

FROM “TRANSITION TO DEMOCRACY” TO “DEMOCRATIC TRANSITIONS”

In Search for Sustainable Management
of Power Transfers in Africa



FROM “TRANSITION TO DEMOCRACY” TO “DEMOCRATIC TRANSITIONS”

**In Search for Sustainable Management
of Power Transfers in Africa**



**Hanns
Seidel
Foundation**

TABLE OF CONTENTS

Foreword	III
Acknowledgement.....	IV
1. Introduction and Problem Statement.....	1
2. Evolution of Democratic Transitions	3
3. The Means by which State Power is Acquired	6
3.1 Lawful/Legitimate Means: Free, Fair, Transparent and Regular Elections.....	6
3.2 Illegitimate Means	9
Table 2: Changing term limits in Africa in practice (2000–18): Main decision-makers	14
Table 3: Examples of indicators of constitutional manipulation	15
3.3 Borderline Means of Power Change.....	16
4. How is Power Acquired to? The Process and Practice of Executive Transitional Management.....	19
5. Which Players/Actors are Involved?	21
6. Conclusion.....	24
7. Recommendations.....	25
8. About Hanns Seidel Foundation	26
9. About the Author.....	27

FOREWORD

The majority of the countries in Africa have adopted the practice of regular elections, as a way of fulfilling democratic constitutional requirements. But holding regular elections alone is not enough to guarantee a democratic society – it is rather the quality of the elections, in terms of the extent of being free, fair and credible. Furthermore, the power transfer or transition phase, which is either after an election winner is declared, or through other means, is a crucial democratic process. The capacity of the people, systems and processes involved matter, and where that falls short, it weakens or compromises the foundation for the incoming administration.

Whereas some countries such as Ghana and South Africa have exhibited a trend of credible elections and power transitions, other countries such as Kenya and Rwanda have had a series of disputed elections and violation of presidential term limits respectively. Other challenges across countries have manifested in the form of weak electoral institutions, low public confidence levels in the credibility of elections and in elections as a way of getting good leaders to office; and the emerging risk in the form of digital technology and the resulting disruption and potential negative impact to elections and power transitions.

Credible elections and smooth power transitions are two critical components of democracy, its growth and stability, as well as the development of a country and the continent. To achieve the African Union Agenda 2063 and progressive initiatives such as the African Continental Free Trade Area (AfCFTA), African countries cannot keep stagnating in flawed elections and power transitions which cause conflicts and derail development.

In the present times, established democracies as well as non-democratic countries in Africa and across the world are finding themselves in a highly disruptive environment characterized by rapid spread of digital technology and socio-political unpredictability and uncertainty. Elections and power transitions have not been spared by the current wave of change. It is therefore necessary, more than ever before, to rethink and find innovative ways of accelerating the implementation of measures, standards and protocols that will ensure states, electoral institutions, the African Union, and other relevant actors achieve a culture of free and fair democratic elections and smooth power transitions. To realize this, it is needful to review the recent-past context of elections and power transitions in Africa, and the emerging trends in form of opportunities, needs and challenges, and propose strategic recommendations. This will primarily enable state and non-state actors to acquire key knowledge and information on the two issues, which will enhance ongoing interventions and inform the design of new responsive approaches.

This is an inaugural publication of the Africa Elections Dialogue (AfED), a project that seeks to provide a permanent and dedicated regional platform that will support the African Union and member states, specifically on the two issues on elections and smooth power transfers. The objective of AfED is “African states entrenching principles and practices of free and fair democratic elections and smooth power transfers”.



Daniel Seiberling
Resident Representative, Kenya & Ethiopia
Hanns Seidel Foundation

ACKNOWLEDGEMENT

This publication benefitted from the input of various participants of the validation meeting from various African countries. There was also key contribution from the project partners including Ms. Mukami Wangai of Strathmore Law School, Dr. Zemelak Ayele of the Centre for Federalism and Governance Studies, Addis Ababa University, and Mr. Mulle Musau of the Elections Observation Group (ELOG), especially in the planning and holding of the validation meetings.

1 INTRODUCTION AND PROBLEM STATEMENT

Liberal democracies have sets of procedures and institutions that allow for the contestation over power in free and fair elections, resulting in governments that are accountable and strive to guarantee equal rights to all citizens of a polity.¹ The pursuit of democratic governance is informed by its utility to “guarantee political rights, protect economic freedoms and foster an environment where peace and development can flourish.”² Democratic culture and practice, strong governance institutions and enhanced political participation and tolerance are core to democratic consolidation.³ Consequently, advocates of greater democracy in African states have long recognised the “need to enhance democracy, both in quantitative and qualitative terms.”⁴ Underpinning this acknowledgement is the necessity to ensure that electoral processes do not undermine state stability by triggering violence, including inter-community clashes.⁵

Despite the appreciation in many quarters of the importance of democracy, Africa’s performance has yet to register a dramatic qualitative improvement in this aspect of governance, with most countries teetering between partial freedom and autocracy. According to Freedom House, Sub-Saharan Africa’s flawed electoral processes, marked by internet shutdowns and violence against opposition party organizing, remain prevalent and often undermine democratic outcomes.⁶ The global decline in the quality of elections,⁷ is also more evident on the continent. More fundamentally, election outcomes are increasingly challenged, either in courts or on the streets, and power transfers contested. The rarity of uncontested transition from one party to another after an election is in part due to weak democratic consolidation. As a demonstration of this weak institutional and normative framework, no specific norm at the continental level defines the concept of democratic transition of executive power.

While the African Union’s normative instruments seek to ‘promote democratic principles and institutions,’⁸ and ‘take measures to ensure...[the] constitutional transfer of power’⁹, none of these formulations provide sufficient clarity to the concept of democratic transitions. Based on an analysis of existing literature, this study adopts the definition of democratic transition

1 Terry Lynn Karl ‘Dilemmas of Democratization in Latin America’ (Oct 1990) 23:1 Comparative Politics pp. 1-21 at 2.

2 UN General Assembly ‘The causes of conflict and the promotion of durable peace and sustainable development in Africa’ Presented to the Security Council by the UN Secretary General UN. Doc A/52/871-S/1998/319.

3 Africa Charter on Democracy, Election and Governance (adopted 30 January 2007, entered into force February 15, 2012).

4 AU (2006) ‘Report of the Ministerial Meeting on the Draft African Charter on Democracy, Elections and Governance and on the Revision of the Lomé Declaration on Unconstitutional Changes of Government in Africa’ Ex.CL/258(IX).

5 *ibid*

6 Freedom House, Freedom Report 2020 online at <https://freedomhouse.org/report/freedom-world/2020/leaderless-struggle-democracy>.

7 Anna Lührmann, Seraphine F. Maerz, Sandra Grahn, Nazifa Alizada, Lisa Gastaldi, Sebastian Hellmeier, Garry Hindle and Staffan I. Lindberg. 2020. Autocratization Surges – Resistance Grows. Democracy Report 2020. Varieties of Democracy Institute (V-Dem) pg 9. The Report uses Liberal Democracy Index (LDI) to assess the state of democracy or autocracy. This index combines measures of the quality of elections, suffrage, freedom of expression and the media, freedom of association and civil society, checks on the executive, and the rule of law across time and regions.

8 Africa Union Constitutive Act, Art 3(3)(g).

9 Africa Charter on Democracy, Election and Governance, *supra* note 3, Art 5.



An Electoral official arranges ballot boxes in Kenya, s General Election on 2017. (Photo: Courtesy)



The rarity of uncontentional transition from one party to another after an election is in part due to weak democratic consolidation

as connoting *the orderly, free and peaceful handover of power by an incumbent head of state or government to the winning party's candidate after free, fair and regular elections presided over by an independent institution of the state upon the exhaustion of any legal challenges to the electoral outcome*. The following distinct but interrelated elements can be gleaned from this definition:

- a. The means by which power is acquired
- b. The manner in which power is acceded to
- c. The parties/actors involved in the process of accession to power (i.e., incumbent, winner, loser)
- d. The institutions involved: electoral management bodies, political parties, adjudication mechanism(s), institutions that guarantee the free exercise of democratic rights (i.e., police, media, military, international observer missions, among others)

Each of these elements is further elaborated in Part 3 of this Report by examining its legal foundations, the context of implementation in select contexts in Africa, some indicators of the nature of each of these dimensions, and the impact on democratic transitions. The next section sketches the history of norm development in favour of democratic transition in Africa as a way of providing an overview of the challenging and in-progress journey towards consolidation of democratic standards on the continent.

2 EVOLUTION OF DEMOCRATIC TRANSITIONS

Prior to the enactment of the Constitutive Act of the African Union, the acquisition of State power on the continent was instructed by the international legal doctrine of effectiveness. Under this theory, what was required for purposes of legitimacy is a demonstrable successful seizure of the instruments of authority by a government, thus lending a sufficient basis for the conferment of recognition by other States.¹⁰ This doctrine was vouchsafed by the principle of non-interference and respect for territorial integrity, central elements of the leitmotif of OAU Charter.¹¹ This state of affairs resulted in a culture of complete indifference as to how governmental power was acquired and exercised within the confines of the territories of an OAU member state. As a result, during the Cold War period of the OAU, military coups and related unlawful methods of change of government were the most common forms of assumption of power.¹² Following the effectiveness doctrine of international law, the OAU accepted regimes coming to power through whatever means, irrespective of their popular legitimacy. Unsurprisingly, over 85 coups d'état (78 of them between 1961 and 1997) were witnessed on the continent.¹³ As a result of such failures in 'good governance', between 1963 and 1998, the continent was a theatre of nearly 26 armed conflicts which affected about 61 per cent of its population.¹⁴

The end of the Cold War disrupted the culture of indifference towards the means for acquiring power. Democracy's victory over communism represented by the fall of the Berlin Wall, was hoped to usher in a democratic utopia popularised by Francis Fukuyama in his treatise *The End of History and the Last Man*.¹⁵ Africa's normative and institutional beliefs were recalibrated by its own leadership to align with the predominant notions of democracy as advanced by the West. These developments led the OAU to acknowledge in 1990 that that socio-economic development was unfeasible absent citizen participation in governance. The OAU then committed its members to "further democratisation...and to the consolidation of democratic institutions."¹⁶ However, the Union continued to extend considerable latitude in favour of member states to "determine, in all sovereignty, their system of democracy on the basis of their socio-cultural values."¹⁷

10 Solomon A Dersso 'The Status and Legitimacy of Popular Uprisings in the AU Norms on Democracy and Constitutional Governance' (2019) 63:S1 Journal of African Law 107–130 at 111-2.

11 Organization of African Unity (OAU) Charter of the Organization of African Unity, 25 May 1963, Art III(2)(3).

12 KO Kufuor 'The OAU and the Recognition of Governments in Africa: Analyzing its Practice and Proposal for the Future' (2002) 17:2 American University International Law Review 369, noting (at 375) that the OAU had accepted the "principle of effective control as one of the conditions for recognition of governments".

13 Van der Linde M. 'Emerging Electoral Trends in Light of Recent African Elections (2001) 1:1 African Human Rights Law Journal

14 Ibrahima Kane (2008) The implementation of the African Charter on Democracy, Elections and Governance, African Security Studies, 17:4, 43-63, at 44.

15 Francis Fukuyama *The End of History and the Last Man* (2006, Free Press).

16 OAU '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 1990 para 10.

17 Ibid.



Most African states, while holding elections fairly regularly, fail to satisfy the threshold of democratic governance and are often described as electoral authoritarian governments



As a result of failure in good governance, between 1963 and 1998, the continent was a theatre of nearly 26 armed conflicts which affected about 61 per cent of its population

This is the minimalist approach to democracy which emphasises electoral processes with acknowledgement of national variations, resulting in electoral authoritarianism. The maximalist approach, in contrast, relies on the existence of structured institutions as well as a body of norms and rules, which helps democracy to survive attacks to which it might be subjected.¹⁸

This maximalist conception of democratic development began to gain ascendancy towards the end of the 1990s. The OAU Heads of States Summit in Algeria in 1999 introduced a prohibition against ‘an unconstitutional interruption of the democratic order or the alteration of the constitutional order’.¹⁹ Coming after attempted coups in Zimbabwe and Sierra Leone, the Algiers Summit emphasised that coups were the consequence of non-adherence by a member state to democratic governance principles and a failure to respect its own constitutional order.²⁰ The Algiers Declaration further enunciated the values of democratic governance to include the following:

1. **Adoption of a democratic Constitution: its preparation, content and method of revision should be in conformity with generally acceptable principles of democracy;**
2. **Respect for the Constitution and adherence to the provisions of the law and other legislative enactments adopted by Parliament;**
3. **Separation of powers and independence of the judiciary;**
4. **Promotion of political pluralism or any other form of participatory democracy and the role of the African civil society, including enhancing and ensuring gender balance in the political process;**
5. **The principle of democratic change and recognition of a role for the opposition;**
6. **Organization of free and regular elections, in conformity with existing texts;**
7. **Guarantee of freedom of expression and freedom of the press, including guaranteeing access to the media for all political stake-holders;**
8. **Constitutional recognition of fundamental rights and freedoms in conformity with the Universal Declaration of Human Rights of 1948 and the African Charter on Human and Peoples’ Rights of 1981;**
9. **Guarantee and promotion of human rights.**

The adoption of the Algiers Declaration marked the first time that the continent acceded to a common concept of democracy whose quantum was clearly measurable based on objective standards. At the 36th Ordinary Session of the Assembly of Heads of State and Government of the OAU, held on 10–12 July 2000 in Lomé, Togo, two major documents were adopted: the Constitutive Act of the African Union and the *Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*. The Lomé Declaration represents a comprehensive set of common values and principles for democratic governance.²¹ The declaration provides a definition of what conduct amounts to an unconstitutional change of government. It also details the measures and actions which the OAU will adopt in response to unconstitutional changes of government. The Lomé Declaration also outlines an implementation mechanism for the speedy return of constitutionally sanctioned government.

¹⁸ Ferguson, P A 2002. The Inter-American Democratic Charter: challenges and opportunities. A rapporteur’s report on the Conference on the Inter-American Democratic Charter, held in Vancouver on 12–13 November.

¹⁹ OAU ‘Decisions on unconstitutional changes of government (Algeria Decision)’ (AHG/Dec. 141 & AHG/Dec 142 (XXXV)). Adopted by the Assembly at the 35th ordinary session, held in Algiers, Algeria on 12–14 July 1999.

²⁰ Ibid.

²¹ OAU, Lomé Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government (AHG/Decl.5 (XXXVI)).

Unfortunately, the Lomé Declaration's non-binding nature limits its use in constraining UCGs. It also fails to address other circumstances that create conditions fertile to UCGs including manipulating the constitution to remain in power; election rigging and more.²²

Consistent with the Lomé Declaration, the Constitutive Act condemns and rejects unconstitutional changes to government.²³ Article 30 simply states that "Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union."²⁴ The Act does not provide further elaboration of UCG presumably leaving it to future legislative action by the organs of the Assembly.

The African Charter on Democracy, Elections and Governance (ACDEG) adopted in 2007 and entered into force in 2012 is therefore seen to fill this normative gap. ACDEG is a unique instrument, whose ambition is to address the challenges to good governance by, in the words of its preamble, deepening and consolidating "the rule of law, peace, security and development." As will be evident from this Report, ACDEG's role in dealing with "unconstitutional changes of governments" is a clear elaboration of the continent's repudiation of unlawful seizure of political power. For its implementation, the Charter foresees a multi-level governance framework at the continental, regional and country levels.²⁵ To operationalise this intricate web of institutions and actors, an African Governance Architecture (AGA) was established in 2011. The AGA is a platform for dialogue between various stakeholders including the AU organs, RECs, and institutions with a mandate to promote good/improved governance, democracy, and human rights in Africa.²⁶

22 Solomon A Dersso 'Unconstitutional Changes of Government and Unconstitutional Practices in Africa' (World Peace Foundation Paper No. 2 (2016) online at <https://sites.tufts.edu/wpf/files/2017/07/2.-UCG-Dersso-f.pdf>)

23 OAU, Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, entered into force May 26, 2001, art 4(p).

24 OAU, Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, entered into force May 26, 2001.

25 African Charter Democracy, Election and Governance, supra note 3, chapter 11.

26 Micha Wiebusch, Chika Charles Aniekwe, Lutz Oette and Stef Vandeginste 'The African Charter on Democracy, Elections and Governance: Trends, Challenges and Perspectives' (2019) 54:2 Africa Spectrum pp 95–105 at 97.

3 THE MEANS BY WHICH STATE POWER IS ACQUIRED

There are several approaches by which state power has been historically acquired as outlined in part 1. At either ends of this continuum lie lawful and illegal/illegitimate means. Borderline modes of acquiring power are situated in between these two extremes, and their legality or legitimacy will depend on context. We discuss these three broad modes in the following sections.

3.1. Lawful/Legitimate Means: Free, Fair, Transparent and Regular Elections

Elections are a necessary ingredient for democracy. They are the means through which the *demos* (the people) are supposed to exercise their *cratos* (power or rule - of choice) of who will represent and govern them.²⁷ There can be no democratic transition without an election based on the Universal Declaration of Human Rights' explicit requirement that the will of the people expressed in periodic and genuine elections is the precondition for legitimate basis of government.²⁸ Credible elections whose outcomes are widely accepted by the populace in conjunction with a smooth, regular and peaceful hand-over of State power by an incumbent administration to its successor against a historical backdrop of legal and constitutional violations of such requirements – in some cases accompanied by violence - are the hallmarks of a positive democratic transitions.

The ACDEG sets the standards for genuine elections to include regular, transparent, free and fair elections.²⁹ It however does not define any of these terms. At the same time, it calls for the establishment of independent and impartial electoral management bodies and redress mechanisms - presumably courts - as well as for equitable access to the media by all parties.³⁰ It further enjoins the adoption of a code of conduct by all parties to an election whose key provision includes a commitment by all parties to accept election results or challenge them solely through legal means.³¹ The Charter assumes that in combination, these factors will yield a fair and transparent election. This is not a guarantee. In Africa, these standards are observed more in the breach than in compliance, because of the resiliency in authoritarian electoral victories sustained by entrenched relationships between autocrats and its elites, citizens, and external actors.³² The table below highlights the most common paths to political power on the continent over the last two decades.



The African Governance Architecture (AGA) is a platform for dialogue between various stakeholders including the AU organs, RECs, and institutions with a mandate to promote governance, democracy, and human rights in Africa

27 Matlotleng Matlou 'Election is in Africa: Give Us This Day Our Daily Bread, and All Our Problems Are Solved' (2015) 8:4 The Journal of Pan African Studies at 13.

28 Universal Declaration Art 21(3).

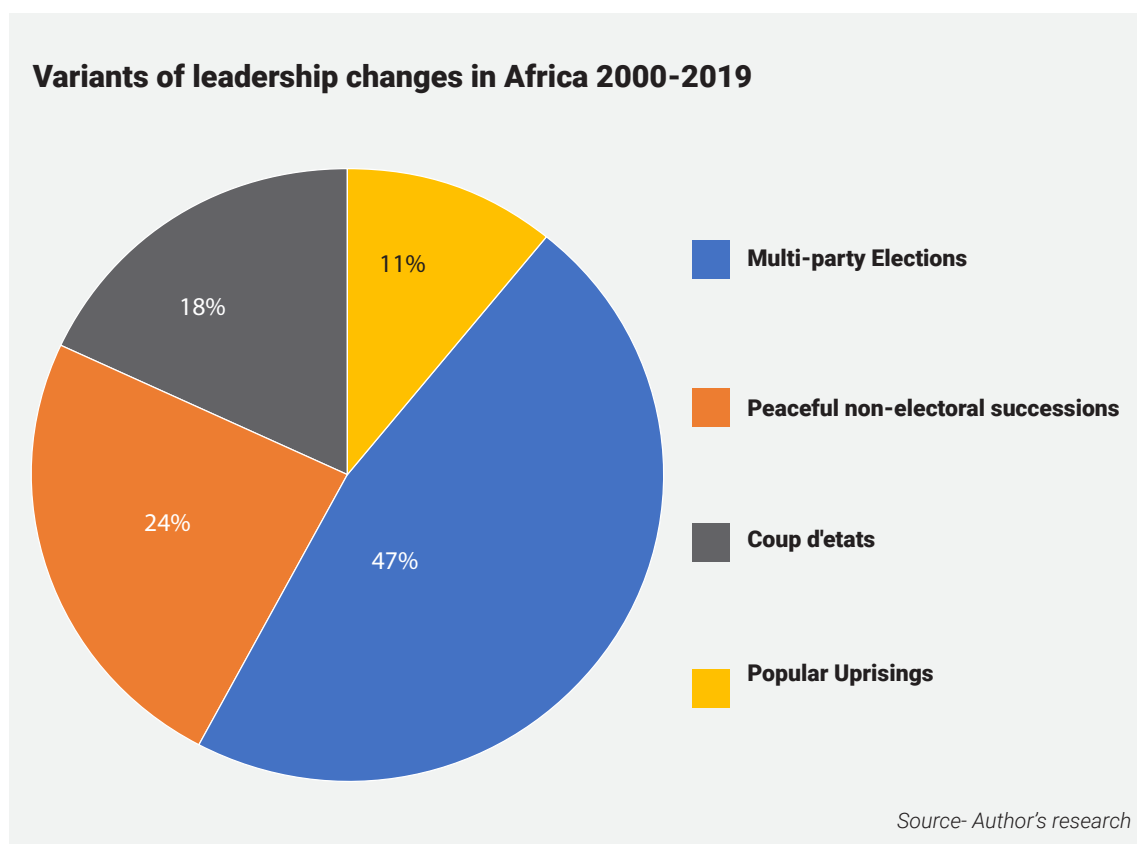
29 Africa Charter on Democracy Elections and Governance, supra note 3, Art 17

30 Ibid, Art 17(1)-(3).

31 Ibid, Art 17(4). See also Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), 2002, Art 13.

32 Morse, Y. (2018) How Autocrats Compete: Parties, Patrons, and Unfair Elections in Africa (Cambridge: Cambridge University Press) doi:10.1017/9781108596817 at 260.

CHART 1



Multiparty elections regularly conducted have not neutered self-rule on the continent as illustrated in the table below.

TABLE 1.

LEADER & COUNTRY	IN POWER FROM/TO	DURATION IN OFFICE
Teodoro Obiang Nguema - Equatorial Guinea	1979 - To date	41 years
Paul Biya - Cameroon	1982 - To date	39 years
Yoweri Museveni - Uganda	1986 - To date	34 years
Robert Mugabe - Zimbabwe	1980 - Ousted 2017	37 years
Blaise Compaoré - Burkina Faso	1987 - Ousted 2014	31 years
Denis Sassou Nguesso - Republic of the Congo	1997 - To date	23 years
Hosni Mubarak - Egypt	1981 - ousted by popular uprising in 2011	30 years
Omar Al Bashir - Sudan	1989 - 2019 deposed by coup d'état	30 years

Source - Author's research

The longevity in office of the above leaders serves to illustrate the difficulty of realizing democratic transitions. The longer a leader stays in power, the more likely the institutions of the state - including election-related institutions - become personalised: a *L'état c'est moi* situation. It is unsurprising that in the end, most of these leaders have been deposed either by their militaries or popular uprisings. This consequence has given rise to the idea that there are "good coups"



There can be no democratic transition without an election based on the Universal Declaration of Human Rights' explicit requirement that the will of the people expressed in periodic and genuine elections is the precondition for legitimate basis of government

and “bad coups.”³³ By replacing a bad government that has *ipso facto* lost legitimacy, a coup may enjoy popular support of the masses and be deemed a good coup notwithstanding that it runs afoul of the constitutional prescription for change of government.³⁴ As we will discuss below, African Union norms frown upon any change of government through coups notwithstanding the popular support they may enjoy.

Even the conduct of a genuine election does not necessarily lead to a democratic transition. A defeated incumbent may deploy a range of tools to frustrate the transition process. Evidence has shown that the period between the declaration of an election and the assumption of office of an elected leader is a very fragile one during which the State is most vulnerable to rupture, violence, massive violation of rights and humanitarian crises.³⁵ In 2007, at the height of expectations that the opposition leader, Raila Odinga, would be declared the election’s winner, the chair of Kenya’s electoral body was forced to announce the incumbent’s victory at the Presidential residence leading to the swearing-in of Mwai Kibaki by the Chief Justice at night.³⁶ This act triggered widespread violence in the country leading to the deaths of over 1,500 people and the displacement of several hundred thousand. In the mediation processes that followed presided over by the African Union, a government of national unity was cobbled together with the incumbent remaining president and the opposition leader occupying a newly-created position of prime minister.³⁷

The refusal to relinquish power is also exemplified in the Côte d’Ivoire case where former President Laurent Gbagbo refused to recognize the new administration led by Allasane Quattara which had been victorious in the 2010 elections. Rather, he decided to proclaim himself the winner with the help of the then constitutional court.³⁸ The four month violence that engulfed the country and led to the death of 3,000 people, continued until Gbagbo was ousted with the help of the French military. In Madagascar, Andry Rajoelina, with the support of the army and highly mobilised civilian supporters, forced President Marc Ravalomanana, then near the end of his term having been elected in 2002, to resign from office in 2009. Although international and AU-led mediators managed to negotiate for a return to constitutional order (the Maputo Agreement, 8-9 August 2009 as well as the Addis Ababa Additional Act, 6 November 2009), Rajoelina successfully boycotted further meetings and stalled any progress.³⁹ These circumstances demonstrate that losers reject unfavourable election outcomes deliberately in order to strengthen their post-election bargaining positions and extract political concessions from the winners. This is called the “blackmail strategy” of losing parties and candidates: losing candidates threaten to upend post-election stability unless they receive benefits.⁴⁰ This opportunistic behaviour reveals a gap in the normative armour created by ACDEG and a risk to democratic transitions. The playbook employed by would-be saboteurs of peaceful power transfers encompass a wide range of tools: cultivate

33 Francis Nguendi Ikome ‘Good Coups and Bad Coups: The Limits of the African Union’s Injunction on Unconstitutional Changes of Power in Africa’ (2007, Institute for Global Dialogue).

34 Ibid, at 13.

35 Eghosa E. Osaghae, Political Transitions and Ethnic Conflicts in Africa (2004) 21:1 Journal of Third World Studies.

36 The Guardian, ‘Kenya riot as Kibaki declared poll winner’ (31 December 2007) online at <https://www.theguardian.com/world/2007/dec/31/kenya.topstories>.

37 The Guardian ‘Kenya’s leaders agree power-sharing deal’ (28 February, 2008) online: <https://www.theguardian.com/world/2008/feb/28/kenya>

38 Pacifique Manirakiza, ‘Insecurity Implications of Unconstitutional Changes of Government in Africa: From Military to Constitutional Coups’ (2016) 17:2 Journal of Military and Strategic Studies 86-106 at 93.

39 Ulf Engel ‘Unconstitutional Changes of Government – New AU Policies in Defence of Democracy’ (Working Paper Series of the Graduate Centre Humanities and Social Sciences of the Research Academy Leipzig, No.9, Leipzig 2010), p. 6.

40 Víctor A. Hernández-Huerta ‘Disputed Elections in Presidential Democracies: Contexts of Electoral “Blackmail” (2019) 82:1 The Journal of Politics, pp. 89-103.



PHOTO: ISTOCK

a cult following based on ethnic or religious cleavages through polarizing rhetoric; undermine or capture critical governance Institutions including courts and election management bodies; if incumbent, employ intimidation, coercion or bribery using state machinery; shut down information flow, particularly new media and internet sites; manipulate disaster response for political ends, and court, threaten or divide the international community.⁴¹ Tracking the extent to which these factors are salient ahead of an electoral process will provide an opportunity for forecasting, early warning and response.

3.2 Illegitimate Means

According to the Lomé Declaration,⁴² the most consequential decision of the OAU before it was succeeded by the AU, the following situations constitute unconstitutional changes of government:

- Military coup d'états against a democratically elected Government;
- Intervention by mercenaries to replace a democratically elected Government;
- Replacement of democratically elected Governments by armed dissident groups and rebel movements;
- The refusal by an incumbent government to relinquish power after losing a free and regular election.

For the most part, coup d'états and removals of democratically elected governments by mercenaries are more likely where regimes are undemocratic and where weak frameworks for the holding of free and fair elections exist.⁴³ The São Tomé and Príncipe coup in 2003,

Even the conduct of a genuine election does not necessarily lead to a democratic transition. A defeated incumbent may deploy a range of tools to frustrate the transitional process

41 Nic Cheeseman, Brian Klaas *How to Rig an Election* (2019); Jennifer Mercieca *Demagogue for President: The Rhetorical Genius of Donald Trump* (July 7, 2020).

42 OAU, Lomé Declaration of July 2000 on the Framework for an OAU Response to Unconstitutional Changes of Government (AHG/Decl.5 (XXXVI)).

43 Muna Ndulo 'The Prohibition of the Unconstitutional Change of Government' in Abdulqawi Yusuf & Fatsa Ouguerouz *The African Union: Legal and Institutional Frameworks* (eds) (2015), p. 267.



Losers reject unfavourable election outcomes deliberately in order to strengthen their post-election bargaining positions and extract political concessions from the winners

for instance, was grounded on corruption in the government and a failure to equitably and transparently divide expected oil revenues.⁴⁴ The Guinea Bissau Coup on 14th September 2003 was celebrated by civilians who viewed the government as incompetent, corrupt, repressive and reluctant to undertake much sought-after democratic reforms in the country.⁴⁵ The incumbent President had declined to promulgate a constitution adopted by the National Assembly and instead proceeded to dissolve parliament and appoint a caretaker administration pending elections.⁴⁶ Togo's 2005 coup occurred after the death of the long serving dictator, Gnassingbe Eyadema, and the refusal of the military leadership to allow for the constitutionally sanctioned process for succession by the Speaker of Parliament for 60 days to prepare fresh elections.⁴⁷

The prohibitions against coup d'états and sanction mechanisms targeted at perpetrators have crystallised and are universally accepted in continental norms and practice.⁴⁸ The Protocol Relating to the Establishment of the Peace and Security Council (PSC), adopted in Durban, South Africa, on 9 July 2002, in its Preamble refers to the AU instruments on unconstitutional changes of government. Article 7(g) of the PSC Protocol stipulates that the PSC "shall institute sanctions whenever an unconstitutional change of government takes place in a Member State, as provided for by the Lomé Declaration". In the same vein, Rule 37 of the Rules of Procedure of the Assembly of the African Union entitled "Sanctions for Unconstitutional Changes of Government", which incorporates the provisions of the Lomé Declaration, states in paragraph 5 that "the Assembly shall immediately apply sanctions against the regime that refuses to restore constitutional order." To discourage the subversion of democratic transition through the perpetration of a UCG, the ACEDG is prepared to impose serious sanctions. In addition to the suspension of the country concerned the Charter provides, in cases of unconstitutional change, the following measures:

- Non-participation of the perpetrators of the unconstitutional change in the elections held for the return to the constitutional order;
- Ban or lustration from occupying senior positions in the political institutions of their state;
- Possible trial by the competent bodies of the AU; and
- Possibility for the AU Assembly to apply other forms of sanctions, including economic sanctions to wit, seizure of assets.

Gaps and inconsistencies in implementation notwithstanding, it is asserted that the existing prohibitions against unconstitutional changes to government occasioned by coups and mercenary intervention may have had a positive effect. Thus, it has been calculated that between 2003 and 2017, the AU suspended over 90% of countries that experienced coups and imposed targeted sanctions on over 70%.⁴⁹ Compared to the pre-Lomé Declaration period, when the continent witnessed 78 coups in 40 years,⁵⁰ the continent has witnessed fewer successful coups. The region has had 35 coup attempts in the past 18 years – an average of two per year, a clear demonstration of the constraining impact of the AU

44 Ibid, p. 257.

45 Ibid, p. 258.

46 Ibid, p. 259.

47 Ibid, p. 260.

48 Ibid.

49 Seth Appiah-Mensah 'Why can't the AU seem to deter coups?' African Arguments (October 20, 2020) online: <https://africanarguments.org/2020/10/20/why-cant-the-au-seem-to-deter-coups/>.

50 Giovanni Carbone 'Elections and Leadership Changes: How Do Political Leaders Take (and Leave) Power in Africa?' (2 April 2014) Polity.



People celebrate in the streets with members of Guinea's armed forces after the arrest of Guinea's president, Alpha Conde, in a coup d'état in Conakry, September 5, 2021. (Photo: Courtesy)

normative frameworks.⁵¹ Recent coups in Burkina Faso and Mali point to the unsettled state of normative implementation.

In contrast to military takeovers that are generally on the decline, the other forms of unconstitutional changes to government – ‘refusal to hand over power to a winning candidate or amendment or revision of constitutions or legal instruments which affect the principles of democratic changeover’ - are on the ascendancy. Recognizing this reality, the Charter on Elections Democracy and Governance adopts all the four forms of UCGs elaborated in the Lome Declaration but adds a fifth: namely, any amendment or revision of the constitution or legal instrument which is an infringement on the principles of democratic change of government.⁵²

The Malabo Protocol reinforces the African Charter on Democracy by criminalizing any constitutional amendment or other legal instruments in a manner that infringes on the principles of democratic change of government or is inconsistent with a country's constitution. Additionally, any substantial modification of the electoral laws in the six months before an election is considered criminal.⁵³ The Ezulwini Framework for the Enhancement of the Implementation of the Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa provides further clarifying language to this prohibition, thus: “constitutions shall not be manipulated in order to hold on to power against the will

The major contributing factor to coup d'états and removal of democratically elected government by mercenaries is the prevalence of undemocratic governance and weak frameworks for the holding of free and fair elections

51 Clayton Besaw & Mathew Frank 'No coups occurred in 2018. Will next year be so stable?' The Conversation online: <https://theconversation.com/no-coups-occurred-in-2018-will-next-year-be-so-stable-108387>

52 ACDEG, supra note 3, Art 23(5).

53 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), adopted by the Twenty-Third Ordinary Session of the Assembly of Heads of State and Government held at Malabo, Equatorial Guinea, 27 June 2014; Statute of the African Court of Justice and Human and Peoples' Rights, Article 28(e).

The prohibitions against coup d'états and sanction mechanisms targeted at perpetrators have crystallised and received near universal acceptance in continental norms and practice

of the people.....⁵⁴ Further, the Framework warns that constitution-making or constitutional review processes shall not be driven by personal interests and efforts aimed at undermining popular aspirations".⁵⁵ These positive prescriptions are still rendered in broad terms that evince an intention to uphold constitutionalism but are not sufficiently elaborated to facilitate coherent implementation.

The use of constitution-making processes and amendments to achieve undemocratic ends are on the rise on the continent. The extent to which the Egyptian Muslim Brotherhood in 2012 and the Egyptian military in 2014 used such mechanisms to entrench their interests has been documented.⁵⁶ In Benin, the country's 2019 constitutional changes pushed through by President Talon were challenged before the African Court on Human and Peoples' Rights (ACHPR).⁵⁷ The court ruled that the amendments violated the African Charter on Democracy, Elections and Governance to which Benin is a party, and noted the lack of political consensus and consultation and that the amendment was approved by a non-inclusive Parliament that excluded opposition parties.⁵⁸ The ACHPR ordered the government to annul the amendment and revert to the preceding status quo. These developments demonstrate that by altering constitutions to perpetuate their interests, incumbents successfully subvert democratic transitions without running afoul of the continental norm against unconstitutional change of government.

A particularly prevalent form of 'soft' UCG is alterations of constitutions to remove presidential term limits. Presidential term limits are defined as explicit legal restrictions on the duration and number of terms that an occupant of the top executive office can hold.⁵⁹ Limiting lengthy stays in office in presidential systems is widely perceived to help sever links with special interests, break down established personal fiefdoms, and thus limit corruption.⁶⁰ Despite the normative position of the AU restricting constitutional amendments that deviate from democratic principles, from April 2000 to July 2018, presidential term limits were changed 47 times in 28 countries and at least six further attempted changes failed.⁶¹ In 23 cases, spread over 19 countries, the changes strengthened term limits by introducing or imposing stricter temporal boundaries on presidential mandates, but in 24 instances in 18 countries the temporal restrictions on holding presidential office were removed or loosened.⁶²

The latter occurred in Guinea (2001), Togo (2002), Tunisia (2002), Gabon (2003), Chad (2005), Uganda (2005), Algeria (2008), Cameroon (2008), Niger (2009) and Djibouti (2010).⁶³ While

⁵⁴ Ezulwini Framework for the Enhancement of the Implementation of Measures of the African Union in Situations of Unconstitutional Changes of Government in Africa (2009) para 4(vi).

⁵⁵ *Ibid.*, para (vii).

⁵⁶ Adem Kassie Abebe 'Taming Regressive Constitutional Amendments: The African Court as a Continental (super) Constitutional Court'(2019) 1. See also, Washington Post 'Here's how African leaders stage constitutional coups': They tweak the constitution to stay in power.' (16 September 2016) online <https://www.washingtonpost.com/news/monkey-cage/wp/2016/09/16/heres-how-african-leaders-stage-constitutional-coups-they-tweak-the-constitution-to-stay-in-power>.

⁵⁷ HOUNGUE ÉRIC NOUDEHOUENOU V. REPUBLIC OF BENIN. App. No. 003/2020 (African Court of Human and Peoples' Rights, December 3, 2020)

⁵⁸ *Id.* See also, Olabisi D. Okinkube 'International Decisions' American Journal of International Law (2021) 115:2, 281-287

⁵⁹ Micha Wiebusch & Christina Murray 'Presidential term limits and the African Union' (2019) 63: S1 Journal of African Law 131-160, p. 140.

⁶⁰ Giovanni Carbone & Alessandro Pellegata Political Leadership in Africa (2020, Cambridge Press) 154.

⁶¹ Micha Wiebusch & Christina Murray, *supra* note 46 at 136. In parliamentary systems, official limits to one's length of stay in office are generally deemed unnecessary (on the ground that, in principle, legislators are in a position to sack and replace their prime minister at any time). *Id.*, p. 155.

⁶² Micha Wiebusch & Christina Murray *supra* note 56, p. 136.

⁶³ *Ibid.*, p. 137.

these presidential term limit changes have followed relevant constitutional procedures - that is, required majorities were achieved and required referenda held - superficial compliance with constitutional requirements may mask constitutional manipulation by powerful groups in the pursuit of their interests to remain in power.⁶⁴ Indeed, some of these constitutional changes amount to 'constitutional coups'. Table 3 below documents how term limits have been achieved on the continent (and the year in which each occurred).

TABLE 2:
Changing term limits in Africa in practice (2000–18): Main decision-makers

Parliament	Referendum	Judiciary
<ul style="list-style-type: none"> ▪ Burkina Faso (2000, 2015) ▪ Togo (2002) ▪ Gabon (2003) ▪ Algeria (2008, 2016) ▪ Cameroon (2008) ▪ Senegal (2008) ▪ Djibouti (2010) ▪ Tunisia (2014) ▪ South Sudan (2015, 2018) ▪ Seychelles (2016) ▪ Uganda (2017) ▪ Chad (2018) <p>(Total 15)</p>	<ul style="list-style-type: none"> ▪ Côte d'Ivoire (2000) ▪ Comoros (2001, 2009, 2018) ▪ Guinea (2001, 2010) ▪ Senegal (2001, 2016) ▪ Republic of Congo (2002, 2015) ▪ Tunisia (2002) ▪ Rwanda (2003, 2015) ▪ Central African Republic (2004, 2016) ▪ Chad (2005) ▪ Uganda (2005) ▪ DRC (2006) ▪ Mauritania (2006) ▪ Niger (2009, 2010) ▪ Madagascar (2010) ▪ Equatorial Guinea (2011) ▪ Egypt (2012) ▪ Zimbabwe (2013) Burundi (2018) <p>(Total 26)</p>	<ul style="list-style-type: none"> ▪ Burkina Faso (2005) ▪ Malawi (2009) ▪ Benin (2011) ▪ Senegal (2012) ▪ Burundi (2015) ▪ DRC (2016) <p>(Total 6)</p>
Overall total: 47		

Source: Authors' own compilation.

While these institutional mechanisms clothe such constitutional changes with a modicum of legality, the lack of broad social consensus underpinning them means that the reforms are often perceived (and correctly so) as products of manipulation and thus lacking legitimacy. The main indicator of such widespread constitutional manipulation is the instability engendered by these changes. Thus, police crackdowns on freedom of expression, street protests and damage to property during a process of constitutional change indicate that deeper problems may exist. The table shown below outlines indicators of constitutional manipulation in direct response to incumbents' efforts at changing constitutions.



The region has had 35 coup attempts in the past 18 years – an average of two per year, a clear demonstration of the constraining impact of the AU normative frameworks

64 Ibid, p. 144.

TABLE 3:
Examples of indicators of constitutional manipulation

Instability	Illegality	Illegitimacy-Consequence
<ul style="list-style-type: none"> ▪ Political assassinations ▪ Detention of politicians ▪ Suppression of protests ▪ Police violence ▪ Militia violence ▪ Property damage ▪ Use of emergency measures ▪ Domestic deployment of the military 	<ul style="list-style-type: none"> ▪ Restrictions on political participation rights ▪ Restrictions on political communication rights ▪ Suppression of opposition parties ▪ Electoral fraud during a referendum ▪ Political corruption 	<ul style="list-style-type: none"> ▪ Low turnout during a referendum ▪ Opposition boycott ▪ Personalization of politics ▪ Questionable judicial independence ▪ Questionable parliamentary independence ▪ Questionable civil-military relations ▪ Non-inclusive and non-participatory constitutional dialogue ▪ Lack of transparency in constitutional reform process

The state of presidential term limits resulting from constitutional amendments on the continent is shown in the table below.

TABLE 4

Country	Renewable	Renewable once	Renewable twice	Max two consecutive terms	Max two terms altogether	4 year term	5 year term	6 year term	7 year term
Algeria		X					X		
Angola					X		X		
Benin		X			X		X		
Burundi	X			X					X
Burkina Faso		X			X		X		
Cameroon	X								X
Central African Republic		X		X			X		
Cape Verde	X			X			X		
Chad		X						X	
Ivory Coast		X					X		
Comoros		X					X		
Congo Brazzaville			X				X		
Djibouti	X						X		
Democratic Republic of Congo		X					X		
Egypt		X				X			
Equatorial Guinea	X			X					X
Eritrea				X			X		
Gabon	X								X
Gambia	X						X		
Ghana				X		X			
Guinea Bissau	X			X			X		
Guinea Conakry		X		X			X		
Kenya				X			X		
Liberia				X				X	
Libya		X					X		

Country	Renewable	Renewable once	Renewable twice	Max two consecutive terms	Max two terms altogether	4 year term	5 year term	6 year term	7 year term
Madagascar		X					X		
Malawi				X			X		
Mali		X					X		
Mauritania		X					X		
Mozambique	X	X		X			X		
Namibia					X		X		
Nigeria					X	X			
Niger		X			X		X		
Rwanda		X					X		
Senegal				X			X		
Seychelles					X		X		
Sierra Leone					X		X		
South Sudan	X						X		
São Tomé and Príncipe	X				X		X		
Sudan		X					X		
Tanzania					X		X		
Togo	X						X		
Tunisia					X		X		
Uganda					X		X		
Zambia					X		X		
Zimbabwe					X		X		

Source: Author's own compilation

The contrast between the AU's response to military coups on the one hand, and to "constitutional coups" on the other, is most visible in political crises that involved both. For example, in Niger in 2009, although the PSC had endorsed the ECOWAS' decision to impose sanctions including suspension, because it considered that the constitutional referendum to remove presidential term limits violated the ECOWAS Supplementary Protocol on Democracy and Good Governance, the PSC did not actually impose sanctions. It was only when a military coup took place in 2010 that the PSC suspended Niger from all AU activities.⁶⁵

The use of referenda to legitimize spurious constitutional changes that have the effect of weakening democratic safeguards calls for AU standard-setting. The code of Good Practice on Referenda adopted by the European Union's Venice Commission is a good starting point. Under this Code, the fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law.⁶⁶ It further requires observation of the referendum process by impartial observation missions whose remit must include the pre-referendum processes including signature collection where this is applicable.⁶⁷ Importantly, the Code calls for the unity of content in the referendum questions. This means that unless the entire constitution is under revision "there must be an intrinsic connection between the various parts of each question put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole any such provisions without an intrinsic link; the revision of several chapters of a text at the same

⁶⁵ Ibid, p. 150.

⁶⁶ Venice Commission, Code of Good Practice on Referenda, Clause II(2)(b).

⁶⁷ Ibid, Clause II(3.2)

time is equivalent to a total revision.”⁶⁸ Unfortunately, the Kenyan Supreme Court recently failed to provide guidance on the application of the ‘unity of content’ doctrine when it held that the issue whether the BBI amendments to the Constitution needed to be submitted as separate and distinct referendum questions to the People was not ripe for determination.⁶⁹

3.3 Borderline Means of Power Change

The right of citizens to resist gross undemocratic practices that amount to violations of their democratic rights is not yet part of Africa Union law.⁷⁰ While popular uprisings or “democratic revolutions”, cannot *a priori* be deemed to be constitutionally legitimate, the AU’s application of its UCG norms to North Africa’s Arab Spring uprisings as well as to Burkina Faso and more recently to Sudan and Zimbabwe has opened new legal avenues that offer constitutional justification and legitimacy for popular uprisings overthrowing authoritarian regimes.⁷¹ It is noteworthy that popular uprisings are not listed among the modes of unconstitutional change of governments⁷² tacit acknowledgement that citizens are at the centre of state sovereignty.

Popular uprisings are often the result of the utter failure of legally established governmental processes and institutions to yield governance and developmental outcomes acceptable to the people.⁷³ But whether resistance to violation of rights or dissatisfaction with the state of governance can rise to an entitlement to oust a leader from office is yet unclear.⁷⁴ It appears that whether popular uprisings can escape the tag of UCG is a highly contextual and controversial matter that is still evolving. The legal condoning of popular uprisings is only valid on the presumption that they are genuine, rights-oriented, representative, and conducted by those (peoples) who have the legal authority to effect change.

Protests can induce systemic change although in some cases, such change may not be sustained.⁷⁵ Burkina Faso’s 2014 Burkinabe uprising saw thousands of protesters condemn the abolition of presidential term limits. Hundreds of thousands of citizens made clear that President Blaise Compaoré had lost legitimacy among the public and within the regime. After his departure, the country underwent significant political liberalization.⁷⁶ Similarly, Sudan’s sustained protest against the regime of President Bashir, led to his ouster and the takeover of state power by a transitional government under civilian Prime Minister but with notable military control of government.⁷⁷

At the height of Egypt’s popular uprising that ousted Hosni Mubarak and led to the election of Mohammed Morsi who was then ousted by the military after another round of citizen

68 Ibid, Clause III (2).

69 Supreme Court of Kenya, Petition No. 12 of 2021 (Consolidated with Petitions Nos. 11 & 13 of 2021 David Ndi & Others v Attorney General and Others (31 March 2022).

70 Pacifique Manirakiza, *supra* note 29 p. 90.

71 Solomon A Dersso, *supra* note 10 at 109.

72 The AU condoned the popular uprisings in Egypt and Tunisia; see PSC press statement PSC/PR/BR.(CDXXXII) at 2. At its 432nd meeting, the PSC held an open session, on 29 April 2014, devoted to the theme, “Unconstitutional changes of governments and popular uprisings in Africa: Challenges and lessons learnt”

73 A Khan ‘A legal Theory of Revolutions’ (1987) 5 Boston University International Law Journal 1, p. 2.

74 Tamarood, the Egyptian youth protest movement for instance gave President Mohammed Morsi Until 2 July at 17:00 to resign or face a civil disobedience campaign. See, Final Report of the African Union High Level Panel for Egypt, PSC/AHG/4.(CDXVI) (17 June 2014), p. 6.

75 The failed transition in Zimbabwe is one example.

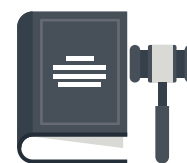
76 Thomas Carothers & Benjamin Press ‘Understanding Protests in Authoritarian States’ (Summer-Fall 2020) 40:2 SAIS Review of International Affairs, 15-24 at 22.

77 Reuters ‘Sudan’s Bashir ousted by military; protesters demand civilian government’ (April 11, 2019) online at <https://www.reuters.com/article/uk-sudan-politics-idUKKCN1RN0AU>>

clamour, the AU's PSC established a High-Level Panel for Egypt led by former Malian President, Alpha Oumar Konare, to mediate the dispute.⁷⁸ The communique establishing the Panel urged for the preservation of *"the gains of January- February 2011 Revolution."*⁷⁹ This is notable because the January-February 2011 Revolution was the popular protest that ousted President Mubarak from power. Essentially, the PSC was lending imprimatur to this specific mode of effecting executive leadership change in Egypt. In contrast, the PSC condemned the subsequent overthrow of the democratically elected president Morsi as falling within the rubric of UCG for failing to conform to the Egyptian constitution.⁸⁰ The Panel observed that "If mass uprisings, no matter how popular they might be, are allowed to justify the intervention of the military to remove democratically-elected Governments, then, no AU Member State could be immune and periodic instabilities will be inevitable."⁸¹ This means that whereas the 2011 revolution was sanctioned, the Tamarood youth civil disobedience in 2013 that led to military intervention was condemned. In furtherance of normative development, the Panel recommended the elaboration of guidelines for determining the compatibility of popular uprisings with AU norms on unconstitutional changes of government.⁸² It further urged that the following standards be satisfied for a popular uprising compatibility with UCG norms to be extant: "(a) the descent of the (ousted) government into total authoritarianism to the point of forfeiting its legitimacy; (b) the absence or total ineffectiveness of constitutional processes for effecting change of government; (c) popularity of the uprisings in the sense of attracting a significant portion of the population and involving people from all walks of life and ideological persuasions; (d) the absence of involvement of the military in removing the government; (e) peacefulness of the popular protests."⁸³

The import of the above standards (whose content is yet to be elaborated in the envisioned Guidelines) is to accept the proposition that there is a certain degree of democratic agency enjoyed by citizens beyond participation in electoral processes. This agency might extend to widespread citizen action that may oust an undemocratic regime so long as it is exercised peacefully. The challenge here is to delimit the scope of this agency lest popular protests become weaponized by putschists or external aggressors to pursue what AU norms specifically proscribe. This situation is made more critical given the ubiquitous use of technology platforms to mobilize citizens -especially the youth - towards popular causes. What is clear is that the requirement that popular protests must be peaceful excludes the radical transformation of citizen agency into an armed struggle. The Mali protest that dethroned Keïta was notable for its peaceful nature except for the looting of the home of Keïta's son, Karim, whose ostentatious display of wealth was an insult to the millions of poor people in Bamako.⁸⁴ Equally, the protesters' looting of the national assembly building on July 10 and 11 was demonstration of popular disaffection with the failure of the legislative organ of the state to rein in the excesses of Keïta's regime.⁸⁵

The Global Protest Tracker by the Carnegie Endowment Centre, a tool that monitors popular demonstrations of disaffection, demonstrates that protests against authoritarianism are on the rise even as civic space is under threat through both soft and hard tactics on the part



The fundamental aspects of referendum law should not be open to amendment less than one year before a referendum, or should be written in the Constitution or at a level superior to ordinary law

78 Final Report of the African Union High Level Panel for Egypt, PSC/AHG/4.(CDXVI) (17 June 2014), p. 10.

79 Ibid.

80 Ibid.

81 Ibid, p. 27.

82 Ibid, p. 31.

83 Ibid, p. 31.

84 Paul Melly 'The Mali Crisis: Security, Democracy, and Protest in the Sahel' (Summer-Fall 2020) 40:2 SAIS Review of International Affairs 77-85 at 79

85 Ibid



Popular uprisings are a result of the utter failure of legally established governmental processes and institutions to yield governance and developmental outcomes acceptable to the people

of repressive states.⁸⁶ As demonstrated by the Mali protests of August 2020 that led to the removal of President Keïta, mass protest is widely perceived in the Sahelian region as a legitimate tool for exerting pressure for fundamental political change — a legitimacy that in the eyes of some may rival that of formal electoral systems that are at risk of manipulation or mismanagement.⁸⁷ Unsurprisingly, ECOWAS' non-intervention to halt the Mali coup signifies this nuanced view. The same view does not hold sway in the case of other parts of the continent, however, where repressive response by the state is the standard treatment of protests.⁸⁸

⁸⁶ Ibid

⁸⁷ Ibid, at 78.

⁸⁸ Uganda, Zimbabwe and Kenya stand out in this regard.

4 HOW IS POWER ACCEDED TO? THE PROCESS AND PRACTICE OF EXECUTIVE TRANSITIONAL MANAGEMENT

Power is acceded to by the successful conduct of a credible election, followed by the transparent transmission of results, leading to the declaration of the successful candidate by an independent electoral management body, a declaration which, if challenged, is rejected or sustained by a duly established independent election tribunal mechanism. A process of peaceful handover prescribed in law follows.

Evidence has shown that the period between the declaration of an election and the assumption of office of an elected leader is a very fragile period during which an evolving democratic system is most vulnerable to rupture, violence, massive violation of rights and humanitarian crises.⁸⁹ Several things could happen during this period that would complicate peaceful and regular democratic transition, especially where an incumbent is eligible for re-election:

- a. The use of state security institutions by the incumbent to intimidate opponents and create an environment in which opponents are unable to effectively engage the populace;
- b. Use of state resources by the incumbent to campaign;
- c. Use of state media to amplify the incumbent's messages and achievements;
- d. Potential changes of leadership of critical institutions involved in managing elements of the electoral or transition process;
- e. Weaponization of judicial power to serve the incumbent's or opposition's interest among others;
- f. Shutting down of the internet to deny opponents platforms for reaching the youthful population;⁹⁰ and,
- g. The deployment of new technologies to manage aspects of the electoral process without an accompanying transparency framework.

Despite the plethora of potential abuse of power between the declaration of presidential election results and inauguration, few African countries have laws that limit the President's authority during this period even when the incumbent has been defeated or is retiring. Known as the temporary incumbency phase, this period requires that, in fairness, an incumbent be constrained from exercising far-reaching head of state functions such as appointing judges, ministers, ambassadors and other public officers, as well as entering into obligations committing the country's finances and other resources, among other such actions. The mischief sought to be prevented by the law is to ensure that the incumbent does not use presidential authority in a manner that abuses power to his advantage and that is likely to impair democratic transitions. In countries like Uganda, restrictions on incumbent behaviour go only part of the way, exempting the Head of States when campaigning as a candidate,

⁸⁹ Eghosa E. Osaghae, supra note 34.

⁹⁰ Salem Solomon 'Journalists Struggle Through Information Blackout in Ethiopia' (December 04, 2020) online at <https://www.voanews.com/press-freedom/journalists-struggle-through-information-blackout-ethiopia>.



Protest can induce systemic change although in some cases, such change may not be sustained



Kenya, outgoing President Mwai Kibabi handover power to President Elect Uhuru Kenyatta in 2013. (Photo: Courtesy)

from significant provisions that apply to such status.⁹¹ In Kenya, the Constitution limits the president who is a temporary incumbent from appointing judges, appointing or dismissing ambassadors and ministers among other public appointments which the substantive president is authorised to make.⁹² This curb on the abuse of incumbency is more effective with respect to the use of some publicly owned resources than others. Creating a level playing field by eliminating pro-incumbent bias by state media has been largely unsuccessful in emerging democracies. Perhaps more success has been achieved regarding the use of public funds and civil servants by incumbents. However, the lack of norms to curb such abuses on behalf of incumbents is a major risk to democratic transitions on the continent.

The absence of established procedures and laws to guide the process of power handover is another area of concern impacting regular and peaceful transitions on the continent. The most some states have is a law governing the swearing-in and assumption to office of the president-elect.⁹³ Ghana's Presidential (Transition) Act attempts to provide for a seamless change of executive power by proposing the appointment of a Transition Team.⁹⁴ The law seeks to make comprehensive practical arrangements to regulate the transfer of power including by briefing the president-elect on the state of every aspect of government through handover notes from state departments.⁹⁵ The Manual on the Management of Handover of Power, the second limb of this Africa Elections Dialogue Project, provides a clear toolkit that can be adopted by the AU to inform management of transitions by African states.

91 Uganda Constitution

92 Article 134, Kenya Constitution (2010).

93 See, Kenya Assumption of the Office of President Act (21 of 2012).

94 Republic of Ghana, Presidential (Transition) Act, 2012 (Act 845).

95 Ibid, sections 2 & 6.

5 WHICH PLAYERS/ACTORS ARE INVOLVED?

The ACDEG enjoins parties to an electoral process to commit to accept results of the election or challenge them through exclusively legal channels.⁹⁶ The Charter further proscribes any refusal by an incumbent government to relinquish power to the winning party or candidate at the end of an openly contested election.⁹⁷ The ECOWAS Protocol (2001, art 9) clarifies further 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.” These norms taken together evince an understanding by the AU and RECs that various parties are responsible for ensuring a successful democratic transition. The incumbent and winning candidate are the main protagonists in this drama. Additionally, the legal institutions mandated to resolve electoral disputes are the other critical actor. Courts especially play an important role as happened recently in Ivory Coast in determining disputes on the eligibility of candidates especially on questions touching on third termism⁹⁸ or ratifying undemocratic referendum outcomes as happened in Alpha Conde’s Guinea.⁹⁹ One must therefore recognize that there are several actors involved in the success of a transition, each with a distinct set of interests and, accordingly, a characteristic perspective of what would constitute success.¹⁰⁰

An emerging trend that is beginning to bear on democratic transitions is a consequence of judicial decisions touching on presidential elections. In the past, it was a given that no judiciary in Africa could annul a presidential election. However, this has changed with independent judiciaries beginning to assert themselves to protect democratic electoral processes. As of May 2020, presidential elections in Africa had only been nullified by courts in three African states Côte d’Ivoire, Kenya¹⁰¹ and Malawi. On 3 February 2020, the High Court of Malawi in *Saulos Klaus Chilima & Lazarus McCarthy Chakwera v. Arthur Peter Mutharika & Electoral Commission* found ‘widespread, systematic and grave’ electoral irregularities when it annulled the presidential election that returned President Peter Mutharika to power in May 2019.¹⁰² This was upheld unanimously by Malawi’s Supreme Court of Appeal on 8 May 2020 which confirmed that the irregularities in the election ‘were not only serious but also troubling’.¹⁰³

While the annulment of presidential elections by courts - if legally justifiable - is a welcome development as it can contribute to future improvement of electoral integrity, it can, in the context of repeat elections, trigger unintended consequences which increase state



Evidence has shown that the period between the declaration of an election and the assumption of office of an elected leader is a very fragile period during which the State is most vulnerable to rupture, violence, massive violation of rights and humanitarian crises

96 ACDEG, supra note 3, Art. 17.4

97 Ibid, Art. 23.5

98 Al Jazeera, Ivory Coast Constitutional Council confirms Ouattara re-election (9 Nov 2020) online at <https://www.aljazeera.com/news/2020/11/9/ivory-coast-president-ouattaras-disputed-third-term-confirmed>

99 BBC, Guinea elections: Alpha Conde wins third term amid violent protests (24 October 2020) online at <https://www.bbc.com/news/world-africa-54657359>

100 W. David Clinton and Daniel G. Lang 'What Makes a Successful Presidential Transition? The Case of Foreign Affairs' (1993) 23:1 Presidential Studies Quarterly, 41-55 at p. 41.

101 Raila Amolo Odinga & another v. Independent Electoral and Boundaries Commission & 2 others, Presidential Petition No. 1 of 2017 (20 September 2017), para. 405(i). Kenya’s Supreme Court, by a majority (4–3), declared that ‘the Presidential Election held on 8th August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void’.

102 High Court Constitutional Petition No. 1 of 2019, Saulos Klaus Chilima & Lazarus McCarthy Chakwera v. Arthur Peter Mutharika & Electoral Commission.

103 Ibid, p. 117.



Celebration in the capital of Malawi after the High Court nullified May 2019 presidential election in a landmark judgment.

The absence of established procedures and laws to guide the process of power handover is another area of concern impacting regular and peaceful transitions on the continent

susceptibility to UCG. In the 2017 Kenyan case, while such an annulment resulted in a re-run election within 90 days, the Kenyan opposition, which challenged the results, boycotted it on the grounds that the far-reaching procedural failures of election management body that had been found wanting by the Supreme Court had not been sufficiently rectified.¹⁰⁴ This demand was clearly incompatible with the constitutional requirement for a re-run election within the stipulated three months. The resulting boycott was accompanied by violence in areas dominated by the main opposition party with a view to dissuading voters from exercising their right to vote.¹⁰⁵ The opposition leader's subsequent swearing himself in as 'the people's president' marked a further escalation that was only mitigated several months later when he and the president signed a truce in what has come to be known as *The Handshake*.¹⁰⁶

In the Malawi situation, the incumbent sought to send the Chief Justice of the court that annulled his election on terminal leave.¹⁰⁷ In both cases, the unintended consequences emanating from judicial institutions seeking to protect democratic electoral processes suggest the need for deeper continental reflection on the role of judiciaries in managing democratic transitions.

Aside from courts and electoral management bodies, the role played by other formal institutions, informal actors and non-state actors in the process towards peaceful and regular transition of power must be appreciated. Because executive transition necessarily involves the transfer of authority over security organs of the state, it is imperative that the military remains non-partisan through the entire electoral process. The ACDEG calls for reforms of public institutions including the security sector and the maintenance of harmonious civil-

¹⁰⁴ DW, Raila Odinga: 'No electoral changes, no election in Kenya' (22 September 2017) online: <https://www.dw.com/en/raila-odinga-no-electoral-changes-no-election-in-kenya/a-40644060>

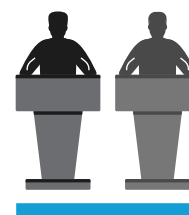
¹⁰⁵ Wall Street Journal 'Violence, boycotts mar Kenya's Presidential election rerun' (26 October, 2017) online at <https://www.wsj.com/articles/kenya-votes-in-controversial-election-rerun-1509004796>

¹⁰⁶ Financial Times 'Handshake ends crisis and leads to signs of progress in Kenya' (1 Nov 2019) online at <https://www.ft.com/content/59339450-d555-11e9-8d46-8def889b4137>.

¹⁰⁷ Nyasa Times 'Malawi Govt Sends Chief Justice On Leave Pending Retirement - Law Scholar Faults Move' (13 June 2020) online <https://allafrica.com/stories/202006150198.html>.

military relations.¹⁰⁸ To “call for” in no way guarantees military and security sector non-interference. A more affirmative obligation with a clear sanctions regime could help to deter errant behaviour. Similar non-partisanship should be expected from the entire public service, yet the reality is that depending on the method of recruitment and promotion, it is unlikely that civil servants will be neutral in the face of threats to their occupational survival. The insulation of the civil bureaucracy from political affiliations and positions is critical in safeguarding regular transfers of power. The recent refusal by key US administration officials to acquiesce in President Trump’s attempt to subvert the constitutional order in the United States demonstrates the centrality of civil service neutrality in democratic transitions.¹⁰⁹ A bureaucracy that is invested in the preservation of a particular regime will torpedo democratic developments that threaten it. Civil servant neutrality enables neutral bureaucrats to implement the policies of whichever party is lawfully in power with equal zeal is a norm or principle that runs counter to any political affiliation.¹¹⁰ While the African Charter on the Principles of Public Service and Administration enjoins public servants to “act with impartiality and loyalty” at all times,¹¹¹ the Charter falls short in elucidating the role of civil service in enabling the integrity of peaceful and lawful transitions.

The role of civil society - defined as including all organized groups outside the state - and media in watchdogging a lawful transition can also not be ignored. An open and liberalised civic space is necessary for these institutions to function optimally and ensure critical concerns touching on political developments are articulated. Under the ACDEG, political, economic and social governance within states require the fostering of partnership with civil society organizations and the promotion of free and professional media.¹¹²



One must therefore recognize that there are several actors involved in the success of a transition, each with a distinct set of interests and, accordingly, a characteristic perspective of what would constitute success

108 African Charter Elections Democracy and Governance, Article 32. See also, Samuel P. Huntington The Soldier and the State: The Theory and Politics of Civil–Military Relations (1957) 678. The author advocated for objective civilian control of the military encompassing the following factors: (1) the military is isolated from “other elements in the social structure,” (2) the defense of society is assigned to the “military groups,” (3) the military remains “indifferent” to the social values and political ideologies of society, and (4) the military operates within “an independent sphere of purely military imperatives.”

109 New York Times ‘What Really Saved the Republic From Trump?’ (Dec 10, 2020) online at <https://www.nytimes.com/2020/12/10/opinion/trump-constitution-norms.html>.

110 David M. Levitan ‘The Neutrality of the Public Service’ (1942) 2:4 Public Administration Review 317-323.

111 AU, African Charter on the Principles of Public Service and Administration (Adopted in Addis Ababa, Ethiopia - 31st January 2011, Entered into force on 23rd July 2016) Article 10(3)

112 ACDEG, art 27(2) and 27(8).

6 CONCLUSION

This Report has assessed the state of democratic transitions on the continent. It has reviewed the normative framework developed since the late 1990s by the OAU and thereafter by its successor, the AU, and concluded that strong norms that discourage military takeovers of democratic governments are in place. The Report contends that these developments have increased the chances of transitions from authoritarian rule to democracy but do not guarantee them, especially those that are sustainable. Moreover, the challenge of consistent enforcement of UCG norms across all countries and regions remains. The failure to internalize democratic practices by most states on the continent is reflected in the hesitancy to intervene even where UCG norms are flouted.

The Report further discusses the emerging forms of radical citizen agency powered by the heightened ease of communication mediated by technology and led mainly by youth in part 3.3. These popular uprisings that started with the Arab Spring have led to the toppling of several authoritarian regimes on the continent. The potential of capture of popular uprisings either by military or opposition parties with support from external actors, makes a popular uprising a very risky means to appropriate power. African norms governing the compatibility of popular uprisings with existing rules of democratic transitions remain in a state of flux. Consequently, the Report, consistent with AU thinking, adopts a cautious approach to such uprisings, welcoming them for their impulse to resist oppressive and corrupt governments, but urging respect for human rights in all the efforts at advocacy for change.

Efforts at constitutional manipulation by incumbents to retain power (or to ensure it is passed to a 'chosen' successor) were highlighted in the Report. These included the bending of the rules of the political environment, a tactic that is increasingly taking many other forms including manipulating senior members the judiciary and electoral commissions or imposing onerous qualifying criteria to shut the door to opposition contestants. Restricting civic space often precedes such constitutional and institutional changes and serves to discourage citizens from holding their governments to account especially during referendum processes. An impartial civil service, media and civil society are other crucial actors in enabling a coherent democratic transition.

Of concern in the Report is the fact that few countries have laws to govern the peaceful transfer of power. Save for Ghana which has a Presidential Transition law, the most that countries on the continent have done is to enact laws on Assumption to Office which merely regulate the procedure prior to and during inauguration day. Without an appreciation that certainty and regularity in the process of handover of power from one administration to a succeeding one is critical to the performance of the incoming administration, threats to democratic transitions and consolidation will remain salient in the continent.

The *Guide on Managing Smooth Transfer and Peaceful Transition of Power in Africa* developed under this Africa Election Dialogue project is thus an important piece of the toolkit the adoption of which by the AU will serve to assist countries on the continent to adopt a more coherent and comprehensive framework on power transfers, even if implementing such frameworks is likely to remain a challenge for some time to come, at least in political systems where the divisions between the most powerful contending forces are wide.

While the annulment of presidential elections by courts - if legally justifiable- is a welcome development as it can contribute to future improvement to electoral integrity, it can, in the context of repeat elections, trigger unintended consequences which increase state susceptibility to UCG

7 RECOMMENDATIONS

- i. Early warning mechanisms should be strengthened. A proactive approach to supporting democratic transitions requires tracking processes in-country across the entire electoral cycle rather than merely focusing on election observation a month or so to elections. A UCG observatory mechanism to accomplish this, including constitutional changes, judicial changes, changes to election law, the way in which presidential term limits are imposed, altered or removed, and the performance of the election management body, needs to be put in place. This mechanism should produce annual reports on threats to democratic transitions in Africa jointly with the African Governance Architecture.
- ii. The AU PSC should introduce guidelines to constitutional change in Africa. Such guidelines shall set down indicators of constitutional manipulation and prescribe institutional responses by different actors within the African Union system. While the AUC has the mandate to 'develop benchmarks for the implementation of the commitments and principles of this Charter and the evaluation of compliance by State Parties' in accordance with Article 44.2 of the ACDEG, this mandate has not been discharged.
- iii. The AU should formulate comprehensive guidelines for determining the compatibility of popular uprisings with AU norms on unconstitutional changes of Government.
- iv. Guidelines for African Union Electoral Observation and Monitoring Missions¹¹³ should be expanded to extend its monitoring to constitutional referenda.
- v. The AU should elaborate an over-arching framework to promote transparency of digital government including algorithmic transparency especially in electoral processes.
- vi. The AU should adopt a Code of Good Practice for the conduct of referenda.
- vii. The AU should adopt guidelines on power transfers in line with the proposals in the Guidebook on Managing Smooth Transfer and Peaceful Transition of Power in Africa. Additionally, it should recommend the formulation of a Model Law on Executive Power Transfer.



The role of civil society and media in watchdogging a regular transition can also not be ignored. An open and liberalised civic space is necessary for these Institutions to function optimally and ensure critical concerns touching on political developments are articulated

¹¹³ AU Executive Council Guidelines for African Union Electoral Observation and Monitoring Missions (2004) EX.CL/91 (V), Annex II.

8 ABOUT THE HANNS SEIDEL FOUNDATION

The Hanns Seidel Foundation (HSF) is a German political foundation. The mission of the HSF is “In the service of democracy, peace and development”. HSF therefore works to promote democracy, the rule of law, peace and human security, good governance, sustainable economic development and environmental protection. For this purpose, the HSF works hand in hand with, among others, committed policy-makers, government officials and institutions, scholars, the media, civil society organisations, inter-governmental organizations, political parties, and the private sector.

9 ABOUT THE AUTHOR

Dr. Korir Sing'Oei is an international law attorney and Convener Open Government Partnership for Kenya. Previously, he served as Litigation Director, Katiba Institute, Conflict and Rule of Law Specialist at the United States Agency for International Development and Founding Director, Centre for Minority Rights Development (Cemiride). Sing'Oei was Fulbright Scholar at the University of Minnesota's School of Public Policy (2007/8) and a research fellow at the Centre for Justice and International Law in Washington DC. Sing'Oei has an LL.B from the University of Nairobi, an LL.M from the University of Minnesota Law School and a PhD from the University of Cape Town. His current areas of scholarship include human and peoples' rights, benefit sharing in natural resource sector, democratic transitions in Africa and climate change.

**STATE OF
DEMOCRATIC
TRANSITIONS IN
AFRICA REPORT**
