The implementation of the African Charter on Democracy, Elections and Governance

Ibrahima Kane*

Since the fall of the Berlin Wall and the end of Eastern Europe’s totalitarian regimes, a consensus seems to have emerged, worldwide, for the introduction of new standards into international standards, commonly called ‘democratic clauses’. The aim of these clauses is to promote the emergence of and contribute to the development of states based on respect for certain democratic principles in the world, particularly in Africa (OAU 1990; OAU 1994), America (Organisation of American States 2001), Asia and Europe (Council of Europe 2000).

The democratic clauses are a set of rules and mechanisms which states are invited to include in their internal legislation, particularly their constitutions, so that, individually or collectively, they may combat possible threats to their democratic systems. Mainly, these regulations and mechanisms are aimed at

* Ibrahima Kane is the AU advocacy director at the Open Society Institute. The views expressed by the author do not reflect the OSI position.
Ensuring respect for democratic standards, human rights and the rule of law in general incorporated into state constitutions, pivotal principles for the functioning of any democratic state;

Implementing independent monitoring procedures for the effective application of these standards and principles in the states in question

Involving civil society in the management of the state (res publica)

In the most appropriate manner, punishing any violation of these clauses, particularly by excluding those who undermine the principal democratic standards and principles, from any participation in the process of restoring the democratic state (Piccone 1997:25)

However, the impact of these standards and principles seems relatively limited, for as Professor Piccone (1997:2) notes, ‘the majority of such democracy clauses … are political commitments rather than formally binding obligations under international law, making enforcement problematic’.

As a continent which, in 45 years, has experienced 85 coups d’état (78 of them between 1961 and 1997 (Van der Linde 2001; Adeyanju 1997)), as well as one-party regimes, states hooked into the ‘sacrosanct’ principle of non-interference in internal affairs, dictatorships known as among the worst in the world,1 and which was the theater, between 1963 and 1998, of nearly 26 armed conflicts which affected about 61 per cent of its population, Africa urgently needed to call on these standards and principles in order to promote the return to peace, security and stability in certain of its regions. It particularly needs to speed up the democratisation2 of the societies (AU 2004:12) and communities comprising it.

The continent’s political leaders has since 1990 for the first time begun to recognise the need for more active participation of the African populace in the process of managing their countries, and to agree ‘to further democratise [their] societies and consolidate democratic institutions in [their] countries’. At the same time they reaffirmed their right to ‘determine their democratic systems, in all sovereignty, based on their socio-cultural values and taking into account their realities as regards the need to ensure development and fulfilment of the fundamental needs of the populace’ (OAU 1990, par 10).

Several years later, they declared that they were satisfied that ‘friendly relations between [their] people as well as peace, justice, stability and democracy meant that the ethnic, cultural, linguistic and religious identity of all [their] people, including minority nations, [were] protected and that conditions favourable for the promotion of this identity [had been] created’ (OAU 1994, par 4). Thereafter the OAU (1999 – Algeria decision) took a series of decisions to galvanise African leaders into making an effort towards
democratising their countries. This was done before the Constitutive Act of the African Union could entrench this wish by forcing member states ‘to promote and protect human and peoples’ rights, to consolidate democratic institutions and culture, to promote good governance and the rule of law’ (AU 2000, preamble), ‘to promote democratic principles and institutions, the participation of the people and good governance’ (AU 2000, art 3, par g) and to condemn and reject unconstitutional changes of government (AU 2000, art 4, par p).

From February 1990, it also agreed to supervise elections in member states in order to ensure that democratic principles were implemented and particularly that the will of the population was respected. It is a sign of the times that the well-known principle of non-interference in the internal affairs of states has been replaced by the principle of non-indifference of the organisation to the internal situation of member states, particularly in conflict situations. In such an event the AU could thus intervene directly without seeking any authorisation from the member state concerned.

This democratic ripple was however overtaken by the re-emergence of coups d’état, rigged elections, and the violence which accompanies them, at start of the 21st century (Van der Linde 2001 & Adeyanju 1997, quoted by Saugweme). To put an end to these practices and implement its new approach, the African Union implemented two important strategies: The first was the revision of its standards and setting up of penalty measures in terms of a coercive diplomacy consisting of measured and targeted pressure and interventions (OAU 2000b:10). An example is the 15 member states of the Economic Community of West African states (ECOWAS), which have since 2001 been involved in a process of ‘legalisation’ of the norms of democracy which many members adopted in 1991 (the ECOWAS protocol). The second strategy was the mobilisation of specialised African institutions on electoral questions and civil society organisations with the aim of promoting dialogue between players involved in elections, establishing norms and standards which could be applied to the management of electoral processes, reinforcing the skills of African experts involved in the management of elections and drawing up a draft declaration on democracy, elections and governance, to be submitted to the heads of state and government of the AU.

The culmination of these efforts was that a treaty of the same name was drawn up four years later and adopted by the AU (2007a). The Charter comprises some 50 articles and deals with the obligations of states in the following areas:

- Democracy, the rule of law and human rights
- Democratic elections, institutions and culture
- Unconstitutional changes of government
Political, economic and social governance

At institutional level it schedules the setting up of new procedures for the settlement of disputes connected with contested elections and unconstitutional changes of government, and new mechanisms through which political and or judicial bodies can intervene.

Normative benefits of the Charter on Democracy

The result of efforts expended over some 20 years with a view to taking up the political, economic and social challenges of Africa, the Charter on Democracy promotes values which African states have undertaken to ‘implement and carry out as a vision for establishing the objectives’ which they have set themselves in the fields of democracy, elections and governance.

Although it does not contain a precise definition of the concept of democracy and does not refer specifically to the African Charter of Human and Peoples’ Rights, at first sight, the Charter on Democracy seems to combine minimalist and hard-line approaches of the Western concept of democracy (Fergusen 2002:5–6).

In its minimalist version, democracy in effect places more emphasis on voting and the electoral process, which varies from one country to another. The hard-line approach, in contrast, relies on the existence of structured institutions as well as a body of norms and rules, which allows it to survive attacks to which it might be subjected. However, the ideal is ‘a more in-depth process of political development which should establish democratic values and culture in all parts of society’ (UN 2002:4), and which must ultimately allow for the ‘preservation and promotion of the dignity and basic rights of the individual, ensuring social justice, promoting economic and social development of the whole, reinforcing society’s cohesion as well as national peace and creating a climate conducive to international peace’ (Inter-Parliamentary Union 1997, par 3).

In this sense the Charter on Democracy adds value, for a study of the will of its authors shows that they specified the contents of citizens’ rights and broadened its fields of application, the aim being to ban from the continent all practices deemed to be incompatible with the values it promotes and in this way contribute to the emergence of a true democratic culture.

Democracy, rule of law and the right of individuals

Compared to the African Charter of Human and People’s Rights (the African Charter), which one can consider to be the founding document of the current system for the
promotion and protection of individual rights on the continent, the Charter on Democracy does not change the obligations of African states with regard to the rights of the individual. It repeats certain undertakings to which the states already subscribed to and attempts to deepen and specify the contents and range of others.

To this end:

- It requires that exercising the right of people to freely determine their political status, and their right to choose the means of economic and social development (OAU 1981, par 1) should be done while ‘respecting the constitutional order’ (AU 2007a, art 5). In addition, it specifies that any constitutional revision must be done by means of consensus or a referendum (AU 2007a, art 10, par 2), and refers to the interpretation of the African Commission on Human and Peoples’ Rights (the African Commission) of the provision, namely that ‘taken in its political sense … the right of peoples to self-determination refers mainly to the management of their “internal and local affairs” and their citizen participation in national life on an equal footing, without this implying any territorial division which could occur in violation of the territorial integrity of the contracting states’ (African Commission 2007, par 26)

- It extends the benefit of guaranteed rights to ‘ethnic and migrant minorities’, which are not formally legal categories specifically protected in the Charter on Rights and particularly to ‘any other marginalised and vulnerable social group’ (AU 2007a, par 8, par 2)

- It uses the concepts ‘lasting development’ and ‘human safety’ to enjoin African states to take the economic, social and cultural rights of their citizens into account when they draw up and implement economic and social programmes. This perspective is particularly interesting in view of the AU definition of human safety as ‘the security of the individual with regard to the satisfaction of his basic needs. It also includes the development of the social, economic, political, environmental and cultural conditions necessary for survival and the dignity of the individual, including the protection of and respect for human rights, good governance and ensuring that each individual is guaranteed the opportunities and choices for his complete development’ (AU 2005, art 1)

**Democracy, elections, democratic institutions and culture**

If there is a matter which the Charter on Democracy has treated with vagueness, it is without a doubt that of elections. This is a significant omission for national laws generally determine the intervals for elections, which means that in modern times the choice of the people on who should lead a country has always been the most reliable barometer
of the good health of their democratic system. The electoral period, preceded as it is by electoral battles, in fact informs the degree of maturity of citizens concerned and the difficulties associated with the concrete implementation of democratic principles in the political and social context of states.

**Elections**

Elections may be regarded as the main ‘ritual’ in democratic societies by means of which citizens periodically renew their commitment to the norms and institutions which embody the democratic state. However, in independent Africa, elections have always been a major issue for political leaders. It is without doubt for this reason that the Charter on Democracy has attached a number of guarantees to the organisation of this ritual, amongst others that it be supervised by the AU.

Elections must be organised regularly by states, and the governments must also agree to accept that

- They are the basis for authority of any representative government
- Their regularity is a key factor in the process of democratisation and good governance, rule of law, maintenance and promotion of peace, security, stability and development
- They contribute to the prevention, management and settlement of conflicts
- They are organised
  - in a free and transparent manner
  - on the basis of democratic constitutions and in accordance with the relevant legal instruments
  - according to a system of separation of powers, and in particular the independence of the judiciary
  - at regular intervals, as set down in national constitutions
  - by impartial electoral non-exclusive institutions, which are competent and have well-trained staff with sufficient logistical means to carry out the task (AU 2002a, par II; see also AU 2007a, art 17)

Before the start of each election, the contracting states must negotiate with ‘the legally recognised political parties’ and ‘the other political players’ about adopting a code of conduct by means of which they will promise ‘to accept the results of the elections or to contest them by exclusively legal means’ (AU 2007a, art 17, par 4).

In the implementation of the principles governing peoples’ rights, the rights and obligations of the citizen-electorate, candidates and political parties, the states have a not insignificant
margin for maneuvering, in the sense that they are only reconfirming their agreement to hold regular elections and to ensure that (AU 2007a, art 17, par 2(3)) the access of the parties and candidates to public media during the electoral period are fair.

The participation of the AU in the process is done through the Department of Political Affairs of the Commission. In fact, the state party which organises an electoral consultation is obliged to inform the executive body of the AU about the dates of the elections and to invite them, at least two months before the start of the elections (AU 2002a, par V(3)), to send an observer mission to that country (AU 2007a, art 19).

Upon receipt of an invitation, the Department of Political Affairs appoints an exploratory mission in the relevant country, whose main aim is to check that ‘the necessary conditions exist, and the environment is conducive for the holding of transparent, free and fair elections’ (AU 2007a, art 20). If this is not the case, the Commission may decide not to follow up on the invitation (AU 2002a, par V(6)). Once the invitation is accepted, a memorandum of understanding is signed with the Commission, in accordance with the principles of the Declaration of the OAU and ‘the relevant laws of the host state’ (AU 2002a, par V(1)). In principle, this memorandum should allow the observer mission to perform its activities freely in the state’s territory and to enjoy the active co-operation of the national institutions in charge of matters to do with elections (AU 2007a, art 2).

The Department of Political Affairs must place the necessary material and human means for their proper management at the disposal of the observation mission. In particular, it must ensure that the electoral battles are conducted ‘in an objective, impartial and transparent manner’ (AU 2007a, art 21, par 4). At the end of the electoral consultation process, the observation mission draws up a report which it submits to the chairman of the Commission within a reasonable period. A copy is sent to the politicians from the contracting state. The chairman also prepares a report on the election and the follow-up activities suggested by the observer mission, which is then communicated to the member states of the AU and made public (AU 2002a, par VI(h)).

Finally, thanks to the Unit and the Fund for Support of Democracy and Electoral Assistance created by the Charter on Democracy, the Commission may support those contracting states who seek aid and advice on administrative, judicial, material and technical aspects of the organisation and holding of electoral consultations (AU 2007a, art 18). Such assistance is necessary to allow states who are learning about democracy to familiarise themselves with these new practices and to subscribe permanently to the dynamic of political pluralism.

**Democratic institutions and culture**

Any democratic system worthy of the name relies on operational institutions, particularly state authorities or bodies, security forces, political parties, independent and accessible
media, as well as an active civil society which is able to play its role of monitoring the action of public authorities. This is why the Charter on Democracy acknowledges the important role played by these participants in the strengthening of democratic culture on the continent, even if it remains very vague as to the exact contribution they could make in moving African societies towards democracy, and the tangible actions which states should undertake to implement their conventional obligations with regard to these participants.

**Democratic institutions**

Apart from the constitutional civil authority, the armed forces and security forces (AU 2007a, art 14, par 1) and the legal institutions (AU 2007a, art 14, par 2 and 3) specifically mentioned, the Charter on Democracy resorts to the notion of the public institution, the outlines of which are not clearly defined, in order to establish which institutions are able to play an effective role in the building of a culture of democracy. According to the Charter, a public institution means any organisation which ensures and supports ‘the promotion of democracy and constitutional order’ (AU 2007a, art 15, par 1) and the independence and autonomy of which are guaranteed by the constitution of the contracting state.

The role of the state in the functioning of these institutions is relatively limited since it is confined to the creation, granting of adequate means and monitoring actions which they are supposed to perform, to ensure they are carried out in terms of their missions (AU 2007a, art 15). The exception is the armed forces and security forces which are subject to the strict control of civil authorities (AU 2007a, art 14, par 1).

**Democratic culture**

With regard to the promotion of democratic political culture, states are required to

- Draw up a legislative and political framework which allows for the development of democratic culture (AU 2007a, art 11)

- Implement programmes and activities designed to strengthen democratic practices. In this regard they are asked to ‘create legal conditions conducive to the development of organisations of civil society’ (AU 2007a, art 12, par 3)

- Integrate civic education on democracy and peace into academic programmes (AU 2007a, art 12, par 4)

- Establish and maintain political and social dialogue promoting transparency and confidence between political participants (AU 2007a, art 13)
Unconstitutional changes of government

This is the key innovation of the Charter on Democracy, even if the notion of the unconstitutional change of government is an improved version of that of ‘an unconstitutional interruption of the democratic order or the alteration of the constitutional order’ as set out in the Inter-American Democratic Charter (Organisation of American States 2001, art 12, par 4). It was introduced to the African continent for the first time at the OAU’s Algeria Summit in 1999 with the aim of preserving the constitutional order of contracting states and particularly to put an end to the seizing of power by the army or other non-state groups.

Complementing the Declaration on the framework for an OAU response to unconstitutional changes of government, adopted in 2000, the Charter on Democracy specifies that ‘any amendment or revision of constitutions or legal instruments which affect the principles of democratic changeover’ also constitutes an unconstitutional change of government. The latter wording was preferred to ‘the amendment and revision of constitutions and legal instruments in violation of the spirit and letter of constitutional provisions by the incumbent government in order to remain in power indefinitely’ used in the second draft revision because of the opposition of many African heads of state and the government at the Banjul Summit in June 2006.

Methods of monitoring the application of the Charter

These are of two kinds, namely those on the application of the general provisions of the Charter and those which are specific to unconstitutional changes of government.

Application of the general provisions

In order to implement its provisions, the Charter on Democracy relies on two types of participants, namely state organisations and bodies of the AU.

State institutions

The Charter says nothing about state organisations which are called upon to play a major role in its implementation. However, on reading paragraph 1 of article 44, this could include the following

- All state institutions involved in drawing up and adoption of national laws, like the executive, parliament, national institutions in charge of the promotion and protection of peoples’ rights and electoral matters
State media which should play an important role in the popularisation of the principles and rules of the Charter on Democracy;

Political parties, who do not only participate actively in the laws-making process and monitoring of the activities of the authorities, but, and particularly, who are the privileged players of the democratic game

For the rest, one of these state organisations must assume responsibility for drawing up the report which the contracting state submits to the Commission of the AU every two years on the measures, legislative and otherwise, which it has taken to implement its agreed undertakings. However, in view particularly of the AU’s new philosophy of promoting the most extensive co-operation possible between national players on democratic matters, one could consider that this report will entail substantial collaboration between public and private participants.

**Bodies of the African Union**

This will be mainly the AU Commission and the Peace and Security Council (PSC).

*The African Union Commission*

The Commission intervenes at both continental and sub-regional levels.

At continental level, the Commission is the central authority for co-ordination of the actions for implementation of the Charter on Democracy (AU 2007a, art 45(a)). In this capacity, it will

- Assist states in identifying the criteria for the Charter which they must apply in performing their contractual obligations. This will amongst others enable them to promote a common understanding among states of their contractual obligations and the practical details of their implementation

- Monitor the application of decisions taken on unconstitutional (AU 2007a, art 44, par 2(d)) changes and encourage contracting states to ‘create conditions favourable for democratic governance on the African continent’ (AU 2007a, art 44, par 3(b))

- Thanks to the Unit and the Fund for the Support of Democracy and Electoral Assistance, it will be possible to supply contracting states with every technical assistance and the resources they require to organise proper elections

- Send a copy of the state progress report to the other bodies of the AU and co-ordinate assessments on the implementation of the Charter
Prepare and submit a summary report on the implementation of the Charter to the Union’s Conference. This report will serve as a basis for the implementation of ‘appropriate measures for handling matters raised by the report’ (AU 2007a, art 44, par 2(b)).

At the level of regional economic communities (RECs), the role of the AU Commission will be to

- Encourage member states of the RECs to ratify the Charter and implement it
- Identify a focal point in each REC, for the co-ordination, assessment and follow-up of the application of the Charter, and particularly to encourage civil society organisations to participate in this process. One can suppose that this will certainly be done at the level of the co-ordination committee created by the Protocol on relations between the AU and RECs (AU 2007b, art 7, par 2(b)) (the REC Protocol), which is the appropriate framework for discussions and decisions on the implementation of the Charter at the level of African regions

The role of the Peace and Security Council in the event of an unconstitutional change of government

Each time a politico-legal crisis within a member state fits one of the situations specified by article 23 of the Charter on Democracy or more generally when a situation could compromise the development of the democratic political and institutional process or the legitimate exercise of power (AU 2007a, art 24), the PSC is called to manage it as follows:

- Together with the chairman of the AU Commission (AU 2002b art 7, par 1), it must rapidly begin ‘preventive diplomacy’ (AU 2002b, art 6, par b) actions, and if necessary offer its services to the political players, attempt reconciliation or conduct in-depth enquiries on the matter
- If these political initiatives fail, the party concerned is immediately suspended from its right to participate in the activities of the AU (AU 2007a, art 26, par 1; UN 2002 art 7, par 1(g)) and a period of six months is then granted to the perpetrators to restore constitutional order (OAU 2000b:5). The sanctioned contracting party is still bound by the constitution, particularly its relevant provisions concerning individual rights (AU 2007a, art 26, par 2), and the PSC is obliged to maintain diplomatic relations with this party in order to bring about the re-establishment of this suspended or abolished constitutional order as quickly as possible (AU 2007a, art 26, par 3)
- If in spite of everything no progress is made, a new system of penalties, which requires the co-operation of member states, regional groups, the UN as well as the rest of the
international community/the donor community (OAU 2000b:5) is introduced, this time by the Assembly of the AU (AU 2007a, art 25, par 6)

The PSC must ensure that the people behind such an event do not take part in the elections which will be organised once the problem has been resolved and, even more importantly, do not take up positions of responsibility in ‘political institutions’ of the state in question. They may not be granted asylum by any of the Union’s member states. If they should arrive in the territory of one of these members, that state must apply the principle of universal jurisdiction to them, which means that they must be tried and extradited to the country requesting their return or in which the crime has been committed (AU 2007a, art 25, parr 8 and 9). In addition, the Charter specifies that they could also be tried before ‘the relevant court of the Union’ (AU 2007a, art 25, par 5).

As important as these key provisions of the Charter on Democracy are, their implementation will pose serious problems which will not, however, be insurmountable provided that the institutions and bodies for supervision of the treaty use it as a living instrument and are resolute in their determination to build open democratic societies.

Obstacles to the application of the Charter on Democracy

The application of such a delicate treaty, particularly in the light of its incompleteness, the vagueness of the terms used by the authors, the ineffectiveness of the organisations tasked with monitoring its implementation, and particularly the fragility and hostility of the current political, economic, social and cultural environment of the continent, can only lead to difficulties for which African leaders, if they wish for the values promoted in the Charter on Democracy to take root in Africa, must find pragmatic solutions.

From the normative point of view

First of all, in a treaty looking to ‘roll back the frontiers of sovereignty on a matter concerning a domain reserved for states … [and create] Democracy an essential principal of international law and international relations’ (Ngarhodjin 2007), the absence of legal definition, or at least clear criteria for identification of the state of the democratic system is regrettable. It is even more significant that nowhere in the text of the Charter on Rights is ‘the right to participate freely in the management of public affairs’ (OAU 1981, art 13) mentioned as a basic right of Africans.

Admittedly, in article 2 the Charter on Democracy specifies the objectives it is pursuing and the principles on which it depends. But it seems that it would have been useful, in
such an essential text, to specify the connection of the citizen to democracy and the permanent nature of the process of building it in order to give it a universal hallmark.

Just like the Inter-American Democratic Charter (Organisation of American States 2001, art 1), and the Universal Declaration on Democracy (Inter-Parliamentary Union 1997), the draft democratic charter examined at Brazzaville in June 2006 took an interesting step in this direction by making democracy ‘a fundamental right’ (art 4) of humans which states should respect,13 but this was rejected by member states at the time of the final negotiations which took place in Addis Ababa in May 2006. The inclusion of such a provision would have meant that each time a party state failed to keep its contractual obligations, that citizens would have had recourse to the Commission or the African Court of Human and Individual Rights to force the state to fulfil its obligations. This would have contributed to the credibility of the argument that all the provisions of the Charter on Democracy should be invoked before national and regional courts (see Eborah 2007). Moreover, this is provided for in the ECOWAS Protocol, according to which ‘every individual or organisation shall be free to have recourse to the common or civil law courts, a court of special jurisdiction, or any other national institution established within the framework of an international instrument for human rights’ (ECOWAS 2001, art 1, par (h))

In addition, if, as the Universal Declaration on Democracy had specified (inter-Parliamentary Union 1997, par 2), the Charter on Democracy had stated that democracy is an ideal to be pursued and a means of government to be applied according to the terms setting out the diversity of cultural experiences and particularities without breaching the internationally recognised principles, norms and rules, it would then have allowed those bodies responsible for the application of the Charter to express themselves better on the nature of certain political regimes on the continent.14 In this way they would also have been better able to assist the citizens of a particular country to make use of the continental treaty to force their leaders to respect the letter and the spirit thereof.

In the second place, it needs to be pointed out that actual application of certain rules relating to the organisation of elections could be highly problematical. For example, what would be the use of asking the state to create and strengthen an ‘independent and impartial’ electoral body, if the latter enjoys the confidence of only some of the political parties involved in the electoral battle? Or basing acceptance of the results of the ballots on a simple code of conduct without clear legal statutes, if it wasn’t signed by all political parties? Those responsible for writing the charter should have been inspired by the ECOWAS Protocol (2001, art 3) which is more specific on the measures which the state should take in the sense that ‘the bodies in charge of elections should be independent and/or neutral and have the confidence of players and protagonists of political life’ and that if necessary, it should organise appropriate dialogue with a view to establishing the nature and form of the relevant bodies.
The ECOWAS Protocol is also more specific than the Charter on Democracy on the matter of respecting the will of the people, which is often problematic on the continent. The Protocol (2001, art 9) states that ‘the defeated political party and/or candidate should, within the period and manner set down by law, yield power to the regularly elected political party and/or candidate’.

One could also blame the authors of the Charter on Democracy for having left out important factors which are found in the ECOWAS Protocol and which contribute to the success of organising transparent and peaceful elections, namely:

- The existence of a reliable and stable system of civil status (ECOWAS 2001, art 4) and electoral lists drawn up in a transparent and reliable manner, and which may be consulted at any time by voters.

- Recourse to civil society organisations to train and raise the awareness of the populace about the holding of ‘peaceful elections free from violence or crisis’.

- The banning of any kind of harassment of the candidate or party which lost the election, or its supporters (ECOWAS 2001, art 20)

With regard to the observation of the election, the steps recommended by the Charter on Democracy contain all the ingredients of its ineffectiveness for a number of reasons:

- The Union’s participation in any election observation is entirely dependent on the goodwill of the state on whose territory the elections are taking place. If a party or candidate does decide to rig the election, the latter may purely and simply send an invitation to the AU Commission one month before the start of the election and block any participation by the regional organisation. This is what happened during the general elections in Kenya in December 2007, with devastating results.

- The rules surrounding the functioning of the observer missions do not guarantee total impartiality because there are no clear criteria for the selection of its members. This is particular relevant for rules dealing with conflict of interests.

- The Charter does not specify how the support fund should be financed, nor its function. One can imagine that, like all aspects on the financing of interventions by the AU with regard to peace and security, this Fund will be at the mercy of the whim of foreign donors. Elections are such a sensitive issue for current African political regimes that it would be hopeless to allow the success of election observer missions to rely on co-operation with Western countries, as this again would depend on the priorities of donors: The United States and the United Kingdom would for example probably prefer to give resources for observing Zimbabwean general elections that for those of the Comores.
In the current budgetary context of the Union, the Chairman of the Commission would find it difficult to finance observer missions, the size of which would amongst others depend on the importance of the election, the political situation in the country, its surface area and the level of development of its political institutions. The resources necessary for the implementation of the observer objectives could be considerable. It is accordingly a matter of urgency to settle the issue of the financing and operation of the Fund by AU bodies, because without an adequately financed Fund, the organisation would find it impossible to fulfil its task.

Both the duration of observer missions and time allocated for presentation of their report are very vague and could give rise to political scheming.

From this point of view, the rules which apply at the level of the ECOWAS are much clearer:

The decision to participate in observing the election in a member country is taken principally by the chairman of the Commission of the ECOWAS (2001, art 12), as is that to aid and assist the country in question.

However, the chairman is obliged, before a general election is held in a member state, to send an exploratory information mission there. The purpose is not only to gather information about the general political situation of the country, but also about the candidates or political parties. The exploratory mission should meet and hold discussions with all parties as well as government authorities and other interested organisations and institutions in order to assess the state of preparedness for the elections. This information is placed at the disposal of the observer or supervisory mission (ECOWAS 2001, art 13) which is always headed by ‘an independent person of a nationality different to that of the state in which the elections are being held’ (ECOWAS 2001, art 14, par (1)).

Members of the mission, who are subject to an obligation of discretion, may cooperate with civil society organisations and hold discussions with other observer missions at the same election, but must decide on the terms and conditions of their deployment together with the appropriate bodies of the host nation.

The members of the mission must stay until the announcement of results and prepare a report to the Commission chairman, the structure of which is set by the Protocol, to be filed within two weeks after the end of the mission (ECOWAS 2001, art 17(1)).

The chairman sends the report, together with its personal observations, to the ECOWAS Mediation and Security Council, which will draw up recommendations for the electoral party or for the action that has to be taken (ECOWAS 2001, art 18) by the voting bodies of the regional organisation.
In the third place, regarding the role of the army and security services, the principles contained in the ECOWAS Protocol on the whole seem more in line with the democratic spirit than those contained in the Charter on Democracy. According to the ECOWAS Protocol (2001, section IV) the army and security forces of a democratic society should be

- Republican and at the service of nations, that is to say they should defend independence, the territorial integrity of the state and its democratic institutions
- Ensure that the law is respected, should maintain order and should protect goods and persons
- Used, if necessary, for tasks of national development

As citizens, personnel of the armed forces and security forces should enjoy all rights granted to other citizens, naturally subject to those obligations associated with their status. But it is obligatory that they be apolitical, and similarly that they are answerable to the regularly constituted civil authorities. The state must ensure that security forces ensuring the safety of goods and persons do not use their weapons to disperse non-violent demonstrations, nor treat individuals in a cruel, inhumane or degrading manner.

**From the institutional point of view**

With the current state of operation of the AU, it is not certain that its Commission can fully accomplish the role which has been assigned to it by the Charter on Democracy for particularly two reasons:

- It does not have the necessary human and financial resources to support the states which ask for it. For example, the Unit responsible for election observer missions at the level of the Commission’s Department of Political Affairs only has about ten people to cover all the actions associated with the preparation, organisation and follow-up of elections in the 53 member states. Under these conditions how could the Commission in good conscience examine the reports which the contracting parties should submit to them every two years as required by the Charter on Democracy and make the appropriate recommendations to the Conference on actions which the states should take in order to comply with the letter and spirit of the treaty?
- It does not have the political and legal means to ensure that the contracting states are more respectful of the measures drawn up by the Union in terms of its sphere of responsibilities.
Under these conditions, asking the chairman of the Commission to co-ordinate its actions with those of the other bodies of the AU, particularly those bodies responsible for the application of treaties and the appropriate national structures, is the best way of blocking any assessment of progress made in the implementation of the Charter on Democracy. These periodic assessments are fundamental, because they are the means by which one can truly know if the democratic values and culture have become entrenched at all levels of society.

At the level of the RECs, the actions required by the Charter on Democracy will not be easy to undertake. Neither ECOWAS (which has already adopted a similar treaty) nor the West African Economic and Monetary Union will be prepared to invest in the promotion of the Charter on Democracy and particularly not to collaborate with civil society organisations.

As far as unconstitutional changes of government are concerned, measures like bringing the perpetrators of these acts before the relevant court of the AU, taking disciplinary action against a state in which an unconstitutional change occurred, or even getting states to sign extradition agreements for the perpetrators are likely to be difficult to implement:

- There is as yet no court with the necessary powers within the AU and on the continent
- Apart from coups d’état and the intervention of mercenaries or armed groups within a member state, which are immediately punished by the AU, the refusal to relinquish power to the winner of the election or constitutional or legislative revision which damage the principles of democracy will be difficult to penalise, quite simply because the Charter on Democracy requires that the AU first exhaust diplomatic and political means of recourse. The example of the presidential election in December 2007 in Kenya shows to what extent such decisions in a context of chaos can be contrary to the results sought by the Charter on Democracy

The speed of the reaction by the bodies of the Union is also a determining factor in the effectiveness of the system which is in place. Firm intervention by the incumbent chairman and by the chairman of the Commission, taken the day after the decision by the Togolese military not to hand over power to the person appointed by the Constitution to occupy the post of President of the Republic after the death of President Gnassingbe Eyadema in February 2005, persuaded the PSC to meet two days afterwards in order to establish the disciplinary action to take (Adjovi 2005:4–5).

**Conclusion**

With the adoption and forthcoming application of the Charter on Democracy, the ‘Western’ era of democratisation of African societies seems to have begun. The process
will be fairly long and strewn with obstacles of all kinds, but it will end with the emergence of new societies whose basic courses and choices will be determined, from now on, by the majority of people who constitute these societies.

In this regard one is tempted to compare the continental text on democracy with the African Charter on Human and Peoples’ Rights which was disparaged, as it was adopted, as being a document to soothe the consciences of dictators which were so widespread on the continent at the time. In the work dedicated to him, the late Keba Mbaye wrote that ‘the editors (had) contented themselves in many scenarios with living in a dream world. The purpose of this technique … was to avoid alarming the representatives of the states and to make way for a dynamic action by the African Commission on Human and Peoples’ Rights’ (Mbaye 2002:198). Twenty-five years after the formation of the African Commission the facts proved him right because the main continental body for the protection of individuals’ rights, through its jurisprudence and activism, made the continental treaty into a living document to which Africans are increasingly resorting to defend themselves against their states.

One can then hope that the bodies of the African Union called to play a fundamental role in its popularisation and implementation, will always, with their respective actions, manage to make the collective will of African states prevail to work towards the improvement and consolidation of democracy on a continent which has suffered greatly from human stupidity.

One must also hope that active involvement of civil society in mobilising the African populace around the values which the Charter promotes, will change the order by propelling matters associated with democracy to the top of the list of concerns of African leaders.

Notes

1 In particular, the regimes of the Jean-Bedel Bokassa in the Central African Republic, Marshal Mobutu Sese Seko in Zaire, Kamuzu Banda in Malawi, Ahmed Sékou Touré in the Republic of Guinea, Sani Abacha in Nigeria, Mengustu Haile Mariam in Ethiopia, Moussa Traoré in Mali and, more recently, Charles Taylor in Liberia.
2 The word ‘democracy’ was absent from the Charter of the OAU.
3 The date on which, at the invitation of President Said Mohamed Johar, the interim president of the Comores, it sent a three-person team to observe the elections.
4 If a member state was guilty of war crimes, crimes against humanity and genocide (art 4(h) of the Constitutive Act).
5 Hawkins and Shaw (2005:2) define legislation as follows: ‘[L]egalisation constitutes one form of institutional change and can be defined as a process in which institutional rules become more obligatory and precise and in which institutional parties received more delegated authority to interpret, monitor, and implement these rules.’
6 See the Ecowas Protocol (Ecowas 2001) which goes back to almost all the principles contained in the declaration of the same name, which was adopted in 1991.
7 See the Preamble of the Declaration of the African Conference on Democracy, Elections and Governance held in Pretoria, South Africa, on 7–10 April 2003, at the request of the Independent Electoral Commission of South Africa, together with the Commission of the African Union and the African Association of Electoral Institutions. The Conference was attended by more than 350 delegates.


9 By way of comparison, American states made the choice of democratic representation which they are obliged ‘to promote and defend’ (Organisation of American States 2001, art 1), the essential components of which are ‘respect for human rights and basic freedoms, access to power and the exercising of this power subject to the rule of law, the holding of periodic elections, which are free and fair and based on universal secret suffrage, as an expression of popular sovereignty, the multiple system of parties and political organisations as well as the separation and independence of public powers’ (Organisation of American States 2001, art 3).

10 Particularly articles 4, 6, 7, 8 (1) and 10(3) of the Charter on Democracy.

11 According to the OAU (1999) ‘The Conference … decides that member states whose governments have acceded to power by unconstitutional means after the Harare Summit, should restore constitutional legality before the next Summit, failing which the OAU will take disciplinary measures against these governments until democracy is re-established’.

12 The Declaration on the framework for an OAU response to unconstitutional changes of government (OAU 2000a:4) defines unconstitutional change in terms of four criteria:
- A military coup d’état against a legitimate government
- The overthrow of a legitimate government by a group of mercenaries
- The overthrow of a legitimate government by armed dissident groups and rebel movements
- The refusal of an incumbent government to hand over power to the winning party after free, fair and regular elections

13 By comparison, the Inter-American Charter states that ‘the peoples of America have the right to democracy and their governments have the obligation to promote and defend it’ (Organisation of American States 2001).

14 Such as the case of Jamahirya Ilbyenne and the Kingdom of Swaziland, where constitutional provisions expressly ban political parties.

15 Article 5 of the ECOWAS Protocol (2001) even requires that political parties and voters participate in their preparation.

16 See ECOWAS Protocol (2001, art 8). Paragraph III(e) of the Declaration of the OAU seems much too vague in that it requires the state ‘to promote civic education and the education of voters to democratic values and principles, in strict co-operation with groups of civil society and other concerned stakeholders’.

17 During the recent elections in Zimbabwe, the Zimbabwean authorities made it very clear to the observer missions that their mandate came to an end once voting offices had closed. This was aimed at preventing them from observing whether vote counting was rigged.

18 According to article 16, par 3, it must above all contain information on what the mission has been able to observe itself, testimonies collected, its assessment of the manner in which the election took place compared to national laws and ‘the universally accepted principles in electoral matters’ as well as recommendations ‘with a view to improving future elections and observer missions’.

References


AU 2007b. Protocol on Relations between the African Union and the Regional Economic Communities (RECs) (Assembly/AU/Dec.166 (IX)). Adopted by the Assembly during the ninth ordinary council held in Accra, Ghana on 1–3 July.

AU 2005. Non-aggression Pact and Common Defence. Adopted by the Assembly at the fourth ordinary session, held in Abuja, Nigeria, on 31 January.


AU 2002a. Declaration on the Principles Governing Democratic Elections in Africa (AHG/Decl.1 (XXXVIII)). Adopted by the Assembly at the 38th ordinary session, held in Durban, South Africa on 8 July.


OAU 2000a. Declaration on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI)). Adopted by the Assembly at the 36th ordinary session, held in Lome, Togo on 10–12 July.

OAU 2000b. Declaration on unconstitutional changes of government in Africa (Lomé declaration). Adopted by the Assembly at the 36th ordinary session, held in Lome, Togo on 10–12 July.

OAU 2000c. Declaration on the African common position on the illicit proliferation, circulation and trafficking of small arms and light weapons (Bamako declaration). Adopted at the ministerial conference, held in Bamako, Mali on 30 November to 1 December.


OAU 1990. Declaration on the political and socio-economic situation in Africa and the fundamental changes which are currently taking place in the world (AHG/Decl.1-2(XXVI)). Adopted by the Assembly at the 26th ordinary session held in Addis Ababa, Ethiopia, on 9–11 July.

OAU 1994. Declaration concerning the Code of Conduct for Inter-African Relations. (AHG/Decl.2(XXX))
Adopted by the Assembly at the 30th ordinary session, held in Tunis, Tunisia on 13–15 June.
Assembly in Lima, Peru on 11 September. Available at www.osce.org/item/19392.html [accessed 11 June
2008].
Piccone, T J 1997 International rules and procedures for protecting democratic governments. Available at
8 June 2008].
Law Journal, 1(1).