Code on matters affecting the media and the directive issued by the National Electoral Board of Ethiopia ( NEBE) barring most NGOs from observing elections came out only few weeks prior to the elections.<sup>50</sup> Even if the Federal High Court reversed the decision of the Board, the limited amount of time left for preparation could not permit effective mission on the part of civil society.<sup>51</sup> Adjeumobi describes the above as a 'deleterious manipulation of elections in the form of subversion of electoral rules and regulations.'<sup>52</sup>

Though the NEBE's increased transparency and responsiveness is an improvement over previous elections,<sup>53</sup> its response during complaints processes revealed partiality and partisanship.<sup>54</sup> Institutions such as, police and the armed militia were openly partisan, for example by wearing EPRDF symbols and instructing citizens to attend an EPRDF rally.<sup>55</sup> In the former case, observers witnessed police distributing anti-CUD (opposition) banners and chasing children and youngsters supporting the opposition coalitions.<sup>56</sup> The pre-election period saw state institutions and state assets (i.e. cars, buildings) being used by the ruling EPRDF in the election campaigning.<sup>57</sup>

Although prior to the elections the media which state dominated had generally provided a balanced coverage allowing genuine democratic discussions between political parties,<sup>58</sup> the last week of campaigns witnessed a biased tone of coverage in favour of the ruling party especially by the state

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<sup>46</sup> Carter Centre 'Final Statement on the Carter Centre Observation of the Ethiopia 2005 National Elections,, September 2005' <<http://www.cartercenter.com/documents/2199.pdf>>(accessed 20 August 2007) 4.

<sup>47</sup> As above.

<sup>48</sup> EU Election Observation Mission 'Ethiopia Legislative Elections 2005 Report' <[http://ec.europa.eu/external\\_relations/human\\_rights/eu\\_election\\_ass\\_observ/ethiopia/pre\\_stat\\_17-05-05.pdf](http://ec.europa.eu/external_relations/human_rights/eu_election_ass_observ/ethiopia/pre_stat_17-05-05.pdf)> (accessed 20 August 2007) 21.

<sup>49</sup> As above, 19.

<sup>50</sup> (n 48 above) 2.

<sup>51</sup> As above.

<sup>52</sup> (n 2 above ) 67.

<sup>53</sup> (n 48 above) 10.

<sup>54</sup> As above 14. See also Carter Centre (n 46 above) 10.

<sup>55</sup> EU report (n 48 above) 16.

<sup>56</sup> As above.

<sup>57</sup> EU preliminary statement (n 40 above) 5. See also the final report (n 53 above) 16.

<sup>58</sup> EU report (n 48 above) 17.

owned media.<sup>59</sup> After the elections, there was a drastic reversal of state media policy whereby opposition parties no longer had access to state-owned media.<sup>60</sup> EPRDF victory statement, selective publication of observers' statements through the only media characterised the situation.<sup>61</sup>

The pre-elections period was marked by instances of violence and intimidation of opposition members during the campaign creating a climate in which candidates felt constrained to campaign and voters to choose without fear of repercussions contrary to the Constitutional guarantees of freedom of expressions and assembly.<sup>62</sup>

The period following the elections was marked by highly charged political tensions, several days of protests and electoral violence, delays in vote tabulation, a large number of electoral complaints, and a prolonged and problematic electoral dispute resolution process.<sup>63</sup> This led to the deterioration of the human rights situation, among other things, through the banning of freedom of assembly in the capital, the refusal by the state to publish opposition statements on the electoral process.<sup>64</sup>

These developments were accompanied by arbitrary detentions, beatings and killings of the members of the opposition parties, ethnic minorities, NGO workers and members of the press by government forces.<sup>65</sup> The arrest of 111 people, including opposition leaders, human right defenders and journalists on charges of treason and genocide was later dropped for lesser charges by the Federal High Court.<sup>66</sup>

The detention of opposition leaders who won the elections prevented them from assuming power. As Shedler asserts, 'like elections that begin without a choice, elections that end without consequences are undemocratic'.<sup>67</sup> Winners must be able to assume office, exercise power and conclude their terms in accordance with constitutional rules to ensure democratic transitions.<sup>68</sup>

In addition, despite the establishment of the Complaints Investigation Panels (CIP) by the Electoral Board, the system failed to provide remedy to contestants given the fact that the human rights context in the country was characterised by the repression of the opposition.<sup>69</sup> The setting up of the complaints mechanism has undermined the ability of opposition to participate on an equal field.<sup>70</sup>

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<sup>59</sup> As above 18.

<sup>60</sup> Carter Centre (n 46 above) 5.

<sup>61</sup> EU report (n 48 above) 18.

<sup>62</sup> Carter Centre (n 46 above) 2.

<sup>63</sup> As above.

<sup>64</sup> EU report (n 48 above) 2. There were arrests of students and citizens on strike and the killing of 37 people, according to an official report, with hundreds injured.

<sup>65</sup> Amnesty International 'Ethiopia: The 15 May 2005 Elections and Human Rights - Recommendations to the Government, Election observers and Political Parties (2006) <<http://web.amnesty.org/library/print/ENGAFR250022005>>(accessed 20 August 2007) 116.

<sup>66</sup> E Blunt 'What Next for Ethiopia's Freed Leaders?' <<http://news.bbc.co.uk/2/hi/africa/6236990.stm>> (accessed 8 September 2007).

<sup>67</sup> A Shedler 'Elections without Democracy: The Menu of Manipulation' (2002) 13:2 *Journal of Democracy* 36 39.

<sup>68</sup> As above.

<sup>69</sup> EU report (n 48 above) 3.

<sup>70</sup> As above.



Observers' reports revealed that there were inconsistencies in the application of rules for the admission of evidence and witnesses, reports of intimidation of witnesses, apparent partisanship on the part of NEBE presiding officers.<sup>71</sup> Moreover, intentional delays on the part of opposition parties, withdrawals from the process by the opposition parties resulting in decisions being taken in their absence led to the fall of general confidence in the election process.<sup>72</sup> To add to the problem, while appeal against the decisions of the Electoral Board from the different panels was available, the fact that the judiciary was run by the chairman of the board itself put in question the effectiveness of the mechanism.<sup>73</sup>

### 2.3. The Ugandan Elections

The February 2006 presidential and parliamentary elections in Uganda heralded the transition from single party system to a multi-party system and hence have become a very important milestone in the democratisation process.<sup>74</sup> These elections were also said to have provided an opportunity for a wide range of democratic institutions to be tested.<sup>75</sup> It was also a testing case whether multiparty elections could found a legitimate change of government.<sup>76</sup>

The decision to adhere to multipartyism was followed by the lifting of the presidential term limit through constitutional amendment.<sup>77</sup> The delay in the enactment of the legislation permitting political activity by opposition until few months before the elections contradicted the commitment to promote inclusiveness hindering sufficient preparation by the opposition.<sup>78</sup> However, some opposition parties and importantly the Forum for Democratic Change (FDC) have managed to remain in the elections despite the impediments.<sup>79</sup> As a result, international observation missions affirmed that the elections fell short of full compliance with international principles for genuine democratic elections.<sup>80</sup> The results affirmed the victory of the ruling regime, the National Resistance Movement (NRM) though with less votes than the previous elections.<sup>81</sup>

What Shedler calls 'candidate screening'<sup>82</sup> occurred to the leader of the strongest opposition party, the FDC, Dr. Kizza Besigye upon his arrest on charges of treason and trumped up charges of rape

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<sup>71</sup> Carter Centre (n 46 above) 7.

<sup>72</sup> As above.

<sup>73</sup> As above.

<sup>74</sup> European Union 'Uganda Presidential and Parliamentary Elections 23 February 2006: European Union Election Observation Mission Final Report' <[http://ec.europa.eu/external\\_relations/humanrights/euelectionassobserv/uganda/final.pdf](http://ec.europa.eu/external_relations/humanrights/euelectionassobserv/uganda/final.pdf)>(accessed 5 September 2007) 2.

<sup>75</sup> As above.

<sup>76</sup> As above, 5.

<sup>77</sup> EU report (n 74 above) 5.

<sup>78</sup> As above.

<sup>79</sup> As above.

<sup>80</sup> CNN 'Ugandan President Wins Election' (2001) <<http://archives.cnn.com/2001/WORLD/africa/03/13/uganda.election/>> (accessed 2 September 2007).

<sup>81</sup> As above.

<sup>82</sup> Shedler (n 67above) 42.

few months prior to the elections.<sup>83</sup> However, the Supreme Court ruled that, while not affecting the results of the presidential election in a substantial manner, there existed non-compliance with electoral laws, through the disenfranchisement of voters and in counting and tallying of results.<sup>84</sup> It also affirmed the existence of bribery, intimidation, violence, and violation of the principles of equal suffrage, transparency of the vote, and secrecy of the ballot through multiple voting and ballot box stuffing in some areas.<sup>85</sup>

Although the Electoral Commission managed to maintain significant level of public confidence, especially in the manner it rejected the last minute claims made to it seeking Dr. Besigye's disqualification as a candidate,<sup>86</sup> this was eroded following petitions of electoral flaws made by all political parties.<sup>87</sup> Despite the applauded attitude of the judiciary in maintaining its independence, the Constitutional Court's endorsement of the jurisdiction of the military court over civilians violated the principles of human rights established under international and Ugandan laws.<sup>88</sup>

Both the police and the army (Ugandan Peoples Democratic Force) UPDF were evidently partial in favour of the ruling party despite the Code of Conduct adopted for Security Personnel during the election process.<sup>89</sup> Observers also witnessed intimidation and assault of opposition supporters and independent candidates by security forces.<sup>90</sup>

The NRM utilised state resources in support of campaigns including cars, personnel and advertising, and received overwhelming and positive coverage on state television and radio.<sup>91</sup> On the contrary, the media coverage given to opposition and in particular, the FDC and the candidate Dr. Besigye was devoted to the various legal cases concerning him before the courts instead of his campaign agenda.<sup>92</sup> Moreover, the state media was biased towards Mr. Museveni and the NRM.<sup>93</sup>

Despite some improvements over the previous years, notable shortcomings were observed, in the Electoral Commission, including extensive problems in validating the voter registration resulting in the disenfranchisement of voters on election day, deficient training of polling staff, and problems with the delivery of election materials in some areas.<sup>94</sup>

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<sup>83</sup> EU report (n 74 above)

<sup>84</sup> As above.

<sup>85</sup> As above.

<sup>86</sup> As above.

<sup>87</sup> EU report (n 74 above) 1.

<sup>88</sup> Human Rights Watch News 'Uganda: Government Threat to Free Elections Harassment of Opposition in Presidential, Parliamentary Poll' (2006) <<http://hrw.org/english/docs/2006/14/02/Ugan15887.htm>> (accessed 20 May 2007).

<sup>89</sup> As above.

<sup>90</sup> As above.

<sup>91</sup> EU report (n 74 above) 1.

<sup>92</sup> As above 2.

<sup>93</sup> As above.

<sup>94</sup> As above, 1.

### 2.3. The Nigerian Elections

The most recent and the third consecutive presidential elections took place in Nigeria on April 2007 when for the first time one elected leader succeeded another.<sup>95</sup> Being Africa's most populated country, it is plagued by inter-ethnic, religious conflicts not to mention the political tension that has escalated in the petroleum-rich Niger Delta.<sup>96</sup>

Observer's report stated that the political arena on the pre-election period was fraught with activities such as systematic exclusion of opposition members with the Independent Electoral Commission (INEC) being complicit to government agenda.<sup>97</sup> The internal wrangling among the major political parties and the unsuccessful constitutional reform proposals made to prolong President Olusegun Obasanjo's third term in office also corroborate this assertion.<sup>98</sup>

The elections were brazenly rigged and almost all observers affirmed that they were far from fulfilling the international standard of free and fair elections.<sup>99</sup> The existence in some areas of ballot papers outside of the ballot boxes, the absence of secret voting booths,<sup>100</sup> blatant riggings in some Locals Government Areas (LGAs) or their deliberate omission from being a polling area have been witnessed.<sup>101</sup>

National Observers, when not either complicit with electoral fraud, or coerced into cooperation with local riggers, were often intimidated by party or Independent National Electoral Commission (INEC) agents.<sup>102</sup> In some areas, results have been pre-determined or nullified because they were unpredictable and/or unfavourable to the ruling party.<sup>103</sup>

The unanimous statements of observers showed that the flawed elections facilitated the dynastic succession of the ruling Peoples Democratic Party (PDP) candidate, Umaru Musa Yar'Adua,<sup>104</sup> under the guise of multi-party elections, once again confirming the authoritarian traits of the regime establishing single party dominance.

Pre-election observations have indicated the failure of the national Assembly to review the Constitution to give real autonomy to the Electoral Commission.<sup>105</sup> The Commission's decision to disqualify the major competitor, Vice President Atiku Abubakar, led to the accusation of the

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<sup>95</sup> United States Institute of Peace 'Nigeria's 2007 Elections: The Fitful Path to Democratic Citizenship' Special Report 182, (2007) <<http://www.usip.org/pubs/specialreports/sr182.pdf>>(accessed 2 September 2007) 1.

<sup>96</sup> As above.

<sup>97</sup> IDASA 'Report On IDASA's Observation Mission in Nigeria' <[www.idasa.org](http://www.idasa.org)> (accessed 20 August 2007) 3.

<sup>98</sup> As above.

<sup>99</sup> IDASA (n 97 above) 1. See also International Crisis Group 'Nigeria's Elections: Avoiding a Political Crisis' Crisis Group Africa Report N°123, 28 March 2007 <[www.crisisgroup.org](http://www.crisisgroup.org)> (accessed 20 August 2007) 1.

<sup>100</sup> (n 95 above) 6.

<sup>101</sup> IDASA report (n 97 above) 8.

<sup>102</sup> As above 10.

<sup>103</sup> As above.

<sup>104</sup> As above 3.

<sup>105</sup> (n 95 above) 1.

Commission's partisanship.<sup>106</sup> Its inefficiency in the electoral administration led to the non-transparent and non-reliable process and the results obtained.<sup>107</sup>

Exclusionary measures targeting the opposition parties have also been taken.<sup>108</sup> Accordingly, the major competitor to the ruling Peoples Democratic Party (PDP) Umaru Musa Yar'Adua, Vice President Attiku Abubakar, escaped disqualification through the Supreme Court's ruling that overturned the INEC's decision to have gotten him on the ballot only few days before the elections.<sup>109</sup> This impacted on his campaign effectiveness and his ability to build-up enough support for his candidacy.<sup>110</sup>

In addition, voter intimidation by political parties as well as the Commission took place.<sup>111</sup> Parties themselves were under the constant intimidation of INEC or stronger party agents.<sup>112</sup> Human Rights Watch reported that it was an exceptionally violent election resulting 300 election related deaths showing the inability of the government to protect fundamental rights of the people.<sup>113</sup>

The elections have exhibited the most haphazard and dismal record in terms of setting up mechanisms to rectify election related problems in the country. Accordingly, it was reported that '...there was no mechanism in place for troubleshooting or correcting problems or discrepancies at polling units, local government offices or INEC offices.'<sup>114</sup> Also, polling officials had little or no support on the ground, sometimes turning to police or party agents for assistance out of necessity.<sup>115</sup>

## **2.4. Some conclusions**

The above discussion highlights five key problems common in elections held in the three countries. These include manipulation of electoral processes and results; lack of impartial electoral bodies and democratic institutions; government's use of state resources and the media in electoral campaigns; repression of basic human rights and civic engagements; as well as impartial and insufficient complaints and dispute resolution mechanisms.

As Shedler correctly argues, 'democratic elections are mechanisms of social choice under conditions of freedom and equality.'<sup>116</sup> Thus, to qualify as democratic, elections should offer an effective choice of political authorities, allowing citizens to formulate their preferences to be

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<sup>106</sup> IDASA report (n 97 above) 3.

<sup>107</sup> As above 10.

<sup>108</sup> As above 9.

<sup>109</sup> As above 3.

<sup>110</sup> As above.

<sup>111</sup> IDASA (n 97 above) 10.

<sup>112</sup> As above.

<sup>113</sup> C Albin-Lackey and B Rawlence 'What's next for Nigeria? The whole Concept of African Democracy is at Risk' Human Rights Watch <<http://hrw.org/english/docs/2007/05/09/nigeri15887.htm>> (accessed 20 May 2007).

<sup>114</sup> As above.

<sup>115</sup> As above.

<sup>116</sup> Shedler (n 67 above) 38.

governed by their own choice.<sup>117</sup> However, even if pre-electoral conditions allow for free and fair competition, the will of the people may be tramped by electoral fraud.<sup>118</sup> While the introduction of multipartyism raised the hopes of the people, the elections posed what Ellis called 'choice between oppressors.'<sup>119</sup> The 'politics of exclusion' characterising the nature of states in Africa<sup>120</sup> is manifested through multi-party elections. This is opening a lee way for the increasing number of electoral authoritarians in the continent.

The importance of specific institutions such as police, the army and the judiciary have been heavily compromised making their role as engines of democracy very limited. This is compounded by the wanton misuse of the media by the incumbents. This has ultimately limited the role of political parties and civil society in the democratisation process. The absence of institutions with sufficient complaint mechanisms during and after elections, which, according to Cowen and Laakso, guarantee equal protection of political forces in the course of democratic competition characterised the elections.<sup>121</sup> Thus, they confirm what Van de Walle refers to as the 'routinisation of multiparty elections' without genuine competitions.<sup>122</sup>

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<sup>117</sup> As above.

<sup>118</sup> As above.

<sup>119</sup> S Ellis 'Elections in Africa in Historical Context' in J Abbink and G Hesselning (eds) *Election observation and Democratisation in Africa* (2000) 37-45.

<sup>120</sup> C Ake *The Feasibility of Democracy in Africa* (2000) 39.

<sup>121</sup> M Cowen and L Laakso 'An Overview of Election Studies in Africa' (1997) 35:4 *Journal of Modern African Studies* 717-735.

<sup>122</sup> Van de Walle (n 3 above) 298.

## Chapter Three

### Appraisal of Pre-existing Commitments Addressing Electoral Problems in Africa

#### 3.1. Introduction

In order to assess the value of the Charter it is important to place it in the context of the instruments that have preceded it. This will indicate if and to what extent it has added value to the holding of free and fair elections. Hence, in this chapter, an assessment of the effectiveness or otherwise of pre-existing commitments dealing with free and fair elections will be made.<sup>123</sup>

#### 3.2. The African Charter on Human and Peoples' Rights (1981)

The Charter's adoption<sup>124</sup> was built on the idea that the continent needs an "African Convention on Human Rights" to give full effect to the Universal Declaration of Human Rights and the United Nations Charter.<sup>125</sup> It aimed to provide a normative framework for the African regional human rights system.<sup>126</sup> It stipulates, *inter alia*, freedom of conscience,<sup>127</sup> rights to receive information,<sup>128</sup> free association,<sup>129</sup> free assembly,<sup>130</sup> and to participate freely in the government of one's country, either directly or indirectly through freely chosen representatives in accordance with the provisions of the law.<sup>131</sup>

In particular, Article 13 of the Charter resonates the notion of freeness of elections though it does not give the content of what it signifies. Nor it stipulates the requirement of fairness as a distinct element but seems to merge the two to imply the requirement of the expression of the will of citizens in choosing their representatives. Hence, except in providing a general framework of rights by enjoining states to fulfil, promote, respect and protect such rights, the Charter fails to elaborate on the elements of democratic elections and their framework of implementation. As a result, the

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<sup>123</sup> See the Preamble of the African Charter on Democracy, Elections and Governance as well as the Report of the meeting of Independent Experts on the Draft Charter in Democracy, Elections and Governance, Addis Ababa, Ethiopia, 21-23 November 2005, available at <<http://www.africa-union.org/root/au/conferences/past/2006/april/pa/apr7/meeting.htm>> (accessed 18 September 2007) 6. Nearly all the endeavours discussed in this chapter are drawn from the preamble of the new Democracy Charter which aims to 'enhance the relevant Declarations and Decisions of the OAU/AU.'

<sup>124</sup> African (Banjul) Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) entered into force Oct. 21, 1986 <<http://www1.umn.edu/humanrts/instree/z1afchar.htm>> (accessed 18 September 2007).

<sup>125</sup> Human Dimension program, Mediterranean Academy of Diplomatic Studies in Cooperation with DiploFoundation 'The African Charter on Human and Peoples' Rights' <[http://www.diplomacy.edu/african\\_charter/default.asp](http://www.diplomacy.edu/african_charter/default.asp)> (accessed 18 September 2007).

<sup>126</sup> F Viljoen and L Louw 'The Status of the African Commission: From Moral Persuasion to Legal Obligation' (2004) 48:1 *Journal of African Law* 1 1. See generally G Bekker 'The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States' (2007) 51:1 *Journal of African Law* 151 152.

<sup>127</sup> Article 7.

<sup>128</sup> Article 8.

<sup>129</sup> Article 9.

<sup>130</sup> Article 10.

<sup>131</sup> Article 13(1).

need for specific set of rules that transform the rights into enforceable principles in a separate manner is implied.

### 3.3. Algiers Declaration (1999)

As a continuation of previous efforts meant to free the continent from the socio- cultural, economic and political problems, African Head of States adopted the Algiers Declaration.<sup>132</sup> The rhetoric of democracy, good governance, and sustainable development emerged in this document reiterating *inter alia*,

commitment to the protection and promotion of human rights; increased space for freedom and the establishment of democratic institutions that are representative of our peoples and receiving their active participation,.....underpinned by the rule of law, respect for the fundamental rights and freedoms of the citizens and the democratic management of public affairs.<sup>133</sup>

Such progress shows the increased acknowledgment of the indispensability of human rights and democratic principles in promoting development in the continent. Notwithstanding the Declaration's status as a guide to states' behaviour in upholding democratic qualities through, for instance, holding of free and fair elections, its failure to provide the requirements of freeness and fairness in ensuring democratic elections leaves glaring gaps.

### 3.4. Lome Declaration Unconstitutional Change of Governments (2000)

This document is a response to a *coup d'etat* that took place in Sierra Leone by denouncing the act as unacceptable in light of the principles of human rights established under the OAU Charter and the African Charter on Human and peoples' Rights.<sup>134</sup> There is an indication that further efforts such as the new Democracy Charter were deeply buttressed by this document in ensuring democratic transitions in Africa.<sup>135</sup>

In effect, the Declaration aims to consolidate principles of democratic governance as set out in various Declarations and other documents of the OAU.<sup>136</sup> Accordingly, it lists common principles that need be adhered to, such as, respect for rule of law and human rights, promotion of pluralism or participatory democracy and role of civil society.<sup>137</sup>

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<sup>132</sup> Adopted at the thirty-Fifth Ordinary Session of OAU/Third Ordinary Session of AEC 12-14 July 1999 AHG/Decl. 1-2 (XXXV) Algiers, Algeria <[http://www.africa-union.org/official\\_documents/Heads%20of%20State%20Summits/hog/9HoGAssembly1999.pdf](http://www.africa-union.org/official_documents/Heads%20of%20State%20Summits/hog/9HoGAssembly1999.pdf)> (accessed 18 September 2007).

<sup>133</sup> As above 17.

<sup>134</sup> Declaration On the Framework for An OAU Response to Unconstitutional Changes of Government(Lome Declaration) Adopted by Organization of African Unity, meeting at the Thirty-sixth Ordinary Session of our Assembly in Lomé, Togo from 10 – 12 July 2000 AHG/Decl.5 (XXXVI) 2000 <[http://www.ohchr.Org/English/law/compilation\\_democracy/lomedec.htm](http://www.ohchr.Org/English/law/compilation_democracy/lomedec.htm)> (accessed 18 September 2007) para. 3.

<sup>135</sup> This is implied from Paragraph 4 of the explanatory notes of the Experts and Ministerial meeting on the draft African Charter on Democracy, Elections and Governance <<http://www.africaunion.org/root/au/conferences/past/2006/april/pa/apr7/meeting.htm>> (accessed 20 May 2007).

<sup>136</sup> Para. 9.

<sup>137</sup> Para. 9 sub paras. i,ii,iii, iv, vii, viii, and ix.

Most importantly, it recognises the principle of democratic change and the role of the opposition as well as the organisation of free and regular elections in conformity with existing instruments.<sup>138</sup> The effect of non-adherence to these principles, the obligations of the African Union as well as individual states in response to unconstitutional change of governments, the ensuing sanctions on perpetrators or states and the measures to be taken to restore constitutional order are dealt with.<sup>139</sup> However, in the words of Udombana, it is a 'discreet moral pressure on the perpetrators of the unconstitutional change in facilitating restoration of constitutional order.'<sup>140</sup> It neither resulted in the establishment of sanctions committee to monitor compliance.<sup>141</sup>

### **3.5. The AU Constitutive Act (2001)**

The OAU transformed itself into African Union with renewed objectives among which consolidation of democratic institutions and culture, good governance and the rule of law form part.<sup>142</sup> In addition, other objectives include the promotion of democratic principles and institutions, popular participation and good governance as well as human and peoples' rights as recognized under international and regional instruments.<sup>143</sup> It further condemns and rejects unconstitutional change of governments.<sup>144</sup>

However, apart from laying the basis for democratic values which allow for the holding of free and fair elections, the Act falls short of addressing the electoral problems of the continent. Nevertheless, it provides significantly for the institutional avenue through which erstwhile as well as recent efforts to ensure free and fair elections would be realised.

### **3.6. New Partnership for Africa's Development (NEPAD) Declaration on Democracy, Political, Economic and Corporate Governance (2002)**

Like the predecessor instruments, the Declaration remains to be an expression of the common aspiration of African States. It envisages the achievement of sustainable development in Africa while it claims to be mindful of earlier commitments to ensure 'stability, peace and security, promoting closer economic integration, ending unconstitutional changes of government, supporting human rights and upholding the rule of law and good governance.'<sup>145</sup>

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<sup>138</sup> Para. 9 sub-para.v and vi.

<sup>139</sup> Paras. 12 and 13.

<sup>140</sup> N Udombana 'Can the Leopard Change its Spots?: The African Union Treaty and Human Rights' (2002) 17:6 *American University International Law Review*. 1177 1197.

<sup>141</sup> As above.

<sup>142</sup> See Preamble of the Constitutive Act of the African Union, OAU Doc. CAB/LEG/23. 15 entered into force May 26, 2001 <<http://www1.umn.edu/humanrts/africa/auconst-act2001.html>> (accessed 18 September 2007)

<sup>143</sup> Article 3(g) and (h) of the Constitutive Act. See also Article 4(m) of the Act which resonates similar values as a matter of principle.

<sup>144</sup> Article 4(p).

<sup>145</sup> New Partnership for Africa's Development (NEPAD), Assembly of Heads of State and Government, Thirty Eighth Ordinary Session of OAU, 8 July 2002, Durban, South Africa, NEPAD Doc. Declaration on Democracy, Political,



Democratic values such as free and fair elections have been recognized as an inalienable right of individuals, albeit at an abstract level.<sup>146</sup> It also reiterates the need for free, fair and credible elections as a commitment to promote democracy as its core values.<sup>147</sup> The commitment to 'strengthen and, where necessary, establish an appropriate electoral administration and oversight bodies and provide the necessary resources and capacity to conduct elections which are free, fair and credible' is provided.<sup>148</sup> The need for reassessing and strengthening sub-regional and AU monitoring mechanisms and procedures is also stated.<sup>149</sup>

This Declaration is also a non-binding document which only puts moral and political pressure on member states. However, the partnership being an important avenue for the promotion of democratic values and peer assessment through the APRM,<sup>150</sup> the Declaration will advance the principles of free and fair elections.

### **3.7. ECOWAS Protocol on Democracy and Good Governance (2001)**

This sub-regional document can be compared with that of the new Democracy Charter as it has binding status on the community of members on issues of democracy and good governance.<sup>151</sup> In particular, it insists that regime change must be through free, fair and transparent elections.<sup>152</sup> It further calls for zero tolerance for power obtained or maintained by unconstitutional means.<sup>153</sup> The normative merits of the Protocol extend further since provisions dealing with other democratic and human rights principles are also reiterated.<sup>154</sup>

Specifically on elections,<sup>155</sup> one can perceive the elements of freeness and fairness which reflect the electoral problems of the region. Accordingly, the holding of elections as per electoral laws,<sup>156</sup> prohibition of substantial amendment of electoral laws,<sup>157</sup> the establishment of independent electoral bodies,<sup>158</sup> the arrangement of reliable and transparent voter registrations,<sup>159</sup> the announcement of results in a transparent manner,<sup>160</sup> establishment of adequate complaint

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Economic and Corporate Governance; AHG/235 (XXXVIII). Annex I (2001) para.3 <<http://www.nepad.org/2005/files/documents/2.pdf>> (accessed 18 September 2007) 1.

<sup>146</sup> As above, paras.7 and 13.

<sup>147</sup> As above, para. 7

<sup>148</sup> As above.

<sup>149</sup> As above.

<sup>150</sup> R Herbert 'The Survival of NEPAD and the African Peer Review Mechanism: A Critical Analysis' (2004) 11:1 *South African Journal of International Affairs* 1 2.

<sup>151</sup> Protocol A/ SP1/12 /01 On Democracy and Good Governance: Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security, adopted in December 2001 and entered into force in 2005.< <http://www.dpmf.org/role-ecowas-peace-amadu.html>> (accessed 17 September 2007)

<sup>152</sup> Article 1(b).

<sup>153</sup> Article 1(c).

<sup>154</sup> An overview of the Protocol reveals that it follows an all rounded approach to deal with the problems of the region or for that matter the continent as a whole by stipulating detailed provisions.

<sup>155</sup> Section II, Articles 2-18 are dedicated to substantive and enforcement issues of elections.

<sup>156</sup> Article 2(2).

<sup>157</sup> Article 2(1).

<sup>158</sup> Article 3.

<sup>159</sup> Article 4.

<sup>160</sup> Article 6.

mechanisms,<sup>161</sup> the full collaboration with civil society in the provision of voter education,<sup>162</sup> the need for conceding to defeat according to guidelines<sup>163</sup> and lastly the prohibition of acts of intimidation or harassment against defeated candidates or their supporters by all power holders<sup>164</sup> constitute relevant in the case at hand.

The possibility of electoral assistance is also envisaged upon the request of member states<sup>165</sup> while it provides a robust mechanism of election monitoring which does not leave it to the discretion of the member state to involve the Commission.<sup>166</sup> Its implementation is also accompanied by sanctions in cases of non-compliance which would additionally be governed by the ECOWAS Peace protocol.<sup>167</sup> The range of sanctions includes the use of the ECOWAS Court of Justice.<sup>168</sup>

The Protocol has been put to effect in some occasions to prevent the incumbency of undemocratically seated governments as much as it is criticized for the failure of monitoring missions to impact so much on electoral standards.<sup>169</sup> But, its possible impact on the new Democracy Charter is conceivable. On the whole, it is the best effort that provided a binding and reasonably sufficient framework in addressing the listed electoral problems, though of sub-regional applicability.

### **3.8. OAU/AU Declaration on Principles Governing Democratic Elections in Africa (2002)**

This declaration is entirely dedicated to assert the necessity of democratic elections in any representative government.<sup>170</sup> It took cognizance of previous efforts, the growing role played by the OAU in the observation/monitoring of elections and the need to strengthen the Organization's efforts in setting the principles of democratic elections in Africa.<sup>171</sup> At best, it can serve as a guideline as to what constitutes freeness and fairness as well as the responsibilities of member states.<sup>172</sup> The detailed provisions of the declaration also stipulate the rights and corresponding duties of all stakeholders.<sup>173</sup> The roles of OAU in monitoring elections as well as that of the General Secretariat in ensuring the implementation of the Declaration are also set out.<sup>174</sup>

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<sup>161</sup> Article 7.

<sup>162</sup> Article 8.

<sup>163</sup> Article 9.

<sup>164</sup> Article 10.

<sup>165</sup> Article 12.

<sup>166</sup> Article 13. See Eboobrah (n 38 above) 5. Monitoring takes place upon the decision of the ECOWAS Chair Person. It was explained that with the transformation of the Executive Secretariat of ECOWAS into a Commission, the Executive Secretary of ECOWAS is now known as the chairperson of the ECOWAS Commission.

<sup>167</sup> Article 44(1).

<sup>168</sup> Article 39.

<sup>169</sup> Eboobrah (n 38 above) 9.

<sup>170</sup> African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002 endorsed on the meeting in Durban, South Africa, at the 38th Ordinary Session of the Assembly of the OAU, Para.2(1) <[http://www.ohchr.org/english/law/compilation\\_democracy/ahg.htm](http://www.ohchr.org/english/law/compilation_democracy/ahg.htm)> (accessed 17 September 2007)

<sup>171</sup> See the Preamble.

<sup>172</sup> See Part IV.

<sup>173</sup> See Part V.

<sup>174</sup> See Part VI.

Compared to previous commitments, it provides for more clear and specific guidelines as to what constitutes free and fair elections. However, its status as a legally non-binding instrument leaves it as mere statement of common aspiration. Also, it does not address cases of non-compliance with the principles or how they should be handled. But as the new Democracy Charter provides, it is the primary source for the interpretation of free and fair elections and hence of importance in addressing electoral problems in Africa.<sup>175</sup>

### **3.9. Some Conclusions**

Earlier efforts are not limited to the documents discussed in the preceding sections. The impressive outlay of documents adopted at different times indicates a steady shift towards the acceptance of democratic values. Concerning elections, however, except for the sub-regional commitment, nearly all of them fail to provide explicit and a binding framework in enforcing free and fair elections in Africa. Rather, these set of principles can morally and politically put pressure on states towards the fulfilment of democratic qualities in elections as a kind of soft law. Dugard refers to soft law as imprecise standards generated, among others, by international organisations to serve as guidelines to states but which lack the status of law.<sup>176</sup> On a different note, as much as they expressed the aspirations of states, they failed to impact on the behaviour of states, an implication to the present as will be dealt in the forthcoming chapter.

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<sup>175</sup> Article 17.

<sup>176</sup> J Dugard *International Law: A South African Perspective* (2005) 37.

## Chapter Four

### Assessment of the African Charter on Democracy, Elections and Governance in Light of the Electoral Problems in Africa

#### 4.1. Introduction

The importance of elections as the most visible expressions of the will of the public in a system of electoral democracy and the five major problems that plague elections in Africa have been outlined in the preceding Chapters. The new Charter, *inter alia*, proposes to address the above identified problems. This chapter analyzes the effectiveness of the charter, if adopted, on democratic consolidation in Africa, through elections, both at individual states and continental levels, by focusing on the analysis of the key problems in light of the Charter's provisions. The legislative background and its rationale are provided as an introduction along with its application to the identified problems with the possible challenges and the recommendations.

##### 4.1.1. Legislative History and the Rationale of the Charter

The Charter is a consolidation of earlier commitments through various declarations and decisions of the Union to ensure the success of the democratisation process on the continent.<sup>177</sup> The Charter's adoption was triggered by the decisions taken by Head of States and Governments during the 2002 inaugural summit held in Durban, South Africa,<sup>178</sup> which was followed by the conference on Elections, Democracy, and Governance held in Pretoria, South Africa in 2003.<sup>179</sup> The conference objectives included promotion of dialogue, democracy and good governance; standardisation of norms related to elections; capacity building of electoral management bodies; and the discussion on the African Union Draft Declaration on Elections, Democracy and Governance in Africa.<sup>180</sup>

This conference culminated in the adoption of key democratic principles of governance on, *inter alia*, electoral practises and the requirements of freeness and fairness,<sup>181</sup> leading to the meeting of

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<sup>177</sup> Report on the Meeting of the Independent Experts on the Draft Charter on Democracy, Elections and Governance, Addis Ababa, Ethiopia, 21-23 November 2005. <<http://www.africa-union.org/root/au/conferences/past/2006/april/pa/apr7/meeting.htm>> (accessed 27 September 2007) 5.

<sup>178</sup> As above, 8. The summit adopted two Declarations namely, the OAU Declaration on the Principles Governing Democratic Elections in Africa, and the NEPAD Declaration on Democracy and Governance.

<sup>179</sup> Preamble of the Conference Statement to the Africa Conference on Elections, Democracy and Governance, Pretoria, South Africa on April 7-10/2003 available at <<http://www.elections.org.za/AfricaConference/Default.asp>> (accessed 20 August 2007). It was held under the theme 'Strengthening African Initiatives.'

<sup>180</sup> Preamble of the statement of the conference (n 179 above).

<sup>181</sup> The statement provided for detailed set of principles that deal with democratic values and institutions to promote constitutionalism and good governance, promotion of human rights, constitutional determination of tenure, establishment of effective and independent electoral management bodies, political pluralism, tolerance and political freedom, substantive as well as procedural principles to institutionalize certainty and predictability of election rules, procedures and outcomes; the use of public media; election related conflicts; the role of the judiciary; the need for a code of conduct and election observers and monitors; and review of their work through peer review mechanism.

government experts held in May 2004 in Addis Ababa, Ethiopia which further discussed the outcome of the Pretoria meeting.<sup>182</sup> Accordingly, it recommended the development of a Charter on Democracy, Elections and Governance on the basis of pre-existing documents.<sup>183</sup> This led to the formulation of the Charter which was discussed at the Ministerial meeting held in Addis Ababa, Ethiopia on 6-7 April 2006<sup>184</sup> that was finally adopted by the Assembly of Heads of State and Government of the AU on 30 January 2007.<sup>185</sup>

The Charter reinforces the commitment of AU Member States to democracy, development and peace.<sup>186</sup> It aims at strengthening democratic institutions and entrenching a culture of democracy and peace and multi-party competitive politics.<sup>187</sup> This was visible from the repeatedly affirmed commitment of member States in the Charter towards institutionalisation of democratic, social, economic and political governance.<sup>188</sup>

In particular, halting unconstitutional change of governments is pronounced like that of previous documents as a justification for its adoption.<sup>189</sup> The Charter is intended to provide a robust and responsive mechanism in addressing the existing and future challenges to democracy and development.<sup>190</sup> As such, it is only a restatement of earlier commitments and hence the question of whether it will successfully respond to the problems in the democratisation project and in particular that of electoral processes of the continent remains to be seen in the future.

#### **4.1.2. Overview of the Features of the Charter**

The Charter has three basic pillars namely democracy, elections and governance. Under the rubric of these concepts various democratic values are reiterated such as the promotion of democracy, rule of law and human rights. It enjoins states to recognise popular participation through universal suffrage as the inalienable right of the people,<sup>191</sup> and to ensure constitutional transfer of power.<sup>192</sup> The enjoyment of fundamental freedoms and rights without any indivisibility, taking into account

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<sup>182</sup> Experts' report (n 177 above) 9.

<sup>183</sup> As above. Following the Pretoria Conference, the AU Commission embarked upon 1) the review of the OAU /AU Declaration on the Principles Governing Democratic Elections and its accompanying Guidelines for Election Observation of the AU observers 2) the prospects for the establishment of the Electoral Assistance Fund and Unit as envisaged in the previous instruments 3) the preparation of a draft Declaration on Democracy, Elections, and Governance. This meeting led to the transformation of the draft Declaration into a Charter having regard to its status as a non-binding instrument to enforce the already existing commitments.

<sup>184</sup> Ebobrah (n 38 above) 2.

<sup>185</sup> As above.

<sup>186</sup> Experts' and Ministerial Meetings on the Draft Charter on Democracy, Elections, and Governance: and the Lome Declaration, 3-4 and 6-7 April 2006 'Draft Charter on Democracy, Elections and Governance: Explanatory Note' <<http://www.africa-union.org/root/au/conferences/past/2006/april/pa/apr7/meeting.htm>> (accessed 23 September 2007) See generally Articles 2 and 3 for the detailed objectives and the principles of the Charter.

<sup>187</sup> Experts' report (n 177 above) 6.

<sup>188</sup> Explanatory note (n 186 above).

<sup>189</sup> See the experts' report (n 177 above) 6 and the Preamble of the Charter which states that they have been the cause of insecurity, instability and violent conflict in Africa.

<sup>190</sup> Report of the Ministerial Meeting on the African Draft Charter on Democracy, Elections and Governance and the Lome Declaration, Addis Ababa, Ethiopia, 6-7 April 2006 (2006) 3. (Report, on file with the researcher).

<sup>191</sup> Article 4.

<sup>192</sup> Article 5.

their universality,<sup>193</sup> the strengthening of organs in the AU which promote human rights,<sup>194</sup> eradication of discrimination against vulnerable groups, minorities and the promotion of culture of tolerance of diversity as states' obligations are heralded.<sup>195</sup>

In addition, the entrenchment of constitutional supremacy,<sup>196</sup> the culture of democracy and peace through transparent and accountable administration, civil engagement, civic education, political dialogue<sup>197</sup> and the promotion of democratic institutions form part of the commitments.<sup>198</sup>

The crux of the present work analyses provisions governing democratic elections as provided under Chapter 7 of the Charter. Accordingly, the requirements of free and fair elections,<sup>199</sup> the possibilities of securing electoral assistance, observer missions and exploratory missions from the AU Commission, and their regulation<sup>200</sup> are stipulated. It further provides for unconstitutional change of governments by outlining the possible elements thereof,<sup>201</sup> measures to be taken upon its occurrence,<sup>202</sup> the implementing body<sup>203</sup> and the corresponding duties of state parties.<sup>204</sup>

The governance aspect of the Charter focuses on states' duties in the promotion of political, economic and social governance by creating strong institutions and by promoting the development of the private sector,<sup>205</sup> and coordination of governments, civil society, and the private sector.<sup>206</sup> The Charter also recognized the role of women in development and democratic processes and enjoined states to take measures to promote their full participation.<sup>207</sup>

Popular participation,<sup>208</sup> especially, of people with special needs,<sup>209</sup> institutionalisation of political, economic and corporate governance,<sup>210</sup> decentralization of power,<sup>211</sup> inclusion of traditional authorities<sup>212</sup> are stipulated. To this end, states are obliged to promote the use of international and sub-regional commitments<sup>213</sup> and encourage solidarity among member states.<sup>214</sup> Other duties such as the adoption of policies, strategies and programmes to alleviate poverty,<sup>215</sup> to provide basic

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<sup>193</sup> Article 6.

<sup>194</sup> Article 7.

<sup>195</sup> Articles 7 and 8.

<sup>196</sup> Article 10.

<sup>197</sup> Articles 12 and 13.

<sup>198</sup> Articles 15 and 16.

<sup>199</sup> Article 17.

<sup>200</sup> Articles 18-21.

<sup>201</sup> Article 23.

<sup>202</sup> Article 25.

<sup>203</sup> Articles 24 and 25.

<sup>204</sup> Article 25.

<sup>205</sup> Article 27.

<sup>206</sup> Article 28.

<sup>207</sup> Article 29.

<sup>208</sup> Article 30.

<sup>209</sup> Article 31.

<sup>210</sup> Articles 32 and 33.

<sup>211</sup> Articles 34 and 35.

<sup>212</sup> Article 35.

<sup>213</sup> Articles 36 and 37.

<sup>214</sup> Articles 38 and 39.

<sup>215</sup> Article 40.

social services,<sup>216</sup> to protect the environment<sup>217</sup> and to provide free and compulsory basic education are enshrined.<sup>218</sup>

In the end, the application mechanism of the Charter outlined the respective duties of member states and that of the primary enforcement organ i.e. the AU commission.<sup>219</sup> It also stipulates the monitoring mechanism under the Charter and the duties of the states and monitoring organs.<sup>220</sup> On the whole, the Charter provides for an array of value laden concepts translated into state obligations covering a range of issues.

## **4.2. Normative Standards of Democratic Elections**

The Charter provides for various value laden principles calling for the commitment of states to ensure their effective implementation. Among these, the holding of free and fair elections constitutes one. The substantive essence of the provisions on democratic elections in terms of sufficiency is discussed below.

### **4.2.1. Overview of the Standards**

Among the range of objectives the Charter reiterated, electoral related issues feature laudably. Accordingly, it seeks to:

Entrench a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies.<sup>221</sup>

Notionally, the Charter's aims at institutionalising legitimate and democratic change of governments,<sup>222</sup> by promoting the holding of regular, transparent, free and fair elections.<sup>223</sup> The criterion of "freeness" and "fairness" stand as a litmus test for democratic elections under the Charter. Thus, the holding of transparent, free and fair elections must be made in accordance with the AU Declaration on the Principles Governing Democratic Elections in Africa.<sup>224</sup> Instead of providing for the criteria of freeness and fairness, the Charter makes cross reference to the Declaration setting out principles on democratic elections.

The OAU/AU Declaration envisages elections conducted:

freely and fairly<sup>225</sup> under democratic constitutions and in compliance with supportive legal instruments,<sup>226</sup> under a system of separation of powers that ensures in particular, the independence of the judiciary,<sup>227</sup> at regular intervals, as provided for in national constitutions,<sup>228</sup> by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics.<sup>229</sup>

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<sup>216</sup> Article 41.

<sup>217</sup> Article 42.

<sup>218</sup> Article 43.

<sup>219</sup> See generally Chapter 10.

<sup>220</sup> See generally Chapter 11.

<sup>221</sup> Preamble.

<sup>222</sup> Article 2(3).

<sup>223</sup> Article 3(3) and (4).

<sup>224</sup> Article 17.

<sup>225</sup> Para. 4(a).

<sup>226</sup> Para. 4(b).

<sup>227</sup> Para. 4(c).

<sup>228</sup> Para. 4(d).

<sup>229</sup> Para. 4(e).

To this end, states commit themselves to take measures, *inter alia*, to establish institutions which administer elections and their process and draw codes of conduct, including impartial, an all inclusive, competent and accountable national electoral bodies and constitutional courts to arbitrate in the event of disputes arising from the conduct of elections.<sup>230</sup> The promotion and protection of civil liberties including freedom of movement, assembly, association, expression and campaigning as well as access to the media form part of the commitments.<sup>231</sup>

It further provides for the need to take measures and precautions to prevent the perpetration of fraud, rigging or any other illegal practises throughout the electoral processes.<sup>232</sup> To this end, states are required to ensure transparency of the entire electoral process by facilitating the deployment of representatives of political parties and individual candidates at polling and counting stations and accredited international and national observers.<sup>233</sup>

In translating these principles into rights and obligations, the Declaration provides for the rights of individuals and party candidates to basic freedoms.<sup>234</sup> On the other hand, it prohibits acts that may lead to violence or the deprivation of rights and the granting of favours to influence the outcome of elections.<sup>235</sup> It also stipulates the need for the impartiality of the media,<sup>236</sup> the respect for the decisions of election related adjudication bodies as well as the opportunity to challenge them according to the law.<sup>237</sup>

States are required to provide adequate logistics and resources including funds for carrying out elections to all registered parties to enable them to organise their work.<sup>238</sup> The need to closely work with civil society with the view to promoting voter education is stipulated as a measure to be taken by states.<sup>239</sup> Thus, within the spirit of the Charter, the concepts of freeness and fairness are the indices reiterated in the Declaration.

Perhaps, a third aspect included as a distinct component is what is named, according to the European approach, the “transparency” of elections.<sup>240</sup> Bjornlund avers that to be transparent, an election must have predictable procedures, have published results, both aggregated and broken down by constituency, and polling station, and ensure security against fraud.<sup>241</sup>

Whereas the Charter explicitly speaks of only four scenarios as states’ obligations, including the establishment and strengthening of independent and impartial national electoral management

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<sup>230</sup> Para. 3( b) and (c).

<sup>231</sup> Para. 3(d).

<sup>232</sup> Para. 3(f).

<sup>233</sup> Paras. 3(i).and 3(h)

<sup>234</sup> Para. 4(1-6).

<sup>235</sup> Para. 4( 8-9).

<sup>236</sup> Para. 4(10-11).

<sup>237</sup> Para. 4(12-13).

<sup>238</sup> Para. 3(g).

<sup>239</sup> Para. 3(e).

<sup>240</sup> E Bjornlund *Beyond Free and Fair: Monitoring Elections and Building Democracy* (2004) 99.

<sup>241</sup> As above.



bodies,<sup>242</sup> the establishment and strengthening of national mechanisms responsible to redress election related disputes,<sup>243</sup> fair and equitable access to state controlled media by contesting parties and candidates,<sup>244</sup> and the adoption of code of conduct governing stakeholders.<sup>245</sup> Thus far, it seems not to go further enough in addressing all the identified problems.

#### **4.2.2. Principal Elements Addressed Under the Charter**

##### **4.2.2.1. Establishment and Strengthening of Independent and Impartial National Electoral Management Bodies**

The Charter primarily obliges state parties to establish and strengthen independent and impartial national electoral management bodies. As Mozaffar noted, electoral management bodies are the ‘...principal instruments for organizing credible election processes, linking voters and governments in order to secure procedural legitimacy for the substantive uncertainty inherent in competitive elections.’<sup>246</sup> Their institutional effectiveness depends largely, though not exclusively on their autonomy from the government.<sup>247</sup> This conceptual understanding is also reflected in the different regional commitments discussed, as affirmed in the Charter.

The trends in Africa, however, show that the dearth of such institutions led to the mis-management of elections leading to electoral frauds and subsequent violence resulting in the violation of rights. Thus, the fact that the Charter enjoins states to establish and strengthen independent electoral management bodies<sup>248</sup> is vital in addressing problems in electoral management bodies observed in recent elections in Africa. However, it seems inadequate compared to for instance, the ECOWAS Protocol which further requires that they should enjoy the confidence of all political actors.<sup>249</sup>

As Murphy argues, the established impartial, all-inclusive, competent and accountable national electoral bodies ‘...generally have the responsibility to ensure conditions conducive to free and fair elections and for all matters involving the electoral process.’<sup>250</sup> To this end, states are obliged to provide these institutions with sufficient resources to perform their assigned missions efficiently and effectively as provided in the charter.<sup>251</sup>

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<sup>242</sup> Article 17(1).

<sup>243</sup> Article 17(2).

<sup>244</sup> Article 17(3).

<sup>245</sup> Article 17(4).

<sup>246</sup> S Mozaffar ‘Patterns of Electoral Governance in Africa’s emerging Democracies’ (2002) 23:1 *International Political Science Review* 85 90.

<sup>247</sup> As above, 85.

<sup>248</sup> Article 17(1).

<sup>249</sup> Article 3.

<sup>250</sup> J Murphy ‘An Independent Electoral Commission’ in Steytler et al. *Free and Fair Elections* (1994) 25 35.

<sup>251</sup> Article 15(4).

#### 4.2.2.2. Establishment of National Mechanisms Responsible for Redressing Election Related Disputes

The Charter generally obliges states to enhance the independence or autonomy of institutions guaranteed by the constitution, and ensures that they are accountable to competent national organs.<sup>252</sup> These provisions are applicable, be it to electoral commissions or the judiciary which are the appropriate forums to redress electoral disputes.

Hence, according to the Charter, states should enhance and strengthen these mechanisms to ensure a timely redress.<sup>253</sup> In particular, given the history of marginalisation of the judiciary in the politics of states, such interpretation supports the current democratic and constitutional reforms in the continent that give them far greater authority in electoral matters.<sup>254</sup>

By rejecting unconstitutional change of governments, including the extension of presidential tenure and by upholding electoral related petitions courts have demonstrated their key role as democratic watchdogs.<sup>255</sup> This is in part proved by the Ugandan courts in upholding the oppositions' election petitions alleging electoral mal-practices. Sustaining this zeal requires the establishment of competent legal entities including effective constitutional courts to arbitrate electoral disputes.

Although the Charter requires 'timely disposition' as an end result of the establishment or the enhancement of these institutions,<sup>256</sup> the element of "independence" should be infused to guarantee their effectiveness. The inclusion of other institutions such as ombudsman and human rights institutions should be envisaged within the ambit in order to ensure that claims of citizens are redressed effectively.<sup>257</sup>

#### 4.2.2.3. Fair and Equitable Access to state Controlled Media

According to Shedler, plural information source is crucial in ensuring effective choice in democratic elections.<sup>258</sup> Accordingly, candidates should enjoy political space if the will of the people is to be expressed through voting.<sup>259</sup> In effect, media is a key instrument in democratisation process.<sup>260</sup> The Charter, in providing for this obligation has reinforced the understanding mentioned above. However, this should mean not only ensuring equal access, but also refraining from any act that

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<sup>252</sup> Article 15(2).

<sup>253</sup> Article 17(2).

<sup>254</sup> H K Prempeh 'Africa's "Constitutional Revival": False Start or New Dawn?' (2007) 5:3 *International Journal of Constitutional Law* 469 492.

<sup>255</sup> As above, 493.

<sup>256</sup> Article 17(2).

<sup>257</sup> D Beetham *Democracy and Human Rights* (1999) 91.

<sup>258</sup> Shedler (n 67 above) 40.

<sup>259</sup> As above.

<sup>260</sup> I Van Kessel 'Stability or Democracy: on the Role of Monitors, Media and Miracles' in J Abbink and G Hesslings (eds) *Election observation and Democratisation process in Africa* (2000) 72.

might constrain or limit their adversaries from using the facilities of public media for campaign purposes.<sup>261</sup>

As an element of fairness, the state should create level playing field for all political stakeholders by promoting freedom of expression, freedom of the press, by fostering a professional media which is the basis for democracy on the continent.<sup>262</sup> Especially, the need to professionalize journalists through massive trainings and equipping the enterprise with resources would make a huge difference in ensuring editorial autonomy and in turn impartial performance.<sup>263</sup> As Kessel counsels, they should desist from being ‘...the praise singer of the ruler or unashamed propagandist of the opposition.’<sup>264</sup>

#### **4.2.2.4. Adoption of Code of Conduct**

The agreement of all parties through the adoption of a code of conduct would contribute to peaceful, credible elections ensuring the legitimacy of the election results. Under the Charter, it is provided that the code should include the commitment of political stakeholders to accept election results.<sup>265</sup> The Declaration on the other hand requires that elections be free and fair when the results are announced by the competent national bodies as provided for in the constitution and the electoral laws.<sup>266</sup> The Charter however emphasises this duty on political stakeholders, understood as ‘political parties’, as opposed to the Declaration which commits ‘every citizen’ to respect the decision of an electoral management bodies.<sup>267</sup>

Under the Charter, states have the obligation to inculcate and strengthen political pluralism through, among others, the recognition of the roles, rights and duties of legally constituted political parties.<sup>268</sup> In reality, however, constitutional or legislative engineering has resulted in the systematic exclusion of opposition from electoral competition.<sup>269</sup> In this case, the phrase ‘legally recognised political parties’ does not escape scrutiny.<sup>270</sup> The fact that it implies state discretion to determine who is ‘legal’ poses a threat to the effective participation of parties which may have stood as a strong contender to the governing regime.<sup>271</sup> It is also surprising that the term appeared in this document while no mention of legality is made in the ECOWAS Protocol as well as the OAU Declaration on Democratic Elections.<sup>272</sup>

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<sup>261</sup> Para. 4(11).

<sup>262</sup> Article 27.

<sup>263</sup> Kessel (n 260 above) 71.

<sup>264</sup> As above 64.

<sup>265</sup> Article 17(2).

<sup>266</sup> Para. 4(13).

<sup>267</sup> Compare paragraph 4(13) Declaration with Article 17(4) Charter.

<sup>268</sup> Articles 2(6) and 3(11).

<sup>269</sup> Adjeumobi (n 2 above) 67.

<sup>270</sup> Saungweme (n 39 above) 4.

<sup>271</sup> As above.

<sup>272</sup> Paragraph 1(i) of the Protocol in particular provides for the free and equal participation of political parties without attaching the condition “legally recognized”. In the same manner, the Declaration refers to political parties’ rights while it makes reference to “registration” in relation to their right to access to funds and resources under paragraph 3(g).

### 4.2.3. Principles Omitted from the Charter

Even if the Charter made a reference to some important aspects of free and fair elections in Africa, its key omissions puts its efficacy in addressing few of the discussed electoral problems as a standard setting document in question. The following sections thus will demonstrate these omissions and their implications in light of the electoral problems discussed.

#### 4.2.3.1. Manipulation of Elections

There is evidence that fraudulent and non-competitive elections in Africa have repeatedly legitimised authoritarian incumbent regimes.<sup>273</sup> Elections are a farce once they are characterised by extensive frauds, riggings and falsification of results.<sup>274</sup> As Shedler put it, '...electoral alchemy has been a favoured pursuit of authoritarian incumbents worried by the uncertainty of transitional elections.'<sup>275</sup>

To date, this has been the persisting problem of elections in Africa since virtually all of the case examples cited in this research have been plagued by electoral fraud. All of them affirmed the authority of an incumbent regime or facilitated for the election of a hand picked successor. While the ECOWAS Protocol attempts to address some of the facets of election related frauds such as double voting,<sup>276</sup> the Charter is woefully silent on these issues making its importance as a binding framework governing democratic elections a failed effort.

Save for providing for unconstitutional change of governments, it is silent on the issue of accessing of power through the avenue of rigged and fraudulent elections. To this extent, the OAU/AU Declaration clearly obliges states to prevent any electoral fraud throughout the whole electoral process.<sup>277</sup> To deter fraud and manipulation, Calingaert suggests the promotion of transparency in the entire electoral process by election observers, the substantial representation of opposition parties or independent candidates on election commissions, the effective monitoring of every stage of the electoral process, and the documentation and publication of any abuses that take place.<sup>278</sup>

As a result, appropriate and well-enforced election laws and regulations are critical for ensuring the transparency of electoral processes.<sup>279</sup> Independent electoral commissions, to this end, play an important role while watch dogs of democracy such as the judiciary and human rights institutions ensure the enforcement of the laws. According to Nevitte and Canton, to achieve democratic

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<sup>273</sup> R Temcani *Reflections on the Question of Political Transition in Africa: The Police State* (2005) 38. See also G K Kieh Jr. 'Democratisation in Africa: a Balance Sheet' in J M Mbaku (ed) *Preparing Africa for the Twenty First Century: Strategies for peaceful Coexistence and Sustainable Development* (1999) 106.

<sup>274</sup> Van De Walle (n 3 above) 306.

<sup>275</sup> Shedler (n 67 above) 45.

<sup>276</sup> Article 5 of the Protocol requires that voters' lists be prepared in a transparent and reliable manner, with the collaboration of the political parties and voters who may have access to them whenever the need arises. In addition, the ECOWAS Protocol stipulated provisions prohibiting substantial modification of electoral laws in the last six months before the elections under Article 2(1) and requiring the preparation of voter lists in a transparent and reliable manner to all stakeholders under Article 5.

<sup>277</sup> Para.3(f).

<sup>278</sup> D Calingaert 'Election Rigging and How to Fight It' (2006) 17:3 *Journal of Democracy* 138 147.

<sup>279</sup> As above.

consolidation and the institutionalisation of democratic procedures, potential contributions of non-partisan domestic election-monitoring groups are significant.<sup>280</sup> It is also important to make the public aware of the likely threats to fair elections and to election officials and ruling party agents on the legal penalties for violations of the election law and the need to ensure prosecution of any such violations.<sup>281</sup>

#### 4.2.3.2. Use of State Resources

While the Charter refers to the unfair use of the state media, it fails to provide for the duty not to abuse state resources for campaign purposes. As de Vos states ‘...it will give the incumbent regime an unfair advantage constituting an unfair election practice.’<sup>282</sup> Thus, the Declaration will provide assistance in determining states’ obligation.

Accordingly, states’ obligation of availing adequate resources for carrying out democratic elections for all registered political parties to enable them organise their work, including participation in electoral process should be discharged.<sup>283</sup> To this end, safeguards from abuse such as constitutions and electoral laws which put a check on the governing regime as well as administrative reforms must be put in place.<sup>284</sup>

#### 4.2.3.3. Repression of Human Rights

Underpinning democratic elections is the enjoyment of civil liberties guaranteed in national and international laws. Elections can not be free unless these rights are secured. The recent elections in the mentioned countries show that incumbents have violated the rule of law by breaking laws that guarantee civil and political rights.<sup>285</sup> As Beetham wrote, ‘...democratic rights such as freedom of thought, conscience, movement etc. presuppose a capacity of self-conscious and reasoned choice in matters affecting ones own life.’<sup>286</sup>

Given the reality in Africa, the lacuna in the Charter can not be accounted for.<sup>287</sup> Conversely, the OAU Declaration guarantees civil liberties and prohibits any act that deprives constitutional rights and liberties.<sup>288</sup> Hence, here too, unless the wider human rights protection in the Charter is made applicable, provisions on democratic elections remain to be insufficient. Additionally, the cross reference to the OAU declaration would lead to this interpretation.

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<sup>280</sup> N Nevitte and S A Canton ‘The Role of Domestic Observers’ (1997) 8:3 *Journal of Democracy* 47 59.

<sup>281</sup> As above.

<sup>282</sup> P De Vos ‘Free and Fair Campaigning’ in Steytler et al. (eds) *Free and Fair Elections* (1994) 119 143.

<sup>283</sup> Para. 3(g).

<sup>284</sup> De Vos (n 282 above) 143.

<sup>285</sup> R Rose and W Mishler ‘Comparing Regime Support in Non-Democratic and Democratic Countries’ (2002) 9:2

*Democratisation* 1 4.

<sup>286</sup> Beetham (n 257 above) 93.

<sup>287</sup> See for instance Article 10 of the ECOWAS protocol which insulates defeated voters as well as opposition from intimidation and harassment by all holders of power. This may address some of the problems, albeit its failure to deal with the whole scenario of human rights violations occurring during election processes.

<sup>288</sup> Paras. 3(d) and 4(8).

#### **4.2.3.4. Some Conclusions**

The stipulation of some of the few elements of free and fair elections in the Charter can not be reasonably explained as it limits states' obligations in relation to the holding of democratic elections to the mentioned ones. While it aims to govern, *inter alia*, democratic elections as a binding document, it falls short of establishing robust standards unlike the ECOWAS Protocol.<sup>289</sup> Consequently, the cross reference to a pre-existing but a non-binding set of principles as a guide to elaborate democratic elections downgrades its value as a self-standing instrument.

The cross reference to the OAU Declaration for elaboration of states' duties is intended to address the identified issues. This by itself is problematic as it deprives the Charter of its normative value in addressing standing issues of the continent. Its application fully depends on the constant allusion to the Declaration, which is not an easy task. On a positive note, however, the latter can have an interpretive value providing detailed guidelines in ensuring democratic elections in Africa. Upon coming into force, the normative application of the Charter should take this stance if it is to succeed.

#### **4.3. Application of the Charter**

To give effect to the Charter's commitments, the respective obligations of state parties and that of the principal enforcer of the Charter, the AU Commission, at a continental and regional level have been provided.<sup>290</sup> The monitoring mechanism under the Charter should ensure the proper enforcement of these obligations in the realization of the principles enshrined therein. Accordingly, the following sections would analyse the obligations and the existing enforcement mechanisms. In particular, the effectiveness of the different implementation mechanisms in addressing existing electoral problems in Africa would be assessed.

##### **4.3.1. State Party level**

Broadly speaking, the Charter imposes three main duties on states to ensure the implementation of its provisions. These include legislative,<sup>291</sup> executive and administrative<sup>292</sup> and promotional measures.<sup>293</sup> Each duty and what it entails is succinctly described below.

##### **4.3.1.1. Legislative Measures**

The duty to take legislative measures<sup>294</sup> entails the enactment of laws which promote free and fair elections within the spirit of international law and specifically the Charter. Most importantly, constitutions and electoral laws should aim to enforce the commitments reiterated in the Charter. It

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<sup>289</sup> Though Section II of the ECOWAS Protocol does not define what freeness and fairness constitute, some of the elements are portrayed in the provisions dealing with elections.

<sup>290</sup> See Chapter 10, Articles 44 and 45.

<sup>291</sup> Article 44(1) (a) and 44 (1) (d).

<sup>292</sup> As above.

<sup>293</sup> Article 44(1) (b) and (c).

<sup>294</sup> Article 44(1) (a).

further obliges states to incorporate the commitments and principles of the Charter in their national policies and strategies.<sup>295</sup>

The notion of constitutionalism requires the existence of rules that determine the validity of actions of the state prescribing a procedure to be followed and curb the arbitrariness of the powers.<sup>296</sup> Likewise, democratic elections can only be ascertained when rules and procedures govern the actions of governments and political actors by providing an accountability mechanism.<sup>297</sup>

Thus, though the Charter fails to address the issues of electoral manipulations and repression of human rights, the principles enshrined in the Declaration should essentially form the rules of elections in the laws of state parties.

#### **4.3.1.2. Executive and Administrative Measures**

Sustainable democracy needs the consolidation of institutional frameworks which make the process independent of the persons who are in power.<sup>298</sup> This can occur if only states embark on legal and institutional reforms and through governing regulations that make the creation of democratic institutions possible.

With this in view, the Charter places an obligation on states to take executive and administrative actions to bring national laws and regulations into conformity with the charter.<sup>299</sup> In so doing, states must ensure the enactment of rules and regulations governing institutions of democracy such as independent electoral commissions, human rights institutions and the judiciary in accordance with the provisions of the Charter so as to institutionalise democracy.

#### **4.3.1.3. Promotional Measures**

The Charter stipulates a two tiered duty on states which can generally be categorised under the rubric of promotional measures. Primarily, it enjoins states to undertake wider dissemination work on the principles of the Charter and other laws enacted to give it effect.<sup>300</sup> This duty entails an obligation to create awareness among the public at large enabling the citizenry to have an informed say in democratisation process. Thus, it is mandatory for states to establish independent public institutions that promote and support democracy within the purview of the Charter.<sup>301</sup> These include auditors, electoral commissions, anti-corruption commissions, and national human rights

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<sup>295</sup> Article 44(1)(d).

<sup>296</sup> J Hatchard; M Ndulo and P Slinn *Comparative Constitutionalism and Good Governance in the Common Wealth: An Eastern and Southern African Perspective* (2004) 1.

<sup>297</sup> As above.

<sup>298</sup> J Abbink 'Rethinking Democratization and Election Observation' in J Abbink and G Hesselings (eds) *Election Observation and Democratization in Africa* (2000) 1 7.

<sup>299</sup> Article 10(1) (a).

<sup>300</sup> Article 44(1) (b).

<sup>301</sup> Article 15.

institutions which can act as oversight mechanisms to prevent improper state action and improve governance.<sup>302</sup>

Yet, another important measure is the creation of a space for non-state actors in the promotion of the Charter and domestic laws. Although the state itself bears the prime responsibility, emboldened civil society can contribute significantly in this process.<sup>303</sup> To this end, the Charter further obliges states to create conducive conditions for civil society organisations to exist and operate within the law.<sup>304</sup> Entrenching democratic culture requires the integration of civic education in education curricula and the development of programmes and activities as provided in the Charter.<sup>305</sup>

It is also imperative to recognise the role of independent media in ensuring the free flow and dissemination of information, views, and opinions relevant to the electoral process.<sup>306</sup> The Charter reiterates this notion by obliging states to promote the conditions necessary to foster participation through freedom of the press and access to information.<sup>307</sup> Prempeh asserts that multiple independent media organizations in Africa serve as ‘...a check on the integrity of national election administration thereby lending greater legitimacy to officially declared results.’<sup>308</sup> Hence, states’ involvement in publicly owned media should not be intrusive to an extent of eroding freedom of expression and undermining its independence.<sup>309</sup>

Secondly, the Charter demands that states instil political will necessary for the attainment of the goals set forth in it.<sup>310</sup> Democracy will truly last when political actors are earnestly involved in it.<sup>311</sup> In this regard, it requires states to inculcate democratic values within the three government arms and as powerful institution to bring on board all parties in the political process. The differences in programmes of parties should not entail fragmentation and countervailing effects. Rather, it should help foster a healthy competition which is an essential ingredient in democratic elections. In addition, the commitment would galvanize states’ efforts in promoting democratic elections in the continent through the various frameworks of cooperation that exist within the region.

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<sup>302</sup> L C Reif ‘Building Democratic Institutions: The Role of National Human Rights Institutions in Good Governance and Human Rights Protection’ (2000) 13:8 *Harvard Human Rights Journal* 1 1.

<sup>303</sup> Prempeh (n 254 above) 82.

<sup>304</sup> Article 12(3).

<sup>305</sup> Article 12(4).

<sup>306</sup> J Sarkin ‘The South African Media in the Transition to Democracy’ in Steytler et al. *Free and Fair Elections* (1994) 154.

<sup>307</sup> Article 2(10).

<sup>308</sup> Prempeh (n 254 above) 83.

<sup>309</sup> Sarkin (n 306 above) 181.

<sup>310</sup> Article 44(1)(d).

<sup>311</sup> M Bratton and N V de Walle *Democratic Experiments in Africa: Regime Transition in Comparative Perspective* (1997) 279.



### 4.3.2. The AU Commission

As the secretariat of the Union, the AU Commission (AUC) is at the heart of the endeavours to implement the objectives of the African Union.<sup>312</sup> Under the Charter, it is mandated to act as the central coordinating body by overseeing the implementation as well as assisting state parties in their implementation efforts.<sup>313</sup> It is also required to coordinate the evaluation of the Charter's implementation with other organs of the AU, Regional Economic Communities (RECs) and appropriate national structures.<sup>314</sup> Since the Charter addresses cross cutting issues, the involvement of the other organs would offer proper guidance towards its effective implementation. Accordingly, in relation to elections too, it is entrusted with wider mandates at regional as well as continental levels as discussed below.<sup>315</sup>

#### 4.3.2.1. At a Continental Level

The Commission is required to develop bench marks for the implementation of the commitments and principles of the Charter and evaluate compliance by state parties.<sup>316</sup> In particular, given the fact that substantive obligations in undertaking democratic elections are deficient, the benchmarks would establish a uniform standard to be applicable in the continent as a whole. This creates a clear mechanism in overseeing state compliance to the provisions of the Charter.

The Commission is further obliged to promote the creation of favourable conditions for democratic governance, in particular, by facilitating the harmonisation of policies and laws of state parties.<sup>317</sup> Given the fact that continent suffers from weak integration system,<sup>318</sup> this duty poses a challenge to the commission's effectiveness. In addition, the numerous outlay of normative standards would be applicable only through effective harmonisation efforts. These require the necessary institutional and financial capacities, which the Commission is lacking at present.<sup>319</sup>

The Charter also envisages the possibility of electoral assistance to be facilitated by the Commission through the Electoral Assistance Unit and the Democracy and Electoral Assistance Fund established under the Commission.<sup>320</sup> The OAU/AU Declaration on Democratic Elections, among other things, focuses on the need for adequate funding of elections. Thus, the Interim

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<sup>312</sup> Commission of the African Union 'Strategic Plan of the Commission of the African Union, Volume 2: 2004-2007, Strategic Framework of the Commission of the African Union' 2004 <<http://www.africaunion.org/AU%20summit%202004/volume%202%20final%20-%20English%20-%20June%202004.pdf>> (accessed 17 October 2007) 4.

<sup>313</sup> Article 45 (a) and (b).

<sup>314</sup> Article 44(2)(B).

<sup>315</sup> Article 44(2).

<sup>316</sup> Article 44 (2) (A) (a).

<sup>317</sup> Article 44(2)(A) (b).

<sup>318</sup> (n 312 above) 6.

<sup>319</sup> As above 7.

<sup>320</sup> Article 44(2)(A)(c).

Commission of the African Union has been mandated to mobilize extra-budgetary funds to augment the secretariat's resource base for the implementation of the Declaration.<sup>321</sup>

Considering the fact that election administration in Africa is weak due to logistical reasons, the establishment of the fund would have a significant contribution. However, the funding should target the building of a strong and stable electoral administration capacity which is a better long-term investment than ad hoc contributions to electoral events.<sup>322</sup> De Zeeuw states that;

[t]he assistance should focus on constitutional and legal reforms, establishment of election administration (including national election commission) monitoring, training of election staff, political party assistance, international election monitoring, civil society aid (e.g. voter education and election monitoring).<sup>323</sup>

The scheme could be a reality if the Commission is able to raise the resource required from donors and state parties to the Charter. This depends on its vigorous effort and the political will of all stakeholders concerned.

#### **4.3.2.2. At a Regional Level**

The mandate essentially relates to the establishment of frameworks for cooperation with regional economic communities.<sup>324</sup> This involves encouraging the ratification and adherence to the Charter and designation of focal points to facilitate its implementation with the participation of stakeholders, in particular, civil society organizations.<sup>325</sup> Well intentioned the idea of cooperation may be, the existence of several integration groupings in the five regions of the continent has been problematic to the Commission itself.<sup>326</sup> The lack of leadership and coordinated goal, scattered researches, competition that thwarts solidarity and the resulting donor fatigue are some of the reasons to be mentioned.<sup>327</sup>

Even so, the vision of creating an integrated Africa as stipulated in the AU Constitutive Act requires the emergence of virile regional communities striving to remove all barriers to harmonisation of their policies and programmes.<sup>328</sup> In particular, some of the efforts made in ensuring democratic elections by RECs such as the ECOWAS had put exerted pressure on the states to make an effort with the minimum requirements of free and fair elections. Thus, the contribution of RECs should be encouraged by the Commission, albeit the necessity of political will that determines its success.

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<sup>321</sup> Para. 6(b).

<sup>322</sup> A Ellis, P Guerin, A Ayoub 'Effective Electoral Assistance Moving from Event-based Support to Process Support: Conference Report and Conclusions' (2006) <<http://www.idea.int/publications/eea/upload/Inlay%20FINAL.pdf>> (accessed 17 October 2007) 6.

<sup>323</sup> J de Zeeuw 'How to Make Democracy Assistance More Effective? Recommendations for Doing It Differently' Paper submitted for the European Conference on 'Enhancing the European Profile in Democracy Assistance' 4-6 July 2004, the Netherlands <[http://www.boell.de/downloads/demokratiefoerderung/dezeeuw\\_effective.pdf](http://www.boell.de/downloads/demokratiefoerderung/dezeeuw_effective.pdf)> (accessed 16 September 2007) 123.

<sup>324</sup> Article 44(2) (B).

<sup>325</sup> Article 44(2) (a) and (b).

<sup>326</sup> (n 312 above) 9.

<sup>327</sup> As above.

<sup>328</sup> As above.

#### 4.4. Monitoring the Implementation of the Charter

Parallel to the respective duties of the implementation of the Charter, its monitoring mechanisms generally fall under two categories; namely reporting and electoral observation missions. Though such distinct categories are not provided, a holistic reading indicates to this effect. The following sections will discuss if the Charter warrants effective monitoring mechanisms.

##### 4.4.1. Reporting Mechanism

State parties are obliged to submit a report every two years from the date of enforcement to the Commission on legislative as well as other measures taken to give effect to the Charter.<sup>329</sup> A copy of the report shall be submitted to the relevant organs of the Union for appropriate action to be taken within their respective mandates.<sup>330</sup> But the Commission also prepares the copy of the report to the AU Assembly through the Executive Council which takes appropriate measures with the view to addressing the issues raised in the report.<sup>331</sup>

This procedure seems to be designed along the lines of the African Charter on Human and Peoples' Rights (ACHPR) which has a similar procedure apart from the fact that the Democracy Charter involves other organs in consideration of the report.<sup>332</sup> Under the Democracy Charter, the organs indicated are the ones found under Article 5 of the Constitutive Act. The actual decision making power lies in the AU Assembly rendering their involvement less useful.<sup>333</sup> The other organs could possibly take an advisory role on the different cross cutting issues to assist the Assembly in its determination on the reports submitted.

It is interesting to note that no communication procedure is envisaged under the Charter. In effect, it is merely a standard setting document laying down states' obligations. Concerning individual complaint mechanism, it may be argued that the deliberate framing of the Charter rules out such possibility. This obviously bars prospects for actions to be brought by civil society organisations and individuals for violations of the principles of the Charter by state parties. In particular, given that the African Court of justice is mentioned as one of the relevant bodies in the implementation of the Charter, its significance as an adjudicatory body is downgraded.<sup>334</sup> Thus, in line with the

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<sup>329</sup> Article 49 (1).

<sup>330</sup> Article 49(2).

<sup>331</sup> Article 49(3) and (4).

<sup>332</sup> Ebobrah states that the African Commission on Human and Peoples' Rights proposed to take the role of examination and the Assembly has endorsed the proposal.

<sup>333</sup> Article 6 of the AU Constitutive Act and Article 49(4) of the Charter.

<sup>334</sup> The African Court of Justice established under the AU Constitutive Act is on the way to be merged with the African Court on Human and peoples' Rights which was established by its Protocol in June 1998 as decided by the resolution of the AU Summit in July 2004. Accordingly, upon its coming to operation, the Protocol establishing the court would be the applicable law.

mandate of the African court on human and Peoples' Rights, it may provide advisory opinion at the request of states on any legal matter relating to the Democracy Charter.<sup>335</sup>

Considering the fact that states have a duty to promote political will and to coordinate efforts to ensure the implementation of the Charter,<sup>336</sup> the absence of inter-state complaint mechanism is also another of its loopholes. Indeed, most states have not discharged their reporting duties even under the ACHPR system, in the belief that it is an embarrassment forum.<sup>337</sup> Unless such misconception is dropped, the Democracy Charter would similarly sustain a weak monitoring and enforcement mechanism. This, in turn, will confirm the argument that the Charter is designed to protect regimes and not to implement democratic values.<sup>338</sup>

Nmehielle<sup>339</sup> suggests that, NEPAD's initiative, the APRM<sup>340</sup> could serve as a means of ensuring compliance to human rights instruments as it implicates areas of governance and the rule of law, and perhaps the adverse peer review of states practice could mature into inter-state complaint mechanism. Although it is a potential implementation mechanism for the Charter, the fact that it is a voluntary accession<sup>341</sup> renders its success in securing full cooperation and the enforcement of the Charter problematic. However the Charter's recognition of the importance of the APRM could be realised through utmost political will on the part of state parties.<sup>342</sup>

#### 4.4.2. Election Observation

It is a recognized fact that election observation is a means to enhance democratisation.<sup>343</sup> According to Geisler, observers are likened to a 'democracy police' who by their mere presence are expected to deter blatant fraud and by their mandate to witness irregularities.<sup>344</sup> From time to time their presence has become a *sine qua non* of internationally acceptable elections.<sup>345</sup>

The Charter in a vague manner provides that state parties should inform the Commission of scheduled elections and to invite it to send an electoral observation mission.<sup>346</sup> It further enjoins states to guarantee conditions of security, free access to information, non-interference, freedom of

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<sup>335</sup> Article 4 of the Protocol.

<sup>336</sup> Articles 14(3), 16, 25(10), 28 and 44 are some of the few provisions that indicate to this effect.

<sup>337</sup> V O Nmehielle 'The African Union and African Renaissance: A New Era for Human Rights Protection in Africa?' (2003) 7:2 *Singapore Journal of International Comparative Law* 412 441.

<sup>338</sup> Saungueme (n 39 above) 2.

<sup>339</sup> Nmehielle (n 337 above) 441.

<sup>340</sup> In recognition of the imperatives of good governance for development, the Sixth Summit of the Heads of State and Government Implementation Committee (HSGIC) of the New Partnership for Africa's Development (NEPAD) held in March 2003 in Abuja, Nigeria, adopted the Memorandum of Understanding (MOU) on the African Peer Review Mechanism (APRM).

<sup>341</sup> APRM 'The African Peer Review Mechanism (APRM): Africa's Innovative Thinking on Governance Eighth Gathering of the African Partnership Forum' Berlin, German, 22-23 May 2007 <[http://www.afrimap.org/english/images/documents/APRM\\_G8\\_May07.pdf](http://www.afrimap.org/english/images/documents/APRM_G8_May07.pdf)> (accessed 15 October 2007) 2.

<sup>342</sup> Article 36.

<sup>343</sup> Abbink (n 298 above) 8.

<sup>344</sup> Geisler (n 7 above) 613.

<sup>345</sup> As above, 614.

<sup>346</sup> Article 19(1).

movement and full cooperation with election observers.<sup>347</sup> While the provision seems to put an obligation to inform the Commission, the requirement of sending an invitation erodes the essence of the notification reflected in the first limb.<sup>348</sup> Given the increased scrutiny that is coming from international observers such as the European Union mission, undemocratic regimes such as the ones cited in the cases in this paper may skew its interpretation and hence evade the duty of having elections observed.

Apart from the above, once the Commission is informed, it will send an exploratory mission prior to the election to ensure that conditions necessary to the holding of free and fair elections are established.<sup>349</sup> The fact that no time limit is provided is problematic as it will not allow the missions to acquaint themselves to all necessary and often contested aspects of the electoral processes<sup>350</sup> such as misuse of government media. It also prevents the proper assessment of protection of human rights or the overall political context before the elections.<sup>351</sup> Conversely, the SADC Guidelines Governing Democratic Elections provide for the deployment of the missions at least two weeks prior to voting day though this may not still reveal the overall situation.<sup>352</sup> Moreover, the lack of a provision on detailed task to be undertaken by the mission under the Charter makes it insufficient as opposed to the ECOWAS Protocol.<sup>353</sup>

In general, the Commission has a duty to ensure that the missions are independent,<sup>354</sup> conducted by appropriate and competent experts drawn from continental and national institutions taking due cognizance of regional representation and gender equality.<sup>355</sup> The missions should also be conducted in an objective, impartial and transparent manner.<sup>356</sup> The observer mission would prepare a report of the activities to the Commission which will be submitted to the state party concerned both to be performed within a reasonable time.<sup>357</sup> The clause 'within reasonable time' fails to provide a certain standard unlike the ECOWAS protocol which, at least, fixes a period of fifteen days for the mission to submit the report to the executive secretary of the Community.<sup>358</sup>

Save for stating the fact that the report will be submitted to the state concerned, it fails to provide for recommendations or measures to be taken by the state on the basis of the findings.<sup>359</sup>

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<sup>347</sup> Article 19(2).

<sup>348</sup> This position is informed by the reading of the OAU/AU Declaration, paragraph 5(1) which states that monitoring of elections is subject to a memorandum of understanding between the Secretariat (the Commission) and the host country.

<sup>349</sup> Article 20.

<sup>350</sup> Geisler (n 7 above) 619. The OAU/AU Declaration, however, makes it clear under paragraph 5(3) that the invitation must be made at least two months before the elections.

<sup>351</sup> Saungueme (n 39 above) 5.

<sup>352</sup> SADC 'SADC principles and Guidelines Governing Democratic Elections' adopted by SADC members meeting held in Grande Baie, Mauritius in 17 August 2004 <<http://www.sadc.int/english/documents/politicalaffairs/index.php>> (accessed 15 October 2007).

<sup>353</sup> Article 13(2).

<sup>354</sup> Article 21(1).

<sup>355</sup> Article 21(2).

<sup>356</sup> Article 21(3).

<sup>357</sup> Article 21(4) and (5).

<sup>358</sup> Article 17(1).

<sup>359</sup> The ECOWAS Protocol under Article 18 clearly provides to this effect.

Interestingly, it also does not imply what measures would be taken if the exploratory as well as observation missions find violations of the principles of free and fair elections through such as fraud, rigging and human rights repressions. However, the Declaration reserves the right of the Secretariat (Commission) to refuse the invitation if elections do not measure up to the standards within the Declaration.<sup>360</sup>

All in all, while the idea of a regionalized election observation is commendable, the Charter is substantively deficient in addressing issues like the ones mentioned above. Given the poor resource capacity of the Commission itself, undertaking the missions will be difficult unless effort to pull sufficient funds is made. Unless a code of Conduct to govern observers is adopted the impartiality of the missions would become questionable. To this end, it is suggested that institutionalised observation and monitoring in which the collective definition of the rules of observation ensures that one is reviewed by peers such through the APRM would offer a solution.<sup>361</sup>

#### **4.4.3. Effects of Non-compliance**

Non-compliance under the Charter is a subject matter left vaguely described apart from the measures to be taken in cases of unconstitutional change of governments within the purview of Article 17 of the Charter. Accordingly, the only relevant provision for non-compliance with principles of free and fair elections is by implication derived from Article 46 which provides as:

The AU Assembly and the Peace and Security Council will determine the measures to be taken for non-compliance with the provisions of the Charter in accordance with the applicable provisions of the AU Constitutive Act and the Protocol Relating to the Establishment of the Peace and Security Council.<sup>362</sup>

The Constitutive Act provides for sanctions to be imposed in case a state defaults in the payment of contributions to the budget of the Union which includes denial of the right to speak at the meetings, to vote, to present any candidates for any positions or post within the Union or to benefit from any activity or commitments, therefrom.<sup>363</sup> Further sanctions for non-compliance include denial of transport and communications links with other member states and other measures of economic and political nature to be decided by the Assembly.<sup>364</sup> The Protocol establishing the PSC mandates the Council to institute sanctions whenever an unconstitutional change of Government takes place as provided for in the Lomé Declaration.<sup>365</sup>

It is noted that, the concern and the focus is primarily on unconstitutional change of governments.

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<sup>360</sup> Para. 5(5).

<sup>361</sup> M Obutudu 'Monitoring and observation of Elections in Africa' Conference Paper on Elections, Democracy and Governance 7 April 2003 <[http://www.elections.org.za/AfricaConference/africaconference\\_MAbutudu\\_english](http://www.elections.org.za/AfricaConference/africaconference_MAbutudu_english)> (accessed 20 August 2007) 10.

<sup>362</sup> Article 46.

<sup>363</sup> Article 23(1).

<sup>364</sup> Article 23(2).

<sup>365</sup> Article 7 (1) (g).

The fact that specific and detailed provisions on non-compliance have not been provided for is an indication of its weak implementation framework to address electoral issues of the continent, or for that matter, violations of the democratic principles. There is no explanation why it fails to live up to the standards comparable to the ECOWAS Protocol which relatively speaking exhibits specificity. The ubiquitous cross reference to other instruments is a sign that the document is not meant to serve as a binding and enforceable document. In such situation, one fails to see its distinction from earlier efforts.

While democratic behaviour is improving, as Lindberg's states,<sup>366</sup> with the move from violent regime changes to the holding of elections, the new face of authoritarianism should be forestalled urgently. Austin reminds us that we should also not be deluded by the neatness or the drama of an election thinking that it is or it must always be the first or the most important step in the process.<sup>367</sup> The process of democratisation requires the broader understanding of the picture than mere elections. Specifically, constitutionalism denotes fidelity to citizens and advancing their needs.<sup>368</sup>

As Shivji noted, '...just as setting human rights standards in international instruments does not necessarily advance the observance of human rights, setting constitutional norms may not advance constitutionalism in Africa.'<sup>369</sup> Rather, it may serve to advance and legitimise the struggle for human rights and constitutionalism.<sup>370</sup> Likewise, the values reflected in the Charter would contribute to the consensus on the requirements of holding of free and fair elections. Through utmost political will and further efforts on the part of all stakeholders, the principles would find their way in national laws and in turn an application.

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<sup>366</sup> Lindberg (n 3 above) 15.

<sup>367</sup> Austin (n 1 above) 201.

<sup>368</sup> H W O Okoth-Ogendo 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in I G Shivji (ed) *State and Constitutionalism: An African Debate on Democracy* (1991) 20.

<sup>369</sup> I G Shivji 'State and Constitutionalism: A New Perspective' in I G Shivji (ed) *State and Constitutionalism: An African Debate* (1991) 46.

<sup>370</sup> As above.

## Chapter Five

### Conclusions and Recommendations

Competitive and periodic elections are central to democracy and constitute a critical indicator of popular empowerment. However, the history of competitive elections in much of Africa indicates a process often marred by pre-and post-electoral crises. Likewise, the recently held elections in Ethiopia, Uganda and Nigeria have been plagued with five key problems and hence fell short of the requirements of free and fair elections. As a result, they were characterised by the threat or actual boycott of elections by opposition parties, violence and intimidation of political opponents, and a refusal to accept officially declared results by aggrieved parties, to mention the few.

These confirmed the findings of scholars that African regimes are largely becoming electoral authoritarians who illegitimately access power through the ballot box. While there is a correct shift towards democratic behaviour, a new face of repression is displayed through the violation of the principles of freeness and fairness in democratic elections. However, much of the African response through various commitments focused on the persisting but the diminishing case of undemocratic change of governments through *coup d'etat*.

The impressive outlay of normative standards adopted since the early 1990s paved the way for the increased acknowledgment of the essence of free and fair elections in democratisation though they fared little in clarifying the requirements as well as in setting a binding standard. Nevertheless, what has begun as common aspiration culminated in the adoption of a binding treaty which is the new AU Charter on Democracy, Elections and Governance restating earlier commitments except for its binding nature and universal applicability.

The evaluation of the provisions of the Charter in addressing key electoral problems reveals its severe deficiency at substantive as well as application levels. The fact that it fails to make a modest attempt to deal with the persisting problems encountered in elections downgrades its efficacy as a binding normative standard. The vague and insufficient enforcement mechanism makes it a toothless lion. In effect, it raises the question if it adds anything on existing instruments. The analysis points out the Charter's shortcomings but without undermining the values it may transpire in advancing and legitimizing the efforts to ensure democratic elections through a binding commitment such as itself.

Now that it is waiting for the required number of ratification, measures need to be taken by all stakeholders to find ways of filling the chasm and ensure its proper implementation upon its enforcement. With this in view, the following recommendations would serve as a pointer of the few measures to be taken.



Ensuring the universal ratification being the primary task, law and policy reforms should follow in achieving consistency with the principles of the Charter. Further efforts should also be made to incorporate the principles governing democratic elections reiterated in the OAU/AU Declaration with the view to fully enforcing the principles of freeness and fairness. In particular, as the core organ behind the implementation of the Charter, the AU Commission should be able to adopt a benchmark that would be incorporated in domestic laws. The harmonisation of domestic laws is a critical task if uniform application of the benchmarks as well as the Charter is to be achieved.

In this relation, the existence of a set of objective and impartial criteria or norms and standards would reduce inconsistencies between domestic observation missions of states and with the Commission's observation missions precluding different conclusions. To this end, the continent needs to discuss and adopt these criteria promptly.

In addition, the utility of elections could be enhanced at a national level if only the electoral process is accompanied by the building of institutions that foster accountability and greater transparency in the governance of the country. The prevailing personality politics could only be checked through such mechanisms. Hence, entrenching the independence of national institutions responsible for elections namely independent electoral commissions, human rights and anti-corruption commissions is a critical step that must be taken by states. Ensuring that they are insulated from undue influence and intrusion by political formations competing for power is essential. Guaranteeing the establishment and their independence is needed in ensuring democratic governance.

The establishment and effective operation of all the above institutions has financial implications. Since these are not institutions and mechanisms involved in economically productive activities, initiatives to strengthen revenue generation by governments must be prioritised. Sufficient training on existing standards and on general human rights standards to personnel in these institutions is an essential step.

Civil society organisations (CSOs), including powerful sectors like trade unions and faith-based organisations, as well as business communities should be involved in the promotion of the rule of law. The democratic function of CSOs lies in their capacity of facilitating political and social interaction between state and society. Thus, emboldened CSOs would play a leading role in the entrenchment of democratic values at a national as well as continental level. It would also be pragmatic to build on existing efforts at sub-regional levels to launch a continent-wide initiative with the substantial involvement of all of Africa's sub-regions.

The continued existence of strong political parties greatly contributes to the political process. To this end, parties should be identified with programmes and not along ethnic and alliance of some groups to pose as contenders in democratic manner. The persisting repression of democratic

forces such as opposition forces should be checked. The need to build trust and cooperation is the only solution in ensuring genuine multi-party elections in the continent.

The media should play a role in public education and in spreading democratic values in an independent and non-partisan manner. It can be a real watch dog if it effectively empowers the public at large enabling it to make a choice of regime or a system. Professionalism could be entrenched through capacity building works on the various aspects of the issues.

The AU Commission must be able to overcome the capacity challenges in order to effectively engage in standard setting as well as its liaisoning duties. To this end, it must be able to effectively engage Regional Economic Communities (RECs) to infuse the commitments at sub-regional levels. In particular, the significance of the NEPAD initiative, the APRM, should be promoted in drawing more members into the mechanism and in effect in the promotion of democratic principles.

Moreover, the AU should act decisively on the non-recognition of undemocratic governments who managed to access power through undemocratic elections; else its renewed commitment to democracy would be spurious. The need for promoting reporting under the Charter is another crucial task.

Lastly but most importantly, the process of democratization goes beyond the question of simply installing a multiparty system. Accordingly, it requires the entrenchment of the rule of law and the respect for human rights. The abundant human rights standards should be translated into a reality if people should make an effective choice of government. Human rights should be respected at all times as it determines the nature of democraticness of elections. Legitimacy of regimes could only be ensured if it is accompanied by improvement in the conditions and quality of life of the broad masses calling for the fulfilment of their socio-economic rights. Otherwise, elections in Africa would increasingly become processes alien to the voters, leaving them only the right to cast their vote and in a state of apathy. To this end, utmost political will on the part of states is an essential prerequisite if democracy is to be guaranteed through democratic elections in the continent.

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