

**THE CHALLENGES OF ADJUDICATING PRESIDENTIAL ELECTION DISPUTES
IN AFRICA: EXPLORING THE VIABILITY OF ESTABLISHING AN AFRICAN
SUPRANATIONAL ELECTIONS TRIBUNAL**

By

O'BRIEN KAABA

Submitted in accordance with the requirements for the degree of

DOCTOR OF LAWS (LLD)

At the

University of South Africa

SUPERVISOR: DR. BABATUNDE FAGBAYIBO

JUNE 2015

Dedication

To the memory of my grandfather, Henry Hachoose;

and

In profound gratitude to my uncle, Richard Hachoose.

Declaration

Student Number: 47412321

I declare that **THE CHALLENGES OF ADJUDICATING PRESIDENTIAL ELECTION DISPUTES IN AFRICA: EXPLORING THE VIABILITY OF ESTABLISHING AN AFRICAN SUPRANATIONAL ELECTIONS TRIBUNAL** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

Signed:

Date.....

Acknowledgments

I received profound support and encouragement from many people and institutions while researching and writing this thesis. I am profoundly grateful for this support and encouragement. I owe an undying debt of gratitude to my academic supervisor, Dr. Babatunde Fagbayibo, for timely reviewing my work and offering valuable guidance which helped give direction and shape the research. I am also grateful to University of South Africa support staff, particularly Ms. Marieke Henning, for the kind assistance rendered to me during the course of my study.

To Professors Muna Ndulo and Michelo Hansungule, I am thankful for helping me with relevant and key literature and for their assistance in refining my thoughts. I am also indebted to my late friends, Frs. John Bitterman and Smart Chinyaanwa, for their generous friendship, encouragement and faith in me. To Reverend Dr. Cornelius Hankomoone, am grateful for proofreading the thesis.

I am heavily indebted to my wife Senzen and to my children Chileleko, Nalubomba, Chilemba, and Luumuno for their love, encouragement, understanding and granting of space and time to research and write. I am grateful to my parents, Loveness Madu Hachoose and Edward Kaaba, for their love, and to all my brothers and sisters. Finally, I offer my humble gratitude to the almighty God, whose love has sustained me, and to my ancestors, the saints and Mary the Mother of God, for incessantly pleading my cause.

Summary of the Thesis

In a democracy it is the citizens who choose their leaders. Through elections, the people constitute government to preside over public affairs. However, in several African countries the quality of the elections has been vitiated by fraud, incompetence, unequal playing field and violence. Part of the problem is historical. Within the first decade of attaining independence in the 1950s and 1960s, many African regimes rapidly descended into autocracy and many countries formally recognised one-party regimes.

Despite many one-party regimes having been abolished after the democratisation wave of the late 1980s and early 1990s, challenges of holding free and fair elections persist. Several elections held since this democratic wave were generally not considered by independent observers as free and fair. Indeed Africa has become well known for flawed elections, such as was the case in the 2007 elections in Kenya, the 2008 elections in Zimbabwe and the 2010 elections in Ivory Coast. Due to the stifled democratic climate, where even elections had a predetermined outcome, coups became a common and regular method of showing discontent or removing government.

While the phenomenon of problematic elections is going on, at the continental level, Africa seems to be making renewed commitment towards democratic governance. With the transformation of the Organisation of African Unity (OAU) into the African Union (AU) through the adoption of the Constitutive Act of the African Union in 2000, the AU, inter alia, committed to promoting “democratic principles and institutions, popular participation and good governance” and seems determined to depart from the legacy of poor governance.

It is in view of the foregoing background that this research sought to investigate the challenges the judiciary in Africa has faced in adjudicating presidential election disputes. And, in light of the growing trend towards establishing common African democratic standards and seeking collective solutions, the research also sought to explore the viability of establishing a continental supranational mechanism for resolving disputed presidential elections through adjudication.

Key words: Adjudication; African Union; courts; democracy; elections; judiciary; presidential elections; regional integration; sub-regional courts; and supranational adjudication.

Table of Cases

International Cases

Association Juristes D'Afrique Pour La Bonne Gouvernance vs. Republic of Cote D'Ivoire
Application no. 006/2011 [African Court on Human and Peoples' Rights]

Christopher Mtikila and The Tanganyika Law Society vs. The United Republic of Tanzania
Consolidated Applications Nos. 009/2011 and 011/2011 [African Court of Human and Peoples' Rights]

Constitutional Rights Project and Another vs. Nigeria (2000) AHRL 191 (ACHPR 1998)

Costa vs. ENEL (Case 6/64) [1964] ECR 1125

James Katabazi and 21 Others vs. Secretary General of the East African Community and the Attorney General of the Republic of Uganda [East African Court of Justice] Reference No. 1 of 2007 [Judgment of 2 November 2007]

Jawara vs. The Gambia (2000) AHRLR 107 (ACHPR 2000)

Jerry Ugokwe vs. The Federal Republic of Nigeria Judgment No. ECW/CCJ/JUD/03/05 [Judgement of 7 October 2005]

Manneh vs. The Gambia (2008) AHRLR 171 [ECOWAS Court 2008]

Michelot Yogogombaye vs. The Republic of Senegal Application No. 001/2008 [The African Court on Human and Peoples' Rights]

Mike Campbell (Pvt) Ltd and Others vs. The Republic of Zimbabwe SADC (T) Case No. 2/2007

Mike Campbell (Pvt) Ltd and William Michael Campbell vs. The Republic of Zimbabwe Case No. SADC (T): 2/07

Musa Saidykhon vs. The Republic of The Gambia Suit No. ECW/CCJ/APP/11/07 [Judgment No. ECW/CCJ/JUD/08/10 of 16 December 2010]

Nixon Chirinda and Others vs. Mike Campbell (Pvt) Ltd SADC (T) Case No. 09/08 [Judgment of 17 September 2008]

Ocean King Ltd vs. Republic of Senegal Judgment No. ECW/CCJ/JUD/07/11 of 8 July 2011

Olajide Afolabi vs. Federal Republic of Nigeria ECW/CCJ/JUD/01/04 Judgment of 27 April 2004

Peter Anyang' Nyong'o and Others vs. Attorney general of Kenya and Others [East African Court of Justice] Reference No. 1 of 2006 [Judgment of 30 March 2007]

Polytol Paints and Adhesives Manufacturers Co. Ltd vs. The Republic of Mauritius Reference No. 1 of 2012 [First Instance COMESA Court of Justice]

Request for an Advisory Opinion No.002/2012 by Pan African Lawyers' Union and Southern African Litigation Centre [African Court of Human and Peoples' Rights] Order of 15 March 2013

Sa'adatu Umar vs. The Federal Republic of Nigeria Judgment No. EWC/CCJ/JUD/17/12 [ECOWAS Judgment of 14 December 2012]

Sikiru Alade vs. The Federal Republic of Nigeria suit No. ECW/CCJ/APP/05/11 [Judgment of June 2011]

Sitenda Sebalu vs. Secretary of the East African Community and Others [East African Court of Justice] Reference No.1 of 2010 [Judgment of 30 June 2011]

The East African Law Society and Others vs. The Attorney General of the Republic of Kenya and Others [East African Court of Justice] Reference No. 3 of 2007

The Legal Resources Foundation vs. Zambia (2001) AHRLR 84 (ACHPR 2001)

Van Gend en Loos vs. Nederlandse Tariefcommissie (Case 26/62)[1963]CMLR105

Western Sahara Case ICJ Report 1975

National Cases

Akashambatwa Mbikusita Lewanika et al vs. Frederick Jacob Titus Chiluba (SCZ Judgment No 14 of 1998) [Zambia]

Amaechi vs. Independent National Election Commission and Others Supreme Court of Nigeria Judgement of 18 January 2008 [Nigeria]

Anderson Kambela Mazoka and Others vs. Levy Patrick Mwanawasa and Others Z.R 138 (SC) L SCZ/EP/01/02/03/2002 [Zambia]

Atiku Abubakar and others vs. Musa Umaru Yar'adua and others SC.72/2008 Supreme Court of Nigeria Judgement of 12 December 2008 [Nigeria]

Attorney-General vs. Nigel Kalonde Mutuna and others Appeal No. 008/2012 SC/8/185/2012 [Zambia]

Bush et al vs. Gore et al 531-2000 Decision of December 12 2000 [USA]

Chukwuemeka Odumegwu Ojukwu vs. Olusegun Obasanjo and others SC 199/2003 Supreme Court Judgment of 2 July 2009 [Nigeria]

John Fitch vs. Tom Stephenson and others Case No.M324/107[2008]EWHC 501(QB)

John Opong Benjamin and others vs. National Electoral Commission and others SC. No.2/2012 Supreme Court of Sierra Leone Judgment of 14 June 2013 [Sierra Leone]

Kenneth Stanley Matiba vs. Daniel Toroitichi Arap Moi and others Civil Application No.NAI 241 (1993) [Election Petition No.27 of 1993] [Kenya]

Kizza Besigye vs. Yoweri Museveni Electoral Petition No. 1 of 2001[Uganda]

Kizza Besigye vs. Yoweri Kaguta Museveni Presidential Election Petition No.1 of 2006 [Uganda]

Morgan vs. Simpson [1975] 1QB 151 [UK]

Movement for Democratic Change and others vs. The Chairperson of the Zimbabwe Electoral Commission and another HH37-08 EP24/08 Judgment of April 2008

Muhammadu Buhari and others vs. Olusegun Obasanjo and others SC.133/2003 17 NWLR (2003) [Nigeria]

Mwai Kibaki vs. Daniel Toroitichi Arap Moi Civil Appeal No. 172 of 1999 [Kenya]

Nana Addo vs. John Dramani No J2/6/2013 Judgment of 29 August 2015 [Ghana]

Raila Odinga vs. The Independent Electoral and Boundaries Commission and others Supreme Court Petition No. 5,3 and 4 of 2013 [Kenya]

Rally for Democracy and Progress and others vs. Electoral Commission of Namibia and Others Case No. A01/2010 [Namibia]

Simmons vs. Khan M/326/07[2008]EWHC B4(QB)

List of International Instruments

- Africa Charter on Democracy, Elections and Governance 2007
- African Charter on Human and Peoples' Rights 1981
- African Peer Review Mechanism: Base Document 2003
- Bangalore Principles of Judicial Conduct 2002
- Border Disputes Among African States Resolution AHG/Res.16(1) Adopted at the First Ordinary Session of the Assembly of Heads of State and Government, July 1964
- Charter of the Organisation of African Unity (OAU) 1963
- Convention for the Protection of Human Rights and Fundamental Freedoms 1950
- Constitutive Act of the African Union 2000
- Declaration on Democracy, Political, Economic and Corporate Governance 2002
- Declaration on Unconstitutional Change of Government 2000
- General Act of the Berlin Conference on West Africa February 1885
- Declaration on Unconstitutional Changes of Government (2000)
- ECOWAS Democracy and Good Governance Protocol 2001
- International Covenant on Civil and Political Rights 1966
- Memorandum of Understanding of the African Peer Review Mechanism 2003
- OAU Decision on Unconstitutional Changes of Government Doc. No. AHG/Dec. 142 (XXXV) 12-14 July 1999
- Principles for Election Management, Monitoring and Observation in the SADC Region 2003
- Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998
- Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament 2001
- Protocol on Amendments to the Constitutive Act of the African Union 2003
- Protocol on the Community Court of Justice (A/P.1/7/91) 1991
- Protocol on the Court of Justice of the African Union 2003

Protocol on Politics, Defence and Security Cooperation 2001 [SADC]

Protocol on the Statute of the African Court of Justice and Human Rights 2008

Protocol on the Tribunal 2000 [SADC]

Protocol on the Tribunal in the Southern African Development Community 2014

Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security 1999 [ECOWAS]

Protocol Relating to the Council for Peace and Security in Central Africa 2000

Revised Treaty of the Economic Community of West African States 1993

SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region 2001

SADC Principles and Guidelines Governing Democratic Elections 2004

Statute of the African Court of Justice and Human Rights 2008

Supplementary Protocol A/SP.1/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice 2005

Supplementary Protocol A/SP.2/06/06 of the Protocol on the Community Court of Justice 2006

The Draft East Africa Community Principles for Election Observation, Monitoring and Evaluation 2011

The East African Court of Justice Rules of Procedure 2013

The New Partnership for Africa's Development Declaration 2001

Treat Establishing the Arab Maghreb Union 1989

Treaty Establishing the Common Market of East and Southern Africa 1994

Treaty Establishing the Economic Community of West African States 1993

The Treaty Establishing the African Economic Community 1991

Treaty for the Establishment of the East African community 1999

Treaty Establishing the Economic Community of Central African States 1983

Treaty of the Southern Africa Development Community 1992

Treaty on the Harmonisation of Business Law in Africa 1993

Treaty of Accession of the Republic of Burundi into the East African Community 2007

Treaty of Accession of the Republic of Rwanda into the East African Community 2007

Treaty of Rome 1957

Universal Declaration of Human Rights 1948

UN Security Council Resolution 1973 (2011) adopted by the Security Council on March 17, 2011

List of National Instruments

Agreement between the Zimbabwe African National Union Patriotic Front (ZANU-PF) and the Two Movement for Democratic Change (MDC) Formations on Resolving the Challenges facing Zimbabwe 2008 [Zimbabwe]

Charter of Incorporation of the British South Africa Company December 1889

Constitution of Botswana

Constitution of the Republic of Cameroon

Constitution of Lesotho

Constitution of the Republic of Malawi

Constitution of Morocco 1996

Constitution of the Federal Republic of Nigeria 1999

Constitution of the Republic of South Africa 1996

Constitution of the United Republic of Tanzania

Constitution of the Republic of Zambia 1996

Draft Constitution of the Republic of Tunisia dated 1 June 2013 (unofficial translation prepared by International IDEA)

Electoral Commission Act 1996 [Zambia]

National Accord and Reconciliation Act 2008 [Kenya]

Preservation of Public Security Act 1966 [Kenya]

Presidential Election Act [Uganda]

Proclamation to All My Subject-Citizens of Swaziland, Proclamation No 11 of April 1973 [Swaziland]

Representation of People Act 1983 [UK]

The Constitutional Declaration of 3 August 2011 [Libya]

The Constitution of Kenya (Amendment)(No 3) Act No 18 of 1966

The Constitution of Kenya 2010

The Constitution of the Kingdom of Swaziland 2005

List of Abbreviations

AEC	African Economic Community
ACDEG	African Charter on Democracy, Elections and Governance
APRM	African Peer Review Mechanism
AU	African Union
ACJ	African Court of Justice
ACJHPR	African Court of Justice and Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
ACtHPR	Africa Court of Human and Peoples' Rights
BSA	British South African Company
BNC	Busotho National Congress
CA	Constitutive Act of the African Union
CENA	Commission Nationale Electorale Autonome
COMESA	Common Market for Eastern and Southern Africa
EAC	East Africa Community
EACJ	East African Court of Justice
ECCAS	Economic Community of Central African States
ECF	Electoral Commissions' Forum
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOMOG	ECOWAS Ceasefire Monitoring Group
ECOWAS	Economic Community of West African States
ECZ	Electoral Commission of Zambia
EISA	Electoral Institute of Southern Africa
EU	European Union
ICJ	International Court of Justice

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IEBC	Independent Electoral and Boundaries Commission [of Kenya]
INEC	Independent Electoral Commission [of Nigeria]
LCD	Lesotho Congress for Democracy
MDC	Movement for Democratic Change
MDC-M	Movement for Democratic Change led by Arthur Mutambara
MDC-T	Movement for Democratic Change led by Morgan Tsvangirai
MMD	Movement for Multiparty Democracy
MOU	Memorandum of Understanding
NATO	Northern Atlantic Treaty Organisation
NEPAD	New Partnership for African Development
NGO	Non-governmental Organisation
NLC	National Liberation Council [of Ghana]
NNLC	Ngwane National Liberation Congress [of Swaziland]
NPC	National Public Conference [of Libya]
NRM	National Resistance Movement
NTC	National Transitional Council [of Libya]
OAU	Organisation of African Unity
OHADA	Organisation Pour L'harmonisation en Afrique du Croit des Affaires/ Organisation for the Harmonisation of Business Laws in Africa
PAP	Pan-African Parliament
PSC	Peace and Security Council
RECs	Regional Economic Communities
SADC	Southern African Development Community
OPDSC	[SADC] Organ on Politics, Defence and Security Cooperation
SCAF	Supreme Council of the Armed Forces [of Egypt]

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UMA	Arab Maghreb Union
UN	United Nations
UNIP	United National Independence Party [of Zambia]
USD	United States Dollar(s)
ZANU-PF	Zimbabwe African National Union Patriotic Front
ZAPU	Zimbabwe African People's Union
ZEC	Zimbabwe Electoral Commission

Table of Contents

Contents

Dedication	i
Declaration	ii
Acknowledgments	iii
Summary of the Thesis	iv
Table of Cases	v
International Cases	v
National Cases	vi
List of International Instruments	viii
List of National Instruments	xi
List of Abbreviations	xii
Chapter One	1
1.1 Background	1
1.2 Statement of the Problem	4
1.3 Research Methodology	5
1.4 Objectives of the Study	6
1.4.1 General Objective	6
1.4.2 Specific Objectives	6
1.5 Overview of Chapters	6
Chapter Two	8
Theoretical Framework of Concepts and General Context	8
2.1 Introduction	8
2.2 Theoretical Discussion of Concepts: Regionalism, Supranationalism and Elections	8
2.2.1 Regional Integration	8
2.2.2 Supranationalism	16
2.2.3 Elections	24
2.3 Historical Context of Democracy in Africa	30
2.3.1 Euphoria of Independence	31
2.3.2 Descent into Authoritarianism	34
2.3.3 Democratic Revival of the Late 1980s and Early 1990s	40
2.3.4 Emerging and Current Trends	43
2.4 Presidential Elections in Africa: Theoretical and Practical Issues	58
2.4.1 Presidential System	59

2.4.2. Parliamentary System.....	65
2.4.3 Monarchical System.....	66
2.5 Common Causes of Flawed Elections in Africa	72
2.5.1 Ethnicity	72
2.5.2 First Past The Post Electoral System	75
2.5.3 The “Military” Playing a Partisan Role.....	77
2.5.4 Compromised Electoral Management Bodies	79
2.6 Summary.....	81
Chapter Three.....	83
The Challenges of Judicial Determination of Presidential Election Disputes in Domestic Courts	83
3.1 Introduction.....	83
3.2 Overview of the Role of Judiciary in Election Disputes	83
3.3 Challenges Associated With Domestic Adjudication of Presidential Elections Disputes in Africa.....	88
3.3.1 All Judgments go in favour of the status quo	88
3.3.2 Sacrificing Substantive Justice for Procedural Technicalities and Misapplication of the Substantial Effect Rule.....	95
3.3.4 Delayed Justice	109
3.3.5 Coming to No Decision	111
3.4 Possible Explanations for such Court Decisions	113
3.4.1 “Why Hire a Lawyer When You Can Buy a Judge?” Judicial Corruption, Lack of Independence and Impartiality.....	114
3.4.2 Intimidation and Judicial Timidity	118
3.5 Consequences of Judicial Decisions in Presidential Election Disputes.....	120
3.5.1 Loss of Confidence in Judiciary.....	120
3.5.2 Rewards Culprits, Justifies and Entrenches Unequal Playing Field.....	122
3.5.3 May Lead to Violence and Breakdown of the State.....	122
3.6 Summary.....	124
Chapter Four.....	125
Transnational Approach to Democratic Elections: An Overview of African Normative Frameworks.....	125
4.1 Introduction.....	125
4.2 The OAU Legacy.....	125
4.2.1 OAU Indifference to Undemocratic and Unconstitutional Change of Government	

4.2.2	Democratic Norms in the African Charter on Human and Peoples' Rights and the OAU Paradigm Shift in Favour of Democracy in the 1990s	129
4.3	A New Dawn With the African Union.....	135
4.3.1	The Constitutive Act of the African Union	136
4.3.2	The African Charter on Democracy, Elections and Governance	142
4.3.3	The NEPAD and APRM process	146
4.4	An Overview of Sub-Regional Normative Frameworks on Democratic Elections	150
4.4.1	East African Community.....	150
4.4.2	Economic Community of Western African States	153
4.4.3	Southern Africa Development Community	157
4.4.4	The Economic Community of Central African States	161
4.4.5	The Arab Maghreb Union.....	162
4.5	The Challenge of Enforcing AU Democratic Norms in Relation to Disputed Presidential Elections.....	163
4.6	Summary.....	166
Chapter Five.....		169
Exploring the Viability of Establishing an African Elections Supranational Court.....		169
5.1	Introduction.....	169
5.2	The Value of Supranational Adjudication.....	169
5.3	Building on the Experiences of Current African Sub-Regional Courts.....	173
5.3.1	The East African Court of Justice	174
5.3.2	The Court of Justice of the Common Market for East and Southern Africa	186
5.3.3	The Community Court of Justice of the Economic Community of West African States	191
5.3.4	The OHADA Common Court of Justice and Arbitration	201
5.3.5	The SADC Tribunal.....	206
5.4	The Viability of An Elections Supranational Tribunal Emerging From the Review of Sub-Regional Courts.....	215
5.5	Integrating the Elections Supranational Court Into the AU Judicial Framework	218
5.6	Possible Relationships with Other AU Organs.....	233
5.7	Criticism Against Supranational Adjudication.....	241
5.8	Summary.....	244
Chapter Six.....		246
General Conclusion and Recommendations.....		246
6.1	Introduction.....	246

6.2	Summary of Key Finding	246
6.3	Key Recommendations	252
6.3.1	Jurisdiction of the court	252
6.3.2	Relations With National Courts	252
6.3.3	Appointment and Removal of Judges	252
6.3.4	Easing Access to the Court	253
6.3.5	Short and Medium Term Recommendations to AU Member States	253
6.4	Contributions to Practice	253
Selected Bibliography		255
Books		255
Journal Articles		257
Theses and Dissertations		265
Reports, Working and Conference Papers		268
Internet Sources		272

Chapter One

General Introduction

1.1 Background

In democratic nations, elections are the only recognised way by which governments assume authority over society. Through elections, the electorate confers power upon government to preside over public affairs and call government to account.¹ The major problem for many countries in Africa is not that elections are rarely held or not held at all. Many countries actually do hold elections routinely. The persistent problem is more about the “quality of the electoral process.”² Within the first decade of attaining independence in the 1950s and 1960s, many African regimes rapidly descended into autocracy and more than 20 countries formally recognised one-party regimes.³ Only the countries of Botswana, Mauritius and, to some extent, Senegal continued with multiparty democracy from independence.⁴

Despite many one-party regimes having been abolished after the democratisation wave of the late 1980s and early 1990s, challenges of holding free and fair elections persist. Forty-four out of forty-eight sub-Saharan African countries held elections between 1989 and 2003, but three quarters of these elections were generally not considered by independent observers as free and fair.⁵ As de Smith has correctly observed, “modern African history is littered with the debris of sham elections which have purported to be authentic expressions of the people’s will.”⁶ Indeed, Africa has become well known for flawed elections, such as was the case in the 2007 elections in Kenya, the 2008 elections in Zimbabwe and the 2010 elections in Ivory Coast.⁷ Even when elections are held routinely and regularly in several African countries, as Ellis has observed, in the great majority of cases the main function of elections has been less to choose a government than as a “form of legitimation of political choices which had already been made by other means.”⁸

¹ Barnette *Constitutional and Administrative law* 353

² Rakner and Svasand *Uncertainty as a Strategy: Electoral Process in Zambia 1991-2001* 2

³ Lindberg *Democracy and Elections in Africa* 48

⁴ Ibid

⁵ Ibid

⁶ de Smith, *The New Commonwealth and Its Constitutions* 3

⁷ HURINET-U “Towards Peaceful, Free, Fair and Democratic 2011 Elections in Uganda: An Analysis of Uganda’s Electoral Laws” <http://docs.mak.ac.ug/sites/default/files/Election%20reforms> (Date of use: 29 March 2015). See also Edwin Odhiambo “Can African States Conduct Free and Fair Presidential Elections?” 122-164

⁸ S. Ellis “Elections in Africa in Historical Context” http://openaccess.leidenuniv.nl/bitstream/handle/1887/9682/ASC_1241486_319.pdf?sequence=1 (Date of use: 2 February 2015)

Due to the stifled democratic climate, where even elections had a predetermined outcome, coups became a common and regular method of showing discontent or removing governments. There were at least 40 successful coups and several more attempts across the African continent in the first twenty years of independence.⁹ From the Egyptian revolution in 1952 to 1998, there were at least of 85 successful coups and unconstitutional changes of government in Africa.¹⁰

Where elections have been affected by anomalies and results are disputed, aggrieved parties have looked to the judiciary as an institution of last hope to seek redress. The judiciary is thus faced with the unenviable task of determining the ultimate outcome of the poll. Consequently, in order to protect the right to choice in an election, and to promote and safeguard democracy, the judiciary must be perceived as competent, honest, learned and independent.¹¹ Such a judiciary plays a transformative role in democracy as an impartial referee or umpire in the democratic game.¹² The judiciary, however, has not won the confidence of major stakeholders and the general public in this regard. For example, following the 1996 and 2001 elections in Zambia, the losing opposition candidates petitioned against the declared winner, and the judiciary in both instances, while agreeing that certain anomalies and malpractices were proved, declined to annul the elections or offer any other remedy.¹³ However, following the 2006 and 2008 elections, the losing opposition parties either withdrew or decided not to petition against the elections stating that they could not trust the judiciary.¹⁴

A similar trend has been observed in several other countries. In Uganda, for instance, major presidential election contests occurred in 2001, 2006 and 2011, which were contested by President Museveni as well as his former physician, Dr. Besigye, as the main opposition leader. In the aftermath of the 2001 and 2006 elections, which he lost, Dr. Besigye petitioned

⁹ Ibid 218.

¹⁰ Udombana "Articulating the Right to Democratic Governance in Africa" 1209-1288

¹¹ Muna Ndulo "Rule of Law, Judicial Reform, Development and Post Conflict Societies"

<http://www.sum.uio.no/english/research/networks/anlep/publicaions/anlep-working-paper-2.pdf> (Date of use: 22 February 2015). See also Muna Ndulo, "Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System." 1-26

¹² Siri Gloppen "How to Assess the Political Role of the Zambian Courts"

<http://www.cmi.no/publications/file/1927-how-to-assess-the-political-role-of-the-zambian.pdf> (Date of use: 13 March 2015)

¹³ See the cases of *Lewanika and Others vs. Chiluba S.C.Z Judgment No. 14 of 1998*; and *Anderson Kambela Mazoka and Others vs. Levy Patrick Mwanawasa and Others Z.R 138 (s.C) L SCZ/EP/01/02/03/2002*. See also *The EU Observer Mission to Zambia Presidential, Parliamentary and Local Elections Final Report (2001/2002)*

¹⁴ See http://english.people.com.cn/200610/17/print20061017_312339.html (Date used: 2 July 2014)

against the election of President Museveni. In both instances, (by a majority of 3 to 2 in 2001 and 4 to 3 in 2006), the Supreme Court upheld the election, despite conceding that serious malpractices and anomalies occurred during the electoral process, on the ground that the noted shortcomings were not substantial as to affect the result of the election.¹⁵ However, following the loss of the 2011 election, Dr. Besigye declined to seek redress in court, stating that he no longer had faith in the judiciary.¹⁶

While the phenomenon of problematic elections is going on, at the continental level, Africa seems to be making renewed commitment towards democratic governance. With the transformation of the Organisation of African Unity (OAU) into the African Union (AU), through the adoption of the Constitutive Act of the African Union in 2000, the AU, inter alia, committed to promoting “democratic principles and institutions, popular participation and good governance,”¹⁷ and seems determined to depart from the legacy of poor governance. This development has been consolidated by the adoption of the African Charter on Democracy, Elections and Governance (ACDEG) in 2007 and the creation of two major courts, that is, the African Court of Justice as well as the African Court on Human and Peoples’ Rights¹⁸, which later merged into the African Court of Justice and Human Rights in 2008,¹⁹ which was in 2014 renamed as the African Court of Justice, Human and Peoples’ Rights. The court has also been vested with criminal jurisdiction.²⁰

It is in view of the foregoing background that this research sought to investigate the challenges the judiciary in Africa has faced in adjudicating presidential election disputes. In light of the growing trend of establishing common African democratic standards and seeking collective solutions, this research will attempt to explore the viability of establishing a continental supranational mechanism for resolving disputed presidential elections through adjudication.

¹⁵ Kizza Besigye vs. Yoweri Museveni and Electoral Commission Petition No. 01 of 2006; and Kizza Besigye vs. Museveni and Electoral Commission Election Petition No. 01 of 2001

¹⁶ See BBC News Africa “Uganda Election: Besigye Calls for Peaceful Protests” <http://www.bbc.com/news/world-africa-12567832> (Date of use: 23 December 2014)

¹⁷ Article 3(g) Constitutive Act of the African Union 2000

¹⁸ Which was created via the adoption of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples’ Rights 1998

¹⁹ See the Protocol on the Statute of the African Court of Justice and Human Rights 2008.

²⁰ The development has largely been a reaction to the indictment and prosecution of African leaders before the International Criminal Court (ICC). Opposition to the prosecution of African leaders before the ICC started showing with the indictment of Sudanese President Omar Al-Bashir and increased in momentum following the indictment and trial of Kenyan President Uhuru Kenyatta and his Vice President William Ruto.

1.2 Statement of the Problem

The main problem this research intends to address can be split into two parts: a) the challenges of adjudicating presidential election disputes in domestic courts in Africa, and b) the viability of establishing an African continental supranational elections court as a remedy. The analysis of the viability of establishing the supranational court will further inquire into the practicability of establishing or rather integrating the proposed supranational adjudication mechanism into the already existing AU judicial framework.

The Carter Centre has observed that “failure to create and implement an effective mechanism” for the resolution of electoral disputes can have the consequence of gravely undermining the legitimacy of an entire electoral process.²¹ Courts, arguably, when sufficiently autonomous and competent, are considered rightly placed to resolve electoral disputes. Where courts are considered apolitical and a symbol of blind folded justice, society is likely to trust them to resolve disputes fairly. Where aggrieved people avail themselves of judicial processes to redress their grievances, the more likely that democracy will grow and there will be stability in a country.²² However, where the judiciary is seen as inept, partial and under the influence of one of the parties to the electoral dispute, or the executive, the aggrieved parties may opt not to ventilate their grievances in court. This research, as stated above, will investigate the challenges concomitant with the domestic judicial resolution of disputed presidential elections and explore the viability of establishing a supranational elections court at the AU level.

The research seeks to answer the following problem research questions:

1. What is the historical, conceptual and legal framework under which presidential elections are held in Africa?
2. How has the domestic judiciary fared in determining presidential election disputes?
3. What common standards and mechanisms exist in Africa for holding democratic elections?
4. What is supranational adjudication, and what are its advantages over other forms of resolving election disputes?

²¹ The Carter Centre “Guide to Electoral Dispute Resolution”

http://www.cartercenter.org/resources/pdfs/news/peace_publications/conflict_resolution/Election_Dispute-Guide.pdf (Date of use: 1 February 2015)

²² Oyebode “The Role of the Judiciary in the Electoral Process in Nigeria”

<http://www.nigeriavillagesquare.com/articles/akinoyebode/the-role-of-the-judiciary-in-the-electoral-process-in-nigeria.html> (Date of use: 22 February 2015)

5. What is the viability of establishing an African elections supranational court as a possible solution?
6. What lessons can be learnt from the existing sub-regional tribunals in Africa?
7. What factors need to be addressed in order to have an effective African supranational elections court?

1.3 Research Methodology

Although quantitative data has been cited, the research is largely qualitative in nature. It will involve consulting primary sources such as international covenants and national statutes, case law both domestic and international, and other documentation of the AU and other relevant bodies. In addition, secondary sources such as academic articles in journals, conference presentations, internet sources, occasional papers, and newspaper publications are referred to. It engaged in a general analysis of the context under which elections are held in Africa, seeking to find common standards on democracy and resolution of electoral disputes in Africa, and explored the possibility of establishing an African supranational approach to adjudication of presidential elections disputes.

The research has integrated the approaches of several legal disciplines. These include public international law, human rights law, jurisprudence and legal theory, as well as comparative constitutional law. It has also applied skills from other disciplines such as history, international relations, political philosophy, and political science.

In this thesis, the term president will be used loosely to mean any elected (as opposed to hereditary) head of government or state.

This thesis is premised on the following assumptions:

1. That the African continental integration process is, *inter alia*, designed to lead to good governance and legitimate democracy;
2. That the continental democratic normative frameworks are intended to be enforced and realized and are, therefore, not just a set of lofty but empty and meaningless statements;
3. That the conduct of presidential elections in Africa should conform with the continental democratic normative frameworks on the conduct of elections; and

4. That where African nationals are aggrieved with the conduct of presidential elections and results in their states, they should have unconstrained access to the continental judicial mechanisms to seek redress.

1.4 Objectives of the Study

1.4.1 General Objective

The objective of the research is to understand the challenges of adjudicating presidential elections disputes domestically and explore the viability of establishing an African elections supranational court as a possible remedy.

1.4.2 Specific Objectives

Specific objectives for this research are:

1. To analyse and understand the African drive towards multilateral and ‘supranational’ standards on the conduct of democratic elections;
2. To comprehend the historical, conceptual and legal framework under which presidential elections are held in Africa;
3. To understand the challenges concomitant with the process of determining the electoral disputes at municipal level;
4. To explore the possibility of establishing an African elections supranational court as a possible remedy towards addressing identified challenges in adjudicating presidential election disputes;
5. To propose key ingredients that would make a supranational elections court successful.

1.5 Overview of Chapters

The first chapter of the thesis is the general introduction. It lays background to the research, gives preliminary information and an overview of the research. The second chapter discusses the conceptual framework underpinning the entire research. Apart from discussing key concepts, the second chapter also gives the historical and current context in which presidential elections are held in Africa.

The third chapter looks at the challenges of adjudicating presidential election disputes in domestic courts. The chapter analyses key jurisprudence across the continent, discerns common trends, and pinpoints the likely causes of dissatisfactory judgments rendered by the courts.

In the fourth chapter, the sub-regional and African continental framework on democratic elections is discussed. The chapter gives both an overview of the historical genesis of the normative framework as well as the substantive provisions. The fifth chapter of the thesis attempts to respond to all the challenges raised and explores the viability of establishing an elections supranational adjudication mechanism. The sixth chapter is the conclusion. It summarises the findings of the research and makes recommendations in relation to the proposed supranational adjudication mechanism.

Chapter Two

Theoretical Framework of Concepts and General Context

2.1 Introduction

In democratic nations, elections are the only recognised way by which government assumes authority over society. Through elections, the electorate confer power upon government to preside over public affairs and call government to account.²³ The major problem for many countries in Africa is not that elections are rarely held or not held at all. Many countries do actually hold elections routinely. But often elections have led to disputes, violence and instability in some African states.

This chapter gives a framework of concepts that underpin the whole thesis. It also gives a general context under which elections are held in Africa. In discussing the overall context in which African elections are held, the chapter discusses the historical circumstances that have shaped presidential election contests; the legal frameworks or systems that are used to elect presidents; as well as the common problems that account for disputed elections in Africa.

In terms of concepts, the chapter discusses in detail the interrelated concepts of regionalism or integration in the African context; supranationalism; and elections. The three concepts are manifestly related. From the pre-independence era, African leaders have always appreciated the need for African regional integration in order to find collective solutions to common problems. What remained to be solved was the pace of the integration as well as the form it should take, with supranationalism generally considered as the ultimate goal. Disputed elections have emerged as a major problem across the continent, often erupting in violence and instability. There is, therefore, need to find common regional approaches and solutions towards such disputed elections.

2.2 Theoretical Discussion of Concepts: Regionalism, Supranationalism and Elections

2.2.1 Regional Integration

Regional integration (sometimes called regionalism) has been defined by Haas as “the process whereby political actors...are persuaded to shift their national loyalties, expectations

²³ Barnette *Constitutional and Administrative Law* 353

and political activities to a new larger centre.”²⁴ This means that states “voluntarily,” but in a formally binding way, choose to associate over certain stated matters and as regards those matters, create an entity that will be responsible for supervising their interaction. Integration, when fully accomplished, entails formal penetration of binding regional standards into the domestic sphere and “takes precedence over domestic law.”²⁵ Such fully accomplished integration is alternatively described by the term “supranational,” a term which is discussed in more detail below.

There are many theories that try to account for the phenomenon of regional integration and predict its future. They tend to fall into two broad categories: those that emphasize the role of states (governments), and those that tend to emphasise the role of non-state actors in the integration process. At the risk of oversimplification, it can be said that the theory of neofunctionalism tries to account for regional integration by emphasising the role of non-state entities in the integration process, while the theory of intergovernmentalism places more emphasis on the role of the state in the integration process.

Haas, the founder of the neofunctional school of thought, described neofunctionalism as the theory concerned with explaining “how and why nation-states cease to be wholly sovereign, how and why they voluntarily mingle, merge, and mix with their neighbours so as to lose the factual attributes of sovereignty while acquiring new techniques for resolving conflicts between themselves.”²⁶ Neofunctionalism considers that the integration process is primarily driven by non-state interest groups within the state. These interest groups may have, for example, transnational transactions or interactions, but may face uncertainty costs as a result of disparity in national rules and standards.²⁷ Such interest groups view integration as profitable as it creates certainty by creating common standards across national boundaries. States are therefore prompted into integration by the interests of such groups.²⁸ States,

²⁴ See Haas *International Integration: The European and the Universal Process* 366- 392. See also Haas “The Uniting of Europe: Political, Social and Economic Forces 1950- 1957; and Haas “*International Integration: The European and Universal Process*” 93-130. See also Sweet and Saudholtz “*European Integration and Supranational Governance*” 297- 317

²⁵ Burley and Mattli “*Europe Before the Court: A Political Theory of Legal Integration*” 41-76

²⁶ See Haas *International Integration: The European and the Universal Process* 366- 392. See also Haas *The Uniting of Europe: Political, Social and Economic Forces 1950- 1957; and Haas “International Integration: The European and Universal Process*” 93-130

²⁷ Sweet and Saudholtz “*European Integration and Supranational Governance*” 297- 317

²⁸ Moravcsik “*Preferences and Power in the European Community: Liberal Intergovernmentalist Approach*” 474-524

however, still have significance in the integration process as they are the ones that negotiate the actual terms and set parameters of the initial agreement.²⁹

Neofunctionalists argue that once states agree on the initial integration mechanism or treaty, the subsequent and more important traction in the integration process is not much in the hands of the states but mainly in the hands of the “regional secretariat” and non-state actors. Regional secretariats or bodies tasked with implementing integration agreements tend to subtly and incrementally enhance their mandate to address obstacles encountered in the process of integration. This has a reinforcing effect, which leads citizens or non-state actors to begin “shifting more and more of their expectations to the region and satisfying them will increase the likelihood that integration” will ultimately respond to their socio-economic and political needs.³⁰ This idea is at the heart of this research and shall be returned to in chapters four and five.

On the other hand, intergovernmentalism is the diametrical opposite of the neofunctionalism model. Intergovernmentalism emphasises the significant role played by national governments in the integration process. It proceeds on the assumption that in the integration process “dominant actors remain sovereign national states pursuing their unitary national interests and controlling the pace and outcome through periodic revisions of their mutual treaty obligations.”³¹ This theory conceives of states as rational entities which act purposefully towards achievement of certain interests. In order to safeguard those national interests, states bargain among themselves and purposefully act towards fulfilment of those goals served by the process of integration. Therefore, under this theory, major steps and frameworks of the integration process are the product of inter-governmental agreements.³² Integration, therefore, is an act subsequent to, and dependent on, inter-national relations and sustained throughout by states.

Both the theories of neo-functionalism and intergovernmentalism have inherent weaknesses and perhaps should be considered as extreme ends of one continuum. Neofunctionalism, for example, assumes that once governments put in place initial cooperation mechanisms, the integration process will henceforth be self-sustaining and self-reinforcing through the activities of “secretariat” and interested non-state actors. As will be seen later below with the

²⁹ Schmitter “Neo-neo-functionalism” 1-42

³⁰ Ibid

³¹ Schmitter “Neo-neo-functionalism” in Wiener and Diez (eds) *European Integration Theory* 1-42

³² Moravcsik “Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach” 474- 524

African integration process, this has not been the case, despite the initial integration framework having been laid down in 1963 when the OAU was founded. Intergovernmentalism on the other hand, by over-emphasising the role of the state in the integration process, overlooks the role regional institutions and non state actors can play in accelerating the integration process. In the context of the EU, for example, the European Court of Justice and the European Court of Human Rights have played a tremendous role in the emergence of the EU as the most successful supranational organisation.

In Africa, however, the drive for integration has its foundation in the concept of pan-Africanism. Pan-Africanism is a concept that does not render itself to easy definition, largely because it is multifaceted and embodies within it the ideals and history of the struggle for African independence and unity. Pan-Africanism can, however, be unpacked and considered from at least three perspectives. First, there is racial pan-Africanism, which denotes the tendency by people of African descent to unite in common struggle against discrimination anywhere and particularly in the context of the struggle for African independence from colonial rule.³³ Second is residential or continental pan-Africanism which denotes the need for all Africans to unite in order to preserve their independence and pursue common goals.³⁴ Finally, there is ideological pan-Africanism which refers to efforts by scholars and lobbyists who articulate “systematic ideas about how the continent should be liberated and reorganised” and united.³⁵ Pan-Africanism, broadly considered, is a movement and school of thought that urges a closer unity of African peoples and states.³⁶

Pan-Africanism, as a movement and school of thought, seems to have emerged in response to the pain of domination, racism, oppression and exploitation suffered by peoples of African origin. It first gained momentum in the diaspora before it spread to the African continent. George Charles, then president of the African Emigration Association in the USA is recognised by some as the founding father of pan-Africanism. In 1886, George Charles declared to the USA Congress that his association intended to establish a United States of Africa. Although this never materialised, Charles organised the first pan-African congress in Chicago in 1893.³⁷

³³ Biswaro *Perspectives On Africa's Integration from OAU to AU: Old Wine in New Bottles?* 25

³⁴ Ibid

³⁵ Ibid

³⁶ Viljoen *International Human Rights Law in Africa* 158

³⁷ Adejo “From OAU to AU: New Wine in Old Wine Bottles?” 120-141

Several conferences were to follow in the early 1900s organised by activists and scholars of African descent in the diaspora. These included Marcus Garvey and William E. Dubois, who organised several pan-African conferences in Paris in the 1920s, including the 1919 Pan-African Conference in Paris which coincided with the Versailles Peace Conference aimed at promoting self-determination for Africans;³⁸ and Henry Sylvester William, a Trinidad-born lawyer living in England, who is believed to have coined the word “Pan-Africanism”, was the first to organise a pan-African congress in London in July 1900.³⁹ Perhaps the most important Pan-African congress held in the diaspora was the one held in Manchester in 1945 and organised by Dubois. It specifically addressed the issue of colonialism and gave momentum to African independence movements. It was also attended by prominent Africans who were later to play key roles in the independence of their countries. These included Kwame Nkrumah of Ghana, Wallace Johnson of Sierra Leone, Jomo Kenyatta of Kenya, Kamuzu Banda of Malawi, and Nnamdi Azikiwe of Nigeria.⁴⁰ The conference articulated a clear pan-African vision for the African continent as:

- a. To achieve independence from colonial rule throughout the continent so that Africans can rule themselves democratically
- b. To achieve continental unity so that Africa can: (i) bring about faster economic growth and development to catch up with the industrialised countries; and (ii) be strong within the international system⁴¹

After Ghana gained her independence in 1957, President Nkrumah invested tremendous efforts in trying to actualize the pan-African idea of African integration. Nkrumah’s approach was double-pronged. In the first instance, he sought to establish an immediate union of states that would serve as a model for West African, and ultimately continental African unity. In the second instance, he sought to persuade the whole of Africa to pursue immediate political unity.

First, in seeking to set a model for unity, Nkrumah and Sekou Toure of Guinea announced in November 1958 that their newly independent states had agreed to unite and form what they called the Ghana-Guinea Union (GGU).⁴² Subsequently, Nkrumah and Sekou Toure in May

³⁸ Ibid

³⁹ Supra, note 11, p 26

⁴⁰ Ibid

⁴¹ See Bujra “Pan-African Political and Economic Visions of Development from OAU to AU: From Lagos Plan of Action (LPA) to the New Partnership for African Development (NEPAD)” DPMF Occasional Paper No. 13 2004

⁴² Supra note 11, p 30

1959 followed upon their earlier announcement by signing a joint declaration to the effect that their union was going to be a basis or nucleus for a wider union of African states in which member states would surrender part of their sovereignty in the interest of African unity.⁴³ This was followed by another declaration in 1960 involving Nkrumah, Sekou Toure, and Modibo Keita of Mali in which they announced the establishment of the merging or union of their three states.⁴⁴ Needless to say, this stated union never materialised for a myriad of reasons.⁴⁵

In the second instance, Nkrumah sought to persuade the whole of Africa to integrate and form one union, akin to the United States of America. In 1958, soon after Ghana's independence, Nkrumah convened a conference of independent African states (Ethiopia, Libya, Morocco, Sudan, Tunisia, United Arab Republic and Ghana) in Accra. This was actually the first pan African conference to be held on the African continent. A year later Nkrumah hosted another conference, entitled the "All African Peoples' Organisation." This was in fact a meeting of African political parties. In both events, Nkrumah promoted his idea of African unity, arguing that in order for Africa to secure the gains of freedom and to stave off pressures of neo-colonialism, Africa needed to unite into one supranational state, the United State of Africa.⁴⁶

A few more conferences were held in the aftermath of those conferences called by Nkrumah. The most notable is the 1960 conference held in Addis Ababa, which was attended by eleven independent African states and other countries on the verge of being independent (these included Somalia, Madagascar, Nigeria, Cameroon, Mali Federation and Congo Kinshasa).⁴⁷ It became clear at the conference that there was no consensus on the form the proposed African unity should take. The disagreements revolved around two models: whether to cede sovereignty and immediately establish a supranational union such as the USA or to simply form a loose association of independent sovereign states modelled on the UN system.⁴⁸

Some leaders, such as Nkrumah, Sekou Toure, and Modibo Keita favoured an immediate political union of African states in order to form the United States of Africa, while others

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Ibid. These include differences in culture, lack of common boundaries (e.g., Guinea and Ghana don't share any common boundary), and interference from former colonial masters, particularly France, not eager to lose its control over its former colonies.

⁴⁶ Viljoen *International Human Rights Law in Africa* 160

⁴⁷ Fagbayibo *A Politico-Legal Framework for Integration in Africa: Exploring the Attainability of a Supranational African Union* 40

⁴⁸ Viljoen *International Human Rights Law in Africa* 161

such as Nnamdi Azikiwe of Nigeria and William Tubman of Liberia favoured an incremental approach, starting with a mere association of independent sovereign states. Azikiwe is known to have categorically stated that “if for many years certain parties have fought for their sovereignty; it is unlikely that they will surrender that sovereignty to a nebulous organisation simply because we feel it necessary to work together.”⁴⁹

In order to bridge the divide, Emperor Haile Selassie of Ethiopia hosted another conference in Addis Ababa in 1963, which was attended by all 32 independent African states then. After much haggling, a compromise was reached which gave birth to the Organisation of African Unity (OAU) on 25 May 1963.⁵⁰ The objectives of the OAU included the promotion of unity and solidarity; defence of sovereignty and territorial integrity; eradication of colonialism and promotion of international cooperation.⁵¹ The OAU Charter made it clear that there would be “non-interference in the internal affairs of states.”⁵² Thus African unity took the form of a loose association of independent sovereign states.

From the foregoing, it is evident that the desire for African unity is universal. What is at issue is the form and pace it should take. From this perspective, the OAU could be viewed as simply laying the foundation stone for the future integration endeavours. Indeed, since the founding of the OAU several attempts have been made to speed up the integration process. Perhaps mention here can be made of two notable ones: the establishment of the African Economic Community and the transformation of the OAU into the AU.

The African Economic Community (AEC) was established by the Treaty Establishing the African Economic Community. Its main objectives include the promotion of economic development and the integration of African economies in order to increase economic self-reliance and promotion of cooperation in all fields of human endeavour in order to “raise the standard of living of African peoples.”⁵³ The Treaty, however, does not make the AEC realizable immediately. It provides for a gradual and protracted six-step process. This starts with the strengthening and establishment of Regional Economic Communities (RECs) where they do not exist, and ultimately ends with the consolidation of the Common African Market, the setting up of an African Monetary Union and the setting up of a Pan-African Parliament.⁵⁴

⁴⁹ Ibid

⁵⁰ Supra note 19. See also Viljoen *International Human Rights Law in Africa* 162

⁵¹ Article 2 Charter of the Organisation of African Unity (OAU) 1963

⁵² Article 3(2) Charter of the OAU 1963

⁵³ See Article 4(1)(a) The Treaty Establishing the African Economic Community 1991

⁵⁴ See Article 4(1)(c) The Treaty Establishing the African Economic Community 1991

The treaty provides for a transition period not exceeding 34 years.⁵⁵ Although the treaty entered into force on 12 May, 1994, little progress was made in its implementation.

While the AEC focused almost exclusively on economic integration, efforts towards more comprehensive integration continued and ultimately led to the transformation of the OAU into the African Union (AU). This was achieved through the elaboration and passage of the Constitutive Act of the African Union in Togo on 11 July 2000.⁵⁶ The AU subsumes the AEC into its structures⁵⁷ and provides for greater avenues for integration. The Constitutive Act makes it clear that the establishment of the AU is inspired by pan-African determination for “unity, solidarity, cohesion among the people of Africa and African states.”⁵⁸ Its objectives include “greater unity and solidarity” for African states and peoples as well as the acceleration of both political and economic integration of the whole continent.⁵⁹

Although the Constitutive Act shows a greater tendency towards integration than the OAU charter, there is still ambivalence in its provisions. On the one hand, there are provisions reminiscent of the OAU’s indifference towards internal state problems while on the other hand, there are provisions that show a clear departure from that indifference towards the possibility of establishing a closely knit African continent. On the conservative side, the Constitutive Act, for example, calls for respect of national borders as bequeathed at independence and non-interference by member states into internal affairs.⁶⁰ However, on the progressive side, the Constitutive Act allows for AU intervention in a member state in respect of grave circumstances such as war crimes, genocide, and crimes against humanity.⁶¹ The Constitutive Act also provides for organs of the AU, some of which shall progressively have direct interaction with ordinary citizens in member states. For example, the Pan-African Parliament (PAP) is established to “provide a common platform for African peoples and their grass-roots” to participate in decision making on matters that affect their continent.⁶² The PAP is designed to evolve into a continental legislature whose members shall be elected by nationals of member states by universal adult suffrage and serve in their individual capacity,

⁵⁵ See Article 6 The Treaty Establishing the African Economic Community 1991

⁵⁶ The Constitutive Act entered into force on 26 May 2001

⁵⁷ See Article 33(2) Constitutive Act of the African Union 2000

⁵⁸ See Preamble to the Constitutive Act

⁵⁹ Article 3(a) and (c) Constitutive Act of the African Union 2000

⁶⁰ Article 4(b) and (g) Constitutive Act of the African Union 2000

⁶¹ Article 4(h) Constitutive Act of the African Union 2000

⁶² Preamble of the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament 2001

as opposed to being representatives of their respective states.⁶³ However, currently, its powers are purely consultative and advisory and its members are simply nominated by national governments.⁶⁴

The foregoing review of the concept and experience of efforts towards regional integration in Africa shows that there is unanimity in the desire for unity. However, uncertainty seems to hover around issues of the form and pace that integration should take. Extreme points of the continuum are, on the one hand, setting up a forum for mere inter-governmental interaction and cooperation, as with the case of the OAU, and, on the other hand, setting up a closely knit African community with institutions that are responsive and accessible to ordinary people in member states. Although the AU is still far from being an institution that reflects a closely knit African community, the preamble of the Constitutive Act clearly indicates that the AU is inspired by ideas of close cohesion, unity and solidarity of the whole continent. In order to have an inter-national institution such as the AU (or at least some of its major organs) to be more than a mere forum for inter-governmental cooperation, would require states to cede some sovereignty to the regional body and create structures that will have direct effect on both the states and the people. This effectively means turning the AU into a supranational organisation, a term we analyse next.

2.2.2 Supranationalism

Supranationalism is better understood when contrasted with what is considered as classic international law. In classic international law theory, the international law system is seen as horizontal and composed of independent sovereign states which recognise no sovereign power above them.⁶⁵ Therefore, only states are recognised as subjects of international law and it is they “that create the law and obey or disobey it.”⁶⁶

In contrast, the concept of supranationalism strikes at the heart of classic international law. According to Joseph Weiler and Joel Trachtman, supranationalism has the consequence of “constitutionalizing” international law through the creation of organisations or institutions

⁶³ Article 2(3), Articles 5 and 6 Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament 2001

⁶⁴ Article 2(3)(i) and (ii) Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament 2001

⁶⁵ Shaw *International Law* 4th Edition 5

⁶⁶ *Ibid*, 6 and 139

capable of exercising authoritative and binding power over its member states.⁶⁷ Supranational organisations, so to speak, pierce the veil of classic international law statehood and recognise that states are not simply unitary entities but are themselves composed of multifarious non state actors such as individuals, groups, corporations and other civil society organisations who have a stake in the life of the state.⁶⁸ Supranational organisations directly interact with individuals and non state entities within a state and are empowered to make decisions which are directly against member states, individuals, commercial entities and other non state entities within a state.⁶⁹ This is clearly different from classical international law organisations which are generally seen as a mere forum for inter-state cooperation and can only act on the consent and instructions of member states.

Peter Hay identifies four key elements of supranationalism as:

- Institutional autonomy of an organisation from member states
- Ability of an organisation to bind its member states by a majority or weighted majority vote
- Direct binding effect of law emanating from the organisation on natural and legal persons
- Attribution of powers which differ markedly from powers bestowed on other organisations.⁷⁰

Further, Joseph Weiler draws a distinction between legal or normative supranationalism from decisional supranationalism. Decisional supranationalism relates to ‘political’ decision-making process whereby institutional policies and measures are in the first place, not only debated and formulated, but then promulgated and finally executed.⁷¹ Normative

⁶⁷ Weiler and Trachtman “European Constitutionalism and Its Discontents.” 354. See also Weiler “The Transformation of Europe,” 2403- 2483 and Fagbayibo “Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview” 31-69

⁶⁸ Helfer and Slaughter “Toward a Theory of Effective Supranational Adjudication” 273-391

⁶⁹ Ibid

⁷⁰ See Hay “Federalism and Supranational organisations” 834. See also Leal-Arcas “Theories of Supranationalism in the EU,” 1-25; Best “Supranational Institutions and Regional Integration,” <http://www.eclac.cl/brasil/noticias/paginas/2/22962/BEST-SUPRANATIONAL%20INSTITUTIONS%20AND%20REGIONAL%20INTEGRATION.pdf> (Date of use: 1 May 2014); and Fagbayibo *A Politico-legal Framework for Integration in Africa: Exploring the Attainability of a Supranational African Union* <http://upetd.up.ac.za/thesis/available/etd-10092010-143207/> (Date of use: 12 September 2014)

⁷¹ Weiler “The Community System: The Dual Character of Supranationalism” 267-306. See also Weiler “The Transformation of Europe” 2403-2483; Leal-Arcas “Theories of Supranationalism in the EU” 1-25; and Fagbayibo *A Politico-legal Framework for Integration in Africa: Exploring the Attainability of a Supranational African Union* 24

supranationalism on the other hand means that the laws of an organisation have the following three factors:

- Have direct effect in member states
- Are superior to the laws of member states
- Member states are pre-empted from enacting contradicting legislation.⁷²

This research is rooted in normative supranationalism, as it explores the possibility of supranational adjudication of presidential election disputes. The concept of supranational adjudication therefore requires further elaboration here.

Helfer and Slaughter define supranational adjudication as:

adjudication by a tribunal that was established by a group of states or the entire international community and that exercises jurisdiction over cases directly involving private parties—whether between a private party and a foreign government, a private party and her own government, private parties themselves, or, in the criminal context, a private party and a prosecutor’s office.⁷³

In essence, in supranational adjudication, courts or tribunals created by states are allowed to operate independent of the direct influence of states and are accessible to both state and non state entities and individuals. This differs significantly from traditional or classical international adjudication where adjudication only involved state-to-state litigation. Because supranational adjudication is beyond the direct and immediate influence of states, supranational courts have a rare opportunity “where regular politics and the power disparities in the world do not shape how the law is interpreted and applied.”⁷⁴ Thus, unlike traditional international adjudication where states control access to international tribunals, supranational courts are protected from the direct interference of individual states and, on the basis of pre-determined rules, make autonomous binding decisions on all the parties.

It is important to note that although supranational tribunals are insulated from direct influence of individual states, they are actually created by the member states themselves. The member states can therefore be said to be the ones delegating some aspects of their sovereignty to supranational tribunals. All international organisations created by states could be said to have

⁷² Ibid,

⁷³ Helfer and Slaughter “Toward a Theory of Effective Supranational Adjudication” 273-391

⁷⁴ Alter “Agents or Trustees? International Courts in their Political Context” 33-63

been borne of states delegating some of their sovereign power to them. So what distinguishes the kind of delegation states make to supranational tribunals then?

Keohane, Moravcsik and Slaughter identify three dimensions of delegation that are specific to supranational courts. These are independence, access and embeddedness.⁷⁵ Independence refers to the existence of mechanisms that ensure that cases are heard and determined impartially, and without the immediate influence of individual state interests. This requires that judges should not generally have a partisan background; should have a reasonably long tenure; and should have discretion to decide cases on the basis of the law as they see fit, professionally; and that judges should have sufficient resources at their disposal to run the courts smoothly.⁷⁶

Access refers to potentially the range of aggrieved parties who have legal standing (*locus standi*) or audience to move the court. As noted above, state and non state entities usually have access to supranational tribunals. Embeddedness is about who controls the implementation of supranational tribunal's decisions.⁷⁷ It is axiomatic that international tribunals do not have police and military forces and other coercive powers to help implement their decisions. The implementation of their decisions, therefore, depends on how such tribunals are able to penetrate into states and build relations of trust, respect and competence with municipal actors such as courts, law associations, civil society organisations, police, academia and other stakeholders which give international tribunals a sense of relevance, credibility and legitimacy before national audiences.

In sum, supranational tribunals, therefore, tend to be independent, are accessible to both state and non state entities and as a result are embedded into municipal legal systems in order to help implement their decisions.

Successful modern supranational adjudication is traceable to the establishment of the European Court of Justice (ECJ) in 1952⁷⁸ as part of the European Coal and Steel Community and the European Court of Human Rights (ECHR).⁷⁹ The ECJ managed to creatively transform the treaty of Rome and other Community laws into supreme and directly enforceable laws, through cases brought by individuals (private litigants), in national courts.

⁷⁵ Keohane et al "Legalised Dispute Resolution: Interstate and Transnational" 457- 488

⁷⁶ Ibid

⁷⁷ Ibid

⁷⁸ See Article 64 The Treaty of Rome 1957

⁷⁹ See Article 19 Convention for the Protection of Human Rights and Fundamental Freedoms 1950

This was largely through the development of the doctrines of supremacy and direct effect of Community law. The doctrine of supremacy of Community law entails that Community law is supreme over national law and, therefore, national law cannot prevail over community law.⁸⁰ The doctrine of direct effect means that Community law “confers rights and duties within member states without further legislative participation.”⁸¹ The doctrines were developed and articulated in some of the earliest cases to reach the court.⁸² The ECHR, on its part, allowed for private or non state litigants to have access to it from the beginning.⁸³

The two courts are considered to be the most successful and effective supranational tribunals and have become the model for other integration projects across the globe. Effective adjudication has been defined as the court’s “basic ability to compel or cajole compliance with its judgment.”⁸⁴ Such compliance depends on the supranational court’s ability to develop harmonious relations with municipal justice institutions, with support of civil society organisations, to harness the national institutions to use their powers on its behalf.⁸⁵

Helfer and Slaughter have extensively studied the European supranational courts (ECJ and ECHR), and on the basis of the success of the European model, have been able to deduce factors that have made these courts effective and successful. They devised a checklist of these factors that have influenced the effectiveness of these supranational courts. They divide the factors into three categories: those factors within the power of states setting up a supranational tribunal; those factors within the power of the supranational tribunals; and external general factors about the types of cases presented to the supranational tribunals and the municipal political arrangements and ideologies of state parties to the supranational tribunals.⁸⁶ These factors can be summarised as follows:

Factor within the control of state parties:

- Composition of the tribunal: European supranational tribunals have been successful partly because they have been composed of senior, well recognised and respected

⁸⁰ Barnette *Constitutional and Administrative Law* 240 and 253

⁸¹ Ibid

⁸² See for example *Van Gend en Loos V Nederlandse Tariefcommissie* (Case 26/62)[1963]CMLR105, and *Costa V ENEL* (Case 6/64) [1964]ECR1125

⁸³ See Article 34 Convention for the Protection of Human Rights and Fundamental Freedoms 1950

⁸⁴ Helfer and Slaughter “Towards a Theory of Effective Supranational Adjudication” 273-391

⁸⁵ Ibid

⁸⁶ Ibid

jurists from member states. This made it relatively easy for municipal courts to accept the judgements of the supranational courts.

- Caseload or functional capacity of the court: The European supranational courts have had, over years, a reasonably high caseload, which enabled them to be influential and make a mark. A court that is hardly used is of little influence.
- Independent fact finding capacity: The courts have an ability to independently test the veracity of allegations before them and make an independent decision.
- Formal authority or status as law of the instrument that the tribunal is charged with interpreting and applying: This has to do with whether or not the instrument that the tribunal is tasked with interpreting is binding law and consequently whether the tribunal's decisions are equally binding. In this case both the Treaty of Rome establishing the ECJ and the European Convention on Human Rights provide that the decisions of the two courts are binding on member states.⁸⁷

Factors within the control of supranational tribunals:

- Awareness of audience: The supranational courts were able to recognise an audience beyond the immediate parties to a dispute at hand and crafted their judgments to encourage additional cases by appealing to both the material and professional interests of prospective litigants. This also involved fostering harmonious relationships with national courts and assuring national courts that they are partners in enforcing supranational legislation.
- Neutrality and demonstrated autonomy from political interests: This has to do with the tribunal's ability to make decisions based on generally applicable laws and decide cases impartially, refusing "to pander to governments at whose sufferance it exists." Both courts have been willing to make decisions against governments in big cases.
- Incrementalism: If a court pushes too fast and too far, member states can act to curtail its jurisdiction or urge national courts not to cooperate. Demonstration of autonomy must be "tempered with incrementalism and awareness of political boundaries."⁸⁸
- Quality of legal reasoning: well reasoned judgements make decisions of courts more acceptable as they give an assurance that the "authority of judgments derives from intrinsic rationality rather than from an argument of authority."⁸⁹

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Ibid

- Judicial cross-fertilisation and dialogue: The ECJ and ECHR were able to enhance each other by referring to one another's decisions.⁹⁰

External factors beyond the control of the states and tribunals:

- Nature of violations: Until the courts are fully respected, usually they are more successful in enforcing their decisions in minor violations, which require fewer concessions from states. For example, the courts were powerless in the face of serious systematic violations of human rights in Greece during the military dictatorships of the 1970s.
- Autonomous domestic institutions committed to the rule of law and responsive to citizen interests: National government institutions committed to the rule of law, responsive to the entitlements of individual citizens, and able to formulate and pursue their interests independently from other government agencies, is a strongly favourable pre-condition for effective supranational adjudication.
- Relative cultural and political homogeneity of states subject to a supranational tribunal: cultural and political homogeneity of the member states makes supranational courts relatively easily acceptable.⁹¹

It must be noted that these positive views about supranational adjudication are not universally shared among scholars. Eric Posner and John Yoo are among the leading critics of the value and effectiveness of independent supranational courts. Posner and Yoo's views are shared by other scholars such as John Mearsheimer⁹² and Vitalius Tumonis.⁹³ Posner and Yoo's arguments are contained in two articles, which are a response to the works of Helfer and Slaughter (referred to above).⁹⁴ Posner and Yoo feel that the spread of supranational adjudication is being pushed to extremes, which risks substituting the tyranny of judges for that of governments. They argue that in fact such tribunals are a danger to international cooperation because they are susceptible of making decisions based on morality which are at

⁹⁰ Ibid

⁹¹ Ibid

⁹² Mearsheimer "The False Promise of International Institutions" 5-49

⁹³ Tumonis "Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement" 35-64

⁹⁴ See Posner and Yoo "Judicial independence in international tribunals, and Posner and Yoo Reply to Helfer and Slaughter" 1-75

variance with interests of states.⁹⁵ They contend that states will be reluctant to use such tribunals unless they have control over the judges.

Contrary to the views of Posner and Yoo, that states are reluctant to create independent supranational courts, the model of supranational courts is spreading across the globe. For example, in 1985 there were only seven such courts, but by 2008 there were 26, and are actually processing several cases as they have made more than 15, 000 judgments since 1990.⁹⁶ Against such evidence, Posner and Yoo are of the view that states set up such courts for symbolic reasons especially to increase their prestige. Apart for reasons of prestige, Posner and Yoo concede minimal benefits accruing from supranational tribunals, that is, that of enabling states to overcome a few cooperation challenges in international cooperation. For example, states with a boundary disputes may prefer to settle such disputes through adjudication instead of going to war. In such cases, Posner and Yoo argue, states will comply with court decisions because “the cost of compliance is less than the future benefits of continued adjudication.”⁹⁷ Outside such cases, supranational courts are not effective as states will not comply with judgements that threaten their interests and will seek to undo the tribunals.

With respect, the views of Posner and Yoo seem to be based on the concept of a monolithic and unitary state, as the main player on the international scene. In the contemporary world, such a concept of the state is simplistic as the very well being of the state depends on various non state entities such as law societies, civil society organisations, labour movements, student unions and the like. Enlightened views of such organisations and groups can potentially compel democratic states to obey international standards acceded to by their states. Further, assertions that tribunals are simply for symbolic reasons of prestige, while true to some extent as shall be discussed below, are not entirely correct as such tribunals have made decisions against immediate interests of affected states. We shall return to the concept of supranationalism in the fourth chapter in the context of discussing the possibility of establishing an elections supranational court.

⁹⁵ Ibid

⁹⁶ Supra, note 52

⁹⁷ Supra, note 47

2.2.3 Elections

The concept of elections is intrinsically linked to that of democracy and may be considered a sub-set of democracy. Therefore, before analysing the concept of democracy, an overview of what constitutes democracy is given here. There is no one standard definition of democracy. Etymologically, “democracy” derives from the Greek words “people” (demos) and “authority” (karatia).⁹⁸ Democracy, therefore, implies that power to govern derives from the people. It is essentially about power, “irrespective of whether it is the use, sharing, control or transfer of power, or the accountability of those who wield it and those who seek it.”⁹⁹ Since power lies with the people, it means that in a democracy, people should always have a controlling influence over the manner government is constituted and exercises its authority.

There is no standard mode of a democratic government or system. Former UN Secretary-General, Boutros-Ghali, correctly observed that democracy is not a model to be copied from certain states, but is something that “may take many forms, depending upon the characteristics and circumstances of societies.”¹⁰⁰ Rather, there are elements or virtues considered essential for any system to be considered democratic. Amartya Sen, for example, identifies three virtues upon which democracy rests. These are:

1. Political participation and human freedom;
2. Instrumental importance of political incentives in keeping governments responsible and accountable; and
3. The constructive role of democracy in the formation of values and understanding of needs, rights and duties.¹⁰¹

These elements entail that in a democracy, people have political freedom to exercise their civil and political rights; people have space to express themselves and support their claims and their views receive due consideration from those holding public office; and citizens have an opportunity to learn from one another.¹⁰² Similarly, Claude Ake lists three essential

⁹⁸ Sen “Why Democracy is Not the Same as Westernisation: Democracy and its Global Roots” 17

⁹⁹ Bassiouni “Toward a Universal Declaration: From Principles to Realisation: Some General Considerations” in Bassiouni (ed) *Democracy: Its Principles and Achievements* 3

¹⁰⁰ The UN Secretary-General’s Report on New and Restored Democracies UN Doc.A/50/332 (1995) para.5

¹⁰¹ Sen “Democracy as a Universal value”8

¹⁰² Ibid, 6

elements of democracy, related to those of Sen. These are widespread participation of the people, consent of the governed, and public accountability of those in power.¹⁰³

There have been claims that democracy is alien to Africa and is at variance with traditional systems of governance and culture.¹⁰⁴ This can only be true if one confuses Western-style institutions with democracy. But when one considers constitutive elements of democracy such as participation, popular consent and accountability, then it becomes apparent that these were never in short supply in many traditional African societies.

Anthropologists Meyer Fortes and Edward Evans, who analysed traditional African political systems, concluded that “the structure of an African state implies that Kings and Chiefs rule by consent.”¹⁰⁵ Ake further argues that in fact in many traditional African systems, accountability was stricter than even in modern Western societies:

Chiefs were answerable not only for their own actions but for natural catastrophes such as famine, epidemics, floods, and drought. In the event of such disasters, Chiefs could be required to go into exile or “asked to die.”¹⁰⁶

Perhaps a better known demonstration of democracy in traditional African societies is to be found in Nelson Mandela’s autobiography. In describing how decisions were made, Mandela notes that no conclusion was forced upon people but instead all the people were heard and a decision was taken together.¹⁰⁷ In two informative paragraphs, Mandela narrates how this was done:

Everyone who wanted to speak did so. It was democracy in its purest form. There may have been a hierarchy of importance among the speakers, but everyone was heard, chief and subject, warrior and medicine man, shopkeeper and farmer, landowner and labourer. People spoke without interruption and the meetings lasted many hours.¹⁰⁸

At first, I was astonished by the vehemence- and candour- with which people criticised the regent. He was not above criticism- in fact, he was often the principal target of it. But no

¹⁰³ Ake “Rethinking African Democracy” 34

¹⁰⁴ Ibid, 34

¹⁰⁵ As cited in Sen “Why Democratisation is Not the Same as Wesernisation: Democracy and Its Global Roots”

16

¹⁰⁶ Ake “Rethinking African Democracy”34

¹⁰⁷ Mandela *Long Walk to Freedom* 29

¹⁰⁸ Ibid, 28

matter how flagrant the charge, the regent simply listened, not defending himself, showing no emotion at all.¹⁰⁹

The fact that elements of democracy such as participation, consent and accountability were present in traditional African societies is important considering that, as shall be discussed below, there are still three African states (Lesotho, Morocco and Swaziland) that still use the hereditary monarch system of governance. As discussed here, democracy is not necessarily incompatible with such traditional forms of government. This is discussed further below.

Turning to the concept of election, the concept of elections has to do with how a state constitutes authority (government) to attend to its various common needs and resolve its challenges. This authority is seen as necessary for the survival, equilibrium and peaceful existence of society. Various theorists and philosophers have crafted explanations for the need of such authority. Theorists like Hobbs, Spinoza, Rousseau and Bentham, with variations, argue on the basis of a mythical construct of the “state of nature,” where human beings left to their own devices, without a compelling authority, life would be chaotic and violent.¹¹⁰ Without this common power to prevail over society, society would be in perpetual warfare of “every man against every man”¹¹¹ and the life of everyone in society, in the famous words of Hobbs, becomes “solitary, poor, nasty, brutish, and short.”¹¹² In order to protect their lives and property, and in order to live happily, orderly and peacefully, it is therefore imperative that human beings ‘contract’ or agree to institute a common authority (the sovereign) to preside over public affairs.

Other theorists such as Thomas Paine and John Locke, while not disputing the mythical state of nature as the substratum upon which authority in a state is based, emphasise that the will of the people is the real basis of authority in a state. Paine considers government as being born of the consent of the people and necessary (in his words “a necessary evil”), but only necessary to constrain human vices in order for harmony and prosperity to prevail.¹¹³ Locke, like Paine, considers consent as the basis for government. It is the people who collectively set up government to look after their common interests. This invariably means that government, which arises from the free will of the people, does not have absolute and unrestrained power

¹⁰⁹ Ibid, 29

¹¹⁰ See the works of Hobbs, Spinoza, Rousseau and Bentham in Curtis (ed) *The Great Political Theories: From the Greeks to the Enlightenment* Vol 1 326-350

¹¹¹ Hobbs *Leviathan* in Guest et al *Jurisprudence and Legal Theory* 30

¹¹² Ibid 30

¹¹³ Paine *Common Sense* 1

over them and, therefore, has to be constrained by respect for basic human rights and property rights.¹¹⁴

In theory, there is, therefore, basic consensus for the need for authority or government in society. In history, governmental authority is assumed in different ways. These have included conquest, heredity, selection by lot, military coup d'états and elections. In democratic societies, where government ought to be based on the consent of the people, elections have become universally acknowledged as the most appropriate demonstration of that popular consent for establishing that government. The Zambian Supreme Court aptly stated:

elections, it goes without saying, are the sole lawful, constitutional, and legitimate method for the peaceful and legal acquisition of political power...Those in power should govern with the consent and by the will of the governed expressed in periodic genuine, open, free and fair elections where the result reflects the exercise of free choice.¹¹⁵

To elect is to choose and an election is therefore “a procedure whereby group decisions are made on the basis of choices exercised by individual members of the group.”¹¹⁶ In a democratic state, elections are an institutionalised method of realising the democratic norm of “rule of the people by the people.”¹¹⁷ Elections are the only democratically legitimate procedure for translating popular sovereignty into workable executive and legislative powers.¹¹⁸ For purposes of this research, an election is considered as a method or means by which eligible nationals or citizens of a state choose the person or persons to assume the highest office in government, particularly the presidency. It is about people freely and collectively consenting to the setting up of a government that will preside over their affairs.

The concept of elections is intrinsically linked to two concepts of representation (or delegation) and accountability. Elections are connected with the concept of representation and accountability in that those elected into government are considered as representatives or delegates of the people and consequently accountable to the people. The people, therefore, collectively decide to delegate the running of public affairs to persons they freely elect.

¹¹⁴ Locke *The Second Treatise of Civil Government* in Curtis (ed) *The Great Political Theories: From the Greeks to the Enlightenment* Vol 1 326-350

¹¹⁵ Akashambatwa Mbikusita Lewanika et al Vs Frederick Jacob Titus Chiluba (SCZ Judgment No 14 of 1998)

¹¹⁶ Encyclopaedia Britannica, Vol 8

¹¹⁷ Lindberg *Democracy and Elections in Africa* 1-2

¹¹⁸ Ibid

Because those elected draw their mandate from the public, this necessarily entails accountability as representatives ought to be held responsible for decisions and actions undertaken in the name of the people they purport to represent.¹¹⁹ Each of the concepts of representation and accountability will require further elaboration.

We start with representation. In ancient times in many societies, when there was a common challenge to be resolved in the community, citizens assembled and collectively resolved the challenge. The ancient city-state of Athens is a well known example, where almost all major political decisions were made directly by the assembly of eligible citizens. For example, at the beginning of each year, the Code of existing laws had to be submitted for review, amendment or approval to the assembly, which usually voted by a show of hands.¹²⁰ In modern states, important government decisions have to be made daily, requiring specialised skills and continuous attention. As a result, it is largely impossible that people would gather in assembly daily, and collectively run government effectively and efficiently.¹²¹ As a result, if people have to participate reasonably in government, they have to choose a small number from among themselves to act on their behalf as their representatives.¹²²

Representation has been defined as:

The process through which the attitudes, preferences, viewpoints and desires of the entire citizenry or part of them are, with their expressed approval, shaped into governmental action on their behalf by a smaller number among them, with binding effect upon those represented.¹²³

Those elected, therefore, represent the collective will of the voters. However, the concept of representation is not without attendant difficulties. Two major weaknesses can be noted here. First, the quality of representation that can be attributed to government in power depends on the applicable electoral system in a state. For example, in a country that uses the simple majoritarian system for electing a president, it is possible that a president may be elected on a thin majority and therefore his or her election cannot be said to be reflective of the collective or majority will of the people. Such was the case in Zambia during the 2001 elections where

¹¹⁹ O'Donnell "Delegative Democracy?" 1-17

¹²⁰ Manin *The Principles of Representative Government* 21-23

¹²¹ Encyclopaedia Britannica Vol 8

¹²² Ibid

¹²³ Ibid

the winning candidate only garnered a paltry 29 percent of cast votes.¹²⁴ Similarly, during the 2004 Malawian presidential elections, the winning candidate merely got 35 percent of the votes.¹²⁵ Secondly, even where a government is elected into power on a certain platform or promises, once in office, governments are usually not under binding instructions to fulfil their promises, and in many cases do actually betray campaign promises under which they were elected, and pursue personal interests.¹²⁶

Turning to the concept of accountability, genuine elections have been hailed as “the kernel of political accountability and a means of ensuring reciprocity and exchange between the governor and governed.”¹²⁷ Governments are considered accountable to the electorate in the sense that elections can be used as a tool to hold governments responsible for consequences of actions during their tenure in office. Governments thus are considered to anticipate the verdict of voters and as a result are “induced to choose policies that in their judgement will be positively evaluated by citizens at the time of the next election.”¹²⁸ Voters, therefore, could use their vote to retrospectively punish an incumbent government for wrong decisions or reward them for good decisions and actions.

The authors Timothy Hellwig and David Sammuels have identified several factors, which can be reduced into two points, which influence how effective accountability in an electoral system will be.¹²⁹ First, it is easier for voters to hold government accountable where one party controls the executive and legislative branches of government. But where executive and legislative powers of a government are in the hands of a coalition or minority government, then it becomes difficult for voters to assign responsibility. Second, in holding a president accountable, it is easier for voters to do so where a president is directly elected by the people as opposed to where a president is elected indirectly through parliament or the legislature.

Two shortcomings of the concept of accountability in elections can be noted here. First of all, where national constitutions prescribe term limits and political parties are hardly

¹²⁴ Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others Z.R 138 (SC) L SCZ/EP/01/02/03/2002

¹²⁵ See Electoral Institute for Sustainable Democracy “Malawi: 2004 Presidential Election Results” <http://www.content.eisa.org.za/old-page/malawi-2004-presidential-election-results> (Date of use: 1 April 2015). See also Chris Maroleng “Malawi General Election 2004: Democracy in the Firing Line.” During the 2004 Malawian elections the top three candidates scored as follows: Dr. Bingu Wa Mutharika 35 percent; John Tembo 27 percent; and Gwanda Chakuamba 26 percent.

¹²⁶ Przeworski, Stokes and Manin (eds) *Democracy, Accountability and Representation* 27-55

¹²⁷ Adejumobi “Elections in Africa: A Fading Shadow of Democracy?” 362-388

¹²⁸ *Supra* note 90, p 27-55

¹²⁹ Hellwig and Sammuels “Electoral Accountability and the Variety of Democratic Regimes” 1-25

institutionalised, an incumbent government serving its last term in office would have minimal incentives for seeking re-election. Second, electoral accountability only works retroactively as generally the electorate have to wait for the next election in order to punish an ill or non performing government. This is usually when the damage has already been done.¹³⁰

Although elections, as an instrument for recruiting government leadership and as a means of holding leadership accountable, may have shortcomings as stated above, they still remain the only democratic mechanism available for that purpose. Elections afford people, as a collective entity, to choose both policy and government leadership and to influence the leaders, while in office, to behave appropriately. This function of elections is now universally acknowledged and is enshrined in key international treaties. The Universal Declaration of Human Rights (UDHR), which was adopted “as a common standard of achievement for all peoples and nations,”¹³¹ categorically stated that “the will of the people shall be the basis of the authority of government” and “which shall be expressed in periodic and genuine elections...”¹³² The International Covenant on Civil and Political Rights, arguably the most important international human rights instrument incorporating democratic governance, equally recognises the right of “everyone to vote and to be elected at genuine periodic elections...”¹³³ At the African regional level, several instruments recognise the role of elections as the only means to constitute a legitimate government.¹³⁴ These instruments and provisions shall be discussed and elaborated in more detail in the fourth chapter.

2.3 Historical Context of Democracy in Africa

Africa has gone through several cycles in trying to establish and consolidate electoral democracy since attaining independence from colonial powers. This section gives an overview of these phases. The four phases discussed in this section are:

- a. the independence era of the 1950s and 1960s pregnant with euphoria and expectation for genuine democratic governance;
- b. the negation of the promise of independence through the establishment of dictatorship, military and one-party regimes from the 1960 to the 1980s;

¹³⁰ Supra, note 14

¹³¹ Preamble of the Universal Declaration of Human Rights 1948

¹³² Article 21(3) Universal Declaration of Human Rights 1948

¹³³ Article 25(b) International Covenant on Civil and Political Rights 1966

¹³⁴ See for example, Article 13(1) African Charter on Human and Peoples’ Rights 1981; and Article 17 Africa Charter on Democracy, Elections and Governance 2007

- c. the wind of change in the 1980s and 1990s characterised by the demise of dictatorships and one party-rule; and
- d. the current and emerging trends affecting presidential elections since the year 2000.

2.3.1 Euphoria of Independence

Systematic colonisation of the African continent was formally consummated at the Berlin Conference in 1884 and 1885. This is when the Western dominant powers arbitrarily divided Africa among themselves into territorial units, and without regard for existing states and kingdom boundaries, thereby grouping together those who may have been enemies and invariably separating those who were homogeneous.¹³⁵ In fact distinguished African scholar Claude Ake traces challenges of ethnic conflicts within the modern African state to this development. He argues that in many parts of pre-colonial Africa, states and ethnicity generally occurred in “a local space where territoriality and ethnic identity roughly coincided.”¹³⁶ By amalgamating distinct ethnic groups into the colonial state, that laid the foundation for inter-ethnic conflict within the state because it dissociated “ethnicity from autonomous polity and territoriality.”¹³⁷ The Berlin Conference was held under the leadership of Chancellor Otto von Bismarck. Although fighting slave trade, development of trade, and expansion of civilisation were mentioned as the purpose of the dividing and sharing the African continent,¹³⁸ in reality the conference was about devising methods of dividing the African continent and its resources among the European powers. The conference agreed, inter alia, that any European nation that took possession of a coastland (including its hinterland) , named themselves as protectorates, had to inform signatories of the Berlin Conference Act in order for their right of possession to be recognised.¹³⁹

In some cases, and during certain periods, some European powers did not exercise direct colonial authority over territories but allowed commercial entities to do so on their behalf. In Southern Africa, for instance, this was done through the British South Africa Company (BSA). The BSA was granted extensive power which included:

¹³⁵ Ndulo “The Democratisation Process and Structural Adjustment in Africa” 315-368

¹³⁶ Ake “What is the Problem of Ethnicity in Africa?”<http://archive.lib.msu.edu/DMC/African%20Journals/pdfs/transformation/tran022/tran022002.pdf> (Date of use: 28 December 2014)

¹³⁷ Ibid

¹³⁸ See the General Act of the Berlin Conference on West Africa February 1885

¹³⁹ Article 34 General Act of Berlin Conference on West Africa February 1885

to acquire by any concession, agreement, grant or treaty, all or any rights, interests, authorities, jurisdictions and powers of any kind or nature whatever, including powers necessary for the purposes of government and the preservation of public order in or for the protection of territories, lands, or property...and to hold, use and exercise such territories, lands, property, rights, interests, authorities, jurisdictions and powers respectively for the purpose of the company, and on the terms of this our charter.¹⁴⁰

Although there were incidental benefits arising from contact with Europe during colonialism, colonialism caused massive disruption of indigenous governance systems and instead introduced a system of governance that was centralised, elitist and exercised powers absolutely, permitting no room for dissent for indigenous people.¹⁴¹ Many consequences Africa suffered as a result of colonialism have been documented. But for our purpose it is sufficient to say that the colonial system failed to bequeath a legacy of representative and accountable democracy, respect for human rights and equitable distribution of resources. Africans were generally excluded from government. Benefits accruing from mineral resources went to develop European homelands, leaving behind wretchedness and poverty, especially in rural areas. Ake considers that, as a result of this legacy, there is an interplay between the inherited colonial state that was deficient in democracy and accountability on the one hand, and the subsequent (and still continuing) underdevelopment in Africa, on the other hand. He concludes that the “absence of democracy is a major cause of underdevelopment in Africa.”¹⁴²

Over time African voices against colonialism, in preference for self-determination or majority democratic rule, started getting stronger. However, colonial powers initially never considered that time would come, when they would have to relinquish their hold on “their” African territories. The French government, for instance, in 1944 made a declaration that “the eventual formation, even in the distant future, of self-government in the colonies must be excluded.”¹⁴³ However, it was not long, before the colonial powers conceded that time for change had come, and by the 1950s and 1960s, the colonial authorities began to retreat and grant independence to African governments. British Prime Minister, Harold Macmillan, during a tour of Africa in January 1960, acknowledged this and stated: “the wind of change is

¹⁴⁰ See Section 3 Charter of Incorporation of the British South Africa Company December 1889

¹⁴¹ Ndulo “The Democratisation Process and Structural Adjustment in Africa” 315-368

¹⁴² Ake “The Unique Case of African Democracy” 239-244

¹⁴³ As cited in Young *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* 11

blowing through the continent and whether we like it or not, this growth of national consciousness is a political fact.”¹⁴⁴

In 1956, Morocco, Tunisia and Sudan got their independence from colonial rule. But it was the independence of the Gold Coast (as Ghana was then known) that resonated across the continent, and set the pace for the rest of Africa, especially Anglophone Africa, to follow.¹⁴⁵ Once Ghana was independent, the proverbial flood gates opened and decolonisation proceeded at frenetic speed, with thirty-five of the fifty-three states achieving independence between 1956 and 1966.¹⁴⁶ By the 1970s, decolonisation was complete, except for a few countries (Angola, Mozambique, Guinea-Bissau, Cape Verde and Sao Tome and Principe) under Portuguese rule, which had to wait and fight until the demise of Portuguese dictatorship back home in 1974, after which they promptly gained their independence.¹⁴⁷

With the attainment of independence, Africa was pregnant with euphoria, new hopes, dreams and expectations. Multitudes attended public events celebrating this achievement, with high hopes of economic and political prosperity. The economic outlook of Africa looked optimistic. The prices of minerals and cash crops such as cocoa, cotton and coffee, which Africa produced abundantly, increased sharply between 1945 and 1960.¹⁴⁸ Moreover, there was a lot of good will from both bilateral and multilateral donors. Grants and low interest loans from North Africa and Western Europe reached more than USD1 billion by 1964.¹⁴⁹ In 1967, World Bank economist, Andrew Karmarck, optimistically remarked: “For most of Africa, the economic future before the end of the century can be bright.”¹⁵⁰

Politically, it was expected that the new indigenous governments would build viable autochthonous democratic states based on democratic inclusiveness, respect for human rights and rule of law. Kwame Nkrumah, the first President of Ghana, captured these expectations in his independence speech when he stated that: “today we have awakened. We will not sleep anymore. Today, from now on, there is a new Africa in the world.”¹⁵¹

¹⁴⁴ As cited in Meredith *The State of Africa: A History of Fifty years of Independence* 90

¹⁴⁵ Young *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* 3

¹⁴⁶ *Ibid*, 6

¹⁴⁷ *Ibid*, 23

¹⁴⁸ *Supra* note 108, p 141

¹⁴⁹ *Ibid*

¹⁵⁰ As cited in Meredith *The State of Africa: A History of Fifty years of Independence* 141

¹⁵¹ Kwame Nkrumah, Independence Speech, Accra Ghana, 6 March, 1957

<http://panafricanquotes.wordpress.com/speeches/independence-speech-kwame-nkrumah-march-6-1957-accra-ghana/> (Date of use: 2 December 2014)

2.3.2 Descent into Authoritarianism

The euphoria of independence was short-lived. Instead of building viable, tolerant and inclusive new democratic states that spring from the will of the people and accountable to the people, the new governments soon abandoned these expectations and reverted to the repressive governance tactics of the colonial masters. As Hatchard, Ndulo and Slinn have observed, the new African president replaced the colonial governor both in fact and in deeds.¹⁵² In many cases, the independent African state behaved worse than the colonial ones and became characterised by at least four notable features:

- (i) power consolidation and one-party rule,
- (ii) corruption and wastefulness,
- (iii) assassinations and disappearances of critics, and
- (iv) military interventions.

We look at each one of these in detail.

2.3.2.1 Power consolidation and one party rule

Generally, independent African states inherited multiparty constitutions that allowed for various political parties to market themselves to the electorates for ascendance into office. This however did not last long as the continent descended into power consolidation, characterised by one party rule. Power consolidation and one party rule were justified on grounds that that it was necessary to forge national unity. Many African leaders argued that class divisions that shaped party politics in Europe were absent from Africa, and thus, there was no need for many parties. In addition, it was argued that African societies were communal and operating on the basis of consensus and, therefore, not suited for adversarial politics.¹⁵³ The president, and his party, therefore came to personify the state. As Senegalese President, Leopoldo Sedar Senghor, stated: “the President personifies the nation as did the monarch of former times his people.”¹⁵⁴ Similarly, President Julius Nyerere of Tanzania argued that the primary duty of the new state was fighting poverty, ignorance and disease. To effectively fight these, the state needed to fast-track social and economic development. “We

¹⁵² Hatchard, Ndulo and Slinn *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* 19

¹⁵³ Young *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* 16

¹⁵⁴ As cited in Meredith *The State of Africa: A History of Fifty years of Independence* 162

must run, while others walk,” was Nyerere’s approach.¹⁵⁵ For this to happen, there was need for national harmony and unity, which could only be brought about by a one-party system.¹⁵⁶ By 1970, only about three states (Botswana, Gambia and Mauritius) had remained multiparty.¹⁵⁷

Just as Ghana was the pacesetter for independence, it set the tone for repression, power consolidation and one party rule. Ghana’s Constitution was revised in 1960 to the effect that the President was now “to rule by decree, dismiss any member of the judiciary and reject decisions of parliament.”¹⁵⁸ In 1964, Ghana organised a referendum to determine if it was to be a one party state or not. By official figures, the people overwhelmingly voted for the introduction of the one party system. The results, however, were suspicious as even in the opposition stronghold of Ashante region, no single “NO” vote was recorded.¹⁵⁹

Many other countries soon followed the example of Ghana and the one party state, with its concomitant repressive laws and practices, became the trade mark of African regimes. A few examples are worth mentioning here. In Kenya, soon after independence, the government passed a constitutional amendment that increased the period for parliamentary review of emergency powers from two to 18 months, which effectively allowed the president to arbitrarily imprison, without trial, opposition members and critics.¹⁶⁰ From 1966 Kenya was a *de facto* one party state until 1982 when it became a *de jure* one party state, following the passing of the Constitution of Kenya (Amendment) Act No. 7 of 1982. For the 1988 election, Kenya went beyond just preventing opposition but abolished the secret ballot in primary elections, and required voters to simply line up behind the agent holding the picture of their preferred candidate.¹⁶¹

In Uganda, Prime Minister Milton Obote in 1966, forced into exile the President (Sir Edward Mutesa II), abrogated the 1962 independence Constitution, and banned all political parties.¹⁶² Yoweri Museveni, who took over power in 1986, introduced the no-party system, which effectively was a one party rule as only his National Resistance Movement (NRM) was

¹⁵⁵ See Msekwa *Reflections on the First Decade of Multi-party Politics in Tanzania* 4

¹⁵⁶ *Ibid*

¹⁵⁷ Young *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* 124

¹⁵⁸ Barrie “Paradise Lost: The History of Constitutionalism in Africa Post Independence” 289- 322

¹⁵⁹ *Ibid*

¹⁶⁰ The Constitution of Kenya (Amendment)(No 3) Act No 18 of 1966. See also the Preservation of Public Security Act 1966

¹⁶¹ *Supra* note 122, p 289- 322

¹⁶² Sewanyanga and Awori “Uganda: The Long and Uncertain Road to Democracy” 465- 477

recognised. In Malawi President Hastings Kamuzu Banda declared himself life president in 1971 and no opposition was allowed.¹⁶³

In December 1987, the Zimbabwean government passed a constitutional amendment which transformed the office of the Prime Minister (Robert Mugabe) into an all-powerful executive president. The same year, after years of persecution, the Prime Minister, and opposition leader, Joshua Nkomo, signed an accord that merged Mugabe's ZANU-PF Party with Nkomo's ZAPU Party, which effectively ended multiparty politics.¹⁶⁴ The name of the new party after the merger, ironically, came to be known as ZANU-PF, which in reality actually meant the dissolution of the opposition ZAPU.¹⁶⁵ In Zambia, President Kaunda in February 1972 announced at a press conference that government had decided that Zambia shall become a "one-party participatory democracy,"¹⁶⁶ and subsequently appointed a Commission to simply inquire into the manner that this was to be achieved.¹⁶⁷ The Zambian constitution was duly amended in 1973, and the country became a *de jure* one party state, with the ruling United National Independence Party (UNIP) becoming the only recognised political party.

Under one party rule, elections lose the cardinal attributes of representation and accountability that ought to underpin genuine elections. The electorate lack a choice between competing party platforms and since ruling parties entrenched themselves in power, the electorate cannot hold them accountable by the ultimate sanction of removal from office.

2.3.2.2 Corruption and Wastage of Public Resources

The post-colonial African state became characterised with petty and gross corruption. Access to power translated into access to public resources, to be assumed for oneself and those linked to the politicians. Many politicians mercilessly plundered public resources for personal use and distributed to their clients. Frantz Fanon aptly characterised this African state when he wrote:

¹⁶³ Supra note 122, p 289- 322

¹⁶⁴ *Stiff Cry Zimbabwe: Independence Twenty Years On* 243

¹⁶⁵ Ibid

¹⁶⁶ Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia (Mainza Chona Commission) October 1972

¹⁶⁷ Section 1 of Statutory Instrument No. 46 of 1972 under which the Commission was appointed simply required Commissioners to: "consider the changes in – (a) the Constitution of the Republic of Zambia; (b) the practices and procedures of the Government of the Republic of Zambia; and (c) the Constitution of the United National Independence Party, necessary to bring about and establish one party participatory democracy in Zambia."

Scandals are numerous, ministers grow rich, their wives doll themselves up, the members of parliament feather their nests and there is not a soul down to the simple policeman or customs officer who does not join the great procession of corruption.¹⁶⁸

Huge corruption and wastage scandals involving the ruling elite engulfed almost all African states. In Nigeria, for example, the Marketing Board, which was created in 1954 with revenue of 42 million British Pounds and earned an additional 26.4 million pounds between 1954 and 1962, was by May 1962, under indigenous leadership, effectively bankrupt due to political corruption and wastage.¹⁶⁹ President Shagari's government in Nigeria, because of its endemic corruption, became known as "the government of contractors, for contractors and by contractors."¹⁷⁰ In Kenya, the Justice and Reconciliation Commission found the government of the first president Jomo Kenyatta and his successors (Daniel Arap Moi and Mwai Kibaki) to have been guilty of "economic crimes and grand corruption."¹⁷¹ In fact, due to high level corruption, Kenya is said to have lost in excess of 70,000 heads of elephants during the tenure of President Jomo Kenyatta.¹⁷² The excesses of Jean-Bedel Bokasa, who took power in Central Africa Republic through a coup, and whose coronation (inauguration) cost in excess of \$20 million, included seventeen wives, each with plush palaces, chests of diamonds, expensive cars and other exotic toys.¹⁷³

In some instances, not only was corruption tolerated but in fact was encouraged. Zairian President, Mobuto Sese Seko, is known to have told his officials that, "if you steal, do not steal too much at a time. You may be arrested...steal cleverly, little by little."¹⁷⁴ In Burundi, Joseph Nzeyimana, a well-respected virulent critic of government corruption while in opposition, changed his attitude once he was co-opted into government and given a ministerial position. He justified his silence in government by quoting a Burundian proverb stating that, "a well raised child does not talk when his mouth is full."¹⁷⁵

Corruption has had a tragic effect on the legitimacy of the government in the minds of the people. It engendered feelings of frustration, hopelessness and undermined the people's faith

¹⁶⁸ As cited in Meredith *The State of Africa: A History of Fifty years of Independence* 173

¹⁶⁹ Nwabueze *Constitutionalism in Emergent States* 102

¹⁷⁰ Barrie "Paradise Lost: The History of Constitutionalism in Africa Post Independence" 289- 322

¹⁷¹ Report of the Truth, Justice and Reconciliation Commission, Vol 1 May 2013

¹⁷² Supra note 132, p 267

¹⁷³ Ibid, 224-230

¹⁷⁴ Supra note 132, p 303

¹⁷⁵ Ngaruko and Nkurunziza "Civil War and Its Duration" in *Burundi* in Collier and Sambanis *Understanding Civil War: Evidence and Analysis* Vol 1 57

in the state. Many people even developed nostalgia for the colonial regimes as the independent state was increasingly seen as a mere “transformation of the state from an instrument of subjugation by an alien people into one of plunder by elected representatives who are supposed to administer it as a trust for the people.”¹⁷⁶

2.3.2.3 Extermination and Assassination of Perceived Enemies

In many countries critics and opponents who could not be silenced by repressive laws and brutal power, had to be assassinated and in some circumstances large groups perceived to be enemies of the regime had to be exterminated. The regime of Mengistu Haile Mariam in Ethiopia in the 1970s executed more than 60 prominent former leaders and hundreds if not thousands of perceived enemies of the regime through his red terror campaign.¹⁷⁷ In Malawi in 1983, three ministers and a Member of Parliament who suggested reforms to the one party system were bludgeoned to death by police.¹⁷⁸ The Zairian government, with the collaboration of Belgium and the USA, assassinated Patrice Lumumba;¹⁷⁹ while in Zimbabwe the government of Robert Mugabe allegedly exterminated more than 15,000 Ndebele people (in the opposition stronghold of ZAPU Party) during the ‘war’ of Operation Gukurahudi ostensibly to get rid of dissenters.¹⁸⁰ In Chad, the regime of Hissene Habre relied on death squads to keep its hold on power and is estimated to have exterminated at least 20, 000 people.¹⁸¹ It is important to note that in June 2013, Senegal formally took Habre into custody to begin the process leading to his prosecution for these atrocities.¹⁸²

Kenya had a fair amount of political assassinations of leading critics and opposition leaders and perhaps better epitomises the phenomenon of assassinations. The four most devastating are probably the assassination of Pio Goma Pinto, who was killed on 24 February, 1965, and whose death marked the beginning of political assassinations by the Kenyatta regime;¹⁸³ the assassination of Tom Mboya on 5 July, 1969;¹⁸⁴ the assassination of Josiah Mwangi Kariuki

¹⁷⁶ Nwabueze *Constitutionalism in Emergent States* 107

¹⁷⁷ Supra note 122, p 289- 322

¹⁷⁸ Ibid

¹⁷⁹ In January 2002 the Belgian government officially acknowledged and apologised for its role in the assassination of Lumumba. See Ndikumana and Emizet, “The Economics of Civil War: The Case of the Democratic Republic of Congo” in Collier and Sambanis *Understanding Civil War: Evidence and Analysis* Vol 1 84

¹⁸⁰ Stiff *Cry Zimbabwe: Independence Twenty Years On* 413

¹⁸¹ Meredith *The State of Africa: A History of Fifty years of Independence* 356

¹⁸² See Human Rights Watch “Hissene Habre in Police Custody”

<http://www.hrc.org/news/2013/06/30/senegal-hissene-habre-police-custody> (Date of use: 1 April, 2015)

¹⁸³ Report of the Truth, Justice and Reconciliation Commission, Vol 1 May 2013

¹⁸⁴ Ibid

(popularly known as JM), who was found dead on March 3, 1975;¹⁸⁵ and the 1990 assassination of Robert Ouko, Kenya's well respected foreign affairs minister, who had compiled a dossier of high level corruption in the Daniel Arap Moi regime.¹⁸⁶

These assassinations had the effect of inflicting terror in the opposition camps and the general public. By eliminating opponents and ruling on the basis of terror, African regimes lost the basis of constructing legitimacy on the consent of the people and, therefore, no longer truly representative of the people and accountable to them.

2.3.2.4 Military Rule

As the ruling elite entrenched themselves into power through the one party system, grand corruption and elimination of opponents, there was no viable democratic way of changing government by the people. Military interventions came to be seen as an answer to acute social and political problems and as an answer to national progress and stability.¹⁸⁷ As a result, military coups became the only realistic method of regime change. Indeed military rule came to characterise the way power changed hands in Africa, as Joseph rightly stated:

The African military coup d'état has accomplished the transfer of power and influence...much more frequently than have elections and other forms of national politics in Sub-Saharan Africa.¹⁸⁸

In the first few years, coups were sporadic and few but later increased in number. The first successful military coup to occur in postcolonial Africa was in Egypt in 1952 when a group of young military officers, under the leadership of Gamel Abdel Nasser took over power. This was followed by military takeover in Sudan in 1958, merely two years after attaining independence. From the 1958 Sudanese coup until 1965, only five more coups occurred across the African continent.¹⁸⁹ These were in Zaire in 1960, Togo in 1963, Congo Brazzaville in 1963, Benin in 1963 and Gabon in 1964.¹⁹⁰

The floodgates opened after 1964. In 1965 and 1966, in the space of about one year, nine successful military coups took place and displaced existing regimes in Algeria, Benin,

¹⁸⁵ Ibid

¹⁸⁶ Meredith *The State of Africa: A History of Fifty years of Independence* 401

¹⁸⁷ Ikome "Good Coups and Bad Coups: The Limits of the African Union's Injunction On Unconstitutional Changes of Power in Africa" 18

¹⁸⁸ As cited in Souare "The African Union as a Norm Entrepreneur on Military Coup D'état in Africa (1952-2012): An Empirical Assessment." 70

¹⁸⁹ Young *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* 140-142

¹⁹⁰ Ibid, 143/4

Burkina Faso, Burundi, Central Africa Republic, Chad, Zaire, Ghana and Nigeria.¹⁹¹ There were eight coups in 1966 alone.¹⁹² Many more coups and attempted coups were to follow. Between 1956 and 2001 there were 108 failed coups across the continent and 80 successful ones.¹⁹³

Although military coups became the most viable practical way of seeking regime change, military rule by its nature is an extreme negation of representative and accountable government as power is assumed by force. The military, as soon as it assumed office, in almost all cases, settled down to be worse than the civilian regimes it had replaced.

2.3.3 Democratic Revival of the Late 1980s and Early 1990s

By the 1980s the retreat into authoritarianism seemed to be reaching its saturation point in Africa and people's tolerance waned. They were tired of one-party and military dictatorships, gross corruption, assassinations and mass poverty caused by all this. Out of about fifty African states, by the 1980s only Botswana and Mauritius had remained genuinely democratic and conducted free and fair elections routinely.¹⁹⁴ Elections, when held, were mere rituals meant to confirm the incumbent and his party in office. Between 1960 and 1989 no election in the whole of Africa led to any change of government.¹⁹⁵ Independence lost meaning as people came to see it as a "curse" which had brought them nothing more than more exploitation, pain, exclusion, humiliation and hopelessness and consequently tended to regard the former colonial years as the lost golden days.¹⁹⁶

The drive for democratic governance and multiparty elections erupted in the late 1980s across the whole continent. As a result of the pressure for democratic governance, between 1985 and 1991, at least twenty-eight authoritarian governments in Africa were forced to make political and constitutional changes to allow for multiparty democracy, and at least eight credible elections were held during that period.¹⁹⁷

¹⁹¹ Ibid 144

¹⁹² Shivji "Good Governance, Bad Governance and the Quest for Democracy in Africa: An Alternative Perspective" 2

¹⁹³ Ibid, 147

¹⁹⁴ Ibid 195

¹⁹⁵ Supra note 150, p 386

¹⁹⁶ Ihonvbvere "Where is the Third Wave?: A Critical Evaluation of Africa's Non-Transition to Democracy" 343-368

¹⁹⁷ Adejumobi "Elections in Africa: A Fading Shadow of Democracy?" 59- 73

Despite this strong drive for change in the late 1980s and early 1990s, the response to the drive was not even. Adejumobi has identified at least four patterns that characterised this democratisation wave.¹⁹⁸ The first pattern was where civil society organisations were strong, well organised and took the lead and engaged the state in a fierce battle for reforms. As a result electoral laws were amended to allow for multiparty elections and key institutions such as the judiciary and electoral management bodies were given an appearance of autonomy. In such cases, usually popular civil society movements transformed themselves into opposition political parties. Under this pattern, opposition was able to wrestle power from the incumbent regimes.¹⁹⁹ This was the case in countries such as Zambia, Benin, Malawi, Congo and the Cape Verde. In March 1991, Benin became the first African country in which the incumbent peacefully handed over power to the opposition following the defeat of President Kerekou by Nicephore Soglo in an election.²⁰⁰ Zambia followed Benin in October 1991 and became the first Anglophone African state to transition from one party regime to multipartism, following President Kaunda's defeat by opposition leader Frederick Chiluba.²⁰¹ In Malawi, Kamuzu Banda lost elections to Bakili Muluzi.

The second pattern was where civil society took the initiative for change but the process was manipulated and hijacked by the ruling elite. The result was that existing laws were either not amended or very minimal changes were made to the electoral laws, and the regimes maintained firm control over the process.²⁰² Under this pattern, elections were either not held or when held, they were manipulated and produced no change at all. This was the case in Togo, Kenya, Zaire and Gabon. In Zaire, for example, Mobutu initially yielded to pressure for democratic change and announced in April 1990 plans for reform. However, a month later he discarded the plans for change and openly declared that "never in my lifetime will there be multipartism in Zaire."²⁰³ That same year when students in the city of Lubumbashi demonstrated against Mobutu's decision to block reforms, his troops responded by shooting dead at least 294 students.²⁰⁴ Mobutu held on to power until 1997 when he was forced to flee by Laurent Kabila's advancing forces. In Togo, Kenya and Gabon, Gnassimbe Eyadema,

¹⁹⁸ Ibid

¹⁹⁹ Ibid

²⁰⁰ Souare "The 2011 Presidential Elections in Benin: Explaining the Success of One of Two-Firsts" 73-92

²⁰¹ Barrie "Paradise Lost: The History of Constitutionalism in Africa Post Independence" 289- 322

²⁰² Adejumobi "Elections in Africa: A Fading Shadow of Democracy?" 59-73

²⁰³ Reyntjens "The Winds of Change: Political and Constitutional Evolution in Francophone Africa 1990-1991" 44- 66

²⁰⁴ Ndikumana and Emizet "*The Economics of Civil War: The Case of the Democratic Republic of Congo*" http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1051&context=peri_workingpapers (Date of use: 22 April 2014)

Daniel Arap Moi and Omar Bongo, respectively, managed to outmanoeuvre the reform process. Both Eyadema and Bongo died in office in 2005 and 2009 respectively, while Moi only left office in 2003 after surviving two cycles of “democratic” elections.²⁰⁵

The third pattern is where the state took the front role in reform and offered some form of guided democratic reform in which it effectively manipulated the system and managed to impose its will. As in the second pattern, little was achieved in terms of electoral results. Such was the case in Nigeria, Gambia, Ghana, Cote d’Ivoire, Cameroon and Algeria. In Algeria and Nigeria, the presidential election results of 1992 and 1993, respectively, were annulled when they were won by persons not favourable to the military regimes.²⁰⁶

Finally, the fourth pattern is where the drive towards democratic transformation disintegrated and dissolved into conflict and civil war.²⁰⁷ This was the case in countries such as Rwanda, Burundi and Somalia. In Rwanda, for example, while negotiations were ongoing about creating a more inclusive government, President Habyerimana was killed as his plane was shot and crashed in April 1994 while approaching the Kigali airport. This triggered an unprecedented massive genocide that led to the death of at least 800, 000 people in the space of less than 100 days, mostly from the minority Tutsi ethnic group, and the widespread rape of women and children.²⁰⁸

There were two major underlying factors that influenced the wave towards democratisation. First of all, as noted above, many people within Africa felt betrayed, angry and frustrated with the dictatorship regimes that replaced colonialism and plundered public resources for personal ends. This anger could, therefore, not be contained any further and it was just a matter of time before it exploded. The second factor was external. The demise of the Cold War between Russia and the West changed how both blocs dealt with Africa and adopted new policies. Russia’s Mikhail Gorbachev in the late 1980s introduced the “new thinking” policy whereby Russia began to retreat from Africa and no longer maintained and sustained their client regimes that had relied on them for survival.²⁰⁹ France’s President Mitterrand also in 1990 announced at a Franco-Africa summit in June 1990, to the dismay of his African counterparts, that from then onwards democracy would be a necessary condition for receiving

²⁰⁵ Young *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* 199

²⁰⁶ Adejumobi “*Elections in Africa: A Fading Shadow of Democracy?*” 59- 73

²⁰⁷ Ibid 59

²⁰⁸ Kaaba *The Merging Sexual Violence Jurisprudence in International Humanitarian Law: A Case Study of the Rwandan Tribunal* 30-34

²⁰⁹ Meredith *The State of Africa: A History of Fifty years of Independence* 386

French aid and cordial relations.²¹⁰ There was at the same time a change of approach in the Western lending agencies. The World Bank, for example, in 1989 published a seminal report entitled “Sub-Saharan Africa: From Crisis to Sustainable Growth,” in which it linked good governance to economic development and recognised the importance of the rule of law, freedom of the press and human rights.²¹¹ With these external changes, it meant that days of business as usual for African regimes were numbered.

2.3.4 Emerging and Current Trends

A lot has been achieved in Africa in terms of representative democracy since the democratic wave of the 1980s and 1990s. All over the continent, elections have become the universally accepted norm for ascending to power and changing government and are usually held routinely. In many countries, such as South Africa, Ghana, Malawi, Tanzania, Mozambique, Zambia and even Nigeria (which has been the epicentre of brutal military rule in Africa), power has changed hands relatively peacefully. Some African leaders who lost elections have departed from office gracefully, while many others have respected constitutional term limits and left office after serving the stipulated terms in office.

In spite of these achievements, problems still exist. There are also worrisome emerging trends which are a cause of concern as they may have negative impact on the conduct of genuine presidential elections in Africa. This section discusses current as well as emerging trends in Africa that may have a bearing on the conduct of presidential elections. It looks at the time from the year 2000 to date. Four trends will be discussed here: (i) The Arab uprising; (ii) the growth of Chinese influence on Africa; (iii) the emergence of power sharing deals to resolve election disputes; and (iv) regression and defying winds of change.

2.3.4.1 Popular Uprising in North Africa

African countries in North Africa (mainly Algeria, Morocco, Tunisia, Libya and Egypt), dominated by Arabic culture and Islamic religion, have since independence, been ruled by authoritarian dictators and have long been considered impervious to democracy. The democratisation of the 1980s and 1990s scantily affected North Africa. Some scholars have

²¹⁰ Reyntjens “The Winds of Change: Political and Constitutional Evolution in Francophone Africa 1990-1991” 44- 66

²¹¹ The World Bank *Sub-Saharan Africa: From Crisis to Sustainable Growth* xii,6

long postulated that Arabic culture and Islamic faith are antithetical to the concepts of representative democracy where the people freely elect their governors, who are in turn accountable to them.²¹² British historian, Elie Kedourie, in 1992, characterised this view in these terms:

...the notion of popular sovereignty as the foundation of governmental legitimacy, the idea of representation, or elections, popular suffrage, of political institutions being regulated by laws laid down by a parliamentary assembly, of these laws being guarded and upheld by an independent judiciary, the ideas of the secularity of the state, of society being composed of a multitude of self-activating groups and associations- all of these are profoundly alien to the Muslim political tradition.²¹³

All this changed with the events of December 2010, which originated in Tunisia and spread to other Arabic countries in Africa and beyond the African continent to affect countries such as Syria. It all started with a twenty-six year old street trader, Mohammed Bouazizi's altercation with a policewoman on December 17, 2010, who abused him and confiscated his vegetable cart and its contents.²¹⁴ Without education and employment to rely on, this threatened Bouazizi's livelihood, his very survival and the well-being of his family. In frustration, he set himself on fire in front of municipal headquarters buildings and subsequently died of his wounds on January 4, 2011.²¹⁵ This act sparked public protests, which moved from mere solidarity with Bouazizi, to demand for human rights, good governance, democracy and the removal of veteran authoritarian ruler President Zine El Abidine Ben Ali and his regime. Within December 2010, Ben Ali's regime collapsed, succumbing to public protests, and he fled the country, bringing his 33 year rule to an abrupt halt.

In Africa, the countries which are most affected as a result of the Arab spring are Tunisia, Libya and Egypt, where former veteran rulers were ousted from power. With the ousting of these authoritarian rulers, the herculean task of designing a government genuinely elected by the people, and government institutions accountable to the people began. However, this task has not been smooth sailing but has been attended with several hurdles, some threatening to drench the very spirit of the uprising. Here we discuss in outline the efforts of these three

²¹² Diamond "Why are There No Arabic Democracies?" 93- 104

²¹³ As cited in Mark Tessler "Islam and Democracy in the Middle East: The Impact of Religious Orientation on Attitudes Towards Democracy in Four Arab Countries." 337- 353

²¹⁴ Hanlon "Security Sector Reform in Tunisia: A Year After the Jasmine Revolution" 1-3

²¹⁵ Ibid

(Tunisia, Egypt and Libya) to establish genuine representative governments where government serves on the basis of the will of the people.

In Tunisia, where it all began, the country held its first credible election on October 23, 2011. The electorate elected a 217-member Constituent Assembly, whose largest party with a 41 percent of seats is Ennahda.²¹⁶ The Constituent Assembly set up an interim government and elected Hamadi Jebali, as the first interim Prime Minister, and Moncef Marzouki as the first interim President, to serve until a new constitution is promulgated and new elections held on the basis of that Constitution.²¹⁷ The Constituent Assembly is, *inter alia*, tasked with writing the country's new constitution.

The Constituent Assembly has so far produced four draft constitutions and the final version is yet to be agreed and enacted. The fourth draft, nevertheless, gives a clear indication of the nature of government being crafted for Tunisia and how it will be set up.

The draft constitution makes it clear that the people are the source of governmental power and they shall exercise this power through their freely elected representatives.²¹⁸ It also proposes the combination of both the parliamentary and presidential systems, by vesting executive and state power into a president and prime minister, with both having real power. The president shall be elected for a term of five years “by means of general, free, direct and secret elections...by an absolute majority of the voters.”²¹⁹ Where no candidate manages to secure an absolute majority, a run-off election featuring the two candidates with the highest votes shall be had.²²⁰ The Prime Minister, on the other hand, is to be appointed by the president from the party having the majority of seats in the legislature, or where two or more parties have the same number of seats, the appointment shall be based on the number of votes that a party received in an election.²²¹

It seems the Tunisian idea of splitting executive powers and sharing them between the president and prime minister is inspired by the experience of “one-man-show” dictators

²¹⁶ Stepan “Tunisia’s Transition and the Twin Tolerations.” 89- 103

²¹⁷ *Ibid*

²¹⁸ Article 3 Draft Constitution of the Republic of Tunisia dated 1 June 2013 (unofficial translation prepared by International IDEA)

²¹⁹ Article 73 Draft Constitution of the Republic of Tunisia dated 1 June 2013 (unofficial translation prepared by International IDEA)

²²⁰ Article 74 Draft Constitution of the Republic of Tunisia dated 1 June 2013 (unofficial translation prepared by International IDEA)

²²¹ Article 88 Draft Constitution of the Republic of Tunisia dated 1 June 2013 (unofficial translation prepared by International IDEA)

consolidating all power in themselves. This shows a clear desire to cure this mischief so that one person or institution does not monopolise power and become so powerful as to enslave all other institutions. If the draft constitution is adopted and implemented in good faith, Tunisia will have made the tremendous transition from the era of absolute dictatorship to true representative democracy where government serves on the basis of the will of the people.

Unlike Tunisia, Egypt's transition to democracy seems tumultuous and more worrying. Egyptians, inspired by developments in Tunisia, took to the streets to protest against the dictatorship of the government of President Hosni Mubarak and demanded his removal. Mubarak succumbed to the pressure and stepped down on 11 February, 2011, where upon the Supreme Council of the Armed Forces (SCAF) took power on an interim basis to help steer the country forward.²²² SCAF dissolved parliament on February 13, 2011, and suspended the 1971 Egyptian Constitution, and set up a committee of experts of eight persons to revise the constitution.²²³

The committee released its draft revised constitution on February 26, 2011, which was subsequently put to a referendum on March 19, 2011 and was adopted by 77 percent of the voters.²²⁴ This was to serve as an interim constitution to guide the transition period until a new comprehensive constitution was drafted and approved in a referendum by December 2012.²²⁵ On the basis of the interim constitution, presidential elections were held on May 23 and 24, 2011, and a run-off on June 16 and 17. Mohamed Morsi was elected president with 51.7 percent of the popular vote.²²⁶

The new government of President Morsi was short-lived. Increasing frustration and discontent with President Morsi's governance style led to mass protests in June 2013. Protesters called for Morsi to either step down or call for an early presidential election. On July 3, General Sisi announced that the 2012 Constitution had been suspended, the president relieved of his duties, and an interim government would be appointed to spearhead the nine month transition.²²⁷ He subsequently appointed the head of the Supreme Constitutional Court, Adly Mansour, as interim president. Mansour on July 8 issued a decree granting him

²²² Brown "Tracking the Arab Spring: Egypt's Failed Transition." 45- 58

²²³ IFES "The Electoral Framework in Egypt's Continuing Transition: February 2011- September 2013" (IFES Briefing Paper October 2013)

²²⁴ *ibid*

²²⁵ *ibid*

²²⁶ *ibid*

²²⁷ *ibid*

authority to appoint a legal committee to revise the constitution. The revised constitution would then be put to voters in a referendum for their approval and there after legislative and presidential elections would be held.²²⁸ In January 2014 a new constitution was put to the voters in a referendum. Although only 38 percent of the people turned up for the referendum, 98.1 percent of the voters affirmed it.²²⁹ Consequently, presidential elections were held in May 2014 and unsurprisingly, General al-Sisi was elected president, with 93 percent of votes (although the voter turnout was just about 46 percent).²³⁰ He was consequently sworn into office on a four year term on 9 June, seemingly ending a protracted period of turbulence.²³¹ Although the election of al-Sisi may have led to restoration of public order, his ascendancy to power represents a common phenomenon in Africa where military usurpers of power arrange for elections which they easily win and thus legitimise their assumption of power.

Unlike Tunisia and Egypt where public protests drove their leaders to step down, Libyan leader Colonel Muammar Gaddafi refused to go, thereby plunging his country into a protracted civil war. The UN Security Council, concerned about “the deteriorating situation, escalation of violence and the heavy civilian casualties,”²³² authorised member states to take all necessary measures to protect civilians under threat of attack and established a “no fly zone” over Libya.²³³ This was the basis for NATO and allied forces’ aerial bombardments on Libya’s military targets that weakened Gaddafi’s military capability and enabled the rebel forces to capture and kill him on October 20, 2011. The National Transitional Council (NTC), which was the *de facto* government representing forces opposed to Gaddafi, declared Libya as liberated on October 23, 2011 and called for cessation of hostilities.

The NTC was formed on February 27, 2011, as the *de facto* government for the anti-Gaddafi forces during the revolution. To help guide the orderly transition of the country to democratic governance, the NTC on August 3, 2011 promulgated a Constitutional Declaration. The Constitutional Declaration acknowledges that “the people are the source of powers” of

²²⁸ Ibid

²²⁹ <http://www.nydailynews.com/news/world/egypt-approves-new-constitution-article-1.1584231> (Date of use: 20 June 2014)

²³⁰ “Egypt election: Sisi Secures Crushing Win” <http://www.bbc.com/news/world-middle-east-27614776> (Date of use: 2 April 2015)

²³¹ “Abdel Fattah el-Sisi Sworn in as President” <http://edition.cnn.com/2014/06/08/world/africa/egypt-presidential-election/> (Date of use: 2 April 2015)

²³² See Preamble to the UN Security Council Resolution 1973 (2011) adopted by the Security Council on March 17, 2011

²³³ Sections 4 and 6 UN Security Council Resolution 1973 (2011) adopted by the Security Council on March 17, 2011

government.²³⁴ For the time being, the NTC was the supreme power responsible for running government and for passing legislation.²³⁵ By the Constitutional Declaration, the NTC was suppose to dissolve itself after conducting elections of the National Public Conference (NPC), which would form the interim legislature and from which government (cabinet) would be drawn.²³⁶ The elections were duly held on July 7, 2012, and the NTC dissolved itself, leaving the NPC as the interim government tasked to spearhead the transition period and to draft a new constitution that would be put to a referendum for approval, and subsequent to this approval, hold legislative and presidential elections.²³⁷ The NPC, however, failed to timely draft the constitution and had voted to extend the life of the interim government, which was due to end at the end of 2013, by another year to enable the drafting of the constitution to be completed. This led to the members of the NTC claiming that the NPC was hence unconstitutional and revived itself as the constitutional government. This has led into Libya being divided into two groups claiming to be the legitimate government, in addition to other less well organised armed groups strewn across the country.²³⁸ As of March 2015, under the auspices of the UN, the warring factions have been negotiating the possibility of establishing a government of national unity.²³⁹

In general, the Arab revolution in North Africa has opened a new possibility, which could not have been imagined a few years ago, of establishing genuine representative democracy. However, several years of dictatorship that negated the development of strong and autonomous democratic institutions means that the democratic process almost starts from scratch. New constitutions, electoral laws and institutions have to be crafted to embolden the process. In all the three countries most affected by the revolution (Tunisia, Libya and Egypt), the old order has died but the new democratic state is yet to be born. The collapse of the Morsi government is an indication that the transition process for these countries is replete with difficulties and will be protracted.

²³⁴ Article 1 The Constitutional Declaration 3 August 2011

²³⁵ Article 17 The Constitutional Declaration 3 August 2011

²³⁶ Article 30 The Constitutional Declaration 3 August 2011

²³⁷ Article 30 The Constitution Declaration 3 August 2011

²³⁸ Spencer and Blair "How Libya Descended into Faction-Fighting and Chaos"

<http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/11218039/How-Libya-descended-into-faction-fighting-and-chaos.html> (Date of use: 2 April 2015)

²³⁹ Aziz El Yaakoubi "UN Hopes Libyan Factions Come Closer to Unity Government Deal"

<http://news.yahoo.com/u-n-hopes-libyan-factions-come-closer-unity-135138517.html> (Date of use: 3 April 2015)

Although the Arab spring did not inspire large scale protests in Sub-Saharan Africa, it was a strong reminder across the continent that real power vests in people. In some instances, some authoritarian leaders took drastic measures to stave off the possibility of similar protests arising in their own countries. In Eritrea, for example, media coverage of the Arab protests was forbidden,²⁴⁰ while in Zimbabwe, some activists who circulated videos of the Arab uprising were arrested.²⁴¹ In Chad, senior military officers and some legislators were imprisoned on allegations that they intended to cause Arab-like uprisings.²⁴² In Burkina Faso, however, protests similar to those of the Arab Spring occurred in October 2014. The protests were a reaction against President Blaise Compaore's attempts to amend the national constitution in order to allow him run for another term in office (having already been in power for 27 years). The protesters, inter alia, set fire to the parliamentary buildings and ultimately led to the resignation of Compaore.²⁴³

2.3.4.2 The Emergence of China as a Major Donor

When discussing the revival of democracy in the 1980s and 1990s, it was noted above that one of the contributing factors was that after the demise of the Cold War, Western states and their multilateral financial institutions, now conditioned aid on good governance. This compelled many countries to begrudgingly open up the political space in order to receive aid. As a result, some measures of success in good governance and democracy have been recorded.

However, the emergence of China as a major player in the African aid industry is considered by many as potentially disruptive of the gains made to African democracy because of China's manner of delivering its aid. The emergence of China as a major donor and lender has rapidly transformed the foreign aid landscape in Africa as western donors no longer enjoy a monopoly.²⁴⁴

The recently held Fifth Forum for China-Africa Cooperation (FOCAC) in Beijing agreed on a Beijing Action Plan 2013-2015. Under this plan, China will provide African countries with USD20billion in concessional loans to be applied in the development of agriculture,

²⁴⁰ Ibn-Oumar "Africa: Learning the Lessons of Arab Spring"

²⁴¹ Ibid

²⁴² Ibid

²⁴³ "Burkina Faso general takes over as Compaore Resigns" <http://www.bbc.com/news/world-africa-29851445>

(Date of use: 3 April 2015)

²⁴⁴ Sato et al *How Do Emerging Donors Differ from Traditional Donors?* 4

infrastructure and manufacturing.²⁴⁵ This is double the figure that China had pledged in 2010 and indicates China's growing intent to engage Africa in this respect. The value of trade between Africa and China in 2011 was in excess of USD260billion, a drastic improvement from the USD1billion in 1981.²⁴⁶ This dovetails with Africa's strong economic growth over the past 10 years. Over the past 10 year, six of the world's top ten fastest growing economies were in Africa and it is estimated that seven of the top 10 fastest growing economies in the next five years will be African.²⁴⁷ This development has given African states an ability to seek new external partnerships, including being able to borrow money directly from the markets. The downside to this, however, is that the economic development is largely fuelled by the growth in the extractive sector and the benefits from there have not spread enough around to ease poverty.²⁴⁸

Chinese funding as compared to traditional Western aid is more appealing to African leaders because it is considered not to have any strings attached and does not even consider good governance and democracy as conditions for its provision.²⁴⁹ China's funding is also preferable because it does not involve complex procedures to access it; and most of it goes to priority areas identified by African countries themselves.²⁵⁰

On the other side, China's unconditional support to Africa has been criticised for its potential disruptive effect on democratic consolidation in Africa. First of all, China's involvement in Africa is criticised for lacking normative principles as it deals with all African states in the same manner regardless of the country's human rights and good governance score card. For example, China continues to conduct its business smoothly with governments with records of gross human rights violations and authoritarianism such as Sudan and Zimbabwe.²⁵¹

Secondly, Chinese aid is seen as helping many African countries meet public demands for development in areas of infrastructure and services. To this effect, roads, hospitals, bridges

²⁴⁵ Maru "China-Africa Relations: Democracy and Delivery"

<http://studies.aljazeera.net/en/reports/2013/04/201343011415424904.htm> (Date of use: 21 February 2015)

²⁴⁶ Ibid

²⁴⁷ http://www.economist.com/blogs/dailychart/2011/01/daily_chart (Date of use: 13 June 2014); and

<http://www.worldbank.org/en/news/press-release/2013/04/15/africa-continues-grow-strongly-despite-global-slowdown-although-significantly-less-poverty-remains-elusive> (Date of use: 13 June 2014)

²⁴⁸ Ibid

²⁴⁹ Sato et al *How Do Emerging Donors Differ From Traditional Donors* 1-12. See also Furukawa and Kobayashi "Our Perspectives of Emerging Donors" 1- 25

²⁵⁰ Ibid. See also Sato et al *"How Do Emerging Donors Differ From Traditional Donors"* 1-12 and Furukawa and Kobayashi "Our Perspectives of Emerging Donors" 1- 25

²⁵¹ Maru *China-Africa Relations: Democracy and Delivery*"

<http://studies.aljazeera.net/en/reports/2013/04/201343011415424904.htm> (Date of use: 21 February 2015)

and schools have been built with Chinese support.²⁵² However, this kind of development may mask authoritarian regimes as it superficially gives incumbent governments, in the eyes of their nationals, some performance legitimacy.²⁵³ In the long run, governments which were making strides towards greater democratisation may stall the process knowing that they have carrots to dangle before the electorate, without necessarily undertaking the painstaking and risky process of strengthening democratic institutions.²⁵⁴ In other words, the manner in which Chinese aid is delivered can be said to reduce or in some cases completely remove “the incentives for recipient countries’ good governance reforms.”²⁵⁵ This potential regression could obviously affect the conduct of democratic elections and the opening up of political space.

Should this trend materialise and Africa regress on the democratic path, then Chinese aid may turn out detrimental to Africa’s long term development and good governance credentials. However, as noted above, Chinese aid is considered unconditional, that is, the Chinese government deals with African governments as they are. It is, therefore, possible that African states with relatively strong governance institutions and vibrant civil society organisations will not be adversely affected by the increasing aid. This is because where a culture of strong and accountable institutions and vibrant civil society has been developed, it is likely that Chinese aid will be negotiated in a transparent and accountable manner. Botswana might be a good example here. Bilateral aid and trade between the two countries grew from about zero 30 years ago to about USD 149 million per annum in 2007.²⁵⁶ Yet Botswana’s good governance indicators have continued on a positive trajectory as before.²⁵⁷ This enables aid to be seen as going to the people and not in support of any particular regime. On the other hand, weak states without strong governance institutions and wavering or suppressed civil society may turn out to be the most adversely affected. However, evidence of Africa going into democratic regression as a result of increasing Chinese aid is anecdotal and incomplete.²⁵⁸ One study comparing good governance indicators (focusing on corruption and regulatory quality) between 2002 and 2009 in 16 Sub-Saharan African countries found that

²⁵² Ibid

²⁵³ Ibid

²⁵⁴ Furukawa and Kobayashi “Our Perspective of Emerging Donors.” 1- 25

²⁵⁵ Ibid

²⁵⁶ Chen “China’s Role in Infrastructure Development in Botswana”

http://www.voltairenet.org/IMG/pdf/China_s_Role_in_Botswana.pdf (Date of use: 4 April 2015)

²⁵⁷ Lewin “Botswana’s Success: Good Governance, Good Policies and Good Luck”

<http://siteresources.worldbank.org/AFRICAEXT/Resources/258643-1271798012256/Botswana-success.pdf>

(Date of use: 4 April 2015)

²⁵⁸ Supra, note 215

Mauritania, which had not received significant Chinese support, was the only one to have recorded significant negative changes to its governance indicators, while in others there were no significant changes either positive or negative.²⁵⁹

2.3.4.3 Power Sharing Agreements

Power sharing agreements involve “the construction of a more or less inclusive government that represents a broad range of concerned parties.”²⁶⁰ This usually involves the sharing of senior government portfolios. Power sharing deals are not new to Africa. They have traditionally been used as effective tool of conflict resolution where a war ceases by the creation of unity government which includes all major warring parties.²⁶¹ Such deals have been employed in countries such as Congo Brazzaville (1999), Sierra Leone (1991, 1996, and 2001), Ivory Coast (2003), Angola (2002), Liberia (2003), and Burundi (2003).²⁶²

Power sharing deals, however, are now emerging as a way of resolving disputed presidential elections. Following the corrupt and fraudulent 2007 presidential elections in Nigeria, for example, the new president proposed to form a unity government bringing together all the major parties.²⁶³ This never materialised. It was Kenya (2008) and Zimbabwe (2008) where such agreements were consummated following fraudulent and disputed presidential elections. In both countries the disputed elections led to the eruption of violence on unprecedented scales leading to the death and injury of thousands of people. With the support of the international community, power sharing deals were concluded as a means of ending violence and resolving the post-election crisis.

In the case of Zimbabwe, the power sharing deal was signed on 15 September, 2008, by President Robert Mugabe representing ZANU-PF, Morgan Tsvangirai representing the main Movement for Democratic Change (MDC-T), and Professor Arthur Mutambara representing the breakaway MDC (MDC-M). In it the parties agree to resolve “once and for all” the

²⁵⁹ <http://www.africaneconomicoutlook.org/theme/emerging-partners/industrialisation-debt-and-governance-more-fear-than-harm/the-impact-on-governance/> (Date of use: 4 April 2015)

²⁶⁰ Cheeseman and Tendi “Power-sharing in Comparative Perspective: The Dynamics of Unity Governments in Kenya and Zimbabwe” 203- 229

²⁶¹ Cheeseman “The Internal Dynamics of Power-sharing in Africa” 336- 365

²⁶² LeVan “Power Sharing and Inclusive Politics in Africa’s Uncertain Democracies” 1-35

²⁶³ Jarstad “The Prevalence of Power-sharing: Exploring the Patterns of Post-election Peace” 41- 62

political crisis and to chart a new political direction for the country.²⁶⁴ The parties agreed to form a unity government and, ironically, named Mugabe, who had lost the first round of elections, as the president, and relegated Tsvangirai, the winner of the first round of elections, as Prime Minister, while Mutambara became a deputy prime minister.²⁶⁵ Cabinet positions were shared with ZANU-PF being assigned 15, MDC-T 13, and MDC-M 3. At the deputy minister level ZANU-PF was assigned 8, MDC-T 6 and MDC-M 1 position.²⁶⁶

The same thing happened in Kenya. Following the disputed elections of December 2007, Kenya descended into a theatre of violence that led to the death of at least 1,000 people and displacement of more than 350,000.²⁶⁷ With the facilitation of the international community, the rival parties agreed on a power sharing deal, which was passed as the National Accord and Reconciliation Act 2008. The agreement recognised that in the context of the violence that followed the disputed elections, neither party would be able to govern without the support of the other.²⁶⁸ The agreement provided for the formation of coalition government and the establishment of positions of a Prime Minister and two deputy Prime Ministers.²⁶⁹ Cabinet and government positions were equitably distributed under the requirement that “the composition of the coalition government shall at all times reflect the relative parliamentary strengths of the parties and shall at all times take into account the principle of portfolio balance.”²⁷⁰ Under this coalition government, Mwai Kibaki served as president and Raila Odinga as Prime Minister.

Proponents of power sharing agreements see such agreements as the best tool for securing an end to conflicts and providing mechanisms for distribution of senior government positions.²⁷¹ In relation to Zimbabwe, Musunungure argued that the power sharing agreement had the following advantages: it set a precedent for peaceful resolution of future electoral disputes; opened up political space and set the transition process in motion; and ended the status of

²⁶⁴ Article I(1) Agreement Between the Zimbabwe African national Union Patriotic Front (ZANU-PF) and the Two Movement for Democratic change (MDC) Formations on Resolving the Challenges facing Zimbabwe 2008

²⁶⁵ Article XX(20.1.6)(1),(2), (3), and (4) Agreement Between the Zimbabwe African national Union Patriotic Front (ZANU-PF) and the Two Movement for Democratic change (MDC) Formations on Resolving the Challenges facing Zimbabwe 2008

²⁶⁶ Article XX(20.1.6) (5) and (6) Agreement Between the Zimbabwe African national Union Patriotic Front (ZANU-PF) and the Two Movement for Democratic change (MDC) Formations on Resolving the Challenges facing Zimbabwe 2008

²⁶⁷ Congressional Research Service “Kenya: The December 2007 Elections and the Challenges Ahead” 1-7

²⁶⁸ Preamble to the National Accord and Reconciliation Act 2008

²⁶⁹ Section 3(1) National Accord and Reconciliation Act 2008

²⁷⁰ Section 4(3) National Accord and reconciliation Act 2008

²⁷¹ Cheeseman “The Internal Dynamics of Power-Sharing in Africa” 336- 365

Zimbabwe's isolation in the sub-region.²⁷² It has also been argued that power sharing agreements are also good for Africa as they reflect the inclusive nature of traditional African society where governance was a consultative and inclusive enterprise.²⁷³

It is our view that these supposed advantages are superficial and constitute real danger to the consolidation of electoral democracy in Africa as they set dangerous precedents. In discussing the concept of elections above, it was noted that elections, inter alia, are a tool for leadership recruitment, which leadership rests on the will of the people. Power sharing agreements do not recruit leadership to government on the basis of the decisions of the electorate and therefore, negate the concept of representative democracy. Power sharing deals turn elections into an "arbitrary bargaining process"²⁷⁴ which enable incumbents to hold onto power, despite actually losing elections, as was the case both in Kenya and Zimbabwe. In this sense, power sharing agreements actually undermine elections as the vehicle of recruiting the nation's leadership on the basis of the people's will. As President Ian Khama of Botswana aptly observed:

These power-sharing agreements are not the way to go on the continent. You cannot have a situation where a ruling party, when it senses it may lose an election, can manipulate the outcome so that they can stay on in power.²⁷⁵

Elections are also a tool in the hands of the electorate to collectively hold those in power accountable. Power sharing agreements, however, take away this power to punish or reward performance. Where subsequent elections are held after the power sharing government, this creates an unnecessary disadvantage for voters as they will find it difficult to identify key players and assign responsibility for government's performance or lack of it.²⁷⁶

Seeing any advantage in power sharing agreements is missing the point. Power sharing deals in the context of disputed elections, as shown by Zimbabwe and Kenya, only reward those who created the problems. They are a danger to democracy and should not be set as precedents. As a Nigerian newspaper correctly observed, with regard to Zimbabwe, power

²⁷² Musanungure "Zimbabwe's Power Sharing Agreement" 1-12

²⁷³ Cheeseman "The Internal Dynamics of Power-sharing in Africa" 336- 365

²⁷⁴ LeVan "Power Sharing and Inclusive Politics in Africa's Uncertain Democracies" 1-35

²⁷⁵ As cited in Assenov and Levan "The Consequences of Political Inclusion in Africa 1990-2008" 1-25

²⁷⁶ *Supra* note 235, p 1- 35

sharing agreements are the “sanctification of brigandage and buccaneering and the acceptance of brinkmanship as the basis of governance and leadership.”²⁷⁷

2.3.4.4 Regression and Defying Winds of Change

This section looks at three inter-related trends: long serving leaders who defy the winds of change and refuse to go and let democracy prevail; removal of presidential term limits; and military coups. These trends not only defy the process of democratic consolidation but are also symptomatic of democratic regression.

Despite the progress made in democratisation since the democratic wave of the 1980s and 1990s, there are still several African leaders who managed to defy the winds of change. They have survived by outfoxing the democratic wave and now, after decades in office, still cling to power through personalisation of the state, intimidation of opponents, crashing dissent, and outright rigging of elections. Such leaders include Teodoro Obiang Nguema of Equatorial Guinea who has been in power since 1979; Jose Eduardo dos Santos of Angola in power since 1977; Robert Mugabe of Zimbabwe since 1980; Yoweri Museveni of Uganda since 1986; Omar al-Bashir of Sudan since 1989; and Idriss Derby Itno of Chad who assumed power in 1990.²⁷⁸ Each of these has been in power for more than two decades.

African leaders who overstay in power tend to undermine democratic institutions, consolidate power in themselves and abuse public resources for private ends. Museveni of Uganda once stated that “no African head of state should be in power for more than 10 years.”²⁷⁹ This according to Museveni is because it is difficult to remove such leaders democratically from office.

As part of the democratisation process, many African countries included presidential term limits in their constitutions. These basically restricted presidents to serve a maximum of two terms. However, since 2000 there has been a trend of eroding this achievement by incumbent presidents who have instigated amendments to allow them to serve a third term in office and sometimes *ad infinitum*. In some countries such as Zambia, Nigeria and Malawi, such

²⁷⁷ Supra note 235, p 1-25

²⁷⁸ <http://www.rappler.com/world/15418-list-africa-s-longest-serving-leaders> (Date of Use: 24 December 2014). See also Mfonobong Nsehe “The Five Worst Leaders in Africa”; and Young *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* 199-218

²⁷⁹ As cited in Cibane “Africa’s Elected Monarchs: Presidential Term Limits and Democracy in Africa” <http://www.africaontheblog.com/africas-elected-monarchs-presidential-term-limits-and-democracy-in-africa/> (Date of use: 22 September 2014). It is ironic that Museveni is still in office since 1986.

attempts were defeated by the people. However, in the vast majority where attempts were made, they were successful. Such countries include:

- Senegal, where the Constitutional Council in January 2012 permitted President Abdoulaye Wade to run for a third term on the pretext that his term in office predated the two-term constitutional reform,²⁸⁰
- Uganda, where the constitution was amended in 2005 to abolish term limits²⁸¹
- Tunisia, where President Ben Ali in 2002 won 100 percent support to remove term limits and run for office without term limits,²⁸²
- Namibia, where the constitution was amended to allow Sam Nujoma to serve a third term in office,²⁸³
- Djibouti, where the legislature in 2010 passed a constitutional amendment that allowed President Ismail Omar Guelleh to run for a third term in office,²⁸⁴
- Chad, where a referendum in 2005 approved an amendment to remove term limits, allowing President Idriss Derby to serve unlimited terms,²⁸⁵
- Cameroon: the legislature amended the constitution to remove the two-term limits, allowing President Paul Biya to extend his term in office,²⁸⁶
- Algeria, where in November 2008 the legislature lifted presidential term limits, allowing President Abdelaziz Boteflika to stay in office without any limit,²⁸⁷
- Burkina Faso, where the Constitutional Court ruled that the constitutional two-term limits of 2005 could not be applied retroactively, thereby clearing the way for President Blaise Compaore to seek and win re-election in 2010 for a third term in office.²⁸⁸ Compaore was forced out of office following violent protests against his intention to change the constitution and seek another term of office.
- In Burundi, a Bill was presented to parliament on 21 March 2014 to remove the presidential terms limits to allow Pierre Nkurunziza to run for a third term when his term expires in 2015. The Bill failed to pass by one vote. The Interior Minister,

²⁸⁰ See <http://www.reuters.com/assets/print?aid=AFL5E89ML201220312> (Date of use: 24 December 2013)

²⁸¹ Ibid

²⁸² Ibid

²⁸³ Ibid

²⁸⁴ Ibid

²⁸⁵ Ibid

²⁸⁶ Ibid

²⁸⁷ Ibid

²⁸⁸ See <http://www.reuters.com/assets/print?aid=AFL5E89ML201220312> (Date of use: 24 December 2013)

Eduard Nduwimana, however, announced that despite the loss in parliament, the president will go ahead and run and it will be for the Constitutional Court to settle the matter.²⁸⁹ In May 2015, the Constitutional Court opened the way for the president to run for another term when it ruled that Nkurunziza is not constitutionally barred from running.²⁹⁰ The decision plunged the country into civil unrest and led to an attempted coup.²⁹¹

- In Congo DR, government introduced a Bill to parliament in January 2015 which would have led to the removal of term limits and allowed President Kabila to seek another term in office in 2016 when he is due to step down. However, this decision by government met massive protests across the country, leading to the death of at least 45 people.²⁹² The Bill was withdrawn pending further consultations.
- In the case of Rwanda, although the government has not made any official position, fears are growing that the incumbent leader, President Paul Kagame, has plans to amend the national constitution to remove term limits and run for a third term in office when his current term expires in 2017.²⁹³

Another observable phenomenon is the resumption (or continuing) of military coups as a means of displacing regimes. Military coups are about the removal of a government by means of military power. This can be directly, where the military takes over the power, or indirectly, where, with military instigation or support some other civilians oust government and assume power. In this respect Africa seems to set the wrong and unenviable record of being host to at least 10 military coups out of 18 coups that have occurred between 2000 and 2013 globally.²⁹⁴ This is despite the AU taking a strong stand against unconstitutional changes of government and not generally recognising governments that come into office unconstitutionally.²⁹⁵

²⁸⁹ See <http://www.modernghana.com/news/531809/1/rejecting-term-limits-burundi-president-seeks-re-e.html> (Date of use: 2 June 2014)

²⁹⁰ <http://www.aljazeera.com/news/2015/05/burundi-court-validates-president-term-bid-150505095216200.html> (Date of use: 20 May 2015)

²⁹¹ Ibid

²⁹² "Grief and Anger in Congo Following Violent Protests Against Joseph Kabila" <http://www.theguardian.com/global-development/2015/jan/26/democratic-republic-congo-protests-joseph-kabila> (Date of use: 4 April 2015)

²⁹³ "Eyes on Rwanda over Plans to Allow Kagame to Seek Third Term in Office" <http://www.theeastafrican.co.ke/news/-/2558/2555122/-/50h00mz/-/index.html> (Date of use: 4 April 2015)

²⁹⁴ See http://www.privatemilitary.org/adverse/military_coups.html (Date of use: 22 December 2013)

²⁹⁵ See Article 23 African Charter on Democracy, Elections and Governance 2007 and Article 4(p) Constitutive Act of the AU 2000

The following are some of the military coups that have occurred in Africa since the year 2000:

- Egypt: On July 3, 2013 President Morsi was ousted by the Egyptian military;
- Central Africa republic: President François Bozize was deposed by the military in March 2013. This was preceded by a coup in 2003 which ousted prime Minister Ange-Felix Patasse;
- Mali: The military deposed President Amadou Toumani Toure in March 2012;
- Niger: In February 2010, President Mamadou Tandja was deposed
- Mauritania: On August 6, 2008, President Sidi Ould Cheikh Abdllahi was deposed by the military. Another coup had occurred in August 2005 which ousted President Maaouiya Ould Taya;
- Togo: A military coup occurred in February 2004 to replace President Etienne Eyadema;
- Guinea-Bissau: The military deposed President Kumba Yala in September 2003; and
- Sao Tome and Principe, where President Fradique de Menezes was removed from office in 2003.²⁹⁶

Military rule is usually assumed through force and continually sustained through threat of violence. It is by its nature inimical to representative and accountable democratic governance.

2.4 Presidential Elections in Africa: Theoretical and Practical Issues

An electoral system is a mechanism by which eligible citizens in a state are enabled to choose their elective office bearers. In modern states, the electoral system is usually defined in the Constitution of the country and in other written laws and as such it is “a set of essentially unchanged election rules under which one or more successive elections are conducted in a particular democracy.”²⁹⁷

Broadly speaking, African states choose their leaders under three major electoral systems, namely the presidential, parliamentary and monarchical systems. Each of these has essential defining features but it is not uncommon to find elements of one in the other. Indeed, as many nations re-engineer their systems, sometimes the differences blur. However, it must be noted

²⁹⁶ Ibid

²⁹⁷ Golder “Democratic Electoral Systems Around the World 1946-2000” 103- 121

that these are broad classifications. Glaring differences could still exist in countries that apply the same system. As such, this section does not address nuanced differences that may exist within the same system but simply focuses on the broad analysis of each system.

2.4.1 Presidential System

There are many definitions of a presidential system and some are extremely complex.²⁹⁸ For purposes of this research, a presidential system is defined minimally and considered as one where the chief executive of the government or state is elected directly by the people. It does not matter how nuanced the electoral rules guiding the elections may be, provided the mandate comes directly from the electorate. The presidential system is the dominant model on the African continent. With the exception of Lesotho, Swaziland and Morocco which are monarchs, there are just about five countries which apply the parliamentary model (Botswana, Ethiopia, Libya, Mauritius and South Africa). The rest of the Countries apply the presidential model where the president is directly elected by the people.²⁹⁹

Two seminal articles of Juan J. Linz entitled “*Democracy: Presidential or Parliamentary: Does it Make a Difference?*”³⁰⁰ and “*The Perils of Presidentialism*”³⁰¹ are probably the most eminent scholarly discussion of the presidential system (in contrast to the parliamentary system). In these works, Linz offers a comparative analysis between Presidential system and Parliamentary systems and concludes that the presidential system is unsuited for long term national stability and democracy. Linz’s analysis and debunking of presidentialism can be clustered as resting under the following four themes which are discussed further below: full claim to democratic legitimacy; dual legitimacy; rigid or fixed term of office; and zero sum game of winner-take-all.

2.4.1.1 Full Claim to Democratic Legitimacy

Linz considers that electing a president directly by the people is one of the advantages of the presidential system as it clothes the president with democratic legitimacy, knowing that his or her mandate is not mediated by parliament but wells up directly from the people who elected him or her. This sets the president in charge of the government apparatus and constitutes government (cabinet) which is responsive to him/her and exercises full control over it.

²⁹⁸ Ibid

²⁹⁹ http://en.wikipedia.org/wiki/Parliamentary_system (Date of use: 2 July 2014)

³⁰⁰ Linz “Democracy: Presidential and Parliamentary: Does it Make a Difference?” 1-88

³⁰¹ Linz “The Perils of Presidentialism” 50- 69

Linz however notes that it is common place for presidents under this system to be elected, where there are several candidates, by a slim majority and thus where this happens, the claim to democratic legitimacy upon which they hold power as representatives of the people is manifestly nonexistent.³⁰² To support this view, Linz cites the example of 1979 Chilean presidential elections where Allende was returned to office with a paltry 36.2 per cent of the popular vote (whilst his closest opponent Allesandri got 34.9 percent). The fact that the president in such a case has not been elected by the majority leads to tension in the country and in socially and ideologically divided societies, this may lead to conflict. Even if some countries require a minimum percentage of votes (usually 50 per cent) for one to be elected president, Linz considers this as negative as it invariably leads to the top two contenders and their camps in a bitter battle. For a divided society, this easily leads to instability and is thus a major disadvantage of the presidential system, as it leads to polarisation.³⁰³

Linz's view that the presidential system (in contrast to the parliamentary system) leads to minority presidents and leads to polarisation in society is, respectfully, incorrect. First of all, where a president in a presidential system is elected by a simple majority, there is always the possibility of electing a minority president. This was the case during the 2001 Zambian elections where the winner, Levy Mwanawasa, only garnered a paltry 29 percent of the popular vote.³⁰⁴ However, it must be noted that the simple majority is not inherent and a necessary concomitant of the presidential system. It is possible to engineer a presidential system to ensure that the president is elected by a qualified majority and to have that majority defused across the country. The new Kenyan Constitution, for instance, requires that not only should the president be elected by more than half of all the votes cast in an election but also that she/he should at least garner 25 per cent of the votes cast in each of the more than half of the counties of Kenya.³⁰⁵ Similarly, the Nigerian Constitution requires that not only should the winning candidate obtain the appropriate majority, but must also garner not less than one-quarter of the votes cast in at least two-thirds of all the federal states including the federal capital.³⁰⁶ This ensures the president has both majority and national support which reflects the national character.

³⁰² Ibid

³⁰³ Ibid

³⁰⁴ Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others Z.R 138 (s.c) L SCZ/EP/01/02/03/2002

³⁰⁵ Article 138(4) The Constitution of Kenya 2010

³⁰⁶ See Articles 133 and 134 Constitution of the Federal Republic of Nigeria 1999

In any case, minority leaders can be produced by the parliamentary system as well, contrary to the views of Linz. For example, while the Labour Party during the 2005 UK elections won an overall majority of 55.1 percent of the seats in the House of Commons, by popular vote they only got 35.2 per cent of the votes.³⁰⁷ This actually meant that even if the Labour Party had gained sufficient numbers of Members of Parliament to form government that government actually rested on very thin public support.

The implication that the presidential system necessarily leads to polarisation, instability and conflict is also incorrect. The early conflicts that assailed some Anglophone countries in the aftermath of independence are attributable to the unsuitability of the parliamentary system actually. Nigeria, for example, attained independence under the Westminster parliamentary style, under which “a cluster of ethnic groups from the north had managed to secure a majority of seats and shut all other groups out of power.”³⁰⁸ This is considered to have precipitated the military coup d'états of 1966 and the Biafra war of secession in Nigeria.³⁰⁹ Uganda is another example of a parliamentary system that did not lead to democratic stability. In 1966, after years of power struggles between the Prime Minister Milton Obote and the titular President Sir Edward Mutesa II (the King of the Baganda , Uganda's largest ethnic group), Obote's military forces invaded Mutesa's palace and forced him into exile. Obote then abrogated the Constitution and turned himself into an executive president.³¹⁰ This brought about instability, military coups and war that took Uganda many years to recover from.

2.4.1.2 Dual Legitimacy

The presidential system necessarily creates two spheres of power, both claiming a direct mandate from the people. These are the president and the legislature, as each is elected directly by the people. Therefore, even if the president is directly elected and entitled to full democratic legitimacy, the legislature too claims the same legitimacy as it is also elected by the people. And since the legislature is elected separately, it is possible that it could be dominated by another party or parties opposed to the president's party. According to Linz, when the legislature is dominated by another party opposed to the president, and this party is cohesive, disciplined and ideologically different, this necessarily creates problems as to who

³⁰⁷ Electoral Reforms Society “The UK General Election of 5 May 2005: Report and Analysis” 2-6

³⁰⁸ Horowitz “Comparing Democratic Systems” 73- 79

³⁰⁹ *ibid*

³¹⁰ Sewanyanga and Awori “Uganda: The Long and Uncertain road to Democracy” 465- 477

truly represents the people. As Linz asked: “who has the stronger claim to speak on behalf of the people: the president or the legislative majority that opposes his/her policies?”³¹¹

In Linz’s view, when this happens, “no democratic principle exists to resolve disputes between the executive and the legislature about which of the two actually represents the will of the people.”³¹² He believes that even where constitutional mechanisms exist to resolve the impasse, the mechanisms are likely to be “too complicated and aridly legalistic” to be of much use to the electorate. As a result, in such cases the armed forces are always tempted to interfere as ‘mediators.’

It is worth noting, as will be show in the next section that Linz also argues that the presidential system is inclined to producing winner-take-all presidents as the race for running government is a zero - sum game. This is a clear contradiction in Linz’s thoughts because where an election produces an executive and legislature controlled by different parties, then clearly this is not a winner-take-all result. As Harowitz has observed, “it is difficult to complain about inter-branch checks and balances and winner-take-all politics at the same time.”³¹³ Where a party does not get the executive but wins the majority of seats in parliament that makes it more likely that there will be a check on executive power.

In any case, the problem of dual legitimacy is not exclusive to presidentialism but has afflicted parliamentary systems as well. This has been a common phenomenon in parliamentary systems with bicameral chambers and each chamber is controlled by a different party.³¹⁴ It is the duty of framers of a constitution to anticipate the possibility of dual legitimacy in modern states and provide for mechanisms of avoiding or resolving competing claims. Parliamentary systems with bicameral chambers such as Canada, Germany, and Japan have constitutional provisions which give the upper houses more power over lower legislatures but are precluded from exercising a vote of confidence against government.³¹⁵

2.4.1.3 Rigid or fixed Term

Linz argues that under the presidential system, presidents are elected for a fixed term in office, after which they have to seek re-election and in many cases presidential systems have term limits. He considers this as causing rigidity to politics as the term cannot be modified,

³¹¹ Linz “The Perils of Presidentialism” 50- 69

³¹² Ibid

³¹³ Supra note 267, p 73- 79

³¹⁴ Ibid

³¹⁵ Ibid

shortened or even prolonged. This turns the political process into “broken discontinuous, rigidly determined periods without possibility for continuous readjustments as political, social and economic events might require.”³¹⁶ This, in Linz’s view, creates chaos if midterm an incumbent president dies or is incapacitated. The successor, if subjected to a new election, may come from a party different from the predecessor or even if he comes from the same party as the predecessor, he may simply implement his own policies. Or where the successor was the vice president who was elected as a running mate, such a person is considered to have been imposed by the president and may not have the support the president had. In fact, the president may have resorted to him/her because he/she least presented a threat to the president’s hold on power.

Linz also argues that fixed term limits adversely affect how presidents implement policies to which their name is tied. The limited time they have in power encourages a sense of urgency in implementing policies which may lead to ill conceived policy initiatives and hasty implementation. As a president is racing against time to build a legacy for himself/herself, he/she is likely to spend money unwisely. Linz considers that in the presidential system, it is difficult to remove an inept president as there is no vote of confidence, leaving only the drastic and difficult process of impeachment.³¹⁷

It is true that fixed terms, without a vote of confidence, in presidential systems can be a serious hindrance to check or remove an ill-performing president. However, considering that we have defined a presidential system as one where the president is directly elected by the electorate, which seems to be Linz’s definition as well, then the issue of fixed and limited terms is not peculiar to presidential systems. Under the South African Constitution, for example, where the president is elected by parliament, the Constitution provides for fixed tenure and limited term in office to two five year terms.³¹⁸

2.4.1.4 Winner-takes-all

In Linz’s view the most important negative implication of presidentialism is that it turns elections into a zero-sum game which consequently leads to winner-take-all electoral outcomes. Linz argues that in parliamentary systems, the winning party may win a majority of seats but the minority would still have representation in parliament, which could be used as a bargaining chip in coalition building. This is contrary to presidential system which only

³¹⁶ Supra note 259

³¹⁷ Ibid

³¹⁸ See Section 88(2) Constitution of the Republic of South Africa 1996

produces one winner, however slender their victory was. The feeling of being elected directly by the people gives the president a “sense of power and mission that might contrast with the limited plurality that elected him.”³¹⁹

As a zero-sum game, elections mark off winners and losers for the entire duration of the presidential term. This is because of the rigidity and fixed term of office of the president whereby there is no possibility of expansion of alliances, expansion of government support base or holding of new elections in response to major new developments in society.

As already noted above, Linz’s argument that presidentialism as opposed to parliamentarism is more inclined to produce winner-take-all electoral results is incorrect. In the UK, which has a long history of the parliamentary system, for example, in the last three decades the ruling party often won a decisive majority seats and obtained full control of government, despite winning far less than 50 per cent of the popular vote.³²⁰ During the 2005 elections, as stated above, the Labour Party only got 32 per cent of the popular vote but managed to get 55.1 per cent of seats in Parliament. In fact, in Africa, many countries that inherited the Westminster parliamentary model, such as Ghana and Nigeria, had to abandon it because it produced governments that were not inclusive, in preference for the presidential system. The parliamentary system bequeathed upon Nigeria at independence, with a titular president to mirror the British monarchy and a Prime Minister in charge of government, simply could not hold and led to political anarchy. Distinguished Nigerian law scholar, Ben Nwabueze, reflecting on some of these challenges stated:

Ministers in Nigeria never regarded themselves as the president’s ministers or the government as his own. If anything, the Prime Minister regarded himself as the President’s superior and often behaved as such towards him. There were hardly any attitudes of personal allegiance, of reverence or of courtesy towards him; he lacked the attribute of kingly majesty in the eyes of the ministers.³²¹

Such experiences indicate that most of the shortcomings that are often associated with the presidential system are not inherent to it. They exist in other systems as well. What matters is to engineer the electoral system to specific circumstances of each state.

³¹⁹ Supra note 259

³²⁰ Mainwaring and Shugart “Juan Linz Presidentialism and Democracy: A Critical Appraisal” 449- 471

³²¹ Nwabueze *Constitutionalism in the Emergent States* 57

However, where the presidential system is employed without adequate safeguards for inclusiveness, it is likely that it will be inclined towards a winner-take-all result and precipitate conflict. This is likely to be the case where the presidential system uses the simple majority method of electing presidents. It has been argued that the all-or-nothing structure of the 1993 Nigerian presidential election made it possible for the military to annul the election results. This is because the losers of the election felt that they had no immediate stake in the political outcome and, therefore, readily acquiesced in the annulment of the election in the hope of being able to run again.³²² The same argument is advanced for Jonas Savimbi's resumption of conflict in Angola following his 1994 election loss to Jose Eduardo dos Santos. Equally, it was the same with Dennis Sassou Nguesso's military ousting of his successor, Pascal Lessouba, following the Congolese presidential elections of 1992, as it was felt that losing a presidential election meant losing all.³²³

2.4.2. Parliamentary System

In a parliamentary system the leader of government (whether titled as Prime Minister or President) is not elected directly by the electorate but by the people's representatives in parliament. Such a president or leader does not have a direct mandate from the electorate but it instead derives from the confidence and consent of Members of Parliament through an election. Government or cabinet serves at the pleasure and confidence of parliament. As indicated above, very few African countries use this model (Botswana, Ethiopia, Libya, Mauritius, and South Africa).³²⁴ The presidential system is the dominant model in Africa.

Botswana is an example of a country that applies the parliamentary system. Under the Constitution of Botswana, the president is elected by members of the National Assembly.³²⁵ Once elected, the president is considered a member of parliament³²⁶ and his or her tenure is for an aggregate period not exceeding 10 years.³²⁷ The president, including the entire government, is removable by a vote of no confidence supported by majority of all members entitled to vote.³²⁸ South Africa is another example of a parliamentary system. Although South Africa is usually classified as a mixed system, but going by our minimalist definition of a parliamentary system above, South Africa would then offer a good example of a

³²² Ndulo "Presidentialism in Southern African States and Constitutional Restraint on Presidential Power"

³²³ Ibid

³²⁴ http://en.wikipedia.org/wiki/Parliamentary_system (Date of use: 2 July 2014)

³²⁵ Article 32 Constitution of Botswana

³²⁶ 57 Constitution of Botswana

³²⁷ Article 34(1) Constitution of Botswana

³²⁸ Article 92 Constitution of Botswana

parliamentary system (on account that the President is not elected by the people but through the legislature). Under the South African constitutional system, the president, unlike the traditional Westminster model where the prime minister only heads government but not the state, is the head of both government and state.³²⁹ The president is elected at the first sitting of the National Assembly, or whenever it is necessary to fill a vacancy, from among its members.³³⁰ The South African Constitution provides for a no confidence vote under two circumstances: when a majority of the National Assembly pass a motion of no confidence in cabinet, but excluding the president, in which case the president has to reconstitute his cabinet;³³¹ and where the majority of the National Assembly passes a motion of no confidence in the president, in which case the president and his entire cabinet have to resign.³³²

As discussed above in contradistinction with the presidential system, apologists of the parliamentary system believe that the parliamentary system is the best in ensuring democratic stability in any country. As already stated, these advantages of the parliamentary system are said to revolve around four ideas: that in a parliamentary system the prime minister does not claim full democratic legitimacy as his/her power is proportional to his or her Party's strength in parliament; that the parliamentary system avoids the challenge of dual legitimacy involved in the presidential system as government is based on the confidence of parliament; that the parliamentary system is flexible as there are no term limits and fixed terms as government can be recalled at anytime by parliament through the device of the confidence vote; and that under the parliamentary system, even the minority parties have representation in parliament, hence avoids the zero-sum game of winner-take-all under the presidential system. But as has been argued above, these features are rather caricatures of the system that do not necessarily exist in one system alone. The defects found in one system can be observed in the other.

2.4.3 Monarchical System

The concept of elections, as discussed above, is premised on government that wells up from the collective consent of the people. Through genuine, free and fair elections, the electorate choose their leaders and hold them accountable for their promises and behaviour. Government, therefore, derives its existence from the will of the people. It thus goes without

³²⁹ See section 83(a) Constitution of the Republic of South Africa 1996.

³³⁰ Section 86(1) Constitution of the Republic of South Africa 1996

³³¹ Section 102(1) Constitution of the Republic of South Africa 1996

³³² Section 102(2) Constitution of the Republic of South Africa 1996

saying that in countries where ascent to power is based on heredity, many conceptual and practical problems ensue.

Hereditary leaders' claim to power usually lies in a long myth-filled tradition which is claimed as a matter of right, or as Thomas Paine stated: "that what at first was submitted to as a convenience, was afterwards claimed as a right."³³³ Paine considers monarchs or hereditary leaders to have no more legitimacy than the leader of criminal gangs, whose power is maintained by subtlety and savagery:

Whereas it is more than probable, that we could take off the dark covering of antiquity, and trace them to their first rise, we should find the first of them nothing better than the principal ruffian of some restless gang, whose savage manners or pre-eminence in subtlety obtained him the title of chief among plunderers; and who by increasing in power, and extending his depredations, overawed the quiet and defenceless to purchase their safety by frequent contributions.³³⁴

To address this inherent challenge in state led by hereditary monarchs, many modern states have drafted constitutions that constrain the powers of the monarch and provide for the election of a government which wields real executive power, while the monarch continues to wield residual and ceremonial powers. This is at least the case in the UK, where the monarch does not have absolute power and the routine government administration is in the hands of an elected government.

There are currently three African states headed by monarchs. These are Lesotho, Morocco and Swaziland. Each one of the three faces the daunting task of crafting a state that is premised on the people being able to freely choose leaders of their government while at the same time upholding their long monarchical tradition. It is to these three we now turn to see how each is struggling to find the right balance between an elected government and a hereditary monarch all under one roof.

³³³ Paine *Common Sense* 16

³³⁴ *Ibid*, 15

2.4.3.1 Lesotho

Lesotho got her independence in 1966 under a constitution that provided for a monarch, where the King was head of state while an elected prime Minister was head of government.³³⁵ However, this did not last long. In 1970, after Prime Minister, Chief Leabua Jonathan, lost his parliamentary majority entitling him to be Prime Minister, he suspended the Constitution and assumed all executive power.³³⁶

Chief Jonathan was deposed in a 1986 military coup and Lesotho remained under military rule until 1993 when democracy was restored. However, this too was short-lived as the subsequent 1998 election was disputed, leading to violent protests and paralysis of government.³³⁷ The Southern African Development Community (SADC) was compelled to intervene and send troops (from Botswana and South Africa) to restore order.³³⁸

Following this crisis, the Constitution of Lesotho was amended in 2001 in order to make the electoral system more reflective of the will of the people and to enhance the features of Lesotho as a constitutional monarch.³³⁹ The Constitution provides for a constitutional monarch, who shall be the head of state.³⁴⁰ The King is chosen by a college of chiefs according to customary law.³⁴¹

Lesotho has a bicameral legislature, that is, the Senate and the National Assembly. The Senate consists of twenty-two principal chiefs and 11 other senators nominated by the King on advice of the council of State.³⁴² The National Assembly, on the other hand, consists of 120 members, 80 of whom are elected directly in constituencies on the basis of first-past-the-post system while the remaining 40 are allocated on the basis of proportional representation.³⁴³

³³⁵ Hatchard, Ndulo and Slinn *Comparative Constitutionalism and Good Governance in Commonwealth: An Eastern and Southern African Perspective* 93

³³⁶ Read "Revolutionary Legality in Lesotho: A Fresh Look at Constitutional Legitimacy" 209- 212

³³⁷ Ibid

³³⁸ Supra note 294, p 94

³³⁹ Common Wealth Observer Group "Lesotho Parliamentary Elections"

<http://thecommonwealth.org/media/news/lesotho-parliamentary-elections-2012-final-report> (Date of use: 14 March 2014)

³⁴⁰ Article 44(1) Constitution of Lesotho

³⁴¹ Article 45(1) Constitution of Lesotho

³⁴² Article 55 Constitution of Lesotho

³⁴³ Article 56 Constitution of Lesotho

The King appoints the Prime Minister, a member of the National Assembly, whose party commands the support of the majority of the members of the National Assembly.³⁴⁴

2.4.3.2 Morocco

Morocco gained her independence from France in 1956, under King Mohammed V, after forty-four years of colonial rule. Mohammed V was succeeded by his son Hassan II in 1961. It is Hassan II who transformed the Moroccan monarchy into a strong institution wielding absolute executive power.³⁴⁵

The Moroccan monarch's roots go back to the 1660s³⁴⁶ and its legitimacy is premised on the *Sharifian* doctrine which considers Moroccan rulers to be descendants of Prophet Mohammed, the founder of Islam. This makes the King both temporal and spiritual leader.³⁴⁷ Ascent to the crown is hereditary, handed down from father to son "in direct line and by order of primogeniture among the off-springs of the King" unless the King during his lifetime did "designate a successor among his sons apart from the eldest son."³⁴⁸

The King appoints the Prime Minister, but is under no obligation to appoint the leader of the party commanding majority support in parliament.³⁴⁹ He also appoints cabinet, which serves at his pleasure as he can terminate its mandate at his caprice.³⁵⁰

There are, however, signs that Morocco may be moving towards being a genuine constitutional monarch where an elected government will have more power to run government. The current monarch, King Mohammed VI, in response to the Arab uprisings in early 2011, set up a commission to draft a new democratic constitution. This new Constitution was approved in a referendum on 1 July 2011. It, inter alia, categorically states that the King shall appoint the head of government from within the political party having a majority in the Chamber of Representatives and that the King shall appoint cabinet from names proposed by the Prime Minister.³⁵¹ Morocco duly held parliamentary elections under

³⁴⁴ Article 87(2) Constitution of Lesotho

³⁴⁵ Hazan "Morocco: Betting on a Truth and Reconciliation Commission" USIP Special Report 165 (July 2006)

³⁴⁶ Laremont "Morocco After the Arab Uprisings: Evolution Rather than Revolution" www.fundforpeace.org
(Date of use: 3 March 2014)

³⁴⁷ Campbell "Morocco in Transition: Overcoming Democratic and Human Rights Legacy of King Hassan II" 38-58

³⁴⁸ Article 20 Constitution of Morocco 1996

³⁴⁹ Article 24 Constitution of Morocco 1996

³⁵⁰ Article 24 Constitution of Morocco 1996

³⁵¹ See Article 47 Constitution of Morocco 2011

the new Constitution in November 2011 and the majority of the seats were won by the Justice and Development Party, headed by Abdelilah Benkirane. And in line with the new Constitution, the King in January 2012 appointed Benkirane as Moroccan Prime Minister.³⁵² If Morocco will continue to efficiently and effectively implement the progressive provisions of the new constitution, it will have at long last a government run by a Prime Minister assuming office on the basis of the will of the people as reflected by the configuration of parliament.

2.4.3.3 Swaziland

Swaziland, like Lesotho, at independence (under King Sobhuza II), was bequeathed unto it a Westminster style Constitution providing for multiparty elections with a monarch as head of state and a Prime Minister, from the leading party in parliament, as head of government. King Sobhuza II was uncomfortable with a constraining constitution and multiparty politics and considered them as “divisive, alien and incompatible with Swazi traditions.”³⁵³ In the years leading to independence, Sobhuza, to protect his hold on power, formed his own political party, the Imbokodvo National Movement, which formed the ruling government at independence. However, in the subsequent election of 1972, although his party won 75 per cent of the vote, another party, the Ngwane National Liberatory Congress (NNLC), won 20 per cent of the vote and gained three seats in parliament.³⁵⁴ This unsettled the King who saw the opposition as making inroads towards power.

In April 1973 Sobhuza II issued a Proclamation suspending the Constitution, banned political parties and trade unions and dissolved parliament. The Proclamation in part stated:

Now, therefore, I Sobhuza II, King of Swaziland, hereby decree that, in collaboration with my Cabinet Ministers and supported by the whole nation, I have assumed supreme power in the Kingdom of Swaziland and that all legislative, executive and judicial power is vested in myself....³⁵⁵

Through the 1973 Proclamation, Swaziland became an absolute monarch in which all power vested in the King, who was accountable to nobody. The Proclamation remained in force until 2005 when King Mswati III, successor to Sobhuza, assented to a new Constitution.

³⁵² <http://www.europeanforum.net/country/morocco> (Date of use: 4 April 2015)

³⁵³ Fombad “The Swaziland Constitution of 2005: Can Absolutism be Reconciled with Modern Constitutionalism?” 93- 115

³⁵⁴ Freedom House “Swaziland: A Failed Feudal State” <http://www.freedomhouse.org/report/special-reports/swaziland-failed-feudal-state> (Date of use: 5 February 2014)

³⁵⁵ Section 3 Proclamation to All My Subject-Citizens of Swaziland, Proclamation No 11 of April 1973

Constitutional analysts consider the 2005 Constitution as hardly an improvement over the post 1973 absolute rule era. As Charles Manga Fombad stated: “The pre-2005 unconstitutional absolutism has now been dressed in a Constitution.”³⁵⁶

The Constitution vests all executive power in the King, and makes him directly in charge of the defence forces; police and correctional services.³⁵⁷ In addition, the King has direct authority to assent to bills, summon and dissolve parliament, receive foreign envoys and appoint diplomats, issue pardons, reprieves or commute sentences, declare state of emergency, confer honours, establish Commissions, and order a referendum.³⁵⁸

The electoral system is based on the traditional system of *Tinkhundla* (constituencies). An *Inkhundla* (singular) is established by the King and consists of one or more chiefdoms which act as nomination areas and constituencies for electing members of parliament to the Lower House (House of Assembly).³⁵⁹ The Constitution states that the King “shall appoint the Prime Minister from among members of the House.”³⁶⁰ King Mswati, however, violated this provision with impunity in 2008 when he appointed Barnabus Dlamini as Prime Minister because Dlamini did not qualify since he was not a member of parliament.³⁶¹

The King reigns as an absolute monarch and, therefore, the elections by the people do not lead to the creation of a government representing the will of the people and accountable to them. It is revealing that in September 2013 Mswati decided that the new name for his system of government will henceforth be called “monarchical democracy.”³⁶²

The foregoing discussion of Lesotho, Morocco and Swaziland indicates that states under a monarch have the general problem of an encroaching monarch. In addition, they struggle to find the perfect balance between a hereditary monarch and vesting executive authority in an elected government led by a Prime Minister. While Lesotho and Morocco (to some extent) seem to be evolving towards finding that balance, in Swaziland the King still reigns as an

³⁵⁶ Supra note 312, p 93- 115

³⁵⁷ Section 64(1) The Constitution of the Kingdom of Swaziland 2005

³⁵⁸ Section 4(3) The Constitution of the Kingdom of Swaziland 2005

³⁵⁹ Section 64(4) Constitution of the Kingdom of Swaziland 2005

³⁶⁰ Section 80(1) and 80(2) Constitution of the Kingdom of Swaziland 2005

³⁶¹ Freedom House “Swaziland: A Failed Feudal State” <http://www.freedomhouse.org/report/special-reports/swaziland-failed-feudal-state> (Date of use: 5 February 2014)

³⁶² Magagula “Monarchical Democracy From Heaven- King” <http://swazilandsolidaritynetworkcanada.wikispaces.com/Monarchical+democracy+from+heaven+%E2%80%93+King+Sept+1%2C+2013> (Date of use: 20 December 2014)

absolute monarch and denying the people the experience of electing their own representatives who will be accountable to them.

2.5 Common Causes of Flawed Elections in Africa

There are many causes of flawed and disputed elections in Africa. Some of them are so blatant and obvious, such as violence, ballot stuffing and distorting results, while others are more subtle and only apparent on careful analysis. This section looks at four of some of the subtle major causes of disputed elections in Africa. These are ethnicity, the simple majority electoral system, partisan military involvement and compromised electoral management bodies. These are not causes in the sense of producing an automatic cause and effect relationship, but simply that where these factors are present, it is more likely than not that an election may be disputed.

2.5.1 Ethnicity

Ethnicity generally rests on three dimensions. First it rests on a list of common attributes such as shared cultural values and practices, shared language, and common historical narratives, myths and legends. Second, and probably more importantly, ethnicity is identified by shared common consciousness of belonging to a particular ethnic community. And finally, ethnicity assumes the existence of the “other,” that is, those who are demarcated as not belonging to the group.³⁶³ It is, for example, difficult to delineate what distinguishes the Hutu and Tutsi ethnic groups in Burundi and Rwanda because they speak the same language, live in the same regions and have a common culture.³⁶⁴

Viewed positively, ethnicity is an instrument of social cohesion, common identity and cultural meaning.³⁶⁵ It should be, however, be noted that ethnicity is not cast in stone but “permeable at the margins.”³⁶⁶ That is, the intensity of ethnic consciousness depends on circumstances of each group and matters or resources at stake as a result of claiming or not claiming that identity.

³⁶³ Young *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* 314

³⁶⁴ Ngaruko and Nkurunziza “Civil War and Its Duration in Burundi”

http://www.academia.edu/529099/Civil_war_and_its_duration_in_Burundi (Date of use: 12 January 2014)

³⁶⁵ See Report of the Truth, Justice and Reconciliation Commission, Vol 1 May 2013

³⁶⁶ Young *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* 320

In pre-colonial times, ethnic groups generally constituted African states. There were no other states than these as these performed all the duties of statehood, with chiefs and their councils or advisors performing all the necessary functions of government.³⁶⁷ This was confirmed by the International Court of Justice (ICJ) in the *Western Sahara* case.³⁶⁸ In this case, the court held that “territories inhabited by tribes or peoples having a social and political organisation were not regarded as terra nullius”³⁶⁹ since they lived under chiefs (wielding sovereign power) competent to represent them.³⁷⁰

Colonialism disrupted the existence of African states as they were known then. The national boundaries created by colonial powers were arbitrary, without regard to existing state boundaries and harmonious existence of the people.³⁷¹ As Garth Abraham has stated, the colonial boundaries inherited by African countries “united those who should be divided and divided those who should be united.”³⁷² The boundaries adopted by colonial powers never respected and reflected the way African states were spread. This is clearer from the well known words of Lord Salisbury in 1890 when commenting on how the territorial boundaries were drawn in Africa by colonial powers:

We have been engaged...in drawing lines upon maps where no white man’s feet have ever trod; we have been giving away mountains and rivers and lakes to each other, but we have only been hindered by the small impediment that we never knew exactly where those mountains and rivers and lakes were.³⁷³

After independence, African states decided to maintain the inherited territorial boundaries under the doctrine of *uti possidetis*. *Uti possidetis* is the international law doctrine to the effect that “colonial frontiers [borders] existing at the date of independence constituted a tangible reality” which all states had to respect.³⁷⁴ However, that did not resolve the ethnic question and in some extreme cases, such as Rwanda and Burundi, there have been mass slaughter of one ethnic group against another. But even in countries where there has not been protracted ethnic violence, ethnicity is a major issue that usually determines election

³⁶⁷ Hansungule “Culture, Governance and African Human Rights in Critical Perspective” 69- 86

³⁶⁸ *Western Sahara Case* ICJ Report 1975 p.12

³⁶⁹ *Ibid* paragraph 80

³⁷⁰ *Ibid* paragraph 81

³⁷¹ Abraham “Lines Upon Maps: Africa and the Sanctity of African Boundaries” 61- 84

³⁷² *Ibid*

³⁷³ *Ibid* 62

³⁷⁴ Shaw MN *International Law* 4th edition 356

outcomes.³⁷⁵ Many African states have not yet designed electoral systems that take into account ethnic diversity and the need for inclusiveness.³⁷⁶ As a result, elections are usually seen as battle grounds between competing ethnic groups for control of the state and resource benefits that go with that. A member of an ethnic group that does not win an election feels excluded and marginalised.

In reference to Nigeria, Kirk-Green, noted that the fear of being dominated and ruled by someone from a different ethnic group permeated the whole society and was perhaps the most widespread collective fear. That is, the greatest fear is not of physical violence but “psychological fear of discrimination, of domination...fear of not getting one’s fair share, of one’s desert.”³⁷⁷ Or as a Kenyan respondent in a research answered:

In Kenya we have a culture that says to help someone who is closer to you, and someone of your tribe is closer to you. So if I vote my tribe he’ll develop my rural area, bring infrastructure there. If I’m looking for employment it is easier for me if my own is at the top.³⁷⁸

Thus, it is assumed that leaders assume power to develop their regions and ethnic groups. Elections therefore become war grounds for ethnic control of the state and, unfortunately, Africa is replete with examples of these. In Nigeria, for example, elections are usually drawn as battles between the North and the South. In Ivory Coast, the electoral impasse of 2011 was generally seen as a conflict between Laurent Gbagbo and his southern people on the one hand and Alassane Outtara and his northern ethnic group on the other hand.³⁷⁹ Gbagbo’s government had in fact gone to the extent of limiting registering northerners as voters and questioning their citizenship, including the citizenship of Outtara.³⁸⁰ In Kenya, both governments of Jomo Kenyatta and Daniel Arap Moi had their ethnic based militias that wreaked havoc on those perceived as political enemies of the presidents.³⁸¹

³⁷⁵ As cited in Jenkins “Ethnicity, Violence, and the Immigrant-Guest Metaphor in Kenya” 1- 21

³⁷⁶ Matlosa K “Survey of Electoral Systems and Reform Imperatives in the SADC Region” EISA Occasional Paper No. 12, 2003

³⁷⁷ As cited in Ibrahim “Nigeria’s 2007 Elections: The Fitful Path to Democratic Citizenship” USIP Special Report 182, 2007

³⁷⁸ Supra note 334, p 1- 21

³⁷⁹ Zounmenou and Lamin “Cote D’Ivoire Post-Election Crisis: Outtara Rules But Can He Govern?” 6- 21

³⁸⁰ Ibid. See also Akindes “The Root Causes of The Military-Political Crises in Cote D’Ivoire” 1-11

³⁸¹ Report of the Truth, Justice and Reconciliation Commission May 2013. See also Branch D and Cheeseman N “Democratisation, Sequencing, and State Failure in Africa: Lessons From Kenya” 1- 26; and Mueller SD “Dying to Win: Election, Political Violence, and Institutional Decay in Kenya.” 99- 117

When elections are framed as ethnic battles for ascent to the state power, it makes it hard for elections to be held in a manner that respects the rules of fairness and transparency. Rival candidates would consider it failing their ethnic group to lose an election, and thus election results in this case inadvertently mark off some groups as failures while others as winners. Those not successful would then have to watch on the margins as their colleagues drench themselves in state prestige and resources. This makes it fertile ground for disputed elections for a lot is at stake. The only way to remedy this is for countries to adopt electoral laws that are inclusive and do not leave out any group feeling excluded.

It should, however, be clarified that while ethnicity has played a major role in voting patterns in many African states, ethnicity is not always the single determinant in the outcome of an election. Economic factors (such as unemployment); anticipation of future patronage rewards; and compulsion have been shown to play a role in election outcomes in Africa.³⁸²

2.5.2 First Past The Post Electoral System

Electoral systems clarify how the electorate choose or recruit their leaders. There are many electoral systems in the world. However, these systems are broadly categorised into two groups: majority systems and proportional representation systems. Majority or majoritarian systems are premised on the view that whoever wins or gains more votes than other competitors wins the election (regardless of how thin the majority is).³⁸³ Proportional systems, on the other hand, are anchored on the view that one should only ascend to power in proportion to the actual votes garnered in an election.³⁸⁴ In relation to parliament, it means that the composition of parliament bears resemblance as much as possible to the proportion of the votes gained by each represented political party. Consequently, where a president is elected through parliament constituted by proportional representation, the president's hold on power will be as weak or as strong as his party's command of the respect of parliament.

The First-Past-The-Post (or simple majority system) is one of the majoritarian systems and is one of the commonly utilised electoral methods in Africa, especially in Anglophone Africa. Under this system, a candidate who gets more votes wins the race. Where an election is

³⁸² See Bratton, Bhavnani and Chen "Voting Intentions in Africa: Ethnic, Economic or Partisan?" 27- 52

³⁸³ See Ndulo "Presidentialism in the Southern African States and Constitutional Restraint on Presidential Power" 769- 802; and Ndulo M "The Democratic State in Africa: The Challenges for Institution Building." 70-101

³⁸⁴ Ibid

contested by several candidates, this raises the possibility of splitting votes and that one candidate may therefore assume power on a razor thin majority. In Zambia, for example, President Mwanawasa was in 2001 elected by a thin majority of 29 percent.³⁸⁵ Where the president or prime minister is elected through parliament, and members of parliament are elected via the simple majority system, there is a potential danger that representation in parliament may not reflect the number of votes received but their regional concentration. Where a party's voters are widely spread across the country or too concentrated in one region, such a party will be under represented in parliament.³⁸⁶

The whole point is that the simple majority system is ill-devised to create political inclusiveness and harmony as the power it gives those who win usually has no relation to the amount of votes received. In societies that are ethnically, socially or politically divided, this almost always leads to disputed elections as the losers lose everything while the winners take all the benefits. As a result, instead of being a tool for clarifying the election of leaders, the simple majority system actually tends to be a danger to representative democracy. After observing the effect of the simple majority in West Africa, Lewis aptly remarked: "The surest way to kill the idea of democracy in a plural society is to adopt the Anglo-American system of first-past-the-post."³⁸⁷

The inadequacy of the simple majority and its contribution towards disputed elections can easily be seen from the 1998 Lesotho elections and the conflict that ensued in the aftermath of the election. The official results of the election indicated that in an 80 member parliament, the Lesotho Congress for Democracy (LCD) got only 60.7 percent of votes but got 78 seats, representing 98.73 percent of seats. The main opposition, the Basotho National Congress (BNC) got 24.4 percent of the votes but only one seat, representing a paltry 1.27 of seats in parliament.³⁸⁸

Clearly the outcome of the election was "unbalanced, unrepresentative and inappropriate" for nurturing democracy in a divided and unstable society.³⁸⁹ Analysts believe that it is this outcome, rather than actual rigging that made the losers feel excluded as their votes

³⁸⁵ Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others Z.R 138 (s.c) L SCZ/EP/01/02/03/2002

³⁸⁶ Hatchard et al *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* 108

³⁸⁷ Ibid 369

³⁸⁸ <http://www.content.eisa.org.za/old-page/lesotho-1998-nationalassembly> (Date of use: 9 January 2014)

³⁸⁹ Southall and Fox "Lesotho's General Elections of 1998: Rigged or de rigeur?" 670

ultimately counted for nothing and therefore disputed the whole election, leading to governmental paralysis.³⁹⁰

2.5.3 The “Military” Playing a Partisan Role

The term “military” is here applied in an omnibus sense to include all categories of armed security wings such as the army, navy, air force, paramilitary, police and intelligence services. The military play a significant role in preserving security, peace, stability and public order, essential ingredients of a credible election. In a democratic society, the military serve under the command of a civilian government. The military does not interfere in the civilian affairs of running government while government as well does not interfere with the military’s operational autonomy.³⁹¹ The military thus refrain from partisan politics while the military is afforded professional and operational autonomy. Striking this balance enables the existence of a viable democratic society built on popular consensus.

In many countries in Africa, the balance that separates the government from the military is not fully developed. As seen above, military coups have been rampant in the past and continue to this day. Military rule, usually maintained by force, is antithetical to rule by consensus.

Apart from cases of military takeovers or coups, perhaps more common are instances where the military wings are co-opted to enable the electoral victory of one political party. In many instances, this is usually the ruling party. There have been a few extreme cases where the military intervened to annul the whole election because their preferred candidate did not win. This was, for example, the case with Nigerian military dictator, Babangida’s annulment of the election of Mashood Abiola in the 1993 Nigerian elections, which were hailed by many observers as the freest and fairest elections conducted in Nigeria.³⁹² The same thing occurred in Algeria in 1992, where the military annulled the election, removed President Chadli Benjedid from office and installed a military government.³⁹³

In several other cases the military would usually play a more subtle partisan role to ensure the election of the incumbent or preferred candidate. During the 2008 Zimbabwean election, for

³⁹⁰ Ibid

³⁹¹ Supra note 349

³⁹² Onunkwo and Okolo “The 2011 Nigerian Elections: An Empirical Review” 54- 72

³⁹³ Young *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* 203

example, the police and army clearly took it upon themselves to victimise and intimidate the opposition and voters.³⁹⁴ Many senior army officers openly campaigned for incumbent president Robert Mugabe and indicated on various occasions that they would not let anyone win against Mugabe. Opposition leader Morgan Tsvangirai was arrested and detained five times within the space of 30 days in the run up to the run-off election.³⁹⁵ Six months before the 2008 Zimbabwean elections, a senior army officer, General David Sigauke was reportedly threatening against any government not led by Mugabe:

As soldiers, we have the privilege to defend this task (of guaranteeing Mugabe and ZANU-PF rule) on two fronts: the first being through the ballot box, and second being the use of the barrel of the gun should the worse come to the worst. I may therefore urge you as citizens of Zimbabwe to exercise your electoral right wisely in the forthcoming election in 2008, remembering that Zimbabwe shall never be a colony again.³⁹⁶

Similar patterns have occurred in many other African countries. In Uganda, to cite another example, during the 2001 and 2006 elections, there was evidence that soldiers harassed, intimidated, arrested and abducted people in order to prevent them from voting.³⁹⁷ The soldiers deployed around the country during elections and in some instances took command of polling stations. This atmosphere, as the Uganda Supreme Court later held, led to “intimidation and undermined the principles of free and fair and transparent elections.”³⁹⁸

Sometimes during elections the military are used for covert operations that usually favour the incumbent government. For example, during the presidential election trial following the disputed 2001 Zambian elections, both Michael Sata and Vernon Mwaanga, who served as the ruling Movement for Multiparty Democracy (MMD) Secretary Generals (or party chief executives) in the run to and during elections, respectively, testified that the ruling party had no resources and depended on the Office of the President (OP)- Special Division (which is the Zambian Intelligence organ) for campaign resources.³⁹⁹ Sata indicated that campaign

³⁹⁴ Masunungure “A Militarized Election: The 27 June Presidential Run-Off” 79-97

³⁹⁵ Tarisayi : “Voting in Despair: The Economic and Social Context” 11-24

³⁹⁶ As cited in Masunungure “Voting for Change: The 29 March Harmonised Elections” 79-97

³⁹⁷ See Kizza Besigye v. Yoweri Museveni Electoral Petition No. 1 of 2001

³⁹⁸ Ibid

³⁹⁹ Anderson Kambela Mazoka and Others vs. Levy Patrick Mwanawasa and Others Z.R 138 (SC) L SCZ/EP/01/02/03/2002

vehicles and bicycles were bought by the OP, while Mwaanga indicated that the OP actually printed 20, 000 copies of the MMD campaign manifesto.⁴⁰⁰

These views were confirmed by the Xaviour Chungu, who at the time of the elections served as the Director General of the OP-Special Division. Chungu indicated that the then president instructed him to raise campaign funds of up to K22 billion but that he only managed to raise about K16 billion. He further indicated that using OP money they bought about 158 vehicles, 1,500 bicycles, 300 bales of salaula (second hand clothes) and boats for the MMD to use during the elections.⁴⁰¹ In such a case, the military (intelligence) was basically used to steal and launder public funds in order to support the ruling party to secure electoral victory.

The partisan participation of the military in elections not only is intimidating to the electorate but unfairly tilts the balance in favour of their preferred candidate or party. A government that assumes authority on the basis of such military support may often lack legitimacy as its actual popularity was not genuinely tested under circumstances that allowed for un-vitiated public consensus. It is, therefore, hardly surprising that such elections are almost always disputed.

2.5.4 Compromised Electoral Management Bodies

Many analysts of African elections tend to focus on what happens on elections day and pay little attention to the institution which organises and conducts the elections. The conduct of elections in many African states is assigned to an election management body or Commission. The Commission can either be ad hoc or permanent. It can also be an embedded department within the executive or it can be an autonomous body.

Electoral commissions since the 1980s and 1990s have played a significant role in advancing democracy. But unfortunately, electoral commissions have also been at the centre of disputed elections in Africa. Many factors account for electoral commission's failure to organise impeccable elections. These include inadequate resources and control over budgets, lack of experience of key staff, and lack of reliable voter roll. These are all serious challenges but when they occur inadvertently, they generally tend to affect the parties to an election in similar fashion.⁴⁰²

It is the perception of the electoral commission as being partisan or biased that usually is more devastating. This usually turns around the autonomy of the commission and how its members or commissioners are appointed. As regards autonomy, many countries now have

⁴⁰⁰ Ibid

⁴⁰¹ Ibid

⁴⁰² Supra note 345, p 59

theoretically autonomous commissions. However, a few countries still consider the conduct of elections as an executive duty and as such the executive still organises and conducts the elections. In Senegal, for example, until 2005, elections have been organised and administered by the ministry of the interior.⁴⁰³ However, since 2005 the ministry of the interior still organises and conducts the elections and the newly created Autonomous National Electoral Commission (*Commission Nationale Electorale Autonome- CENA*) has the simple role of simply monitoring and supervising the interior ministry in the conduct of the elections.⁴⁰⁴

Even where electoral commissions are created as autonomous bodies, there are still challenges on the mode of appointing the commissioners. In some countries, such as Cape Verde, the members are elected directly by the legislature,⁴⁰⁵ while in others, such as Benin, the members are largely nominated by political parties in proportion to their representation in the legislature.⁴⁰⁶ However, in the vast majority, the president appoints commissioners. He may do so unilaterally or in consultation with some other body or with the concurrence of the legislature. This is the case in Zambia and Uganda, for example.

The involvement of the president in appointing commissioners is problematic because he or she is usually an interested party in the outcome of the elections. Several times presidents have used this privilege to “pack the bus” with pliant, sympathetic or partisan members. In Cameroon, for instance, at one time 11 out of 13 commissioners came from the president’s ethnic group.⁴⁰⁷

In Zambia the Electoral Commission of Zambia (ECZ) is established by the Zambian Constitution as an autonomous body tasked with responsibility “to supervise the registration of voters, to conduct presidential and parliamentary elections and to review the boundaries of the constituencies into which Zambia is divided for the purposes of elections to the National Assembly.”⁴⁰⁸ The Commission consists of a chairperson and not more than four other members, appointed by the president and subject to ratification by the National Assembly.⁴⁰⁹ Commissioners are appointed for a term not exceeding seven years, subject to renewals and ratification by the National Assembly.⁴¹⁰ Apart from the chairperson, who is required to simply hold or have held high judicial office, there is no stated minimum professional or ethical standard that the president should consider in appointing commissioners.

Although the requirement for parliamentary ratification may have been intended as a check on the discretion of the president, the fact that the legislature is almost always emasculated

⁴⁰³ Fall “Senegal” in Fall et al “Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy” 167-207

⁴⁰⁴ Ibid

⁴⁰⁵ Fall “Cape Verde” in Fall et al “Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy” 162- 208

⁴⁰⁶ Hounkpe “Benin” in Fall et al “Election Management Bodies in West Africa: A Comparative Study of the Contribution of Electoral Commissions to the Strengthening of Democracy” 12- 48

⁴⁰⁷ Fombad “Election Management Bodies in Africa: Cameroon’s National Elections Observatory” 25- 51

⁴⁰⁸ Article 76(1) Constitution of the Republic of Zambia

⁴⁰⁹ Section 4(1), (2) and (3) Electoral Commission Act 1996

⁴¹⁰ Ibid, section 5(1)

and under the tutelage of the executive means that in reality the president acts “with little or no restraint under a system that, in practice, [is] often equated with authoritarianism.”⁴¹¹ The system of appointing commissioners is therefore, non-inclusive, arbitrary and poorly geared towards the building of national cohesion, transparency and inspiring a sense of confidence in stakeholders.

This contrasts sharply with the situation under the South African Constitution. Under the South African Constitution, the President appoints members of the commission on recommendation by Parliament. Parliament recommends persons for appointment who have been nominated by a parliamentary committee proportionally composed of all parties represented in parliament.⁴¹² Once appointed, the commissioners are only removable on grounds of misconduct, incapacity or incompetence, supported with a finding to that effect by a parliamentary committee and a resolution to that effect being supported by the majority of parliament.⁴¹³

2.6 Summary

Elections are a means by which the eligible citizens choose leaders to preside over public affairs as a government. This ensures that public consensus is the basis for assuming office. Elections also serve as an instrument voters wield to hold government accountable. This is because the electorate can use this power to punish an ill-performing government or reward good performance.

Africa has gone through several phases in an effort to build genuine electoral democracy. Soon after independence, most African countries descended into military and one-party dictatorships. However, this changed with the wind of democratisation in the late 1980s and 1990s which led to the demise of de jure one-party regimes. This wave of change, however, did not resolve many old problems regarding the holding of genuine elections as they still occur.

There are structurally three broad systems under which heads of government or state are elected in Africa. These are the presidential, parliamentary and ‘monarchical’ systems. Under the presidential system, the president is elected directly by the people while under the parliamentary system, the president or prime minister is elected by members of the legislative branch of government. In case of the monarchical system, a hereditary monarch is head of state, leaving only room for the possibility of electing a prime minister as head of government. The examples of Swaziland, Morocco and Lesotho above clearly show that this is not easy to achieve.

The chapter also discussed factors that have had a negative bearing on the conduct of presidential elections in Africa. These are ethnicity; the simple majority electoral system; the military engaging in partisan politics; and compromised electoral management bodies.

⁴¹¹ Supra note 345, p 59

⁴¹² See Sections 193(4) and 193(5) Constitution of South Africa 1996

⁴¹³ See section 194(1) Constitution of South Africa 1996

The next chapter will discuss the challenges associated with judicial determination of presidential election disputes domestically.

Chapter Three

The Challenges of Judicial Determination of Presidential Election Disputes in Domestic Courts

3.1 Introduction

Where elections have been vitiated by anomalies and results are disputed, as is often the case in Africa, aggrieved parties have looked to the judiciary as an institution of last hope to seek redress. The judiciary is thus faced with the unenviable task of determining the ultimate outcome of the poll. Consequently, in order to protect the right to choose in an election, and to promote and safeguard democracy, the judiciary must be competent, honest, learned and independent.⁴¹⁴ Such a judiciary plays a transformative role in democracy as an impartial referee or umpire in the democratic game.⁴¹⁵

This chapter looks at how African courts have handled presidential election disputes. It first presents an overview of the role of the judiciary in Africa in resolving disputed presidential elections. It identifies common patterns that characterise how the courts dispose of disputed presidential elections in Africa, all of which are dissatisfactory and a disincentive for the further growth and consolidation of democracy. The chapter further looks at the likely causes of judges rendering such decisions and the consequences of those decisions.

3.2 Overview of the Role of Judiciary in Election Disputes

Elections affirm the sovereignty of the people. Through elections, people constitute government and hold government accountable. But as seen, the history of elections in Africa has been disappointing. Democratic elections have been rare and disputed elections have been the norm.

Although there have been some improvement since the democratic wave of the 1980s and 1990s, sham elections are still prevalent across the continent. In Nigeria, for example, all presidential elections since the return to civilian rule in 1999 have been disputed. The EU

⁴¹⁴ Ndulo "Rule of Law, Judicial Reform, Development and Post Conflict Societies" <http://inbabyproducts.com/tag/rule-of-law-programs-judicial-reform-development-and-> (Date of use: 11 December 2014). See also Ndulo, "Judicial Reform, Constitutionalism and the Rule of Law in Zambia: From a Justice System to a Just System." 1-27

⁴¹⁵ Gloppen "How to Assess the Political Role of the Zambian Courts" <http://www.cmi.no/publications/publication/?1927=how-to-assess-the-political-role-of-the-zambian> (Date of use: 12 November 2014)

observer mission to Nigeria, for instance, condemned the 2007 Nigerian elections in the following terms:

The 2007 state and federal elections fell far short of basic international and regional standards for democratic elections. They were marred by very poor organisation, of essential transparency, widespread procedural irregularities, substantial evidence of fraud, widespread voter disenfranchisement at different stages of the process, lack of equal conditions for political parties and candidates and numerous incidents of violence. As a result the process cannot be considered to have been credible.⁴¹⁶

In a similar fashion, all election observer missions to Zambia's 2001 elections, both local and international, concluded that the elections were far from being free and fair.⁴¹⁷ The EU in fact took a rare stand to waive the immunity of the head of the observer mission, Michael Meadowcroft, to testify for the opposition in the ensuing election petition.⁴¹⁸

Steve Huefner categorises causes of disputed or failed elections into two: fraud and mistake.⁴¹⁹ Fraud means the deliberate manipulation of the system unfairly, often by parties, candidates or their supporters.⁴²⁰ On the other hand, mistake is the unintentional disturbance of the election process, usually caused by those administering the election.⁴²¹ Whether by mistake or fraud, failed elections deny the people their right to constitute government according to their will in a transparent way. Distinguished Nigerian law scholar, Ben Nwabueze, considers this as "robbery of the right of the people to participate in their own government" and "therefore the greatest offence that can be committed against the constitution and the people."⁴²² This is a correct observation because failed elections have the effect of taking away the consent of the people as the basis of the right to govern.

⁴¹⁶ EU Election Observation Mission Nigeria *Final Report: Presidential, National Assembly, Gubernatorial and State House of Assembly Elections* (2007)

⁴¹⁷ See Coalition 2001 *December 27 2001 Tripartite Elections Preliminary Report* (2002); Interim Statement by the SADC Parliamentary Forum Election Observation Mission on the Zambian Presidential, Parliamentary and Local Government Elections (2001); and EU Electoral Observation Mission to Zambia, *Final Report 27 December 2001 Presidential, Parliamentary and Local Elections* (2002)

⁴¹⁸ See the case of Anderson Kambela Mazoka and Others vs. Levy Patrick Mwanawasa and Others Z.R 138 (S.C) L SCZ/EP/01/02/03/2002

⁴¹⁹ Huefner "Remedying Election Wrongs" 265- 326

⁴²⁰ Ibid

⁴²¹ Ibid

⁴²² Nwabueze "Nature and Forms of Elections Rigging"

http://www.nigerdeltacongress.com/articles/nature_and_forms_of_elections_ri.htm (Date of use: 20 May 2014)

Almost all African constitutions or electoral laws recognise that things can go wrong with elections and provide for the possibility of redress. This is because election wrongs or allegations of wrongs often have a bearing on the legitimacy of the electoral process. A fair and transparent redress mechanism, which commands respect of the people lends legitimacy and credibility to the election and “serves as a peaceful alternative to violent post-election responses.”⁴²³ On the other hand, failure to put in place an effective electoral dispute mechanism “can seriously undermine the legitimacy of an entire electoral process.”⁴²⁴

This chapter focuses on the post-election redress mechanisms available in the case of disputed presidential elections. It discusses how courts have handled complaints that seek to correct election results (in whole or in part) or indeed to void the whole election. In almost all African countries, this is a task entrusted to the judiciary. The difference only seems to be at what stage in the judicial hierarchy the litigation is commenced. In countries such as Nigeria,⁴²⁵ Namibia,⁴²⁶ and Kenya⁴²⁷ (prior to the adoption of the 2010 constitution) cases begin in lower courts and appealed ultimately to the Supreme Court. In other countries such as Ghana,⁴²⁸ Zambia,⁴²⁹ Kenya⁴³⁰ (since 2010), and Uganda⁴³¹ presidential election petitions are tried directly by the Supreme Court, allowing for no appeal.

Tanzania seems to be the only African country with a constitutional provision that ousts the jurisdiction of the judiciary from hearing challenges to presidential elections. The Tanzanian constitution categorically states:

⁴²³ Vickery “Understanding, Adjudicating, and Resolving Election Disputes” 1-12

⁴²⁴ The Carter Centre, *Guide to Electoral Dispute Resolution* 3

⁴²⁵ In Nigeria presidential election petitions are commenced in the Court of Appeal and appealable to the Supreme Court. See Article 139 of the Constitution of the Federal Republic of Nigeria 1999.

⁴²⁶ In Namibia such cases are triable in the High Court. The election petition following the 2009 elections, in the case of Rally for Democracy and Progress and others vs. Electoral Commission of Namibia and Others Case No. A01/2010, for example, was heard and determined by the High Court.

⁴²⁷ The case of Mwai Kibaki vs. Daniel Toroitichi Arap Moi Civil Appeal No. 172 of 1999 commenced in the High Court and reached the highest court then, the Court of Appeal, by way of an appeal.

⁴²⁸ In Ghana presidential election disputes are settled by the Supreme Court at first instance. See for example, the case of Nana Addo vs. John Dramani No J2/6/2013 Judgment of 29 August 2015.

⁴²⁹ See Article 41 Constitution of the Republic of Zambia

⁴³⁰ By Article 140 of the Constitution of Kenya 2010, only the Supreme Court has the competence to hear and determine a presidential election petition.

⁴³¹ Article 104 Constitution of the Republic of Uganda

When a candidate is declared by the Electoral Commission to have been duly elected in accordance with this Article, then, no court of law shall have any jurisdiction to inquire into the election of that candidate.⁴³²

Such a provision can only assume that elections will always be impeccable, something which is of course at variance with the African experience. This is a blatant denial of the possibility of seeking judicial redress in case of a grievance. Even where grievances may be ill-founded, the offer of a possible judicial remedy provides a peaceful means of venting frustration instead of resorting to violent protests.

Adjudication or judicial determination of election disputes, in order to be of any significance, must offer aggrieved persons a genuine possibility of redress for their grievances. In order to do this, Huefer identifies at least three factors that need to be embedded in the adjudication process. First of all, the process must be fair and perceived as fair by litigants and the public.⁴³³ This requires that the process treats the parties to a dispute equally and offers them an equal opportunity to present their cases. It also requires that the process awards resolutions impartially and meritoriously. A process that only decides in favour of the incumbent or incumbent party, whatever the strength of evidence presented against it cannot be considered to be fair. Second, the process must be transparent, that is, when an election is disputed and a court adjudicates on the dispute, it must do so in a way that is understandable (based on prior existing rules) and fair analysis of evidence as relates to the competing claims.⁴³⁴ Finally, the process must be prompt and determine cases with finality.⁴³⁵ As is often said, justice delayed is justice denied.

Before moving to the next session, which looks at the challenges associated with adjudication of presidential election disputes in Africa, the art of adjudication will be briefly discussed. The traditional view of adjudication has been that judges simply re-state the law as enacted by the legislature and exercise no discretion. Their decisions, therefore, are nothing more than a discovery of the intention of the legislature.⁴³⁶ This, however, is now recognised as an oversimplification as the adjudication process is inherently imbued with discretion.

⁴³² Article 41(7) Constitution of the United Republic of Tanzania

⁴³³ Huefer "Remedying Election Wrongs"

⁴³⁴ Ibid

⁴³⁵ Ibid

⁴³⁶ Freedman *Lloyd's Introduction to Jurisprudence* 1378 and 1389

Hart, for example, considers the law to be open textured.⁴³⁷ This means that that, “when a judge confronts a rule he is not met by a bloodless category but by a living organism which contains within itself value choices.”⁴³⁸ Hart offers at least three reasons for this discretion: first, that it is due to indeterminacy or ambiguity of language or words; second, that rules usually use only general standards (e.g., “reasonableness,” and “just”) which need to be related to or distinguished from specific circumstances; and third, the indeterminacy inherent in the doctrine of precedents where judges have to relate current decisions with prior decisions.⁴³⁹

Although Ronald Dworkin has virulently criticized Hart’s theory of adjudication, for purposes of this research it is sufficient to note that Dworkin still recognises that there is discretion in adjudication, albeit constrained by law. What Dworkin does is to distinguish between “weak” and “strong” discretion.⁴⁴⁰ Strong discretion is where one is not bound by any standards set by the authority in question, while weak discretion is constrained by standards.⁴⁴¹ Dworkin gives as an example the differences between a sergeant who is ordered to pick five men for patrol and another sergeant who is ordered to simply select his five most experienced men for patrol. The sergeant who is ordered to simply select five men for patrol is considered to have strong discretion compared to the one who has to choose five most experience men as this is weak discretion.⁴⁴² As can be seen, Dworkin considers that judges only have weak discretion as they are constrained by law.

The point is that adjudication is a value laden process and judges have to choose between competing claims and values. As shall be seen in the next section, African judges have almost unanimously chosen to undermine democracy, or in the telling words of Muhammadu Buhari, have chosen to “stunt the growth of democracy.”⁴⁴³

⁴³⁷ Hart *The Concept of Law* 128

⁴³⁸ Freedman *Lloyd’s Introduction to Jurisprudence* 1378 and 1378

⁴³⁹ *Supra* note 24, p 124-141

⁴⁴⁰ *Supra* note 25, p 1398

⁴⁴¹ *Ibid*

⁴⁴² *Ibid*

⁴⁴³ Anya “INEC leaders corrupt, judiciary partial-Buhari” <http://myondostate.com/w3/inec-leaders-corrupt-judiciary-partial-buhari/> (Date of use: 23 May 2014)

3.3 Challenges Associated With Domestic Adjudication of Presidential Elections Disputes in Africa

This section discusses the record of African courts in adjudicating disputed presidential elections. Sifting through the judgements, common threads or patterns emerge that disappointingly negate the advancement of democracy. The four patterns discussed here are:

- a) All cases are decided in favour of the incumbent candidate, candidate sponsored by the ruling party, or the presumptive winner;
- b) Many cases are dismissed on minor procedural technicalities without consideration of merits or there is a misapplication of the substantial effect rule;
- c) In some countries resolution of disputes is inordinately delayed so as to render the whole process nugatory; and
- d) Judges simply fail to address the issues presented before them by constraining themselves from making appropriate decisions.

3.3.1 All Judgments go in favour of the status quo

One of the most notable trends in decisions on disputed presidential elections is that all decisions of the courts tend to serve one purpose that is, maintaining the status quo. The decisions are always given in favour of the incumbent, the candidate sponsored by the incumbent party or the presumptive winner of the election. This seems, inter alia, to stem from judges' misconstrued understanding of their role as that of ensuring political stability than deciding cases fairly, according to the facts presented to them, in line with the applicable law. This seems to be the overriding driving force in adjudication, impelling judges to uphold all elections that are brought in litigation for their determination. Judges have often categorically stated this, without the slightest remorse. For example, in the judgement following the petition to Ghana's December 2012 elections, the Supreme Court stated:

For starters, I would state that the judiciary in Ghana, like its counterparts in other jurisdictions, does not readily invalidate a public election but often strives in public interest, to sustain it.⁴⁴⁴

As can be seen, "striving" to uphold an election is not a judicial role but a political decision. This means, even before the case is presented, the judiciary is only prepared to preserve the

⁴⁴⁴ See the majority judgment of Atuguba JSC in *Nana Addo Dankwa-Addo and others vs. John Dramani Mahama and others* No.J2/6/2013 Judgement of 29 August 2013 P.40

election results that have been announced. As a result, any discrepancies are most likely to be explained away as inconsequential or, as discussed below, “not substantial.” It is, therefore, hardly surprising that despite the African continent being replete with sham elections, the judiciary, when called upon to adjudicate, has always (except for the Ivory Coast’s Constitutional Council in 2011 discussed further below) upheld these disputed elections, as the table below indicates.

Table 1

Notable Presidential Election Petitions in Africa

Country	Date of Election	Name of Case or main contenders	Name of court deciding	Beneficiary of decision
Cameroon	October 2004	John Fru Ndi vs. Paul Biya (incumbent)	Supreme Court of Cameroon	Paul Biya (incumbent)
	October 2011	John Fru Ndi vs. Paul Biya (incumbent)	Supreme Court of Cameroon	Paul Biya (incumbent)
Ivory Coast	November 2010	Laurent Gbagbo (incumbent) vs. Alassane Outtara	Constitutional Council	Laurent Gbagbo (incumbent)
Democratic Republic of Congo	November 2006	Jean-Pierre Bemba vs. Joseph Kabila (incumbent)	Supreme Court of Justice	Joseph Kabila (incumbent)
	December 2011	Etienne Tshisekedi vs. Joseph Kabila (incumbent)	Supreme Court of Justice	Joseph Kabila (incumbent)
Egypt	June 2012	Ahmed Shafiq vs. Mohamed Morsi (presumptive winner)	Constitutional Court	Mohamed Morsi (decision was never rendered and overtaken by events after Morsi was deposed)
Ethiopia	May 2010	Beyere Petros vs. Meles Zenawi (incumbent)	Supreme Court	Meles Zenawi (incumbent)
Gabon	September 2009	Pierre Mamboundou vs. Ali Bongo Ondimba (incumbent)	Constitutional Court	Ali Bongo Ondimba (incumbent)
Ghana	December 2012	Nana Addo Dankwa Akufo-Addo vs. John Dramani Mahama (incumbent)	Supreme Court	John Dramani Mahama (incumbent)
Kenya	December	Harun Mwau vs. Daniel Toroichi	High Court/Court of	Daniel Toroitichi Arap Moi (incumbent)

	1992	Arap Moi (incumbent)	Appeal	
	December 1992	Kenneth Matiba vs. Daniel Toroitichi Arap Moi (incumbent)	High Court/Court of Appeal	Daniel Toroitichi Arap Moi (incumbent)
	December 1997	Mwai Kibaki vs. Daniel Toroitichi Arap Moi (incumbent)	High Court/Court of Appeal	Daniel Toroitichi Arap Moi (incumbent) Uhuru Kenyatta
	March 2013	Raila Odinga vs. Uhuru Kenyatta (presumptive winner and supported by incumbent party)	Supreme Court	Uhuru Kenyatta (Declared winner)
Malawi	May 2004	Gwanda Chakuamba/Aleke Banda vs. Bingu Wa Mutharika (incumbent)	High Court	Bingu Wa Mutharika (case withdrawn and one of the litigants appointed into government)
Namibia	November 2009	Hidipo Livius Mamulanya vs. Hefikepunye Pohamba (incumbent)	High Court	Hefikepunye Pohamba (incumbent)
Nigeria	April 2007	Atiku Abubaka vs. Umaru Musa Yar'adua (candidate for incumbent party)	Court of Appeal/Supreme Court	Umaru Musa Yar'adua (candidate for incumbent party)
	April 2007	Muhammadu Buhari vs. Umaru Musa Yar'adua (candidate for incumbent party)	Court of Appeal/Supreme Court	Umaru Musa Yar'adua (candidate for incumbent party)
	April 2003	Chukuemeka Odumegu Ojukwu vs. Olusegun Obasanjo (incumbent)	Court of Appeal/Supreme Court	Olusegun Obasanjo (incumbent)
	April 2003	Muhammadu Buhari vs. Olusegun Obasanjo (incumbent)	Court of Appeal/Supreme Court	Olusegun Obasanjo (incumbent)
	April 2003	Obafemi Awolowo vs. Shehu Shagari (incumbent)	Supreme Court	

				Shehu Shagari (incumbent)
	August 1983	Waziri Ibrahim vs. Shehu Shagari (incumbent)	Supreme Court	
	August 1983	Obafemi Awolowo vs. Shehu Shagari (incumbent party candidate)	Supreme Court	Shehu Shagari (incumbent)
	August 1979			Shehu Shagari (incumbent party candidate)
Sierra Leone	November 2012	Julius Maada Bio vs. Ernest Bai Koroma (incumbent)	Supreme Court	Ernest Bai Koroma (incumbent)
Togo	March 2010	Jean Pierre Fabre vs. Faure Gnassingbe (incumbent)	Constitutional Court	Faure Gnassingbe (incumbent)
Uganda	February 2006	Kizza Besigye vs. Yoweri Kaguta Museveni (incumbent)	Supreme Court	Yoweri Kaguta Museveni (incumbent)
	March 2001	Kizza Besigye vs. Yoweri Kaguta Museveni (incumbent)	Supreme Court	Yoweri Kaguta Museveni (incumbent)
Zambia	November 1996	Dean Mung'omba vs. Fredrick Chiluba (incumbent)	Supreme Court	Fredrick Chiluba (incumbent)
	December 2001	Anderson Kambela Mazoka vs. Levy Patrick Mwanawasa (candidate for incumbent party)	Supreme Court	Levy Patrick Mwanawasa (candidate for incumbent party)
Zimbabwe	July 2013	Morgan Tsvangirai vs. Robert Gabriel Mugabe (incumbent)	Constitutional Court	Robert Gabriel Mugabe (case was withdrawn but the court still went ahead to issue a judgment and declared the election free and fair)
	March 2008	Morgan Tsvangirai vs. Robert Gabriel Mugabe (incumbent)	High Court	Robert Gabriel Mugabe

Morgan Tsvangirai vs. Robert Gabriel Mugabe	Robert Gabriel Mugabe
March 2002	High Court/Supreme Court

Source: Compiled by author from various court cases

When that happens, the process of adjudication loses meaning. Adjudication is ideally meant to offer litigants a formal method of taking part in the decision making of the court through presenting their proofs and reasoned arguments for a decision in their favour.⁴⁴⁵ Judges should, therefore, only reach a decision after hearing presentation of proofs from both sides of the case and make a determination according to the strength of the evidence laid. As Lon Fuller stated, “participation through reasoned argument loses its meaning if the arbiter of the dispute is inaccessible to reason because he is...hopelessly prejudicial.”⁴⁴⁶

Although Ivory Coast’s Constitutional Council decision in 2010 is the only available judicial decision to interfere and reverse announced results, its effect is the same as other decisions that uphold disputed elections as that decision was made in favour of the incumbent, President Laurent Gbagbo, who had clearly lost the election.⁴⁴⁷ Circumstances of this case are revealing.

After years of conflict and instability, Ivory Coast finally held elections in 2010. The first round did not produce an outright winner, leading to a run-off election pitting incumbent Laurent Gbagbo and main opposition candidate Alassane Dramane Outtara.⁴⁴⁸ The chairperson of the Independent Electoral Commission, Youssouf Bakayoko, announced Outtara as winner, with 54.1 percent of votes against Gbagbo’s 45.9 percent. Gbagbo made a prompt appeal to the Constitutional Council to annul the election of Outtara based on claims that elections had been rigged in the Northern stronghold of Outtara. Without giving audience to the other party, the Constitutional Council hastily invalidated about 600,000 votes from Outtara’s stronghold and declared Gbagbo as winner of the election with 51.45 percent.⁴⁴⁹ Some of the grounds on which the court based its decision to annul the election of Outtara are

⁴⁴⁵ Fuller “The Forms and Limits of Adjudication” 353- 409

⁴⁴⁶ Ibid

⁴⁴⁷ See Verdict of the Constitutional Council of Cote D’Ivoire of December 3, 2010

⁴⁴⁸ Zounmenou and Lamin “Cote D’Ivoire’s Post-Electoral Crisis: Outtara Rules but Can He Govern?” 6- 21

⁴⁴⁹ Ibid

clearly spurious. For example, the Court indicated the fact that the results were announced from a hotel instead of the offices of the Independent Election Commission was suspicious; and that the results were not announced within the prescribed time of three days.⁴⁵⁰ There was actually no evidence presented to the court in support of the serious claims of ballot stuffing and tempering with results. It is, therefore, difficult to see how the court reached a prompt decision to annul Outtara's election within hours, without affording the other party an opportunity to present its case.

The recent Kenya Presidential petition perhaps better epitomises a judiciary willing to go to the extent of legislating and re-writing the Constitution in order to uphold an election. This was in the election petition brought by losing presidential candidate Raila Odinga against the election of Uhuru Kenyatta in the March 2013 elections.⁴⁵¹ The Kenyan Constitution enacted in 2010, under which the election was held required in part, that only a candidate who had garnered "more than half of all votes cast in the election" shall be declared as president.⁴⁵² The former Constitution replaced in 2010 had simply required the winner to be the candidate "who receives a greater number of valid votes in the presidential election than any other candidate."⁴⁵³

Following the election, the Independent Electoral and Boundaries Commission (IEBC) announced Uhuru Kenyatta as the outright winner, with 6, 173, 433 votes out of a total 12,338,667 votes (50.07 percent of the votes), while Raila Odinga, the main challenger had received 5,340,546 votes (43.31 percent). However, the percentage of which Uhuru was declared winner was based on the number of valid votes, contrary to the Constitutional provision that required it to be based on "all votes cast in the election." The importance of the difference is that if the computation is based on the percentage of all votes cast, then that would take into account all votes, that is, including those declared invalid. The consequence would have been that Uhuru would have had less than 50 percent of overall votes to prevent a run-off and, therefore, he would not have been declared winner of the election.⁴⁵⁴ Purporting to be interpreting the Constitution purposefully, the Supreme Court held that "all votes cast in

⁴⁵⁰ Verdict of the Constitutional Council of Cote D'Ivoire of December 3, 2010

⁴⁵¹ Raila Odinga vs. The Independent Electoral and Boundaries Commission and others Supreme Court Petition No. 5,3 and 4 of 2013

⁴⁵² Article 138(4)(a) Constitution of the Republic of Kenya 2010

⁴⁵³ Raila Odinga vs. The Independent Electoral and Boundaries Commission and others Supreme Court Petition No. 5,3 and 4 of 2013 para.40

⁴⁵⁴ Ibid, para. 6, 20, 22and 283

the election” actually “refers only to valid votes cast”, but does not include rejected votes.⁴⁵⁵ If this is correct, why then did the framers of the constitution, and affirmed by the people in a referendum, in 2010 deliberately and consciously change the language of this provision? This approach obviously altered the language of the framers of the Constitution and effectively meant the judiciary clothed itself in a legislative role. It is an approach which assumes that the change of wording in the Constitution from “valid votes” to “all votes cast” was a mistake and not really what the framers of the constitution wanted. In other words, the framers of the constitution did not mean what they wrote.

As the Nigerian Supreme Court correctly observed, it “is not the duty of a judge to interpret a statute to avoid its consequences.”⁴⁵⁶ The further advice of the Nigerian Supreme Court is apt here:

The consequences of a statute are those of the legislature, not the Judge. A Judge who regiments himself to the consequences of a statute is moving outside the domain of statutory interpretation. He has by that conduct engaged himself in morality which may be against the tenor of the statute and therefore not within his judicial power. In the construction of a statute, the primary concern of a Judge is the attainment of the intention of the legislature. If the language used by the legislature is clear and explicit, the Judge must give effect to it because in such a situation, the words of the statute speak the intention of the Legislature.⁴⁵⁷

It could also be argued that by framers of the constitution requiring “all votes cast” to be considered, they wanted to put the right to choose in an election on the same level as other civil and political rights such as the right to freedom of religion which not only includes the right to profess a religion but inherent in it is also the right not to profess or belong to any religion. Similarly, the right to vote or choose obviously includes the right to out-rightly reject any or all candidates offering themselves in an election. Although some rejected votes could be due to human error or illiteracy, there is always a possibility of votes deliberately disfigured so as not to be a vote for any of the names on the ballot paper. If that is the case, then it should be perfectly legitimate to take into account the *negative* choice of those whose votes have been rejected by being *wrongly* marked when computing the national outlook of the election result. This is more so considering that the constitution categorically required that

⁴⁵⁵ Ibid, para. 285

⁴⁵⁶ *Amaechi vs. Independent National Electoral Commission and Others* The Supreme Court of Nigeria S.C. 252/2007 [Judgment of 18 January 2008] p 46

⁴⁵⁷ Ibid

to be the case. It is respectfully submitted that interpreting the provision as it is written in the Constitution would not have led to any absurdity. There was, therefore, no need for the judiciary to tamper with the language of the Constitution in order to sustain the election.

3.3.2 Sacrificing Substantive Justice for Procedural Technicalities and Misapplication of the Substantial Effect Rule

Adjudication is a formal and institutionalised method of reasoned (rational) conflict resolution.⁴⁵⁸ Its goal is to settle disputes fairly and on the basis of applicable laws. In order to decide cases fairly and render substantive justice, courts need procedural or technical rules to guide the handling of the cases before them. In a way, it can be said that courts fly on two wings of rules: substantive and technical or procedural rules. Those rules that apply to the fairness or merits of the case are considered substantive rules and those that govern the manner of resolving a dispute are considered technical or procedural.⁴⁵⁹

Procedural rules and technicalities are manifestly “handmaids rather than mistresses”⁴⁶⁰ of substantive justice. These technical rules are instruments available to the judiciary to help render substantive justice and are therefore not ends in themselves. This was compellingly stated by Lord Penzance in 1878 thus:

Procedures is but the machinery of the law after all- the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve.⁴⁶¹

Although this distinction is obvious in theory, it is usually not so in practice, as the British legal historian, Holdsworth, aptly observed:

One of the most difficult and one of the most permanent problems which a legal system must face is a combination of a due regard for the claims of substantial justice with a system of procedure rigid enough to be workable. It is easy to favour one quality at the expense of the other, with the result that either all system is lost, or there is so elaborate and technical a

⁴⁵⁸ Fuller “The Forms and Limits of Adjudication” 353- 409

⁴⁵⁹ Morrison, Geary and Malleson *Common Law Reasoning and Institutions* 36

⁴⁶⁰ Clark “The Handmaid of Justice” 298

⁴⁶¹ Henry J.B. Kendall and Others vs. Peter Hamilton[1878]4.AC 504

system that the decision of cases turns almost entirely upon the working of its rules and only occasionally and incidentally upon the merits of the cases themselves.⁴⁶²

In modern societies, people submit their conflicts to courts in order that courts may look at their merits, without unduly being fettered by technicalities, and have the cases decided fairly. Judges, therefore, have a duty to do substantive justice. In some countries, this has been made a Constitutional norm. The Constitution of Kenya, for example, requires that “justice shall be administered without undue regard to procedural technicalities.”⁴⁶³

A review of presidential petitions across Africa, however, reveals a disappointing record of courts that “shy away from this sacred duty by hiding behind technicalities.”⁴⁶⁴ Often presidential petitions have been struck out by courts on flimsy and curable technicalities, without considering the merits of the case. When an aggrieved petitioner is sent away from the court, without consideration of merits, that often shatters their confidence in the justice system and negates both the rule of law and consolidation of democracy.⁴⁶⁵ No one has captured this better than American Supreme Court Judge, Stevens J, in his dissenting judgement in the presidential election dispute of 2000 (*Bush vs. Gore*) which the majority largely resolved on a controversial technicality without considering merits of the case:

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law....One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year’s presidential election, the identity of the loser is perfectly clear. It is the Nation’s confidence in the judge as an impartial guardian of the rule of law.⁴⁶⁶

Where judges render decisions without much regard for substantive justice, as retired Tanzanian High Court Judge James Mwalusanya aptly stated, “the people will offer the verdict and the judiciary will find itself without any credible support.”⁴⁶⁷ This in effect negatively affects the consolidation of democracy in a country. As Julius Nyerere, first

⁴⁶² Holdworth *History of English Law* 251

⁴⁶³ Article 159(2)(d) Constitution of the Republic of Kenya 2010

⁴⁶⁴ Ugochukwu “Election Tribunals: Has Anything Changed?”

<http://www.utexas.edu/conferences/africa/ads/1164.html> (Date of use:21 September 2014)

⁴⁶⁵ Ibid

⁴⁶⁶ See dissenting opinion of Steven J in *Bush et al vs. Gore et al* 531-2000 Decision of December 12 2000

⁴⁶⁷ Mwalusanya “Checking the Abuse of Power in Democracy: The Tanzanian Experience” in Kijo-Bisimba and Peter *Justice and Rule of Law in Tanzania: Selected Judgments and Writings of Justice James L. Mwalusanya and Commentaries* 587

President of Tanzania warned, unless judges do their work properly, “none of the objectives of our democratic society can be implemented.”⁴⁶⁸

Below is a discussion of case examples of how the judiciary in Africa has usually avoided doing substantial justice in presidential election cases and dismissed them on flimsy procedural technicalities.

3.3.2.1 *Mwai Kibaki Vs. Daniel Toroitichi Arap Moi Court of Appeal Civil Application No. 172 [Election Petition No.1of 1998]*

This was a presidential election petition brought by then main opposition candidate Mwai Kibaki against the election of President Daniel Arap Moi, following Kenya’s 1997 elections. Mwai had received 1,895,527 votes while Moi got 2,440,801 votes, according to official results.⁴⁶⁹ Mwai brought an action to void the election for several electoral malpractices violating electoral rules. The petition, however, was thrown out on procedural technicalities to do with the service of the petition.

The relevant rule on serving petitions stated that:

(1) Notice of presentation of a petition, accompanied by a copy of the petition, shall within ten days of the presentation of the petition, be served by the petitioner on the respondent

(2) Service may be effected either by delivering the notice and copy to the advocate appointed by the respondent under Rule 10 or by posting them by a registered letter to the address given under Rule 10 so that, in ordinary course of post, the letter would be delivered within the time above mentioned, or if no advocate has been appointed, or such address has been given, by a notice published in the Gazette stating that the petition has been presented and that a copy of it may be obtained by the respondent on application at the office of the Registrar.⁴⁷⁰

The petitioner had served the petition by way of publication in the government Gazette, since the respondent had not furnished details of his advocates as provided for in the rule. The petitioner did not effect personal or direct service because the respondent, as president “is surrounded by a massive ring of security which is not possible to penetrate.”⁴⁷¹

⁴⁶⁸ Ibid 582

⁴⁶⁹ Mwai Kibaki vs. Daniel Toroitichi Arap Moi Court of Appeal Civil Application No. 172 [Election Petition No.1of 1998]

⁴⁷⁰ Ibid, p.8

⁴⁷¹ Ibid p.18

The court held that the rule did not compel the respondent to provide contact details of his advocates. According to the court, service through publication in Gazette would only apply if the option of personal service, service through advocates and/or registered mail had been attempted and failed. Only then could a petition be presented by way of publication in the Gazette, and because this was not done, then the petition failed and the court dismissed it for improper service.⁴⁷²

In Kenya, this was not an isolated incident but was a systematic way the judiciary took to killing off presidential election petitions without hearing the merits. For example, following the 1992 presidential elections, losing opposition candidate, Kenneth Matiba brought a petition challenging the election of Daniel Arap Moi.⁴⁷³ However, before the election Matiba became physically incapacitated and unable even to write, and, therefore, unable to personally sign the election petition as required by the rules of service. The petition was signed by his wife, who he had given power of attorney. The court, however, struck the petition for failure to sign the petition personally by the petitioner.⁴⁷⁴

3.3.2.2 Rally for Democracy and Progress and others vs. Electoral Commission of Namibia and others [High Court] Case No.A01/2010

This was an election petition brought by the opposition following the 2009 presidential and parliamentary elections in Namibia. The petition sought to void the presidential election on stated grounds.⁴⁷⁵ Section 10 of the Electoral Act (1992) required that election petitions could only be presented within 30 days of the results being announced. The petitioners presented their petition on the 30th day at 1630hrs and, therefore, within the statutory requirement. The Registrar of the High Court accepted the petition. However, a rule of court did not allow filing of process any day after 1500hrs. Because the petition was filed after 1500hrs, the court held that the petition was invalid for being filed out of time, and therefore, there was no valid petition to adjudicate on in the eyes of the law.⁴⁷⁶

⁴⁷² Ibid p. 17-19

⁴⁷³ Kenneth Stanley Matiba vs. Daniel Toroitichi Arap Moi and others Civil Application No.NAI 241 (1993) [Election Petition No.27 of 1993]. See also Handbook on Election Dispute in Kenya: Context, Legal Framework, Institutions and Jurisprudence (2013)

⁴⁷⁴ Ibid

⁴⁷⁵ Rally for Democracy and Progress and others vs. Electoral Commission of Namibia and others [High Court] Case No.A01/2010

⁴⁷⁶ Ibid , para. 44 and 45. See also the concurring judgment of Damaseb J, at para. 18

3.3.2.3 John Opong Benjamin and others vs. National Electoral Commission and Others SC. No.2/2012[Supreme Court of Sierra Leone Judgment of 14 June 2013]

In this case the petition was brought by losing opposition leader John Opong Benjamin and other opposition leaders against the election of Ernest Bai Koroma during the Sierra Leone elections of 2012.⁴⁷⁷ Article 55(1) of the Constitution provides that anyone with a grievance in a presidential election should petition the Supreme Court within seven (7) days of the results being declared. The election was held on 17 November and the results were only declared on 23 November.⁴⁷⁸ The petitioners filed their petition on 30 November, the seventh day since the declaration of results. Further rules of court required that petitioners leave names of their advocates acting for them at the court registry in a separate notice, and that within five days of filing the election petition the petitioners make payment for security of costs.⁴⁷⁹ The petitioners' lawyers had indicated their contact details by endorsing them on the petition but not in a separate notice and made security of cost payments on 5 December. The court, however, struck out the petition, holding that it was filed out of time due to delay in payment for costs and for not complying with the need for contacts of lawyers to be on a separate notice.

3.3.2.4 Atiku Abubakar and others vs. Umaru Musa Yar'adua and others SC.72/2008 Supreme Court of Nigeria Judgment of 12 December 2008

This is the final case discussing examples of presidential election cases dismissed on the basis of procedural technicalities without consideration of the merits of the case. It arose from the 21 April 2007 Nigerian elections. The petitioner, Atiku Abubakar, had polled 2, 637,848 votes against winner, Umaru Musa Yar'adua, who got 24, 638,638 votes.⁴⁸⁰ Prior to the election, the Independent Electoral Commission of Nigeria (INEC) had disqualified the petitioner from the election and his name was excluded from the ballot papers. This was based on INEC's erroneous view that the petitioner was indicted for corruption and embezzlement related criminal offences and therefore unsuited for presidential office.⁴⁸¹ His

⁴⁷⁷ John Opong Benjamin and others vs. National Electoral Commission and others SC. No.2/2012 Supreme Court of Sierra Leone Judgment of 14 June 2013

⁴⁷⁸ Christine Thorpe "Statement from the NEC Chairperson on the Conduct and Results of the Presidential Elections Held on 17th November 2012"(23 November 2012)

⁴⁷⁹ John Opong Benjamin and others vs. National Electoral Commission and others SC.No.4/2012 Supreme Court of Sierra Leone Judgment of 14 June 2013 para. 25-29

⁴⁸⁰ See majority judgment of Katsina-Alu JSC in Atiku Abubakar and others vs. Musa Umaru Yar'adua and others SC.72/2008 Supreme Court of Nigeria Judgement of 12 December 2008

⁴⁸¹ Ibid

name was only finally printed on the ballot paper through a ruling to that effect by the Supreme Court, just four days before the election.⁴⁸²

The petitioner sought to challenge the election of Yar'adua on the following grounds:

- (a) The 1st petitioner [Abubakar] was validly nominated by the 3rd petitioner [Abubakar's party] but was unlawfully excluded from the election; alternatively that:
- (b) The election was invalid by reason of corrupt practices,
- (c) The election was invalid for reasons of non-compliance with the provisions of the Electoral Act, as amended; and
- (d) The 1st respondent was not duly elected by majority of lawful votes cast at the 21 April 2007 presidential election.⁴⁸³

The applicable provision, on which the majority based its decision, states:

An election may be questioned on any of the following grounds:

- (a) That a person whose election is questioned was, at the time of election, not qualified to contest the election;
- (b) That the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;
- (c) That the respondent was not duly elected by majority of lawful votes cast at the election; or
- (d) That the petitioner or its candidate was validly nominated but was unlawfully excluded from the election.⁴⁸⁴

The majority reasoned that grounds (a), (b), and (c) above are separated from ground (d) by the use of the word "or", a disjunctive used to express an alternative or choice.⁴⁸⁵ Since the petitioner's name ultimately made it onto the ballot paper, and he took part in the election, he could not, therefore, plead ground (d) as he was not excluded from the election. In the view of the majority, the use of the word "or" meant that the petitioner had to choose between the alternatives and could therefore only plead one set of grounds.

⁴⁸² Ibid

⁴⁸³ Ibid, see concurring judgment of Kutigi, JSC

⁴⁸⁴ Section 145(1) Electoral Act 2006

⁴⁸⁵ Atiku Abubakar and others vs. Umaru Musa Yar'adua and others SC.72/2008 Supreme Court of Nigeria Judgment of 12 December 2008 (majority judgment of Katsina-Alu JSC)

Having considered that the petitioner's name was on the ballot paper, the court declined the invitation to consider that his initial disqualification may have constituted constructive exclusion from the election as it had left him with barely four days to campaign.⁴⁸⁶ But for the majority, since the petitioner took part in the election, his petition on the basis of ground (d) collapsed and since the word "or" denoted alternatives, the rest of the petition collapsed and therefore other grounds would not be entertained.⁴⁸⁷ This decision is surprising considering that the same court, but in a different case, strongly condemned judges constraining themselves with technicalities at the expense of substantial justice and held that judges have a duty to shy away "from submitting to the constraining bind of technicalities."⁴⁸⁸

The decision of the majority was fraught with many flaws and at least three of them can be noted here. First, the majority claim that petitioners had pleaded two sets of inconsistent claims. Even if they were true, there was no legal basis for the court to choose which set of the inconsistent grounds to deal with. The court never explained why they chose one ground under which to dispose of the petition. They could as well have chosen the set of claims which had merit and left the impugned alternative ground.⁴⁸⁹ Second, the practice of pleading alternative and even inconsistent claims is long established in the common law tradition. It is aimed at staving off the possibility of inundating courts with a multitude of successive suits relating to the same facts, and allows courts to deal with all matters in one suit.⁴⁹⁰ This was, for example, allowed in the Zambian 2001 presidential election petition.⁴⁹¹ Similarly, in Uganda where trial of the presidential election petitions is largely by affidavits, the court in 2001 allowed defectively drafted affidavits holding that technical weaknesses should not be allowed to vitiate the quality of documents.⁴⁹² Third, the manner in which the majority dealt with the principal claim of exclusion was nothing more than a trivialisation of the issue and a negation of the right to an effective remedy.

The evidence, accepted by the court, indicated that INEC went out of its way to exclude the petitioner and had printed the first version of ballot papers without his name. INEC was

⁴⁸⁶ Ibid

⁴⁸⁷ Ibid

⁴⁸⁸ See *Amaechi vs. Independent National Election Commission and Others* Supreme Court of Nigeria Judgement of 18 January 2008 p.22, 32 and 93.

⁴⁸⁹ Ibid, See dissenting opinion of Oguntande JSC

⁴⁹⁰ Ibid

⁴⁹¹ See the case of *Anderson Kambela Mazoka and Others v. Levy Patrick Mwanawasa and Others* Z.R 138 (S.C) L SCZ/EP/01/02/03/2002 p.24

⁴⁹² See *Kizza Besigye vs. Yoweri Kaguta Museveni and another Election Petition No.1 of 2001* p. 210

forced to print new ballots four days before the election by order of court. This left the petitioner with just four days to campaign and effectively put him at a disadvantage.⁴⁹³ The court took a narrow and simplistic interpretation of exclusion which negates the need to offer candidates equality of opportunities to present their election platforms to the electorate.

A more concrete example of how the Courts have misapplied technicalities at the expense of substantive justice is the way they have made use of the substantial effect rule. Although all stable African countries have laws and regulation that govern the conduct of elections, these do not by themselves guarantee free and fair democratic elections. Often election results are affected by honest mistakes, incompetence of election officials, corruption, fraud, violence, intimidation, cheating and other irregularities. Some of these irregularities may be minor and inconsequential. However, a lot others are significant and have a bearing on the fairness and legitimacy of an election.

When courts are faced with an election petition, there is therefore need for a legal device or mechanism whereby they will determine which irregularities are minor and inconsequential and which are significant and in need of redress. The substantial effect rule does that. For many Anglophone African countries, this is an old rule inherited from the English legal system. The main point of the rule is that elections should not be nullified for minor irregularities or infractions of rules.⁴⁹⁴

The rule is enacted in the English statute, the Representation of People Act, which has a history going back to the 1800s,⁴⁹⁵ thus:

No parliamentary election shall be declared invalid by reason of any act or omission by the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the parliamentary election rules if it appears to the tribunal having cognizance of the question that-

(a) the election was so conducted as to be substantially in accordance with the law as to the elections; and

(b) the act or omission did not affect its results.⁴⁹⁶

⁴⁹³ Ibid

⁴⁹⁴ See John Fitch vs. Tom Stephenson and others Case No.M324/107[2008]EWHC 501(QB) para. 38

⁴⁹⁵ See Eggers and Spirling "The Judicialisation of Electoral Dispute Resolution: Partisan Bias and Bipartisan Reform in 19th Century Britain" 2-8

⁴⁹⁶ Section 23(3) Representation of People Act 1983. See also section 48 of the same Act.

The idea behind the rule is that flimsy mistakes, omissions and commissions should not lead to an annulment of an election, provided, overall, the fairness of the election was not vitiated. Lord Denning identified three strands to this rule:

- 1.If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.
2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls- provided that it did not affect the results of the election
- 3.But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls- and did affect the results- then the election is vitiated.⁴⁹⁷

The substantial effect rule sometimes can be expansive to include criminal acts such as acts of corruption, treating and other illegal electoral malpractices. Equally here the rule has three strands:

- (a)corrupt or illegal practices or illegal payments...were committed by someone;
- (b)they were committed at an election for the purpose of promoting or procuring the election of a candidate; and
- (c)they prevailed so extensively that they may be reasonably supposed to have affected the result of the election.⁴⁹⁸

The substantial effect rule produces a major challenge where illegal acts or substantial flouting of electoral laws do not lead to automatic avoiding the election, unless it be proved that that had a bearing on the results. Such a rule is defeatist and a carryover, in the case of the British, from the times when electoral corruption and cheating were considered inevitable to the electoral process.⁴⁹⁹ It seems inappropriate in a modern democracy to saddle a litigant who has proved substantial breach of electoral laws and/or corruption, to also prove that they had an effect on results. Every voter in a modern democracy is surely entitled to an honest,

⁴⁹⁷ Morgan vs. Simpson [1975] 1QB 151

⁴⁹⁸ Simmons vs. Khan M/326/07[2008]EWHC B4(QB) para. 35.

⁴⁹⁹ Ibid, para. 36. See also Kam "Four Lessons About Corruption From Victorian Britain" 2; and Eggers and Spirling "The Judicialisation of Electoral Dispute Resolution: Partisan Bias and Bipartisan Reform in 19th Century Britain" 2-8

fair and transparently democratic election. It would certainly not be appropriate for a successful candidate to be heard to say: “I accept I was elected following widespread fraud carried out in my favour but, if you cannot demonstrate to a court that the fraud affected the result, my election stands.”⁵⁰⁰

The substantial effect rule, has worked in the most disingenuous way in Africa to uphold elections fraught with major irregularities and fraud. As shall be seen, from the following case examples, election petitions that manage to survive being thrown away on technicalities usually are decided and dismissed for want of satisfying the substantial effect rule.

3.3.3.1 *Kizza Besigye vs. Yoweri Kaguta Museveni Presidential Election Petition No.01 of 2006*

This petition was brought by main opposition losing candidate, Dr. Kizza Besigye, challenging the election of the incumbent, President Museveni following the February 2006 election. The relevant statutory provision under which the case was mainly decided states:

The election of a candidate as a president shall only be annulled on any of the following grounds, if proved to the satisfaction of the court-

(a) non-compliance with the provisions of this Act, if the court is satisfied that the election was not conducted in accordance with the principles laid down in those provisions and that the non-compliance affected the results of the election in a substantial manner.⁵⁰¹

At the hearing of the petition, the following were framed as the issues for decision by the Supreme Court:

1. Whether there was non-compliance with the provisions of the Constitution, Presidential Elections Act and Electoral Commission Act, in the conduct of the 2006 presidential election.
2. Whether the said election was not conducted in accordance with principles laid down in the constitution, presidential Elections Act and Electoral Commission Act.
3. Whether if either issue 1 or 2 or both are answered in the affirmative, such non-compliance with the said laws and principles affected the results of the election in a substantial manner

⁵⁰⁰ Ibid, para. 39

⁵⁰¹ Section 59(6)(a) Presidential Election Act

4. Whether the alleged illegal practices or any electoral offences in the petition, were committed by the 2nd respondent personally, or by his agents with his knowledge and consent or approval.⁵⁰²

As regards the first two issues, the Supreme Court judges were unanimous that the election was vitiated by disenfranchisement of voters by unlawfully deleting their names from the voters' register; wrongful counting and tallying of results; bribery; intimidation; violence; multiple voting; and ballot stuffing.⁵⁰³ On the third issue, by a majority of four to three, the court held that the failure to comply with the provisions and principles in statutes as found in issues 1 and 2 did not affect the election in a substantial manner.⁵⁰⁴ On the fourth issue, by a majority of five to two, the court held that although there were illegal practices and other offences, these were not committed by the respondent or his agents, nor were they committed with his knowledge or approval.⁵⁰⁵

The third issue (substantial effect), however, was the main issue around which the petition revolved and was mainly resolved. The majority dismissed the petition, holding that in determining if the irregularities and malpractices affected the results in a substantial manner, numbers were the sole measuring yardstick. That is, the court could only be moved if "the winning majority would have been reduced in such a way as to put the victory of the winning candidate in doubt."⁵⁰⁶ Since there was nothing indicating that the margin of 1,580,309 votes between respondent and petitioner would have been significantly reduced, the election therefore stood.⁵⁰⁷

There are many shortcomings that can be noted from both the wording of section 59(6)(a) of the Presidential Election Act which provides for the substantial effect rule, as well as the manner the majority applied it. Four of the flaws can be noted here.

First, section 59(6)(a) requires of the court that it should not just be satisfied that there was non-compliance with electoral laws, but also that the court must be satisfied that the non-compliance affected the election results in a substantial manner. This provision is difficult to implement objectively as the requirement to evaluate whether or not the non-compliance had

⁵⁰² See the majority judgment of Odoki CJ in *Kizza Besigye vs. Yoweri Kaguta Museveni Presidential Election* Petition No.1 of 2006

⁵⁰³ *Ibid* p.5

⁵⁰⁴ *Ibid* p.5

⁵⁰⁵ *Ibid* p.5

⁵⁰⁶ *Ibid* p 103

⁵⁰⁷ *Ibid* p 94

effect on election results in a substantial manner is no longer a legal exercise premised on the evidence before court. It basically requires judges to make subjective evaluation of consequences of their prospective decision. As Kanyeihamba JSC, stated in his dissenting opinion, the provision “transports the judge from the heights of legality and impartiality to the deep valleys of personal inclinations and political judgment.”⁵⁰⁸

Second, the numerical test applied by the majority is manifestly and inherently wrong. While certain malpractices like ballot stuffing, voting by ineligible persons and wrong tabulation of results may be cured by reference to numbers, others such as intimidation, violence, and deploying the military throughout the country cannot be captured in a mechanical sense of numbers. If for example, soldiers kill a person and tell many people that anyone who votes against the incumbent will meet the same fate, how would this be reflected in numbers? It was unanimously accepted by the judges that violence and intimidation were widespread and the Constitution and other electoral laws were seriously flouted. This should have been enough to assure that there was a necessary deleterious consequence on the election that affected their quality. It is strange jurisprudence that after adjudging the election not to have been transparent, free and fair, the majority of the court then backtracked and held that the irregularities were of no substantial effect.

Third, the numerical approach taken by the majority seems at odds with the concept of rule of law and constitutionalism. The judges were unanimous that the elections were held in a manner that violated constitutional and other statutory provisions on the conduct of transparent and democratic elections. The decision of the majority effectively means that gross violations of the constitution and other laws can be of no consequence provided the petitioners cannot by reference to numbers demonstrate that the result gap could have been diminished. It goes without saying that this violates the principle of the supremacy of the Constitution.

Fourth and finally, by overlooking serious electoral malpractices at the expense of numbers, a dangerous precedent for rewarding electoral cheating is entrenched with the full imprimatur of the court. This takes away any incentive for honest behaviour in politics and elections. Ironically, it means one has to cheat so much that the gap in results should be numerically large to avoid judicial interference with results. It is hardly surprising that exactly the same

⁵⁰⁸ Ibid, dissenting opinion of Kanyeihamba, JSC, p.304. see also Twinomugisha “The Role of the Judiciary in Promotion of Democracy in Uganda” 1-22

pattern of electoral irregularities were handled by the Supreme Court during the 2001 election petition.⁵⁰⁹ This is because the precedent set by the court offers no disincentive for committing electoral malpractices especially by those in power.

These four shortcomings pointed out here generally apply to other case examples discussed below and therefore will not be repeated.

3.3.3.2 *Anderson Kambela Mazoka and others vs. Levy Patrick Mwanawasa and others* SCZ/EP/01/02/03/2002

The case was brought following the 2001 Zambian general elections. In the Zambian situation, the substantial effect rule was not a statutory requirement but one which was effectively legislated into existence by the Supreme Court in the first ever presidential election petition that followed the 1996 general election.⁵¹⁰ The Supreme Court admitted that there were many flaws in the electoral process, which included the use of the national intelligence in a partisan way, the unlawful use of public resources by the incumbent party and abuse of resources from parastatal companies.⁵¹¹

The supreme court held that it could not grant any remedy or interfere with the result of the election because, taking into account the national character of the presidential election “where the whole country formed a single electoral college,” it could not be said that the proven “defects were such that the majority of the voters were prevented from electing the candidate whom they preferred.”⁵¹² In the view of the court, the petitioners were supposed to prove that the flaws “seriously affected the result” to such an extent that it could no longer be viewed as the true reflection of the majority of the voters.⁵¹³ To demonstrate this, the petitioners should have proved “electoral malpractices and violations of the electoral laws in at least a majority of the constituencies.”⁵¹⁴

While this case was decided in similar ways as the Ugandan one discussed above, it differs significantly in that the substantial effect rule here was expanded to include wide geographical spread of irregularities, in addition to the numbers. The same flaws noted in

⁵⁰⁹ See Kizza Besigye vs. Yoweri Kaguta Museveni and another Election Petition No.1 of 2001

⁵¹⁰ See the case of Akashambatwa Mbikusita Lewanika and others vs. Fredrick Jacob Titus Chiluba (ZR.49/SC) SCZ Judgment No.14 of 1998

⁵¹¹ Anderson Kambela Mazoka and others vs. Levy Patrick Mwanawasa and others SCZ ?EP/01/02/03/2002

⁵¹² Ibid p.119

⁵¹³ Ibid p. 18

⁵¹⁴ Ibid

relation to the reasoning of the Ugandan Supreme Court apply here. However, the subjective and arbitrariness of the decision is made clear when one takes into account that the winner of the election and the runner-up were separated by less than two percentage points. It is, therefore, possible that any slight anomaly in even one isolated part of the country could have had an effect on the results. Considering that the election was very close, it seems that the court deliberately added the geographical spread element to the substantial effect rule, knowing that the numerical test would not be easy to sustain considering that the result was very close.

3.3.3.3 Nana Addo Dankwa Akufo-Addo and others vs. John Dramani Mahama and others No.J1/6/2013

The case arose from the 2012 Ghanaian elections. The main issue raised by the petitioners include allegations of over-voting; voting without biometric verification as required by law; absence of the signatures of presiding officers on some results sheets, contrary to the law; and the occurrence of same serial numbers for different polling stations.⁵¹⁵ The situation was that if votes tainted with these anomalies were deducted, then the president elect, Mahama, would not have had the 50 percent-plus-one-vote constitutionally required majority to be considered elected president.

Although the majority gave various reasons for upholding the election, the common theme was that even if there were these noted anomalies, the election itself was “conducted substantially in accordance with” the Constitution and other laws.⁵¹⁶ But such jurisprudence should be worrying. The anomalies were contrary to the Constitution and other laws, and thus could not just be wished away. Taking them into account meant that the declared winner did not really win the election. The decision does not seem to be legally supportable and was probably based on other considerations. Adinyirwa, JSC, for example, made it clear that in her view, “public policy favours salvaging the election and giving effect to the voter’s intention.”⁵¹⁷ The decision is in sharp contrast with the guidance of Lord Denning, discussed above, to the effect that even if an election is substantially held in accordance with the law, but is affected by minor infractions that have an effect on the result, then the election is vitiated and voidable.

⁵¹⁵ Nana Addo Dankwa Akufo-Addo and others vs. John Dramani Mahama and others No.J1/6/2013. See the majority judgment of Atuguba, JSC.

⁵¹⁶ Ibid, see concurring judgment of Adinyira JSC

⁵¹⁷ Ibid

3.3.4 Delayed Justice

An effective judicial mechanism for determination of election disputes should not just be fair, but must also be timely and efficient. Many African states allow the swearing-in of the president upon declaration of results and the trail of election petitions follows later. In Nigeria, for example, Olusegun Obasanjo proceeded to be sworn in 2003, despite a court order restraining him and his running mate from presenting themselves for swearing in, pending determination of the substantive election petition.⁵¹⁸ Where a president elect is sworn in even before election disputes are settled by the courts, the need for efficient resolution of cases becomes even more sensitive. Indeed the element of time is inherent in the concept of fair adjudication, making justice a time-bound concept.⁵¹⁹

There are some African countries, which are exemplary with regard to timely resolution of presidential election petitions. In Uganda, for example, the law requires the hearing and determination of presidential election disputes to be done within 30 days of presentation of the petition. The Ugandan Supreme court in both the 2001 and 2006 managed to determine the cases within the set time limit.⁵²⁰ In Kenya, the 2013 election petition, the first since the promulgation of a new Constitution in 2010, was promptly resolved within 30 days of presentation of the petition.⁵²¹

There are, however, still several countries where cases are habitually delayed, rendering the whole adjudication process an exercise in futility. In Nigeria, for example, it is estimated that a presidential election petition takes about two years to complete, which is actually half of the presidential tenure.⁵²² Perhaps Zambia has the poorest record of inefficiency in adjudication of presidential election disputes. The presidential election dispute that arose from the 2001

⁵¹⁸ Buhari vs. Obasanjo Suit No.SC.133/2003 17NWLR 587

⁵¹⁹ Electoral Integrity Group, Towards An International Statement of the Principles of Electoral Justice (The Accra Guiding Principles) 2011

⁵²⁰ See Kizza Besigye vs. Yoweri Kaguta Museveni and another Election Petition No.1 of 2001, and Kizza Besigye vs. Yoweri Kaguta Museveni Presidential Election Petition No.1 of 2006

⁵²¹ Raila Odinga vs. The Independent Electoral and Boundaries Commission and others Petition No. 5,3 and 4 of 2013

⁵²² Adejumo "The Judiciary and the Rule of Law: Challenges of Adjudication in the Electoral Process in Nigeria" <http://www.nigeriavillagesquare.com/articles/akin-oyebode/the-role-of-the-judiciary-in-the...> (Date of use: 21 September 2014)

elections, for example, was only determined in 2005, just about a year before another general election.⁵²³

Delayed determination of election petitions, where one candidate is already sworn in, presents numerous challenges. First of all, it raises the issue of legitimacy of appointments and decisions made by such a president considering that there is a cloud of uncertainty about his or her election until the court finally determines the matter. Second, delays often increase uncertainty and anxiety in a nation. It's not uncommon for delays in determining election petitions to precipitate military coups or coup attempts. In Zambia, for example, disputed presidential elections of 1996 and the delayed determination of the subsequent election petition is thought to have influenced the 1997 military coup attempt.⁵²⁴ Similarly, the military takeover of July 2013 in Egypt came amidst delayed determination of the election petition filed by the losing opposition leader, Ahmed Shafiq, following the 2012 elections.⁵²⁵

Third, although there has been no judicial voiding of a presidential election on the continent so far (with the exception of Ivory Coast), where justice is delayed, and where an election is overturned, that would lead to distortion of the tenure of the person who merits to be the president. In the case of Zambia where, for example, it took almost four years to conclude the election petition, had the court determined that the opposition candidate was the rightful winner that would have left the genuine winner with just a year of office. The illegitimate candidate would then have ruled the country for the better part of the presidential tenure. This of course would violate the people's right to choose their leaders and for the rightful leaders in turn to represent their people.

The Nigerian case of *Amaechi vs. INEC*⁵²⁶, although a governorship case, is illustrative. In this case the Nigerian Supreme Court held that the person who was declared winner of the state governorship position was in fact not the rightful winner and therefore annulled his election and declared the petitioner as the legitimate governor.⁵²⁷ In such a case, it means for about a year while the case was still being litigated, the wrong person served as governor and

⁵²³ Anderson Kambela Mazoka and others vs. Levy Patrick Mwanawasa and others SCZ ?EP/01/02/03/2002 p.3-4

⁵²⁴ Ndulo, "The Democratisation Process and Structural Adjustment in Africa" 315- 368

⁵²⁵ IFES, *The Electoral Framework in Egypt's Continuing Transition: February 2011- September 2013* (2013)

⁵²⁶ *Amaechi vs Independent National Electoral Commission and Others* Supreme Court of Nigeria Judgment of 18 January 2008.

⁵²⁷ *Ibid*

consequently the rightful governor had his term unfairly reduced. There are other examples of this.⁵²⁸

Fourth, if the election were to be overturned or nullified, it means the wrong person was allowed to earn a presidential salary and other benefits for a protracted period, to which he or she was not entitled. It is unlikely such benefits would be reimbursed and therefore delayed justice leads to 'abuse' of public resources.

The requirement under the new Kenyan Constitution which requires elections to be held prior to the expiration of the term of office of the incumbent and that election disputes are resolved prior to the swearing-in of the new president would seem to be a better alternative here.⁵²⁹

3.3.5 Coming to No Decision

Courts sometimes constrain themselves from making any meaningful decision or simply defer to the executive instead of making a final and binding determination. In the Nigerian case of *Buhari*,⁵³⁰ for example, the losing candidate, Muhammadu Buhari, sought and was granted an injunction by the court restraining Obasanjo and his running mate from presenting themselves for swearing-in into office, pending the determination of the main election petition.⁵³¹ The respondents, in violation of the court order, went ahead and were sworn-in, where upon the applicants appealed to the Supreme Court for a determination, inter alia, as to whether the president was validly sworn-in when it was done in violation of a valid court order. The Supreme Court held that the appeal was no longer of any relevance since the respondents were already sworn-in and, therefore, the injunction would only be an academic exercise that had no *res* or status quo to protect. In any case, the court thought that the injunction was not directed at the Chief Justice not to swear-in the respondents.⁵³² The Supreme Court considered that the applicants would not suffer any loss as the courts would still go ahead and determine the main election petition objectively and on its merits.

It goes without saying that such an approach can only lead to cynicism about the commitment of the court to doing justice. It is common knowledge that a person, once sworn into office

⁵²⁸ See, for example, *OShiomhole and others vs. Osunbor and Others* Court of Appeal of Nigeria Judgment of 11 November 2008

⁵²⁹ See Articles 141 and 142 Constitution of the Republic of Kenya 2010

⁵³⁰ *Muhammadu Buhari and others vs. Olusegun Obasanjo and others* SC.133/2003 17 NWLR (2003)

⁵³¹ *Ibid*, p.3

⁵³² *Ibid*, p.5

can improperly influence the court into passing a favourable decision, considering the state power and resources at his disposal. As will be discussed below, the Nigerian Chief Justice later revealed that President Obasanjo made efforts to influence the judges by either bribery or intimidation.⁵³³ In this case, the court simply avoided doing its duty by failing to address itself as to the consequences of the swearing-in going ahead despite a court order to the contrary.

The Zimbabwe 2008 election is another example of self-imposed impotence by the judiciary. Following the March 29, 2008 election, the Zimbabwe Electoral Commission (ZEC) delayed inordinately to announce the results, prompting the opposition Movement for Democratic Change (MDC) to seek an order of the court to compel ZEC to release the results.⁵³⁴ Judge Uchena accepted that the delay was inexplicable and unjustified.⁵³⁵

However, judge Uchena decided the case on the basis of section 67(A)(7) of the Electoral Act, which stated that the Commission's decision on whether or not to order a recount and the extent of the recount "shall not be subject to an appeal." According to Judge Uchena, this provision gave ZEC wide discretion and, therefore, its decisions are final, not subject to inquiry by the Court.⁵³⁶ The court was therefore "not entitled to intervene and order the respondents to announce the results."⁵³⁷

The reasoning of Judge Uchena is defective in many ways, as has been pointed by Odhiambo.⁵³⁸ First of all the action was not an appeal against a decision of ZEC but simply sought an order of mandamus to compel ZEC to perform its statutory duty. The provision the judge based his decision on was, therefore, completely irrelevant to the case. Second, an ouster clause like section 67(A)(7) should not have been applied literally without checking if it passed the constitutionality test, especially when important national matters are at stake.⁵³⁹ Judge Uchena had the responsibility to review the consistency of that provision with

⁵³³ "How Pressure Was Brought to Bear on Judiciary to do Obasanjo's Will Concerning Buhari's 2003 Presidential Election Petition" <http://saharareports.com/news-page/dateline-2005-how-pressure-was-brought-judiciary-do-obasanjo%80%99s-will-concerning-buhari%E2%80%99s-20?> (Date of use: 1 November 2014)

⁵³⁴ Movement for Democratic Change and others vs. The Chairperson of the Zimbabwe Electoral Commission and another HH37-08 EP24/08 Judgment of April 2008

⁵³⁵ Ibid, p.13

⁵³⁶ Ibid, p. 17-18

⁵³⁷ Ibid, p. 18

⁵³⁸ Odhiambo "The Role of the Judiciary in Promotion of Free and Fair Elections" http://www.indabook.org/preview/NTC_NPQZr4CINhNxrEjoy9F3j8CeiGeBAVzhBIHE_fm,/THE-ROLE-OF-THE-JUDICIARY-IN-PROMOTION-OF-FREE.html?query=Kenya-Elections (Date of use: 12 December 2013)

⁵³⁹ Ibid

Constitutional provisions that give courts unlimited power of judicial review of administrative action. Third, as stated above, Uchena admitted that the delay was unreasonable. This finding by the judge, therefore, required him not to simply restate section 67(A)(7) but to inquire into the causes of the delay and the consistency of the causes of the delay with the Constitutional obligations of ZEC to conduct transparent and democratic elections.⁵⁴⁰

In discussing these shortcomings of judicial decisions in presidential election petitions, it should be noted that the desire is not to impress that all petitions presented before court have merit and, therefore, judges should have found for the petitioners in all cases. There have been some cases genuinely lacking in merit, at least in the way the grievance was framed, and rightfully dismissed. For example, in the Nigerian case of *Chukwuemeka Odumegwu Ojukwu vs. Olusegun Obasanjo*,⁵⁴¹ the main complaint was that Obasanjo was not qualified to serve another term in office, owing to the fact that he had served as a military head of state which the petitioners construed to have been Obasanjo's first term in office. This, it was argued for the petitioners, was contrary to section 137(1)(b) of the Constitution of Nigeria (1999), which required that "a person shall not be qualified for election to the office of president if he has been elected to such office at any two previous elections." Obasanjo's ascent to power as a military ruler was not on the basis of any election as contemplated under the Constitution and therefore the term limit set in the 1999 Constitution did not affect him. The petition was, therefore, rightly dismissed.

Cases dismissed for lacking merit, are however, very few. Many cases, as discussed above, usually raise genuine concerns and judges have routinely passed dissatisfactory and poorly reasoned decisions. The next section, therefore, looks at three possible explanations for judges passing such highly questionable decisions.

3.4 Possible Explanations for such Court Decisions

Judges are products of their societies and are influenced by their social and political context. They don't just administer the law, but their context influences their justification and rationalisation of their decisions. As Haynie correctly observed while studying the behaviour

⁵⁴⁰ Ibid

⁵⁴¹ *Chukwuemeka Odumegwu Ojukwu vs, Olusegun Obasanjo and others* SC 199/2003 Supreme Court Judgment of 2 July 2009

of judges who were administering the apartheid laws in South Africa: “Judges are not automatons programmed with statutory construction, legal canon and constitutional doctrine to be mechanistically applied to the conflict.”⁵⁴² Their appreciation of facts and construction of law is influenced by the conditions and pressures that impress upon them.

This section discusses two factors that may influence judges into rendering such unsatisfactory decisions when handling presidential election disputes. These are judicial corruption and lack of independence and impartiality; and intimidation and judicial timidity.

3.4.1 “Why Hire a Lawyer When You Can Buy a Judge?” Judicial Corruption, and Lack of Independence and Impartiality

This section looks at corruption and lack of judicial independence as possible causes of courts rendering decisions as they have done. It starts with a discussion on corruption and ends with lack of independence and impartiality.

There is no universally agreed upon definition of corruption. But most working definitions consider corruption to be the “misuse of entrusted power for private gain”⁵⁴³ or “misuse of a public or private position for direct or indirect personal gain.”⁵⁴⁴ In the context of the judiciary, corruption usually entails the judiciary passing a favourable judgment to a litigant in exchange for favours. Such favours could be in kind; in monetary form (bribery); an elevation in status (such as promotion); or simply to secure continued stay on the bench (especially where security of tenure is dependent on the executive who may have an interest in the outcome of a case).

Certainly judicial corruption is not limited to African judges. The 2013 Global Corruption Barometer, for example, found that globally, the judiciary is ranked the second most corrupt institution, exceeded only by the police. At least 24 percent of people interacting with the judiciary paid a bribe.⁵⁴⁵ However, in Africa, where governance institutions tend to be very weak, judicial corruption tends to be more widespread, and cases of judicial corruption have been documented. In Kenya, for example, judicial corruption is considered to be so widespread that a common expression has been coined: “why hire a lawyer when you can

⁵⁴² Haynie *Judging in Black and White: Decision making in the South African Appellate Division 1950-1990* 93

⁵⁴³ UNDP, *Asia Pacific Human Development Report: Tracking Corruption, Transforming Lives* (2008) 18

⁵⁴⁴ United Nations Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators (2004) p. 27

⁵⁴⁵ Transparency International *Global Corruption Barometer* (2003) 5

buy a judge?”⁵⁴⁶ The “Judges and Magistrates Vetting Board”, set up after the promulgation of the new Kenyan Constitution in 2010, had by February 2013 found that of the nine judges of the Court of Appeal, five (50 percent) were unsuitable to remain in office, while of the 44 High court Judges who had been vetted, 33 (75 percent) were found unsuitable.⁵⁴⁷

In Zambia, then Chief Justice Mathew Ngulube was in 2002 forced to resign following revelations that he had secretly received a total of USD 168,000 from President Fredrick Chiluba while he was hearing the presidential election petition before the Supreme Court.⁵⁴⁸

In Zimbabwe, several judges including Chief Justice Chidyausiku were allocated and accepted farms expropriated from white farmers, even while some cases relating to the expropriation were still active in court.⁵⁴⁹ In Nigeria, the former Chief Justice, Muhammadu Lawal Uwais, is reported to have revealed how President Obasanjo made efforts to bribe and intimidate judges who were hearing the presidential election petition challenging Obasanjo’s 2003 election.⁵⁵⁰

Corruption in the judiciary has devastating consequences, not only to immediate litigants whose cases are no longer determined on merit, but to the whole of society as the judiciary can no longer be trusted as guardian of public interest and rule of law. Judicial corruption destroys the public faith in justice, as judges no longer act impartially. It erodes public confidence in the judiciary’s ability to check on excesses of government; and to protect the weak against the powerful.⁵⁵¹ Where judges are corrupt, there is always a possibility that those with power and resources will get cases decided in their favour, including election disputes. Considering that incumbents and candidates sponsored by incumbent parties have access to state power and resources, it is hardly surprising that judgments have always been given in their favour.

With regard to judicial independence and impartiality, these have been defined by David Malcolm, Chief Justice of Western Australia, as:

⁵⁴⁶ Judges and Magistrates Vetting Board *Interim Report September 2011- February 2013* (2013) 4

⁵⁴⁷ *Ibid* 40

⁵⁴⁸ Joyce Shezongo-Macmillan *Zambia: Justice Sector and Rule of Law* 19

⁵⁴⁹ Moyo “Corrupt Judges and Land Rights in Zimbabwe” in Transparency International *Global Corruption Report: Corruption in Legal Systems* 35

⁵⁵⁰ *Supra* note 120

⁵⁵¹ International Commission of Jurists *Kenya: Judicial Independence, Corruption and Reform* 13

the degree to which judges actually decide cases in accordance with their own determination of evidence, the law and justice, free from coercion, blandishment, interference, or threats from governmental or private citizens.⁵⁵²

Independence and impartiality of the judiciary are universally recognised as the cornerstone of justice. The Bangalore Principles of Judicial Conduct, for example, state that “judicial independence is a pre-requisite to the rule of law and fundamental guarantee of fair trial.”⁵⁵³

The biggest threat to judicial independence and impartiality in Africa has always been an encroaching executive.⁵⁵⁴ Although, almost all national Constitutions in Africa have a clause guaranteeing the independence of the judiciary, the executive manages to interfere with the judiciary, usually through the process of appointments and promotion, extension of tenure and removal process.⁵⁵⁵

Notwithstanding Constitutional provisions that guarantee the independence of the judiciary, the executive is usually clothed with wide discretion in the appointment of judges. The Constitution of Cameroon, for instance, provides that the “judicial power shall be independent from the executive and legislative powers.”⁵⁵⁶ However, this is immediately watered down by a provision within the same article which makes judicial independence dependent on the president and vests all power of appointing judges in the presidency. It reads: “The president of the Republic shall guarantee the independence of judicial power. He shall appoint members of the bench and for the legal department.”⁵⁵⁷

Such wide discretion in the appointment of judges allows the executive to choose pliant judges. Such judges are often chosen for their political inclinations than for their competence. Paul Yao Ndre, the President of the Constitutional Council of Ivory Coast, who reversed election results to declare Laurent Gbagbo winner, was a founding member of Gbagbo’s ruling party, and it is widely believed that he was appointed to that position on account of his loyalty to Gbagbo.⁵⁵⁸

⁵⁵² Malcom “Independence and Accountability: An Asian Pacific Perspective” in Puymbroek (ed) *Comprehensive Legal and Judicial Development: toward an Agenda for a Just and Equitable Society in the 21st Century* 221

⁵⁵³ Value 1, the Bangalore Principles of Judicial Conduct 2002

⁵⁵⁴ USAID *Guidance for Promoting Judicial Independence and Impartiality* (2001) 26

⁵⁵⁵ Ibid

⁵⁵⁶ Article 37(2) Constitution of the Republic of Cameroon

⁵⁵⁷ Article 37(3) Constitution of the Republic of Cameroon

⁵⁵⁸ Zounmenou and Lamin “Cote D’Ivoire’s Post-Electoral Crisis: Outtara Rules but Can He Govern?” 8

In some countries, there is an anomalous standard in the appointment of judges, whereby lower judges are appointed by the president on recommendation or in consultation with the Judicial Service Commission (or an equivalent independent body), while Supreme Court or Appeal Court judges are appointed directly by the president. Such is the case, for example, under the constitutions of Tanzania⁵⁵⁹ and Zambia.⁵⁶⁰ This is a curious anomaly considering that Supreme Courts ultimately determine election petitions and other serious political cases.

Furthermore, in some situations judges are hired on short term contracts or at least those who have attained retirement age are, at the discretion of the president, given new contracts under terms determined solely by the president.⁵⁶¹ This derogates from the principle of security of tenure for judges and ensures judges serve at the pleasure of the executive. Zambia, for example, has since 2012 had a judge who has attained her retirement age but retained by the President to serve as acting Chief Justice with terms of her appointment never disclosed.

Finally, the removal of judges in many countries is not in the hands of an independent body but in the hands of the executive. The Constitution of Malawi, for example, provides that:

The President may by an instrument under the Public Seal and in consultation with the Judicial Service commission remove from office any judge where a motion praying for his removal on the ground of incompetence in the performance of the duties of his office or misbehaviour has been-

- (a) debated in the National Assembly;
- (b) passed by a majority of the votes of all the members of the Assembly; and
- (c) submitted to the president as a petition for the removal of the judges concerned.⁵⁶²

Leaving such enormous power in the hands of politicians gives them power to intimidate judges and ensure a compliant judiciary.⁵⁶³ The danger of such a provision was demonstrated in 2001 when the Malawian National Assembly moved a motion for the removal of three

⁵⁵⁹ Article 118(3) Constitution of the United Republic of Tanzania

⁵⁶⁰ Article 93(2) Constitution of the Republic of Zambia

⁵⁶¹ See for example, Article 98(1) Constitution of the Republic of Zambia, and Articles 101(3) and 120(2) Constitution of the Republic of Tanzania

⁵⁶² Article 119(3) Constitution of the Republic of Malawi

⁵⁶³ Ndulo "The Judiciary, Constitutionalism and Human Rights" 96

High Court judges who had passed decisions considered anti-government and pro-opposition.⁵⁶⁴

The combined effect of wide discretion of the executive in judicial appointments; award or extension of contracts; and removal from office is better characterised by the words of Justice Schofield, in relation to his personal experience of the situation in Kenya where he had served as a judge:

The Chief Justice and some of the judges saw it as their duty to assist the president and government...thus the superior courts tended to support the government and particularly the president grew to expect compliance with his wishes.⁵⁶⁵

3.4.2 Intimidation and Judicial Timidity

Cases of judges suffering direct or subtle intimidation at the hands of the executive in Africa are very common. These could be directed at judges or their family members. Some of the common methods that have been used to intimidate judges include rhetorical attacks; sending party supporters or military officers to occupy the court premises; threats of violence or physical harm; blackmail and, in extreme cases, death.⁵⁶⁶

The worst instances of intimidation have led to the assassination of judges. The first Ugandan Chief Justice, Benedicto Kiwanuka, for instance, was killed by the Idi Amin regime for passing decisions not favourable to the regime.⁵⁶⁷ Similarly, in Senegal, Bubacar Seye, the Vice President of the Constitutional Council was assassinated in 1993, shortly after elections, the validity of which he was supposed to adjudicate.⁵⁶⁸

Sometimes the executive or incumbent sends a clear message to the judiciary that he will not obey judicial decisions that go against his views. President Museveni of Uganda, for example, is known to have said that “the major work of judges is to settle chicken and goat

⁵⁶⁴ Hatchard, Ndulo and Slinn *Comparative Constitutionalism and Good governance in the Commonwealth” An Eastern and Southern African Perspective* 171

⁵⁶⁵ As cited in Gathii “The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya’s Judicial Process”15

⁵⁶⁶ Llanos et al “Informal Interference in the Judiciary in new Democracies: A Comparison of Six African and Latin American Cases”6

⁵⁶⁷ Rugege “Judicial Independence in Rwanda” 411- 425

⁵⁶⁸ Llanos et al “Informal Interference in the Judiciary in New Democracies: A Comparison of Six African and Latin American Cases”18

theft cases but not determining the country's destiny."⁵⁶⁹ In 2005, when the Uganda High Court released suspects on bail, contrary to the wishes of government, Museveni's government sent troops of armed soldiers to surround the Court and re-arrest the suspects.⁵⁷⁰ Chief Justice Odoki in a statement after this incident indicated that the move was intended to intimidate the judiciary.⁵⁷¹

In similar fashion, when the Zimbabwe Supreme court declared farm invasions as illegal, President Mugabe and his senior ministers, including Minister of Justice Patrick Chinamasa, mounted a vicious attack on the judges. Government supporters were unleashed on the court premises in protest and occupied court rooms at the Supreme Court, destructing court business.⁵⁷² While they occupied the court rooms, the protesters chanted slogans such as "kill the judges".⁵⁷³ Judges of both the High and Supreme courts subsequently received death threats.⁵⁷⁴ This forced the Chief Justice, Roy Gubbey, and other independent minded judges, to resign.⁵⁷⁵

Intimidation of judges inevitably leads to judicial timidity, that is, judges live in fear of upsetting the status quo. As Haynie discovered about the art of judging in repressive regimes, judges in cases with high stakes or cases that challenge the status quo, almost always decide in favour of those with power.⁵⁷⁶ Where judges live in timidity should they upset the status quo, in the words of Haynie, "judging is not black and white- judging is a process by which the grey is given the appearance of black and white."⁵⁷⁷

It is usually this climate of timidity that produces what is sometimes referred to as the jurisprudence of executive deference or "the executive is right", that is always finding for the executive in major political cases. In such cases, judges instead of impartially assessing facts before them and decide the case according to law, often detour and make unfounded assumptions that allow them to find in favour of the executive. Perhaps the best recent example of this is the Zambian case of 2013 in which three judges challenged the process of

⁵⁶⁹ As cited in Peter "The Contribution of the Court of Appeal of Tanzania in the Maintenance and Safeguarding of Rule of law and Human Rights" in Peter (ed) *Law and Justice in Tanzania* 237

⁵⁷⁰ Supra note 140

⁵⁷¹ Ibid

⁵⁷² Moyo "Corrupt judges and Land rights in Zimbabwe" in Transparency International *Global Corruption Report: corruption in Legal Systems* 36

⁵⁷³ Ibid

⁵⁷⁴ Ibid

⁵⁷⁵ Ibid

⁵⁷⁶ Haynie *Judging in Black and White: Decision Making in the South African Appellate Division 1950-1990* p.4

⁵⁷⁷ Ibid, 22

their removal, following a decision that went against certain allies of the president. In dismissing their action for judicial review on the ground of irrationality, inter alia, the majority of the Supreme Court stated:

...we are satisfied that bearing in mind the authoritative position of His Excellency, it would be illogical and unreasonable to hold that he did not receive credible information as President for him to act as he did. He is the overall authority on everything. His sources are exclusive to the public domain and must be impeccable.⁵⁷⁸

How could a competent court come to such a decision, making a fundamental judgment on the basis of assumptions and not evidence and law? This is an example of a court that is grovelling before the executive and defers its mandate of adjudication to the discretion of the executive.

3.5 Consequences of Judicial Decisions in Presidential Election Disputes

The judiciary derives its very existence from a country's Constitution and is equal in stature with the executive and legislative wings of government.⁵⁷⁹ It is considered as guardian of democracy, for it has the final authority in interpreting the law and safeguarding democracy. However, where the courts give dissatisfactory decisions and cannot be relied upon to decide cases impartially and according to law and evidence, it could have a deleterious effect on the consolidation of democracy.

This section briefly discusses three consequences of the judiciary rendering dissatisfactory judgements on presidential election disputes. These are the erosion of confidence in the judiciary as an impartial arbiter and dispenser of justice; the entrenchment of unequal playing field and reward of culprits; and the possibility of sparking off violence and breakdown of the state.

3.5.1 Loss of Confidence in Judiciary

Judges do not have military forces to help enforce their decisions. Their effectiveness is solely dependent on the support of the people, who consider delivery of impartial justice as an important common good to be preserved. This public confidence is a treasure and a

⁵⁷⁸ Attorney-General vs. Nigel Kalonde Mutuna and others Appeal No. 008/2012 SC/8/185/2012 p. 124

⁵⁷⁹ Dicey *Introduction to the Study of the Law of the Constitution* 155

“vitally necessary ingredient of any successful effort to protect liberty, and indeed, the rule of law itself.”⁵⁸⁰ It is this public confidence in the judiciary that assures the effective role of the judiciary in contributing to the rule of law and consolidation of democracy. In the words of US Supreme Court Judge Stevens, “it is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law.”⁵⁸¹

In many African countries public confidence in the judiciary as an impartial guardian of the rule of law has been fatally wounded by, inter alia, the manner judges have decided presidential election disputes. The Nigerian Supreme Court captured this loss of confidence when it stated:

Nigerian judges are called all sorts of names by litigants. They are suspected for the slightest action. Parties do not seem to believe that judges can dispense justice in the light of the law and the law alone. The insults are getting too much. Some of us have always taken the matter as one of occupational hazard. It has gone beyond that and is very very worrying.⁵⁸²

What is clear from this statement is that the lack of faith or confidence in the judiciary is not about an occasional disgruntled litigant but an overwhelming problem permeating the nation and threatens the legitimacy of the whole judicial department. This growing lack of confidence in the judiciary to be able to render impartial justice, especially in presidential election disputes, is not limited to Nigeria but ubiquitous and affects almost all African countries.

There are statistics to back these assertions. In a 2013 opinion poll on the levels of public confidence in the judiciary in 28 African countries, Gallup Poll, an opinion poll company, found that “less than half of sub-Saharan Africans (48%) express confidence in the judicial system.”⁵⁸³ Gallup Poll indicates that in fact the level of confidence in the Judiciary in Africa is waning as it has declined from a high of 55 percent in 2010 to rest at 48 percent in 2013.⁵⁸⁴

⁵⁸⁰ See dissenting judgment of Breyer J in *George W. Bush et al vs. Albert Gore et al* 531 US-(2000) No.00_949 p.15

⁵⁸¹ See dissenting judgment of Stevens J in *George W. Bush et al vs. Albert Gore et al* 531 US-(2000) No.00_949

⁵⁸² See majority judgment of Katsina-Alu JSC in *Atiku Abubakar and others vs. Umaru Musa Yar’adua and others* SC.72/2008

⁵⁸³ “Less than Half in Africa Confident in Their Judicial Systems” <http://www.gallup.com/poll/174509/less-half-africa-confident-judicial-systems.aspx> (Date of use: 25 September 2014)

⁵⁸⁴ Ibid

3.5.2 Rewards Culprits, Justifies and Entrenches Unequal Playing Field

As seen in cases discussed above, courts have usually used technicalities to avoid considering merits of petitions. Where cases made it beyond technicalities to be considered on merits, most of them get dismissed for want of satisfying the substantial effect doctrine. This is usually despite readily accepting that there were serious malpractices violating applicable electoral laws. As seen, these violations are not just minor administrative glitches, but serious irregularities that go to the heart of an election and vitiate its legitimacy. These include ballot stuffing; cheating and altering results; violence; abuse of public resources and facilities; involvement of the military to intimidate voters; and restricting space for the opposition.

When the courts make decisions that overlook these flaws, that invariably rewards the culprits and takes away any incentive to behave better in future elections. It is therefore hardly surprising that despite routine challenges to the validity of elections, the pattern of flaws in elections is almost always the same in many countries. For example, the Nigerian cases discussed above raise similar electoral malpractices, which have assailed every election. Ironically, a commission of inquiry led by former Nigerian Chief Justice Uwais reported that “elections conducted by the military tended to be more credible than those conducted by civilian authorities.”⁵⁸⁵ But considering that the courts have overlooked these malpractices and irregularities and made decisions in favour of incumbents or candidates supported by incumbent parties, this ensures that wrong doers are actually the ultimate beneficiaries of their own wrongs. This has the effect of entrenching electoral malpractices as there is no incentive for better behaviour in the future.

3.5.3 May Lead to Violence and Breakdown of the State

Competent and impartial courts enable peaceful resolution of disputes. When courts are trusted to render impartial justice, aggrieved parties are able to ventilate in courts without resort to street violence or self-help means.

However, where courts cannot be trusted to render impartial justice, aggrieved parties will resort to self-help means to redress their grievance. These may include street protests, arbitrary violence and war. In extreme cases, the very life of the state may be at stake as the ensuing violence and chaos may overwhelm all institutions of government. To a great extent, it can be said that post-election violence in Africa is not so much about unsuccessful

⁵⁸⁵ Report of the Electoral Reform Commission (Uwais Commission) December 2008 p. 41

candidates failing to concede defeat, but more about lack of faith in the existence of an impartial and competent judicial forum in which to seek and find redress. The AU Panel of the Wise, for example, considers that with the decline of historic causes of violence in Africa, “elections have emerged as one of the major recent sources of conflict across Africa.”⁵⁸⁶ It attributes this in part due to “lack of impartial judiciaries to interpret and adjudicate electoral disputes.”⁵⁸⁷

There are several examples of post-election violence and conflict in Africa. In Nigeria, for example, the 2011 re-election of President Goodluck Jonathan was greeted with mass protests, especially in northern Nigeria, which led to the loss of about 300 lives.⁵⁸⁸ In Ethiopia, the military killed at least 193 people protesting the results of the 2010 elections.⁵⁸⁹

Perhaps the most serious recent examples of electoral-related violence that threatened the life of the whole state are those of Kenya following the 2007 elections and Ivory Coast following the 2010 elections. In Kenya, following the disputed election, the opposition refused to take their grievance to the court as they considered the judiciary as not independent. Massive violence erupted leading to the death of more than 1000 people and the displacement of more than 350,000.⁵⁹⁰ In the case of Ivory Coast, following the Constitutional Council’s arbitrary decision to reverse the election of Outtara in favour of Gbagbo, and the failure of peaceful resolution of the matter through diplomatic efforts, full scale war broke out, which led to the capture of Gbagbo.⁵⁹¹

Lack of confidence in the judiciary and its capacity to administer justice fairly fans violence which may affect the very existence of the state. Without confidence in the judiciary, aggrieved parties will not ventilate their grievances in the courts, preferring self-help methods.

⁵⁸⁶ African Union Panel of the Wise *Election-Related Disputes and Political Violence: Strengthening the Role of the African Union in Preventing, Managing, and Resolving Conflict* 1

⁵⁸⁷ Ibid, xi

⁵⁸⁸ Onunkwo “The 2011 Nigerian Elections: An Empirical Review” 54

⁵⁸⁹ Malone “Ethiopian Opposition Mounts Court Challenge to Election” <http://www.ethiopia-news.com/Ethiopia-opposition-mounts-court-challenge-to-election> (Date of use: 1 May 2014)

⁵⁹⁰ Congressional Research Service *Kenya: The December 2007 Elections and the Challenge Ahead* (2008)

⁵⁹¹ Zounmenou and Lamin “Cote D’Ivoire’s Post-Electoral Crisis: Outtara Rules but Can He Govern?” 6- 21

3.6 Summary

It is no secret that many presidential elections in Africa have been assailed with major irregularities. When this occurs it usually falls on the judiciary to protect the right of people to choose their leaders in a free and transparent atmosphere. The record of the judiciary, however, has been overwhelmingly disappointing. The judiciary has routinely upheld clearly defective elections, erroneously considering it their duty to salvage defective elections as a matter of public policy. To achieve this, the courts have largely applied two techniques. The first one is to simply dismiss election petitions on flimsy procedural technicalities, without considering merits of the case. Second, the courts have wrongly applied the substantial effect rule to uphold disputed elections, even in the face of glaring evidence indicating serious violations of Constitutional and other statutory provisions. In other circumstances, judges have simply constrained themselves from making an appropriate decision. Further, while in some countries judges have been exemplary in determining cases efficiently, in many countries such cases are still characterised by inordinate delays that negate the whole purpose of adjudication.

There are several possible reasons that may account for this poor judicial record on presidential election disputes. These may include judicial corruption; intimidation of judges; and lack of independence and impartiality. This has consequently led to erosion of public confidence in the judiciary as an impartial custodian of the rule of law; the entrenchment and rewarding of culprits as they continue to benefit from their wrong doing; and in extreme cases the breakdown of violence and threat to national cohesion. Ultimately, consolidation of democracy suffers a setback with the full complicity of the judiciary.

The next chapter looks at the normative frameworks at continental and sub-regional level that set standards for the conduct of democratic elections in Africa.

Chapter Four

Transnational Approach to Democratic Elections: An Overview of African Normative Frameworks

4.1 Introduction

This chapter discusses the African continental and sub-regional normative frameworks that have a bearing on the conduct of democratic elections in African states. The norms are usually in the form of treaties or other international instruments. However, the norms are not restricted to treaties as they are also manifested through consistent behaviour and practices of states.

The chapter is clustered in four parts. The first part looks at the legacy of the Organisation for African Unity (OAU) and how it approached the subject of democratic elections. The second section looks at the standards developed under the African Union (AU), the African regional integration organisation that succeeded the OAU. The important documents discussed here include the Constitutive Act of the AU as well as the African Charter on Democracy, Elections and Governance. The third section looks at the normative frameworks at sub-regional level. Five sub-regions are discussed and these are the East Africa Community, the Economic Community of East African States, the Southern African Development Community, the Economic Community of Central African States, and the Arab Maghreb Union. The final part is the summary of the whole chapter.

4.2 The OAU Legacy

The Organisation of African Unity (OAU) was formed on 25 May 1963, following the adoption of the OAU Charter.⁵⁹² Circumstances surrounding the formation of the OAU have been discussed in chapter two, specifically in the context of the discussion on the concept of regional integration or regionalism. This section will, therefore, only discuss normative frameworks, or lack thereof, as set by the OAU as regards the promotion of democracy and the conduct of democratic elections. The norms and standards set by the OAU are manifest in

⁵⁹² See Article I (1) OAU Charter 1963

the OAU Charter, other OAU treaties, Resolutions and Declarations as well as in the actual conduct or behaviour of OAU member states as a collective unit that set a pattern of behaviour in the area of democratic governance.

Discussion of the OAU normative legacy on democracy is clustered around the following two points:

- a) OAU indifference to undemocratic assumption of power;
- b) The democratic norms articulated with the adoption of the African Charter on Human and People's Rights; and the OAU paradigm shift in favour of democratic assumption of office in the 1990s.

4.2.1 OAU Indifference to Undemocratic and Unconstitutional Change of Government

The OAU was founded on a weak normative framework as regards the promotion and consolidation of democracy in member states. Its founding Charter lacked any reference to enhancing democracy and good governance. The OAU founding Charter (OAU Charter) states that the purposes of the OAU are the promotion of unity and solidarity of African states; coordination of cooperation; defence of their sovereignty, territorial integrity and independence; eradication of all forms of colonialism; and the promotion of international cooperation.⁵⁹³ In pursuit of these aims, the Charter enjoined the OAU member states to observe the following principles:

1. Sovereign equality of all member states;
2. Non-interference in internal affairs of states;
3. Respect for the sovereignty and territorial integrity of each state and for its inalienable right to independent existence;
4. Peaceful settlement of disputes by negotiation, mediation, conciliation and arbitration;
5. Unreserved condemnation, in all its forms, of political assassination as well as subversive activities on the part of the neighbouring states or any other states;
6. Absolute dedication to the total emancipation of the African territories which are still dependant; and
7. Affirmation of a policy of non-alignment with regard to all blocs.⁵⁹⁴

⁵⁹³ Article II(1) OAU Charter 1963

⁵⁹⁴ Article III OAU Charter 1963

The principles of sovereign equality of states; respect for sovereign and territorial integrity and non-interference coalesced into the devastating norm of indifference to how governments in member states assumed office. Thus the OAU could not interfere or be seen as to meddle in the domestic affairs of member states. This was well asserted by then OAU chairperson, President Sekou Toure of Guinea, when he remarked that the OAU was not “a tribunal which could sit in judgment on any member state’s internal affairs.”⁵⁹⁵ Even the principle condemning political assassinations and subversive activities in neighbouring states should not be construed as concern for democratic governance but more about self-preservation of incumbents. It was included in the Charter in the context of allegations that Ghana (Kwame Nkrumah) was sponsoring subversive activities in neighbouring states that did not embrace Nkrumah’s influence, and this is believed to have led to the assassination of President Sylvanus Olympio of Togo in 1963.⁵⁹⁶

The OAU firmly asserted the doctrine of non-interference in domestic affairs of member states such that it was adopted in its initial Resolution as a norm to guide the relationships and conduct among all African states.⁵⁹⁷ In consequence, the OAU paid no attention to how governments changed in member states. In the case of elections, this effectively meant that the OAU precluded itself from setting standards and inquiring into the fairness and genuineness of elections in member states. The problem was compounded, as noted in the second chapter, with frequent changes of government through military coups. The OAU responded to such situations by applying the traditional public international law doctrine of recognition of governments in its brutal and simplistic form, that is, it never considered the constitutional legitimacy of governments in member states but simply considered and recognised as governments, those entities in “effective control” of the state.⁵⁹⁸ Provided it had effective control of the state, how a government came to power was not an issue for which the OAU would withhold its recognition. Thus governments that held office through fraudulent elections, violence and military coups had no major problem securing the

⁵⁹⁵ As cited in Udombana “Towards the African Court on Human and Peoples’ Rights: Better Late than Never.”

56

⁵⁹⁶ Biswaro *Perspectives on Africa’s Integration and Cooperation from OAU to AU: Old Wine in a New Bottle?* 43

⁵⁹⁷ Border Disputes Among African States Resolution AHG/Res.16(1) Adopted at the First Ordinary Session of the Assembly of Heads of State and Government, July 1964.

⁵⁹⁸ Shaw *International Law* 305

recognition of the OAU. It is for this reason that some commentators and scholars referred to the OAU as a “Club of Incumbents.”⁵⁹⁹

The OAU faithfully applied the doctrine of non-interference and recognition of governments with effective control of the state until the 1990s when there was a new wave of democratisation on the continent. The consequence of this approach can be seen from how the OAU dealt with the recognition of competing representatives of states at OAU meetings and events. The cases of Ghana, Uganda, Liberia and Chad are quite illustrative.

In the case of Ghana, following the military overthrow of President Kwame Nkrumah by the National Liberation Council (NLC) in 1966, the NLC sent delegates to the Sixth Ordinary Session of the OAU Council of Ministers, which led to massive controversy as to their status. After much haggling and bargaining, it was resolved to seat the NLC delegates as the government of Ghana.⁶⁰⁰ This was the first major recognition problem faced by the OAU and the decision of the OAU set a precedent to be followed almost piously in subsequent cases and for many years until 1997 when the OAU unanimously rejected the military coup in Sierra Leone.

The next case, of Uganda followed Idi Amin’s overthrow of the Milton Obote regime in 1971. Both Amin and Obote sent delegates to the OAU’s Sixteenth Session of the Council of Ministers. After much arguing, the OAU settled for Idi Amin’s delegates as they had effective control of the state.⁶⁰¹ In the case of Liberia, the OAU recognised the government of Master Sergeant Samuel Doe, who in 1980 overthrew the government of President Tolbert and executed him and several other senior government officials.⁶⁰² In similar fashion, the government of Hissene Habre in Chad, who overthrew the government of President Goukhouni Ouddei in 1982, was recognised, despite protests from the Ouddei faction.⁶⁰³

As discussed in chapter two, no single incumbent African President allowed himself to lose an election until the democratic wave of the 1990s. Considering that the OAU lacked a solid framework for democratic election and democratic yardstick for recognition of governments, this record is then hardly surprising.

⁵⁹⁹ See for example, Omorogbe “A Club of Incumbents? The African Union and Coup d’états.” 123

⁶⁰⁰ Kufour “The OAU and the Recognition of Governments in Africa: Analysing Its Practice and Proposals for the Future” 5-7.

⁶⁰¹ *Ibid*, 11.

⁶⁰² *Ibid* 13/14

⁶⁰³ *Ibid*, 16/15

4.2.2 Democratic Norms in the African Charter on Human and Peoples' Rights and the OAU Paradigm Shift in Favour of Democracy in the 1990s

Thomas Franck, in his 1992 seminal article, postulated the emergence in international law of the right to democratic governance.⁶⁰⁴ This would be an age where citizens of each state will look to international law and institutions for the guarantee of their democratic entitlement. According to Franck, for some states, this will simply be an embellishment of already existing rights at municipal level, while for others, it would “be the realisation of a cherished dream.”⁶⁰⁵ This, he argues, is due to the regimes’ craving for validation and the pull for legitimacy. Regimes are said to crave validation as an indication or measure of their legitimacy, while legitimacy is the process and the quality or value that pulls both the “rule makers and those addressed by the rules towards voluntary compliance.”⁶⁰⁶

Franck points to three democratic norms already widely recognised in international law as the basis for the further growth of the entitlement to democratic governance. These are participation in one’s government, self-determination, and freedom of expression.⁶⁰⁷

In Africa the first pivotal development towards erecting a continental norm in favour of democratic governance was the adoption and entry into force of the African Charter on Human and Peoples’ Rights (alternatively called the Banjul Charter). The Charter was adopted by the OAU in Nairobi, Kenya, on 27 June 1981. It entered into force on 21 October 1986. In it are at least two provisions that relate directly to democratic governance and have been interpreted as having a bearing on the conduct of elections. These are Article 13(1) which guarantees every citizen the right to participate in the government of their country, and Article 20 which provides for self-determination.⁶⁰⁸

As regards the right to participation, the Charter provides thus:

Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.⁶⁰⁹

⁶⁰⁴ Franck “The Emerging Right to Democratic Governance” 46-91

⁶⁰⁵ Ibid

⁶⁰⁶ Ibid

⁶⁰⁷ Ibid

⁶⁰⁸ See Articles 13 and 20 African Charter on Human and Peoples’ Rights 1981

⁶⁰⁹ Article 13(1) African Charter on Human and Peoples’ Rights 1981

Although it is important that the Charter provides for political participation, it does so with an inherent drafting weakness in that the scope of this right is not defined. This can lead to a narrow construction of the right. The drafting style of the provision has also been severely criticized for its lack of depth as a guiding norm for the conduct of democratic elections. At least four weaknesses can be noted here.

The first notable weakness of Article 13(1) is that it does not expressly include the holding of periodic and democratic elections as an aspect of political participation.⁶¹⁰ Second, the words “freely chosen” in the provision may be interpreted narrowly to simply imply the entitlement to vote without coercion and nothing more- without requiring that the election results should reflect the will of the people. Coercion is not the only electoral malpractice that can vitiate the fairness of an election. Third, the provision does not take on board basic standards that go with the holding of democratic elections such as universal adult suffrage, non-discrimination, and secret ballot.⁶¹¹ Finally, the provision requires that the right to political participation be enjoyed “in accordance with the provisions of the law.” This may narrowly be interpreted to mean that the enjoyment of the right is subject to existing (or even future) national constitutions and statutes.⁶¹² In that case, it could be said to be setting no norm at all as it prescribes no quality or value national laws should be measured against.

Despite these inherent drafting weaknesses, however, the African Commission on Human and Peoples’ Rights, the treaty body responsible for the enforcement of the Charter, has interpreted the provision in a very progressive manner that would advance the conduct of democratic elections. In the Nigerian case brought to the Commission by the Constitutional Rights Project, following the Babangida government’s annulment of the 1993 election, considered to have been free and fair by many observers, the Commission considered the act as a violation of Article 13(1). It went on to spell aspects of the right to participation as follows:

To participate freely in government entails, among other things, the right to vote for the representative of one’s choice. An inevitable corollary of this right is that the results of the free expression of the will of the voters are respected; otherwise, the right to vote freely is

⁶¹⁰ Mbondenyi “The Right to Participate in the Government of One’s Country: An Analysis of Article 13 of the African Charter on Human and Peoples’ Rights in Light of Kenya’s 2007 Political Crisis” XX

⁶¹¹ Fox “The Right to Political Participation in International Law” 13

⁶¹² Ibid

meaningless. In the light of this, the annulment of the election results, which reflected the free choice of the voters, is in violation of article 13(1).⁶¹³

The Commission has also developed jurisprudence to the effect that tactics such as the enactment of exclusionary clauses so as to disqualify certain persons or sections of the population from participating in elections amounts to violation of Article 13(1). In *Legal Resources Foundation vs. Zambia*,⁶¹⁴ the Commission had to deal with a Zambian Constitutional provision passed in 1996, which required any presidential candidate to prove that both parents were Zambian citizens by birth or descent.⁶¹⁵ The provision was not only discriminatory but was considered to have been targeted against former President, Kenneth Kaunda, who had returned to active politics and was at the time the main opposition candidate for the 1996 general elections. Both his parents were born in colonial Nyasaland (current Malawi) but they had migrated to Northern Rhodesia (current Zambia) where he was born almost 40 years before independence. The Commission held that the exclusionary constitutional provision was a violation of Article 13(1), and that, although the right to political participation was supposed to be “in accordance with the provisions of the law,” this simply indicated the desire to regulate how the right was enjoyed and not to deny it.”⁶¹⁶ The Commission categorically stated that:

The pain in such an instance is caused not just to the citizen who suffers discrimination by reason of place of origin, but [by the fact] that the rights of the citizens of Zambia to ‘freely choose’ political representatives of their choice is violated. The purpose of the expression ‘in accordance with the provisions of the law’ is surely intended to regulate how the right is to be exercised rather than that the law should be used to take away the right.⁶¹⁷

The second norm under the Banjul Charter that relates to the democratic elections is one on self-determination. The Charter provides for self-determination in the following terms:

1. All peoples shall have right to existence. They shall have the right to unquestionable and inalienable right to self-determination. They shall freely determine their political

⁶¹³ Constitutional Rights Project and Another vs. Nigeria (2000) AHRL 191 (ACHPR 1998) para.50

⁶¹⁴ The Legal Resources Foundation vs. Zambia (2001) AHRLR 84 (ACHPR 2001)

⁶¹⁵ The Provision is still part of the Zambian Constitution as Article 34(3)(b) which states: “A person shall be qualified to be a candidate for election as President if- ... (b) both his parents are Zambians by birth or descent.”

⁶¹⁶ Legal Resources Foundation Vs. Zambia (2001) AHRLR 84 (ACHPR 2001) para.72

⁶¹⁷ Ibid

status and shall pursue their economic and social development according to the policy they have freely chosen.

2. Colonised or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognised by the international community.
3. All peoples shall have the right to the assistance of the state parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.”⁶¹⁸

Although most of the provision relates to the self-determination of people under colonial rule, the first clause has general application and applies even to independent African states. In this case, self-determination is considered as the right of people to “organise in an established territory to determine its collective destiny in a democratic fashion...”⁶¹⁹ In the Nigerian case where General Babangida annulled results of a democratic election, the Commission held that the right to self-determination is actually connected with the right to participate and includes people freely choosing their own government. It stated:

The right of people to determine their ‘political status’ can be interpreted as involving the right of Nigerians to be able to choose freely those persons or party that will govern them. It is the counterpart of the right enjoyed by individuals under article 13.⁶²⁰

In the *Jawara v. Gambia* case where the military took over power in 1994 and ousted democratically elected President Jawara, the Commission held that the military coup was a “grave violation of the right of Gambian people to freely choose their government as entrenched in article 20(1) of the Charter.”⁶²¹

Although the OAU adopted the Banjù Charter, which guaranteed the right to political participation, the OAU continued with its non-interference doctrine. Regimes that came after the adoption, and even entry into force of the Charter, and in clear violation of its provisions, were still recognised. For example, the regime of Hissene Habre discussed above, assumed power through a military coup in 1982, and was recognised as the legitimate government of Chad.

⁶¹⁸ Article 20(1)(2) and (3) African Charter on Human and Peoples’ Rights 1981

⁶¹⁹ Franck “The Emerging Right to Democratic Governance” 52

⁶²⁰ Constitutional Rights Project and Another vs. Nigeria (2000) AHRLR 191 (ACHPR 1998) para.52

⁶²¹ *Jawara vs. The Gambia* (2000) AHRLR 107 (ACHPR 2000) para.73

The OAU could however no longer remain indifferent to the winds of change blowing across the continent in the 1990s.⁶²² It began to depart from its policy of non-interference in domestic affairs. The major trigger for this was the June 1997 OAU Summit in Harare, Zimbabwe, which took place shortly after a military coup led by Major Johnny Paul Koroma, ousted the democratically elected government of President Ahmed Tejan Kabbah of Sierra Leone.⁶²³ The OAU unanimously and unequivocally condemned the coup as contrary to African democratic standards and aspirations and approved military action taken by Nigeria-led ECOWAS forces.⁶²⁴ The ECOWAS forces removed the military junta and restored President Kabbah to power in 1998. This became the first time that the OAU unanimously disapproved of a government that came to power through unconstitutional means and supported action to restore the legitimate government.

The next incident that showed a shift by the African leaders in favour of democratic governments occurred in 1998, when on June 7, the democratically elected government of President Bernardo do Nino Vieira was threatened with a mutiny by senior military officers in Guinea-Bissau. This led to fierce fighting between mutineers and loyal forces.⁶²⁵ In response to a request for help from President Vieira, the governments of Senegal and Republic of Guinea intervened to quell the mutiny and safeguard the democratically elected government of Vieira.⁶²⁶

In the same year South Africa and Botswana troops, on behalf of the SADC regional body, intervened in Lesotho to safeguard the democratically elected government of Prime Minister Mosisili.⁶²⁷ Following the 1998 Lesotho general election that returned Mosisili's government to power, the opposition and part of the military launched street protests that turned violent and threatened to paralyse government. This became the first time in the Southern African sub-region that SADC intervened to safeguard a democratically elected government.⁶²⁸

⁶²² For a detailed discussion of this change, see Fombad "The African Union, Democracy and Good Governance"9-29.

⁶²³ See Omorogbe "A Club of Incumbents? The African Union and Coup d'état;" Nowrof and Schbacker "The use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone"312- 412; Kufour "The OAU and the Recognition of Governments in Africa: Analysing its Practice and Proposals for the Future"369-401; and Levitt "Pro-Democracy Intervention in Africa"785- 833.

⁶²⁴ Ibid

⁶²⁵ Levitt "Pro-Democratic Intervention in Africa"805

⁶²⁶ Ibid

⁶²⁷ Ibid

⁶²⁸ Ibid

Following these incidents, the OAU began to articulate a general policy rejecting all unconstitutional assumptions of power in member states. At its 35th Session in Algiers in 1999, the OAU made a decision that “all member states whose governments came to power through unconstitutional means after the Harare Summit [June 1997], should return to constitutional legality before the next Summit.”⁶²⁹ The affected states were the Comoros, Congo Brazzaville, Guinea-Bissau, and Niger. The concerned states were, however, allowed to participate at the summit, acknowledged their wrong doing and promised rectification of the situation in their states.⁶³⁰

At the next Summit in Lome, Togo, in July 2000, the OAU heads of state and government adopted the Declaration on Unconstitutional Changes of Government. The Declaration denounced the resurgence of military coups and considered them as a serious setback to the process of democratisation in the continent.⁶³¹ It considers military coups unacceptable and defined the following as situations that constitute unconstitutional changes of government:

- i. Military coup d'état against a democratically elected government;
- ii. Intervention by mercenaries to replace a democratically elected government;
- iii. Replacement of democratically elected government by armed dissident groups and rebel movements;
- iv. The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.⁶³²

The Declaration also required that whenever an unconstitutional change of government occurs, the OAU Chairperson shall on behalf of the OAU promptly condemn such a change and call for speedy return to constitutional governance.⁶³³ The perpetrators would be given six months within which to return the country to constitutional governance, failure to which targeted sanctions may be imposed.⁶³⁴ During the six months period, the concerned government would be suspended from taking part in policy organs of the OAU.⁶³⁵

There is no doubt that the adoption of the Lome Declaration was ground breaking in norm setting in the acceleration of democratic governance on the African continent. It sets a

⁶²⁹ OAU Decision on Unconstitutional Changes of Government Doc. No. AHG/Dec. 142 (XXXV) 12-14 July 1999, para.1

⁶³⁰ Fombad “The African Union, Democracy and Good Governance” 19

⁶³¹ Declaration on Unconstitutional Changes of Government (2000)

⁶³² Ibid

⁶³³ Ibid

⁶³⁴ Ibid

⁶³⁵ Ibid

definite departure from the earlier OAU practice of recognising governments in effective control of the state, regardless of how they acquired power.

The Declaration has, however, the weakness of construing unconstitutional changes of government narrowly and generally limiting them to military takeovers. At least three of the four instances of unconstitutional changes of government relate to the deployment of military force in order to take over government power. Only the fourth instance relates to elections. But even the fourth one which deals with elections is very narrow and only considers it as an unconstitutional change of government when an incumbent loses an election but refuses to abdicate. But what of the situation where the incumbent manipulates the electoral system or tampers with election results? Such situations have been common in Africa, as shown in the two preceding chapters. It is allegations of this nature that vitiated the quality of elections in Kenya in 2007, Zimbabwe in 2008 and, to some extent, Ivory Coast in 2010, which led to violence and regional instability.

4.3 A New Dawn With the African Union

At the dawn of the new millennium, the OAU on 11 July 2000, in Lome, Togo, formally agreed to transform the OAU into the African Union (AU) by adopting the Constitutive Act (CA) of the African Union.⁶³⁶ The AU was formally launched on 9 July 2001 in Durban, South Africa, with great promise for the future of Africa.⁶³⁷

While the AU was born with a sense of commitment to advance democracy, respect for human rights, and development for African people, some scholars have criticized it as nothing more than a reincarnation of the old OAU which tolerated dictatorships and manifested disdain for human rights. Udombana, for example, considers the AU as nothing more than old wine in a new wine skin. Udombana pessimistically states:

The treaty [AU Constitutive Act] is merely rousing a desire without the possibility of real satisfaction, for the simple reason that Africa is a continent built out of the barricades, one that slaps a bandage on its worst problems and gives up on the rest. The treaty could actually provide a cover for Africa's celebrated dictators to continue to perpetrate human rights abuses... It is even doubtful whether, at the time of adoption of the treaty, African rulers

⁶³⁶ Article 2 Constitutive Act of the African Union 2000

⁶³⁷ Babaride "The European Union as a Model for African Union: The Limits of Imitation" 17

sincerely imagined that there would be a paradigmatic shift towards better human rights culture on the continent since they know, or are presumed to know, themselves.⁶³⁸

While this pessimism is understandable, considering the poor human rights and democracy record of the continent in the past, there is evidence of some progress both at norm setting and implementation, especially as regards democracy and rejection of unconstitutional changes of government. This, however, is not to indicate that all is well. There are still several challenges that need attention. This section discusses the normative framework set under the AU in support of democracy and democratic elections. The discussion focuses on three main frameworks:

- a. The Constitutive Act of the African Union;
- b. The African Charter on Democracy, Elections and Governance; and
- c. The NEPAD and APRM process.

4.3.1 The Constitutive Act of the African Union

The Constitutive Act of the African Union (CA) establishes the AU as the new African continental regional integration body, replacing the OAU. Unlike the OAU Charter which lacked democratic norms underpinning it, the CA includes among its objectives the promotion of “democratic principles and institutions, popular participation and good governance.”⁶³⁹ It continues with the standard set by the Lome Declaration of condemning and rejecting all unconstitutional changes of government,⁶⁴⁰ and provides for the suspension from AU activities governments that come to power by unconstitutional means.⁶⁴¹

In keeping with the OAU tradition, the CA recognises national territorial boundaries as inherited at independence⁶⁴² and prohibits member states from interfering in internal affairs of another member state.⁶⁴³ However, the AU innovatively departs from the OAU by allowing for the “Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes

⁶³⁸ Udombana “Can the Leopard Change its Spots? The African Union Treat and Human Rights” 1177-1261

⁶³⁹ Article 3(g) Constitutive Act of the African Union 2000

⁶⁴⁰ Article 4(p) Constitutive Act of the African Union 2000

⁶⁴¹ Article 30 Constitutive Act of the African Union 2000

⁶⁴² Article 4(b) Constitutive Act of the African Union 2000

⁶⁴³ Article 4(g) Constitutive Act of the African union 2000

against humanity.”⁶⁴⁴ This provision was amended in 2003 to expand the grounds for intervention in order to include a new ground which it states as: “a serious threat to legitimate order to restore peace and stability to the member state of the Union upon the recommendation of the Peace and Security Council.”⁶⁴⁵ The 2003 amendment, however, is yet to come into force.

While there is no dispute over the AU arrogating itself power to intervene in the case of war crimes, genocide and crimes against humanity, some scholars consider the additional ground of intervening introduced in 2003, that is, where there is a “serious threat to legitimate order” to be problematic and likely to be used to undermine democracy by incumbent leaders who would want to avoid losing power.⁶⁴⁶ This view is augmented by the fact that the Constitutive Act, while proscribing unconstitutional changes in government, does not offer any definition of what constitutes an unconstitutional change of government. It is argued that the lack of a clear definition of an unconstitutional change of government, and the added power in the CA under article 4(j) giving member states the right to request intervention from the Union in order to restore peace, could be used by leaders facing legitimate public protests or even those who face protests for ‘winning’ fraudulent elections to shield themselves.⁶⁴⁷

While these concerns are genuine, the ambiguity of the provision at the same time offers the possibility of intervention by the AU in order to support the democratic process. The use of the words “legitimate order” if taken to mean government democratically elected and based on the will of the people, would support the view of a pro-democracy intervention. This view finds support in the way that the AU handled the Arab uprisings that led to the ousting of incumbent regimes in Libya, Tunisia, and Egypt. In all the three cases, the AU sided with the public protesters.⁶⁴⁸

In the case of Tunisia, the Peace and Security Council (PSC) of the AU strongly condemned the excessive use of force against demonstrators and “expressed its solidarity with the people of Tunisia.”⁶⁴⁹ On Libya, the PSC condemned the excessive use of force and lethal weapons

⁶⁴⁴ Article 4(h) Constitutive Act of the African Union 2000

⁶⁴⁵ Article 4(h) Protocol on Amendments to the Constitutive Act of the African Union 2003

⁶⁴⁶ See for example, Baimu and Sturman “Amendment to the African Union’s Right to Intervene: A shift from Human Security to Regime Security”⁵; and Fombad “The African Union, Democracy and Good Governance”²¹

⁶⁴⁷ Ibid

⁶⁴⁸ Sturman “The African Union and the Arab Spring: An Exception to the New Principles or Return to Old Rules?” 1-5

⁶⁴⁹ Press Statement of the Peace and Security Council of the 257th Meeting Held on 15 January, 2011, Addis Ababa, Ethiopia (PSC/PR?COMM.2 (CCLVII))

against peaceful protestors and underscored that the aspirations of the Libyans for democracy, justice and political reform were legitimate and should be respected.⁶⁵⁰ In relation to Egypt, the PSC offered its solidarity with the people and considered their protests, demonstrations and desire for democracy as consistent with AU instruments and the continent's commitment towards further democratisation and good governance.⁶⁵¹ The approach the AU took towards the Arab Spring seems to suggest that the AU is capable of understanding what constitutes legitimate order and would not authorise military action against civilians protesting against excesses of an authoritarian regime.

With regard to unconstitutional changes of government, the CA proscribes such under Article 4(p) and provides for suspension of such governments.⁶⁵² The AU has continued with the standard set by its predecessor on this core and has largely implemented its policy of rejecting unconstitutional governments consistently. The following are the unconstitutional changes of government that have occurred on the continent since 2003 when the PSC of the AU was launched and how it has dealt with them:

- Central Africa Republic (March 2003): The AU strongly condemned the coup d'état led by General Francois Bozize that took place on 15 March 2003 and rejected it as an unconstitutional change of government.⁶⁵³ The AU imposed travel ban and asset freeze sanctions on political and military actors involved in the unconstitutional change of government.⁶⁵⁴ This became the first time the AU imposed sanctions for an unconstitutional change of government.
- Sao Tome and Principe (July 2003): The AU unreservedly condemned the coup that took place in Sao Tome and Principe on 16 July 2003 as contrary to the provisions of

⁶⁵⁰ See Communiqué of the 261st Meeting of the Peace and Security Council of 23 February 2011 (PR/COMM (CCLXI)); and Communiqué of the 275th Meeting of the Peace and Security Council of 26 April 2011 (PSC/MIN/COMM.2(CCLXXV).

⁶⁵¹ Communiqué of the 260th Meeting of the Peace and Security Council of 16 February 2011 (PSC/PR/CPMM.(CCLX))

⁶⁵² Communiqué of 260th Meeting of the Peace and Security Council of 16 February 2011 (PSC/PR/COMM. (CCLX))

⁶⁵³ Communiqué of the Ninetieth Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level, 17 March 2003 (Central Organ/MEC/AMB/COMM.(XC) para.1

⁶⁵⁴ Ibid. See also Vines "A Decade of African Peace and Security Architecture"89-109

the July 2000 Lome Declaration as well as the AU Constitutive Act and called for return to constitutional order.⁶⁵⁵

- Guinea-Bissau (September 2003): The AU condemned the coup d'état that took place on 14 September 2003 as a violation of the principles enshrined in the Constitutive Act as well as the Lome Declaration.⁶⁵⁶
- Togo (February 2005): The Togolese situation shows AU willingness to construe what constitutes unconstitutional change of government more progressively, and needs to be discussed in slightly more detail. On 5 February 2005 President Gnassingbe Eyadema died suddenly of a heart attack, ending his 38 year rule over Togo. The Togolese Constitution provided for the President of the National Assembly to succeed the President on an interim basis until an election was held to fill the Presidential vacancy.⁶⁵⁷ The president of the National Assembly, Fanbore Natchaba, who was out of the country at the time of the demise of the President, had his return flight redirected to Benin by the army which also sealed all borders to prevent his return. Then on February 6, Togo's National Assembly elected the son of the late President, Faure Gnassingbe Eyadema, as President of the National Assembly and consequently entitled to succeed his father according to the Togolese Constitution. The Assembly also passed an amendment to avoid a Presidential by-election and allow Faure to serve for the remainder of his father's term until 2008.⁶⁵⁸ The PSC considered this as a disguised coup and the constitutional amendments as simply "modifications intended to legally window dress the coup d'état."⁶⁵⁹ It demanded the resignation of Faure Gnassingbe, and return to constitutional order. It suspended Togo from all activities of the AU organs and endorsed sanctions imposed by ECOWAS on the regime.⁶⁶⁰

⁶⁵⁵ Communiqué of the Ninety-Third Ordinary Session at Ambassadorial Level of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution, 24 July 2003 (Central organ/MEC/AMB/COMM/.)XCIII)

⁶⁵⁶ Communiqué of the Ninety-Fifth Ordinary Session a Ambassadorial Level of the Central organ of the Mechanism for Conflict Prevention, Management and Resolution, 18 September 2003 (Central Organ/MEC/AMB/COMM. (XCV))

⁶⁵⁷ For a detailed discussion of the whole succession dispute see Levitt "Pro-Democracy Intervention in Africa" 811- 813

⁶⁵⁸ Ibid

⁶⁵⁹ Communiqué of the Twenty-Fifth Meeting of the Peace and Security Council of 25 February 2005 (PSC/PR/COMM. (XXV)). See Also Communiqué of the Twenty- Fourth Meeting of the Peace and Security Council of 7 February 2005 (PSC/PR/COMM. (XXIV))

⁶⁶⁰ Ibid

- Mauritania (August 2008): The PSC of the AU condemned the coup of 6 August 2008 against President Sidi Ould Cheikh Abdallahi led by General Mohamed Ould Abdel Aziz and declared null and void all the subsequent constitutional, institutional and legislative measures taken by the regime.⁶⁶¹ The AU imposed sanctions in the form of visa denials, travel restrictions and freezing of assets until the return to constitutional order.⁶⁶²
- Comoros (October 2008): In the case of the Comoros, the AU handled not a typical coup but a separatist movement that threatened the territorial integrity of the nation. It (AU) imposed sanctions on the separatist movement and its leaders, which took the form of travel restrictions and asset freeze.⁶⁶³ The AU later authorised military intervention.⁶⁶⁴
- Republic of Guinea (December 2008): The AU condemned the coup d'état of 23 December 2008 which followed the death of President Lansana Conte. The Guinean Constitution required the president of the National Assembly to act as interim president in the event of a vacancy in the office of the president. However, Captain Moussa Dadis Camara took over power and promised to hold elections in 2010, when the President Conte's term would have ended.⁶⁶⁵ The AU condemned the coup, suspended Guinea from participating in all AU activities and imposed sanctions.⁶⁶⁶
- Niger (February 2010): The AU condemned the military coup of 18 February 2010 and suspended Niger from all AU activities until the restoration of democratic governance.⁶⁶⁷
- Madagascar (March 2009): On 17 March, 2009, President Marc Ravalomanana, under pressure from the opposition and the army, resigned and handed over power to the army, which in turn handed it over to Andry Nirina Rajoelina, the former mayor of

⁶⁶¹ Communiqué of the 151st Meeting of the Peace and Security Council of 22 September 2008 (PSC/MIN/COMM.2 (CLI)). See also Interim Report of the Chairperson of the Commission on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage Such Situations (Thirteenth Ordinary Session, 1-3 July 2009 Assembly/AU/7/ (AXIII)

⁶⁶² Communiqué of the 163rd Meeting of the Peace and Security Council of 22 December 2008 (PSC/MIN/COMM.3 (CLXIII)

⁶⁶³ Vines "A Decade of African Peace and Security Architecture"89-109

⁶⁶⁴ Ibid

⁶⁶⁵ Interim Report of the Chairperson of the Commission on the Prevention of Unconstitutional Changes of Government Through Appropriate Measures and Strengthening the Capacity of the African Union to Manage Such Situations submitted at the Thirteenth Ordinary Session of the Assembly of the African Union, 1-3 July 2009

⁶⁶⁶ Ibid

⁶⁶⁷ Communiqué of the 216th Meeting of the Peace and Security Council of 19 February 2010 (PSC/PR/COMM.2 (CCXVI))

the capital city. The AU condemned this as an unconstitutional change of government and suspended Madagascar from its activities. It imposed sanctions that included travel bans, freezing of funds and assets, and diplomatic isolation against Rajoelina and other officials involved.⁶⁶⁸

- Mali (March 2012): The AU condemned the military coup of 22 March, 2012, suspended Mali from AU activities and imposed sanctions on the military regime that took over power.⁶⁶⁹
- Central Africa Republic (March 2013): The AU strongly condemned the takeover of power by the Seleka Rebel Group, in violation of existing ceasefire agreements. It suspended the Central Africa Republic from all AU activities and imposed sanctions (travel bans and asset restrictions) on all the leaders involved.⁶⁷⁰
- Ivory Coast (December 2010): Following the Incumbent President Laurent Gbagbo's failure to transfer power to Alassane Outtara as President of Ivory Coast after losing the election, the AU withdrew its recognition of Gbagbo as president, and suspended Ivory Coast from AU activities until Outtara was installed as president.⁶⁷¹
- Egypt (July 2013): President Mohamed Morsi was deposed by the military on 4 July 2013, following street protests against his government. The army suspended the constitution and appointed a caretaker government. The AU condemned the development as an unconstitutional change of government and suspended Egypt from all AU activities, pending return to democratic order.⁶⁷²

This list, contrary to the pessimistic views like those of Udombana, show that to some extent the AU has permanently departed from the OAU's doctrine of non-interference and has consistently rejected unconstitutional changes of government since 2003. From this angle, it can be firmly stated that the AU has established a firm norm and practice of not recognising unconstitutional changes of government in member states. However, this does not mean all is smooth and democracy is flourishing uninhibited on the continent. In some cases, individual

⁶⁶⁸ Communiqué of 221st Meeting of the Peace and Security Council of 17 March 2010 (PSC/PR/COMM. (CCXXII))

⁶⁶⁹ Communiqué of the 316th Meeting of the Peace and Security Council of 3 April 2012 (PSC/PR/COMM. (CCXVI))

⁶⁷⁰ Communiqué of the 363rd Meeting of the Peace and Security Council of 25 March 2013 (PSC/PR/COMM. (CCCLXIII)); and Communiqué of the 362nd Meeting of the Peace and Security Council of 23 March 2013 (PSC/PR/COMM. (CCCLXII))

⁶⁷¹ Communiqué of the 252nd Meeting of the Peace and Security Council of 9 December 2010 (PSC/PR/COMM.1 (CCLII))

⁶⁷² Communiqué of 384th Meeting of the Peace and Security Council of 5 July 2013 (PSC/PR/COMM. (CCCLXXXVIV))

leaders have been openly opposed to the collective actions of the AU. For example, President Thabo Mbeki was opposed to the imposition of sanctions on Ivory Coast and took sides with President Gbagbo. He portrayed the whole electoral conflict as nothing more than the United Nations “entrenching former colonial powers on our continent.”⁶⁷³ As shall be seen below, there is still a major weakness in the AU system relating to the holding of governments to the standards of conducting democratic elections.

4.3.2 The African Charter on Democracy, Elections and Governance

The African Charter on Democracy, Elections and Governance (ACDEG) was adopted by the AU heads of state and government in Addis Ababa, Ethiopia, on 30 January 2007. It entered into force on 15 February 2012, pursuant to Article 48 which required it to enter into force 30 days after the deposit of the 15th instrument of ratification. ACDEG is a treaty of the AU that consolidates the AU commitments to democratic governance and rule of law. It builds on previous commitments by both the OAU and AU and establishes common standards for democratic governance, and democratic elections.⁶⁷⁴ As such, it is the most comprehensive legally binding AU treaty committing its members to “deepening and consolidating democratic governance.”⁶⁷⁵

ACDEG draws its legitimacy from the Constitutive Act of the AU, particularly Articles 3 and 4 which stress the importance of “good governance, popular participation, the rule of law and human rights.”⁶⁷⁶ In adopting the treaty, the AU sought to entrench a political culture of changing power on the basis of regular, transparent, free and fair elections.⁶⁷⁷ Its objectives include the promotion of “holding of regular free and fair elections to institutionalise legitimate authority of representative government as well as democratic change of governments.”⁶⁷⁸

Unlike the Lome Declaration on Unconstitutional Change of Government, which did not specifically address itself to certain standards for holding and managing democratic elections,

⁶⁷³ Mbeki “What the World Got Wrong in Cote D’Ivoire” 1 and 2

⁶⁷⁴ African Union Panel of the Wise “Election-Related Disputes and Political Violence: Strengthening the Role of the African Union in Preventing, Managing, and Resolving Conflict” 28-45

⁶⁷⁵ Karume and Mura “Reflections on African Union Electoral Assistance and Observation” 27

⁶⁷⁶ See the Preamble to the African Charter on Democracy, Elections and Governance 2007

⁶⁷⁷ Ibid

⁶⁷⁸ Article 2(3) African Charter on Democracy, Elections and Governance 2007

ACDEG has a specific article that sets standards for democratic elections. States parties to ACDEG commit to holding transparent, free and fair elections and are required to:

1. Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections;
2. Establish and strengthen national mechanisms that redress election-related disputes in a timely manner;
3. Ensure fair and equitable access to contesting parties and candidates to state controlled media during elections;
4. Ensure that there is a binding Code of Conduct governing legally recognised political stakeholders, government, and other political actors prior, during and after elections. The Code shall include a commitment by political actors to accept the results of the election or challenge them through exclusively legal channels.⁶⁷⁹

These elements constitute important elements of a credible election whose result would be acceptable to both loser and winner. Without an impartial and independent Electoral Management Body, election results will always be viewed with suspicion. Without an impartial forum for the resolution of electoral disputes, aggrieved parties will resort to self-help measures to vent their anger. Without fair and equitable access to public media, the electorate would be denied an opportunity to make informed decisions when voting. And without a binding and enforceable Code of Conduct, electoral rules and standards of fair play lose meaning as their breach will attract no consequence. These are, therefore, cardinal electoral standards that would contribute significantly to holding credible democratic elections.

One major weakness, however, is that ACDEG does not clearly provide for a remedy or sanction where these provisions under Article 17 are violated. As will be discussed below, ACDEG provides for the imposition of sanctions for violation of its provisions, but these appear to be limited to unconstitutional changes of government.⁶⁸⁰ Violations of standards set under Article 17 do not attract the same sanctions as they do not fit in the definition of unconstitutional changes of government for which sanctions are prescribed.

ACDEG, in line with the Lome Declaration on Unconstitutional Changes of Government and the CA, also proscribes unconstitutional changes of government.⁶⁸¹ It subsumes the four

⁶⁷⁹ Article 17 African Charter on Democracy, Elections and Governance 2007

⁶⁸⁰ See Article 23 African Charter on Democracy, Elections and Governance 2007

⁶⁸¹ Article 23 African Charter on Democracy, Elections and Governance 2007

instances defined as constituting unconstitutional changes of government, and adds a fifth one, thereby expanding the factors that constitute unconstitutional changes of government.

The five factors are:

1. Any putsch or coup d'état against a democratically elected government;
2. Any intervention by mercenaries to replace a democratically elected government;
3. Any replacement of a democratically elected government by armed rebels or dissidents;
4. Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
5. Any amendment or revision of the constitution or legal instrument, which is an infringement on the principles of democratic change of government.⁶⁸²

There is uncertainty about the meaning of the fifth factor or element of unconstitutional change of government introduced in ACDEG. Sturman, for example, argues that the provision expands the definition of unconstitutional change of government to bring within its ambit the constitutional amendments that remove term limits to allow presidents to run for office indefinitely.⁶⁸³ As discussed in the second chapter, there has been a developing phenomenon of undoing constitutional term limits to have incumbent presidents serve indefinitely. A closer look at the provision, however, does not seem to support the view that the provision is aimed at curing this mischief. ACDEG allows amendments to national constitutions, provided the amendment is based on national consensus, and, if need be, through a referendum.⁶⁸⁴ In Chad, for example, the constitutional amendment that removed term limits in 2005 was put to a referendum and received an affirmative vote.⁶⁸⁵

A better view would be that the provision is intended to overcome the mischief of disguised coup d'état, which are given a coat of legal legitimacy, as was the case with Togo in 2005 and Republic of Guinea in 2008. In both instances, as discussed above, the legislature with support (or at the instigation) of the army passed constitutional amendments, following the death of sitting presidents, aimed at circumventing the succession process and bestowing power on a different person other than the rightful successor. The provision proscribes only a constitutional amendment which is “an infringement on the principles of democratic change of government.” This seems to be merely referring to the first four instances of unconstitutional change of government and basically tries to avoid a situation whereby

⁶⁸² Article 23 African Charter on Democracy, Elections and Governance 2007

⁶⁸³ Sturman “Unconstitutional Changes of Government: The Democratic Dilemma in Africa” 2

⁶⁸⁴ Article 10(2) African Charter on Democracy, Elections and Governance 2007

⁶⁸⁵ See <http://www.reuters.com/assets/print?aid=AFL5E89ML201220312> (Date of use: 24 December 2013)

through legal ingenuity the first four instances are rendered nugatory, as was done in Togo and Republic of Guinea.

This position finds support and fortification in the drafting history of the provision. Initially, the provision read as follows: “Amendment or revision of constitutions and legal instruments, contrary to the provisions of the constitution of the state party concerned, to prolong the tenure of office for the incumbent government.”⁶⁸⁶ There was, however, lack of consensus over the phrase “to prolong the tenure of office for the incumbent government.” Those in support of it were of the view that there was need for limiting presidential terms so as to allow for free democratic alternation of power in order to avoid attempts to remain in power indefinitely.⁶⁸⁷ However, opponents, led by Ugandan delegates, were of the view that maintaining a government in office is the democratic expression of the people within national legal frameworks and therefore should not be constrained by such a provision.⁶⁸⁸ As can be seen from the provision in its current form, the phrase that was intended to prevent removal of term limits was removed to accommodate those opposed to it. ACDEG, therefore, does not provide for presidential term limits as instances of unconstitutional changes of government. Providing for term limits could contribute towards overcoming the phenomena of overstaying leaders who personalise state institutions and feel have to win elections at any cost.

Although ACDEG is important for setting democratic standards in one comprehensive treaty, it seems weighted heavily towards preventing military coups. Most of the unconstitutional changes of government it prohibits have to do with forceful seizure of power. While this is important in view of the history of frequent military coups on the continent, it at the same time ignores other aspects that are inimical to democratic constitutional government. In the cases of Kenya in 2007 and Zimbabwe in 2008, the electoral malpractices that led to violence and instability do not fall within the definition of what constitutes unconstitutional change of government as defined by ACDEG. Electoral malpractices such as widespread violence, corruption, abuse of public resources, partiality of electoral officials, and manipulation of results do not fall into any of the categories of what is defined as constituting an unconstitutional change of government. Where an election is tainted with these malpractices, there is no adequate remedy provided for under ACDEG. Defective elections are, therefore,

⁶⁸⁶ Report of the Ministerial Meeting on the Draft African charter on Democracy, Elections and Governance and on the Revision of the Lome Declaration on Unconstitutional Changes of Government in Africa (Executive Council Ninth Ordinary Session, 25-29 June 2006, Banjul, The Gambia) (Ex. CL/258 (IX) para.40

⁶⁸⁷ Ibid, para.43

⁶⁸⁸ Ibid

not given the same significance as military coups. This leads to an anomalous situation where there is no AU remedy under ACDEG for defective elections, but self-help means to get rid of a self-imposing government are prohibited. Sturman calls this anomaly as the democrat's dilemma.⁶⁸⁹

4.3.3 The NEPAD and APRM process

This section briefly discusses two interrelated good governance initiatives of the AU. These are the New Partnership for Africa's Development (NEPAD) and the African Peer Review Mechanism (APRM). The NEPAD Declaration was adopted in July 2001 in Lusaka, Zambia by the OAU Assembly. NEPAD has been described as the African "continental development blueprint."⁶⁹⁰ This is because the primary concern of NEPAD is to extricate the African continent from "underdevelopment and exclusion" and put the continent "on a path of sustainable growth and development."⁶⁹¹

The NEPAD initiative is based on the acknowledgement that genuine "development is impossible in the absence of true democracy, respect for human rights, peace and good governance."⁶⁹² The objective of NEPAD is, therefore, to consolidate democracy and sound economic management of the continent,⁶⁹³ through strengthening the political and administrative framework of participating states.⁶⁹⁴

The NEPAD Implementation Committee in June 2002 adopted the Declaration on Democracy, Political, Economic and Corporate Governance (NEPAD Declaration, or the Declaration). In it, participating states commit to implement democratic and good governance standards of the AU and other international obligations.⁶⁹⁵ In addition, participating states agree to work together in policy and action in order to achieve the following objectives: democracy and good political governance; economic and corporate governance; socio-economic development; as well as the African Peer Review Mechanism.⁶⁹⁶

⁶⁸⁹ Sturman "Unconstitutional Change of Government: The Democrat's Dilemma in Africa" 2

⁶⁹⁰ Matlosa "Pan-Africanism, the African Peer Review Mechanism and the African Charter on Democracy, Elections and Governance: What Does the Future Hold?" 14.

⁶⁹¹ Article 1 The New Partnership for Africa's Development Declaration 2001

⁶⁹² Article 79 The New Partnership for Africa's Development Declaration 2001

⁶⁹³ Article 202 The New Partnership for Africa's Development Declaration 2001

⁶⁹⁴ Article 80 The New Partnership for Africa's Development Declaration 2001

⁶⁹⁵ Article 4 Declaration on Democracy, Political, Economic and Corporate Governance 2002

⁶⁹⁶ Article 6 Declaration on Democracy, Political, Economic and Corporate Governance 2002

The APRM is NEPAD's principal mechanism for achieving its goals. AU member states wishing to participate in the APRM are required to sign the Memorandum of Understanding of the African Peer Review Mechanism (MOU).⁶⁹⁷ Member states signing up to the MOU submit to be peer-reviewed on how they measure up to the objectives of NEPAD and "accept that constructive peer dialogue and persuasion would be exercised...in order to encourage improvements in country practices and policies."⁶⁹⁸

The APRM process is completely voluntary. Its primary goal is to "foster the adoption of policies, standards and practices that lead to political stability, high economic growth and sustainable development."⁶⁹⁹

The APRM has four types of review. These are:

- The first country review which is the base review and is to be undertaken within eighteen months of a country becoming a member of the APRM process;
- A periodic review to be carried out every two to four years;
- A review called by a concerned state for its own reasons and which falls outside of the mandated periodic reviews; and
- A review at the instigation of heads of state of member states when there are early signs of impending political or economic crisis in a spirit of helpfulness.⁷⁰⁰

The APRM process has four main stages. The first stage is the study of the political, economic and corporate governance of the concerned state by the APRM secretariat. This is followed, in second stage, by a visit to the concerned country by the Review Team. The purpose of the visit is to carry out wide consultations with government officials, political parties, parliamentarians and civil society organisations.⁷⁰¹

The third stage is the preparation of the APRM Review Team Report on the basis of information gathered from the APRM secretariat and the country visit. The first draft of the report is shared with the concerned state in order to give the government an opportunity to put forward its views and suggest how the identified shortcomings shall be addressed.⁷⁰² In the fourth stage, the Review Team's Report is submitted to the heads of state of participating

⁶⁹⁷ Article 30 Memorandum of Understanding of the African Peer Review Mechanism 2003

⁶⁹⁸ Article 26 Memorandum of Understanding of the African Peer Review Mechanism 2003

⁶⁹⁹ Article 3 African Peer Review Mechanism: Base Document 2003

⁷⁰⁰ Article 11 African Peer Review Mechanism: Base Document 2003

⁷⁰¹ Articles 18 and 19 African Peer Review Mechanism: Base Document 2003

⁷⁰² Articles 20 and 21 African Peer Review Mechanism: Base Document 2003

countries through the APRM secretariat. The heads of state then consider and adopt it and use it for the actual “peer-review” at the APR Forum when the heads of state engage their peer from the reviewed state on the findings of the report.⁷⁰³

There are so far 35 AU member states that have joined the APRM process.⁷⁰⁴ Seventeen of these have already undergone the initial review. These are Ghana, Rwanda, Kenya, Nigeria, Algeria, South Africa, Benin, Uganda, Nigeria, Burkina Faso, Mali, Mozambique, Lesotho, Mauritius, Ethiopia, Sierra Leone, Tanzania and Zambia.⁷⁰⁵

Many positive developments have been attributed directly to the APRM process in some participating member states. Ghana, for example, made the following governance policy reforms after its initial review:

- Development of draft land-use master plan;
- Establishment of the ministry of chieftaincy and cultural affairs;
- Increased district assemblies from 138 to 166;
- Passed legislation on human trafficking, disability, and gender violence; and
- Reduced the number of cabinet ministers.⁷⁰⁶

Where recommendations from the review are earnestly implemented, that can contribute to deepening of democracy, good governance and economic development. That would also create an ideal environment for the conduct of democratic elections in member states. However, the fact that the whole process is voluntary entails that there are no major consequences for defaulting on some undertakings. Thus, even where initial improvements have been made, there is nothing preventing the same government or another future government reversing some positive policy decisions. Ghana, for example, had significantly reduced the number of cabinet ministers following the initial review, but soon increased the size of cabinet after a change of government.⁷⁰⁷

Although positive policy reforms have been attributed to the review process, in some countries it has been argued that the whole process is merely used as a public relations tool of foreign policy interests. In South Africa, for example, Turianskyi argues that the APRM

⁷⁰³ Article 23 and 24 African Peer Review Mechanism: Base Document 2003

⁷⁰⁴ AU *African Union Handbook: A Guide for Those Working With and Within the African Union* 114

⁷⁰⁵ Gruzd “The African Peer Review Mechanism: Development Lessons from Africa’s Remarkable Governance Assessment System” 17

⁷⁰⁶ Ibid 17

⁷⁰⁷ Ibid 22

process does not inform national planning and policy reform, but that South Africa instead reports as APRM achievements initiatives that have been achieved through other unrelated interventions.⁷⁰⁸

The peer-review process at the APRM Forum (which is the meeting of heads of states of participating countries) has also been criticised for being more of a self-praise event than an occasion for in-depth and critical constructive dialogue that should lead to serious reforms in the concerned state. Instead of asking critical questions and urging genuine reforms, heads of state have often treated the occasion to heap underserved praises on concerned states. Jerry Okungu, a Kenyan official who attended Kenya's initial review in 2006, is reported to have remarked thus:

I counted the number of leaders who spoke after President Kibaki had responded to Dr. Machel. They were from Ghana, Ethiopia, South Africa, Rwanda and Nigeria. Not one of them posed a question to Mr. Kibaki. They all praised the report and commended Kenya for being candid, thorough and open. They pledged to support Kenya in seeking solutions to its constitution review and diversity problems.

When it was all over, Presidents Obasanjo and Mbeki and Prime Minister Meles Zenawi of Ethiopia expressed relief and promised to go on with the process, after realising that it was not a life-and-death situation.⁷⁰⁹

Despite all these weaknesses and challenges, if the aim of using the APRM as a tool to support good governance and economic development is pursued vigorously, that would lead to an environment that would significantly contribute towards the holding of democratic elections in Africa. That would mean participating states faithfully implementing continental standards on democracy and good governance. Where, however, elections are disputed, the APRM would be of little use as it was not designed to specifically respond to such a challenge.

⁷⁰⁸ Turianskyi "South Africa's Implementation of the APRM: Making a Difference or Going Through the Motions?" 2 and 3

⁷⁰⁹ As cited in Manby "Was the APRM Process in Kenya a waste of Time? Lessons that Should be Learned for the Future"2

4.4 An Overview of Sub-Regional Normative Frameworks on Democratic Elections

This section discusses democratic normative frameworks existing at sub-regional level. It focuses on five sub-regions, that is, East Africa, West Africa, Southern Africa, Central Africa and the Maghreb Africa. Although these are not the only sub-regions in Africa, discussing them gives a feel of the major African geographical blocks, cultures and regional histories.

4.4.1 East African Community

The East African Community (EAC) was founded in 1999, with the adoption of the Treaty for the Establishment of the East Africa Community (The Treaty) by Kenya, Uganda, and Tanzania, which are the three founding members.⁷¹⁰ The treaty allows for the granting of membership to other states,⁷¹¹ and pursuant to this Rwanda⁷¹² and Burundi⁷¹³ became members. The new state of South Sudan is in the process of joining the EAC.

The East Africa Community has a very weak normative framework on democracy and the conduct of democratic elections. In the whole of the Treaty, there is no stand alone provision dedicated to articulation of norms for the conduct of democratic elections in member states. In fact, the term democracy is only glossed over, and in the whole Treaty just mentioned in three instances.

The first instance is in the context of considering the application of a foreign country to become a member of the East Africa Community (EAC). In considering such an application, the EAC shall, inter alia, take into account that country's "adherence to universally acceptable principles of good governance, democracy, the rule of law, observance of human and social justice."⁷¹⁴

The second instance is in the context of stating the fundamental principles of the EAC. These are stated as including "good governance including adherence to the principles of democracy, the rule of law...promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights."⁷¹⁵ Although there is no further elaboration, the treaty's reference to the African Charter on

⁷¹⁰ Article 2(1) and 3(1) Treaty for the Establishment of the East African community 1999

⁷¹¹ Article 3 Treaty for the Establishment of the East African community 1999

⁷¹² Article 2(1) Treaty of Accession of the Republic of Rwanda into the East African Community 2007

⁷¹³ Article 2(1) Treaty of Accession of the Republic of Burundi into the East African Community 2007

⁷¹⁴ Article 3(b) Treaty for the Establishment of the East Africa Community 1999

⁷¹⁵ Article 6(d) Treaty for the Establishment of the East Africa Community 1999

Human and Peoples' Rights (ACHPR) could be construed as recognising and subsuming ACHPR standards into the EAC system. If this were the case, then it could be argued that the EAC recognises the democratic rights enshrined in ACHPR, particularly the right to political participation and also self-determination.

The third instance where there is reference to the democratic norm is in the context of the eventual establishment of the Political Federation of the Partner States. As part of this process of moving towards a political federation, the member states are required to develop common foreign and security policies. The objectives of these common policies shall, inter alia, be to “develop and consolidate democracy and the rule of law and respect for human rights and fundamental freedoms.”⁷¹⁶

Outside these three contexts, there is no reference to any democratic standards and absolutely no reference to the holding of democratic, free and fair elections. The EAC seems aware of this shortfall and has been working to ameliorate it. It has developed a draft East African Community Principles for Election Observation, Monitoring and Evaluation.⁷¹⁷ These Principles are not yet formally adopted. However, if adopted, the Principles would set a strong normative framework and benchmark for democratic elections in the EAC. In this document, the EAC proposes to adopt the following as the key principles for the conduct of democratic elections:

- (a) Free expression of the will of the people;
- (b) Genuine elections
- (c) Periodic elections;
- (d) Universal suffrage;
- (e) Equal suffrage;
- (f) Right to participate in public affairs;
- (g) Right to vote;
- (h) Right to be elected;
- (i) Secret ballot; and
- (j) Right to an effective remedy (fair and impartial resolution of election related disputes).⁷¹⁸

⁷¹⁶ Article 123 (3)(c) Treaty for the Establishment of the East African Community 1999

⁷¹⁷ The Draft East Africa Community Principles for Election Observation, Monitoring and Evaluation 2011

⁷¹⁸ See Preamble to the Draft East Africa Community Principles for Election Observation, Monitoring and Evaluation 2011

The document provides for electoral standards not just for the election day but for the whole context in which an election is held, including the pre-election period. It sets principles that should accompany the electoral process through out.⁷¹⁹ It also prescribes standards for institutions involved in the conduct of elections. For example, in relation to Electoral Management Bodies, it requires that such bodies should be:

- (a) Independent, financially and administratively autonomous;
- (b) Representative of society and gender sensitive;
- (c) Composed of professional people of integrity appointed through a fair and transparent process;
- (d) Guarantee security of tenure of its members; and
- (e) Accountable to the people's representatives.⁷²⁰

The document further sets standards for the media; the use of public resources; the role of security forces; political party financing; as well as civic and voter education.⁷²¹ Despite all these high standards set, the document seems to have a weak enforcement mechanism available. The only way these standards will be enforced seems to be election observation and subsequent issuance of an election observers' report.⁷²²

Although the draft EAC Principles for Election Observation, Monitoring and Evaluation set high standards, it must be emphasized that the document is not yet formally adopted and therefore currently of little significance, except as a harbinger of what might come. As things currently stand, EAC has very little in terms of normative framework for the conduct of democratic elections. The urgency of such a normative framework for the sub-region cannot be overemphasised, considering that some member countries, such as Rwanda and Uganda, are experiencing instances of serious violations of basic democratic norms. In Rwanda, for example, the regime of President Paul Kagame routinely prevents genuine opposition leaders from contesting elections, usually through assassinations, intimidation and harassment.⁷²³

⁷¹⁹ See Article 3.1 Draft East Africa Community Principles for Election Observation, Monitoring and Evaluation 2011

⁷²⁰ Ibid

⁷²¹ See articles 3.7 to 3.14 Draft East Africa Community Principles for Election Observation, Monitoring and Evaluation 2011

⁷²² See Articles 5.1 to 5.3.2 Draft East Africa Community Principles for Election Observation, Monitoring and Evaluation 2011.

⁷²³ www.freedomhouse.org/report/countries-crossroads/2011/rwanda (Date of use: 20 December 2014)

4.4.2 Economic Community of Western African States

The Economic Community of West African States (ECOWAS) was founded in 1975 with the adoption of the Treaty Establishing the Economic Community of West African States (ECOWAS Treaty) on 28 May 1975, in Lagos, Nigeria. The Treaty was later revised in 1993. The aims and objectives of ECOWAS were predominantly focused on economic integration, which it believed would lead to the creation of a strong economic union in West Africa “in order to raise the living standards of its people, and to maintain and enhance economic stability, foster relations among member states and contribute to the progress and development of the African continent.”⁷²⁴ Although the ECOWAS Treaty is more about economic integration, it incorporates as a fundamental principle, among other principles, “the promotion and consolidation of democratic system of governance in each member state.”⁷²⁵ Considering that West Africa has been the epicentre of military coups and dictatorships in Africa, this was an important inclusion in the Treaty.

The ECOWAS drive for setting community norms on democratisation stems from frequent experiences of military coups in member states, the desire to deter and prevent them, and assure regional security and stability.⁷²⁶ The main document adopted in this area is the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace Keeping and Security, which was adopted on 10 December 1999, in Lome, Togo. The Protocol establishes a Mechanism for conflict prevention, management, resolution, peace keeping and security.⁷²⁷ The objectives of the Mechanism include prevention, management and resolution of both intra- and inter-state conflicts; cooperation in the area of conflict prevention, early warning system and peace-keeping; and the organisation and coordination of humanitarian relief.⁷²⁸

One of the remarkable achievements under the Mechanism is the setting up of the ECOWAS Ceasefire Monitoring Group (ECOMOG), which has played a significant role in peace-keeping and restoration of stability.⁷²⁹ The Mechanism, however, is not primarily concerned about setting democratic norms for ECOWAS but more with military and security threats to

⁷²⁴ Article 3(1) Treaty Establishing the Economic Community of West African States 1993.

⁷²⁵ Article 4(j) Treaty Establishing the Economic Community of West African States 1993

⁷²⁶ Cowell “The Impact of the ECOWAS Protocol on Good Governance and Democracy” 331-342.

⁷²⁷ Article 1 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security 1999.

⁷²⁸ Article 2 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security 1999

⁷²⁹ Article 22 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security 1999

peace. The promotion and consolidation of democracy is only mentioned in passing as one of the principles of the Mechanism.⁷³⁰

ECOWAS shortly realised that sustainable peace cannot be achieved simply by focusing on military and security factors. Within about two years of adopting the Mechanism, ECOWAS adopted the Protocol on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (hereinafter the ECOWAS Democracy and Governance Protocol),⁷³¹ having observed that in order for the Mechanism to be effective in preventing internal conflict, democracy, good governance and rule of law were essential.⁷³²

The Democracy and Good Governance Protocol creates minimum constitutional principles that shall be shared by all member states. These include the requirement that “every accession to power must be made through free, fair and transparent elections”⁷³³ and, therefore, there would be “zero tolerance for power obtained or maintained by unconstitutional means.”⁷³⁴ The Protocol also requires “popular participation in decision making”⁷³⁵ and prohibits the military from running for elective office, restricting them to serve under a legally constituted civilian government.⁷³⁶

Although the Democracy and Good Governance Protocol declares zero tolerance for power obtained by unconstitutional means, what constitutes “unconstitutional means” is not defined. Would, for example, amending a constitution to remove presidential term limits constitute “unconstitutional means”? This ambiguity can have both advantages and disadvantages. On the negative side, it can allow for the provision to be narrowly interpreted, while on the positive side it leaves room for progressive interpretation according to changing circumstances. That ECOWAS is capable of construing unconstitutional changes of government in a progressive way is manifest in its handling of the Togolese succession dispute of 2005, taking the same stand as the AU in rejecting all attempts at giving legal legitimacy to a coup.

⁷³⁰ Article 2 Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-Keeping and Security 1999

⁷³¹ Adopted on 21 December 2001 in Dakar, Senegal

⁷³² Preamble to the ECOWAS Democracy and Good Governance Protocol 2001

⁷³³ Article 1(b) ECOWAS Democracy and Good Governance Protocol 2001

⁷³⁴ Article 1(c) ECOWAS Democracy and Good Governance Protocol 2001

⁷³⁵ Article 1(d) ECOWAS Democracy and Good Governance Protocol 2001

⁷³⁶ Articles 1(e) and 19 ECOWAS Democracy and Good Governance Protocol 2001

The ECOWAS Democracy and Good Governance Protocol prohibits substantial modification to electoral laws in the last six months preceding an election, except with the consensus of the majority of political actors.⁷³⁷ This is an extremely progressive provision as amending laws too close to an election date allows for little time to educate the public in order that they act as informed participants in the democratic process. This has potential to vitiate the quality of public participation during elections. But apart from vitiating the quality of elections, incumbent governments in Africa have used constitutional and legal amendments to ambush, distract and disadvantage the opposition. President Ellen Johnson-Sirleaf of Liberia, for example, in 2011 sought to introduce major electoral amendments to the Constitution just a month before the scheduled date of elections.⁷³⁸ The proposed amendments include reducing the residency requirements for the President and Vice President from ten years to five years; changing the date of election from the second Tuesday of October to Second Tuesday of November; and changing the electoral system by introducing a single round of first-past-the-post voting for all legislative and municipal elections.⁷³⁹ The proposals, in line with the ECOWAS standard requiring popular consensus, were hastily put to a referendum on 23 August 2011 but were rejected by voters.⁷⁴⁰

Another positive provision of the ECOWAS Democracy and Good Governance Protocol is the mechanism for observation and monitoring of elections in member states. When elections in a member state approach, the ECOWAS Executive Secretary is required to dispatch a fact-finding mission to the concerned member state.⁷⁴¹ The fact-finding mission may be followed by an exploratory mission, which, inter alia, collects details of electoral laws, conditions under which elections are held, meets candidates and government officials; and assesses the preparations for elections.⁷⁴² The actual observation mission follows the exploratory mission and is required to arrive in the country at least forty-eight hours prior to the conduct of elections.⁷⁴³ The observation mission is supposed to remain in the country until election results are announced.⁷⁴⁴ It is supposed to compile a report of its observation and

⁷³⁷ Article 2(1) ECOWAS Democracy and Good Governance protocol 2001

⁷³⁸ Bischoff "Pre-Election Reflection: Liberia 2011 Constitutional Referendum"

<http://www.polity.org.za/article/pre-election-reflection-liberias-2011-constitutional-referendum-2011-08-19>

(Date of use: 1 September 2014)

⁷³⁹ Ibid

⁷⁴⁰ http://en.wikipedia.org/wiki/Liberian_general_election,_2011 (Date of use: 9 April 2015)

⁷⁴¹ Article 13(1) ECOWAS Democracy and Good Governance protocol 2001

⁷⁴² Article 13(2) ECOWAS Democracy and Good Governance protocol 2001

⁷⁴³ Article 15(1) ECOWAS Democracy and Good Governance protocol 2001

⁷⁴⁴ Article 16(1) ECOWAS Democracy and Good Governance protocol 2001

submit it to the ECOWAS Mediation and Security Council for recommendations to be made to the concerned country and proposals for measures to be taken where necessary.⁷⁴⁵

One major criticism against the ECOWAS election observation system is that it has rarely condemned fraudulent elections and it is, therefore, being used as a tool to give legitimacy to defective elections, which makes its effectiveness as a tool for promoting democracy and transparency in elections questionable.⁷⁴⁶ However, the election observation mechanism was put to good use recently in relation the Gambia 2011 elections. After a fact finding mission, which found the environment not suitable for a free and fair election in line with the ECOWAS Democracy and Good Governance Protocol, ECOWAS decided not to send an election observation mission to the Gambia. It indicated that the political environment was unwholesome and tainted with clear machinations to manipulate the outcome of the elections.⁷⁴⁷ It also indicated that there was a lot of intimidation, lack of neutrality of state and parastatal institutions, unacceptable levels of control of electronic media by the incumbent regime; and repression and intimidation against the opposition and the public.⁷⁴⁸ If this approach applied to the Gambia takes root and becomes entrenched in ECOWAS, it would give credibility to the election observation mechanism and avoid the trend of election observation missions being used to give legitimacy to clearly defective elections.

The ECOWAS Democracy and Good Governance Protocol also requires that “adequate arrangements shall be made to hear and dispose of all petitions relating to the conduct of elections and announcement of results.”⁷⁴⁹ The notable weakness about this provision is that it does not oblige member states to ensure that election petitions are decided fairly and efficiently. If interpreted literally, the provision is of little or no significance. Further, the requirement that observation missions should only be in the country up to the announcement of results means that there is no ECOWAS observation of the electoral dispute resolution mechanism in the concerned country.

Finally, the ECOWAS Democracy and Good Governance Protocol provides for the possibility of imposing sanctions where “democracy is abruptly brought to an end by any

⁷⁴⁵ Article 18 ECOWAS Democracy and Good Governance protocol 2001

⁷⁴⁶ Ebobrah “The African Charter on Democracy, Elections and Governance: A New Dawn for Enthronement of Legitimate Governance in Africa?” 9

⁷⁴⁷ “ECOWAS Pulls out of Gambia’s Elections” <http://www.informationafrica.com/politics-africa/ecowas-pulls-out-of-gambia%2%80%99s-elections/> (Date of use: 27 August 2014)

⁷⁴⁸ Ibid

⁷⁴⁹ Article 7 ECOWAS Democracy and Good Governance protocol 2001

means.”⁷⁵⁰ The sanctions may be in the form of suspension of member states from all ECOWAS decision making bodies; refusal to hold ECOWAS meetings in the concerned state; and refusal to support candidates from concerned states for elective posts in international organisations.⁷⁵¹

4.4.3 Southern Africa Development Community

The Southern Africa Development Community (SADC) was formed in 1992, with the adoption of the Treaty of the Southern African Development Community.⁷⁵² From a democracy perspective, SADC is established on principles that include requiring member states to be acting consistent with “human rights, democracy, and the rule of law.”⁷⁵³ The objectives of SADC are, inter alia, the evolution of “common political values, systems and institutions.”⁷⁵⁴

In 1996, as part of the furtherance of regional political integration, the SADC heads of state and government agreed to establish the SADC Organ on Politics, Defence, and Security Cooperation (OPDSC or the Organ).⁷⁵⁵ However, the Protocol on Politics, Defence, and Security Cooperation, which formally established the Organ, was only adopted in August 2001. The general objective of the Organ is “to promote peace and security in the Region.”⁷⁵⁶ Specific objectives for setting up the Organ include political cooperation and evolution of common political values among member states;⁷⁵⁷ prevention, containment and resolution of inter- and intra-state conflict peacefully;⁷⁵⁸ and the promotion of the development of democratic institutions and practices within territories of member states.”⁷⁵⁹

The Organ in 2004 adopted the SADC Indicative Plan for the Organ as a planning and implementation strategy for regional political integration and stability. The development of the Indicative Plan led to the development of the SADC Principles and Guidelines Governing Democratic Elections, which were adopted in 2004. The SADC Principles and Guidelines

⁷⁵⁰ Article 45 (1) ECOWAS Democracy and Good Governance protocol 2001

⁷⁵¹ Article 45(2) ECOWAS Democracy and Good Governance protocol 2001

⁷⁵² Adopted on 17 August 1992 in Windhoek, Namibia.

⁷⁵³ Article 4(c) Treaty of the Southern Africa Development Community 1992

⁷⁵⁴ Article 5(1)(b) Treaty of the Southern Africa Development Community 1992

⁷⁵⁵ See the SADC Gaborone Communiqué of 28 June 1996

⁷⁵⁶ Article 2(1) Protocol on Politics, Defence and Security Cooperation 2001

⁷⁵⁷ Article 2(2)(b) Protocol on Politics, Defence and Security Cooperation 2001

⁷⁵⁸ Article 2(2)(e) Protocol on Politics, Defence and Security Cooperation 2001

⁷⁵⁹ Article 2(2)(g) Protocol on Politics, Defence and Security Cooperation 2001

Governing Democratic Elections constitute the principal regional framework through which the quality of elections is assessed.

The SADC Principles and Guidelines Governing Democratic Elections indicate that they are founded on the democratic principles and objectives of the SADC Treaty, particularly those under Articles 4 and 5 which enjoin member states to adhere to the principles of respect for human rights, democracy, and rule of law; the promotion of common political values; and the consolidation, defence and maintenance of democracy.⁷⁶⁰ The SADC Principles and Guidelines Governing Democratic Elections also indicate that they take cognisance of the objectives of the Protocol on Politics, Defence and Security Cooperation, particularly the duty to promote the development of democratic institutions and practices.⁷⁶¹ From this perspective, it can be stated that these Principles and guidelines were developed pursuant to binding provisions of the SADC Treaty and the SADC Protocol on Politics, Defence and Security Cooperation and in a way give flesh to the bare bones of the two treaties. This is an important point as shall be noted when discussing enforcement challenges of the SADC democracy norms.

The SADC Principle and Guidelines Governing Democratic Elections mainly focus on three areas where they set standards for the conduct of elections. These areas are principles for conducting democratic elections; SADC observation of elections in member states; and duties of member states holding elections.

In terms of principles guiding the conduct of elections, member states are required to observe the following:

- Full participation of the citizens in the political process;
- Freedom of association;
- Political tolerance;
- Regular intervals for elections as provided in the respective national constitutions;
- Equal opportunity for all political parties to access the state media;
- Equal opportunity to exercise the right to vote and be voted for;
- Independence of the judiciary and impartiality of the electoral institutions;
- Voter education; and

⁷⁶⁰ Section 1 SADC Principles and Guidelines Governing Democratic Elections 2004

⁷⁶¹ Ibid

- Acceptance and respect of the election results by political parties proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land.⁷⁶²

Apart from these listed principles, which are not elaborated further in the document, there is no further guidance on how elections should be managed. The rest of the document is dedicated towards election observation. The document could, therefore, be criticised for paying too little attention to setting concrete standards and guidelines for managing elections (covering both the pre-election and post-election phases).

The second focus area of the document is the setting of guidelines for election observation. The document sets guidelines that are aimed at ensuring that observers are competent and impartial, and adhere to a Code of conduct.⁷⁶³ The final focus area of the document is on the duties of the country holding elections. Such a country has the responsibility of ensuring that ultimately the whole election is held in a transparent, competent, free and fair manner, taking into account the respect for human rights of individuals as well as the competence and impartiality of the responsible electoral institutions.⁷⁶⁴ The host state also has the responsibility to formally invite SADC to observe its elections at least 90 days before the polling day.⁷⁶⁵

The futility of the provision requiring the host state to formally invite SADC to observe its elections was demonstrated in 2005 when Zimbabwe had initially refused to formally invite SADC to observe its elections. Zimbabwe only sent the invitation after intense diplomatic negotiations, and just within a month of holding the elections.⁷⁶⁶ This demonstrates a weakness in the enforcement mechanism of the document. A country that wishes to avoid its election being measured against the SADC standards can simply avoid inviting observers to its elections. As the document provides for no other clear enforcement mechanism apart from election observation, this lacuna is problematic.

There is also uncertainty about the legal status of the SADC Principles and Guidelines Governing Democratic Elections, that is, whether the document is considered as legally binding or is simply a mere declaration of lofty intents but not intended to bind member

⁷⁶² Section 2.2 SADC Principles and Guidelines Governing Democratic Elections 2004

⁷⁶³ Sections 3, 4 and 5 SADC Principles and Guidelines Governing Democratic Elections 2004

⁷⁶⁴ Section 7 SADC Principles and Guidelines Governing Democratic Elections 2004

⁷⁶⁵ Section 7.10 SADC Principles and Guidelines Governing Democratic Elections 2004

⁷⁶⁶ Matlosa "Democratisation at the Crossroads: Challenges for the SADC Principles and Guidelines Governing Democratic Elections" 13

states. The Zimbabwean Justice Minister Patrick Chinamasa, for example, has argued that the SADC Principles and Guidelines are simply a declaration of lofty political intent without binding force.⁷⁶⁷ Some scholars also seem to confuse the issue of legal status of the document with that of lacking adequate enforcement mechanism. Khabele Matlosa, for example, seems to argue that because the document lacks or is not “equipped with penalties for non-compliance” it is therefore not legally binding.⁷⁶⁸ It is submitted that the better and more nuanced view, the issue of the inadequate enforcement mechanism notwithstanding, is that the SADC Principles and Guidelines Governing Democratic Elections were developed pursuant to the principles and objectives of both the SADC Treaty and the Protocol on Politics, Defence and Security Cooperation, both of which are binding treaties. Therefore, to the extent that the document simply gives flesh to the two binding treaties and is not ultra vires or does not veer away from the standards of those two treaties, then its standards are binding on member states.

It should also be noted that apart from the SADC Principles and Guidelines Governing Democratic Elections, there are two other frameworks that are routinely used within the SADC region as yardsticks for assessing the credibility of elections. These are the Norms and Standards for Elections in the SADC Region⁷⁶⁹ and the Principles for Election Management, Monitoring and Observation in the SADC Region.⁷⁷⁰ Both documents are not treaties concluded between SADC states and make it clear that their contents are simply recommendations for the management of elections. The SADC Parliamentary Norms and Standards focus mainly on setting standards for the respect of individual voters; the role of government in elections; and the fostering of transparency and integrity in the electoral process.⁷⁷¹ The Principles for Election Management, Monitoring, and Observation in the SADC Region, on the other hand, take a more technical and chronological approach in the management of elections and offers guidance for the management of elections in the three phases of an election: the pre-election phase; the election phase; and the post-election phase.⁷⁷² Both documents concentrate on the more technical aspects of elections, and, unlike

⁷⁶⁷ Ibid, 13

⁷⁶⁸ Ibid, 11

⁷⁶⁹ Adopted by the SADC Parliamentary forum on 25 March 2001

⁷⁷⁰ Adopted on 6 November 2003 by the Electoral Institute of Southern Africa (EISA), the Electoral Commissions Forum of SADC (ECF), and some leading SADC based electoral NGOs.

⁷⁷¹ SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region 2001

⁷⁷² Principles for Election Management, Monitoring and Observation in the SADC Region 2003

the SADC Principles and Guidelines Governing Elections, both offer more concrete standards for the management of the elections than the mere observation of elections.

Although the two documents are not legally binding treaties of SADC, they have some persuasive and moral authority considering that they were adopted by key stakeholders in the elections sector. The SADC Norms and Standards for Elections in the SADC Region is a document adopted by the SADC Parliamentary Forum, which included both ruling and opposition parliamentarians from the SADC member states. The Principles for Election Management, Monitoring and Observation in the SADC Region were adopted by representatives of the Electoral Commissions of SADC member states under the Electoral Commissions Forum of SADC (ECF), the Electoral Institute of Southern Africa (EISA), and leading SADC based NGOs working in the field of elections and democracy.

4.4.4 The Economic Community of Central African States

The Economic Community of Central African States (ECCAS) was created following the adoption of the Treaty Establishing the Economic Community of Central African States.⁷⁷³

The Treaty entered into force the following year in 1984. The member states are Angola, Burundi, Cameroon, Central Africa Republic, Chad, Congo-Brazzaville, Congo DR, Equatorial Guinea, Gabon, and Sao Tome and Principe. Due to virtual lack of political commitment, concomitant with virtual lack of financial contributions by member states, the ECCAS went into abeyance from 1993 to 1998.⁷⁷⁴ It was re-launched in 1998.⁷⁷⁵

The main aim of ECCAS is to provide and strengthen the harmonious cooperation and ensure an evenly balanced development across all economic and social fields in member states.⁷⁷⁶

These include the fields of industry, transport and communications, energy, agriculture, natural resources, trade, customs, financial matters, tourism, science and technology and culture. Ultimately, it is hoped that engagement around these sectors would raise the standard of living of people in member states, increase and maintain economic stability and bring about close and peaceful co-existence among member states.⁷⁷⁷

⁷⁷³ Article 2 Treaty Establishing the Economic Community of Central African States 1983

⁷⁷⁴ Kabunda "The Integration of the Democratic Republic of Congo in ECCAS: Treaty, Areas of Cooperation, Future Prospects, Innovations and Peculiarities" 12 and 14

⁷⁷⁵ Ibid

⁷⁷⁶ Article 4 Treaty Establishing the Economic Community of Central African States 1983

⁷⁷⁷ Ibid

The ECCAS Treaty stands out for lacking any reference to democracy and committing its member states to any democratic norms, particularly as regards the conduct of elections in member states. Unlike ECOWAS and SADC which have dedicated and specific instruments setting standards for democratic elections, ECCAS does not have one.

However, it should be noted that the peace and security architecture of ECCAS sub-region has a casual reference to democracy. The Protocol Relating to the Council for Peace and Security in Central Africa (COPAX)⁷⁷⁸ includes, inter alia, as a principle of the Council for Peace and Security of Central Africa the “promotion and consolidation of the democratic institutions and constitutional legality of every state.”⁷⁷⁹ Therefore, “in the event of overturning or attempt to overturn the constitutional institutions of a member state,” joint armed forces of member states may be deployed to restore peace, security and offer humanitarian assistance.⁷⁸⁰ However, exactly what constitutes overturning constitutional order for which military intervention may be considered is not defined.

4.4.5 The Arab Maghreb Union

The Arab Maghreb Union (UMA) was formed following the adoption of the Treaty Establishing the Arab Maghreb in Marrakech, Morocco, in 1989.⁷⁸¹ Its member states are Algeria, Libya, Mauritania, Morocco and Tunisia.

The aims of establishing UMA are to:

- Reinforce the fraternal links that unite the member states and their peoples;
- Realise the progress and prosperity of member societies and the defence of their rights;
- Contribute to the preservation of peace founded on justice and equality;
- Pursue a common political policy in different domains;
- Work towards the progressive realisation of the free movement of persons, services, goods and capital.⁷⁸²

Like ECCAS, UMA lacks its own sub-regional framework setting standards for democratic elections. It is perhaps no mere coincidence that most of the UMA member states in 2011

⁷⁷⁸ Adopted in February 2000 and entered into force in 2004

⁷⁷⁹ Article 3(h) Protocol Relating to the Council for Peace and Security in Central Africa 2000

⁷⁸⁰ Article 25(d) Protocol Relating to the Council for Peace and Security in Central Africa 2000

⁷⁸¹ Article 1 Treaty Establishing the Arab Maghreb Union 1989

⁷⁸² Article 2 Treaty Establishing the Arab Maghreb Union 1989

witnessed popular uprisings against authoritarian regimes, demanding democratic governance.

4.5 The Challenge of Enforcing AU Democratic Norms in Relation to Disputed Presidential Elections

This section briefly discusses the mechanisms available to the AU of enforcing its norms on democratic elections where elections have been disputed or considered to have been in violation of its norms. It focuses mainly on the enforcement mechanism envisioned by both the AU Constitutive Act and the ACDEG.

ACDEG, as the AU Treaty that comprehensively provides for democratic norms, provides for mechanisms by which member states may comply with its standards. These include requiring member states to domesticate ACDEG standards,⁷⁸³ sending AU election observation missions to member states conducting elections,⁷⁸⁴ providing advisory missions to assist states parties to strengthen their electoral institutions and processes;⁷⁸⁵ and requiring states parties to report every two years on the legislative or other relevant measures taken in order to give effect to the norms set in ACDEG.⁷⁸⁶

These mechanisms if implemented in good faith and observed diligently can contribute significantly towards holding credible democratic elections that reflect the will of the people. Their significance, however, lies in being applied pro-actively to stave off potential shortcomings in an election.

However, none of these mechanisms is of any help where elections have been disputed in a member state. The only enforcement mechanism that might have some relevance to disputed elections is the possibility of imposing sanctions on unconstitutional changes of government as provided for by both the Constitutive Act and the ACDEG.

Both the Constitutive Act and ACDEG provide for the imposition of sanctions in the case of unconstitutional changes of government. In the case of the Constitutive Act, it simply provides that governments which come to power “through unconstitutional means shall not

⁷⁸³ Article 44(1)(a) and (d) African Charter on Democracy, Elections and Governance 2007

⁷⁸⁴ Articles 19 to 22 African Charter on Democracy, Elections and Governance 2007

⁷⁸⁵ Article 18(2) African Charter on Democracy, Elections and Governance 2007

⁷⁸⁶ Article 49 African Charter on Democracy, Elections and Governance 2007

be allowed to participate in the activities of the Union.”⁷⁸⁷ ACDEG develops and elaborates further the AU sanctions regime against unconstitutional changes of government. Whenever there has been an unconstitutional change of government, the AU Peace and Security Council is required to suspend the concerned state from participating in AU activities.⁷⁸⁸ The suspended state shall, however, continue to fulfil its obligations to the AU and the AU shall maintain diplomatic contacts and initiatives aimed at restoring democratic governance.⁷⁸⁹ Sanctions may also be imposed against states that instigate or support unconstitutional changes of government.⁷⁹⁰

ACDEG goes further and requires that authors and perpetrators of unconstitutional changes of government shall not be allowed to contest elections held to restore democracy or hold any position of responsibility in political institutions of their state.⁷⁹¹ This provision may have been actuated by the realisation that the sanctions set under the Lome Declaration which ended at non-recognition of unconstitutional governments and their suspension from AU activities were inadequate to deter prospective coup plotters. This is because perpetrators of unconstitutional changes of government easily found a way of circumventing the sanctions by organising elections which they generally win, thereby using elections to launder themselves, and benefit from their own wrong and give an initially unconstitutional act a coat of legitimacy.⁷⁹² Such was the case, for example, in Togo in 2005 when Faure Gnassingbe, who had assumed office unconstitutionally, won subsequent elections called to normalise the situation.

ACDEG also nebulously provides that perpetrators of unconstitutional change of government may be tried before a competent court.⁷⁹³ But without a penal or criminal AU statute which defines elements of crimes and an operational court vested with criminal jurisdiction, this provision simply creates a possibility that cannot be implemented currently.

It should be recalled at this stage that these sanctions only apply to what ACDEG defines as unconstitutional changes of government. Of the five strands defined as constituting

⁷⁸⁷ Article 30 Constitutive Act of the African Union 2000

⁷⁸⁸ Article 25(1) African Charter on Democracy, Elections and Governance 2007

⁷⁸⁹ Article 25(2)(3) African Charter on Democracy, Elections and Governance 2007

⁷⁹⁰ Article 25(6) African Charter on Democracy, Elections and Governance 2007

⁷⁹¹ Article 25(4) African Charter on Democracy, Elections and Governance 2007

⁷⁹² See Sections 26 and 29 of the Report of the Ministerial Meeting on the Draft African Charter on Democracy, Elections and Governance and on the Revision of the Lome Declaration on Unconstitutional Changes of Government in Africa (Executive Council Ninth Ordinary Session, 25-29 June 2006 Ex.CL/258/IX)

⁷⁹³ Article 25(5) African charter on Democracy, Elections and Governance 2007

unconstitutional changes of government, only one relates to the conduct of elections, that is, where an incumbent refuses to vacate office, having lost an election.⁷⁹⁴ But where an election is disputed, without a common appreciation of facts by contesting parties or candidates, there is no way of knowing whether an incumbent truly lost or the opposition truly won the election, and qualify that situation as an unconstitutional change of government. The general consequence is that it is unlikely that sanctions as contemplated by both the Constitutive Act and ACDEG will be imposed in a situation of contested or disputed elections. At least this was the case in Kenya in 2007 and in Zimbabwe in 2008, both situations which led to widespread violence and regional instability.

Take, for example, the 2007 election situation in Kenya. Two days before Mwai Kibaki was hastily declared winner of the election, opposition candidate Raila Odinga was leading by more than one million votes.⁷⁹⁵ However, suddenly Kibaki overtook Odinga and was hastily sworn in as president. Electoral Commission of Kenya's then chairperson, Samuel M. Kivuiti, later indicated that he declared Kibaki winner out of pressure from the ruling party officials and that he actually did not know who had won the election because there were problems with the tallying of votes.⁷⁹⁶ When this occurred, Raila Odinga refused to accept the results and declined to petition the courts on the basis that they were staffed by Kibaki sympathetic judges. Odinga's supporters took to the streets and the ensuing violence led to the death of more than 1,000 people, with more than 300,000 displaced.⁷⁹⁷

In such a situation, how would the AU have applied its sanctions regime, considering that the actual winner of the election was not known? It is submitted that such a situation requires the AU to have an adjudication mechanism that should sift through competing claims and come to a reasonable, fair and objective conclusion of who has a better claim according to the law and weight of evidence. Only then can it know if someone lost an election and failed to relinquish power to the legitimate winner.

ACDEG has further provisions relating to violations of any other standards of the document, not rising to the level of unconstitutional changes of government, for which the AU Peace

⁷⁹⁴ Article 23(4) African Charter on Democracy, Elections and Governance 2007

⁷⁹⁵ Congressional Research Service "Kenya: The December 2007 Elections and the Challenges Ahead" 1-15; Odhiambo "The Role of the Judiciary in Promotion of Free and Fair Elections" 1-16; and Musarurwa "Creating Sustainable Democracy in Africa- An African Supranational Body for Effective Supervision of Elections in Africa."

⁷⁹⁶ Ibid

⁷⁹⁷ Ibid

and Security Council “shall determine the appropriate measures to be imposed...”⁷⁹⁸ The vagueness about this provision means that the AU does not have precise and clear cut measures to be taken in the event of a violation of any of the ACDEG standards other than unconstitutional changes of government.

Ultimately, as Mangu has argued, ACDEG “has no efficient enforcement mechanism,” for implementing its standards.⁷⁹⁹ This is more conspicuous in relation to election disputes, which does not easily fit the definition of an unconstitutional change of government. However, even if the definition of unconstitutional change of government were to be construed expansively to include disputed elections, in the absence of a fair and competent adjudication mechanism it becomes difficult to make informed decisions about the imposition of sanctions. It is the contention of this research that ACDEG should have provided for the adjudication of disputed elections at a supranational level. This idea is explored further in the next chapter.

4.6 Summary

This chapter has discussed the democratic normative frameworks in Africa. It considered both the sub-regional and continental standards. At the continental level, the OAU initially approached the subject of democracy and elections with indifference and routinely recognised governments that came to power through military interventions. Legitimate winning of elections was not a pre-requisite for OAU recognition of regimes.

This slowly began to change. The adoption of the African Charter on Human and Peoples’ Rights in 1981 was the first continental framework that had provisions relevant to the conduct of democratic elections. Although assailed with drafting weaknesses, the Charter provided for the rights to political participation and self-determination. The African Commission on Human and Peoples’ Rights, which has responsibility for enforcement of the Charter developed progressive jurisprudence in favour of democratic elections. Despite this, the OAU continued to recognise governments that came into office by other means other than free and fair elections.

⁷⁹⁸ Article 46 African Charter on Democracy, Elections and Governance 2007

⁷⁹⁹ Mangu “African civil Society and the Promotion of the African charter on Democracy, Elections and Governance”¹²

In the 1990s, however, the OAU began to shift its stance in favour of democratic constitution of government by rejecting governments that came to power through military coups. The first instance to trigger a unanimous OAU response occurred in 1997 when President Kabbah was ousted by the military in Sierra Leone. The OAU for the first time unanimously condemned the coup and authorised military action to restore democracy and President Kabbah was fully restored to office the following year.

The OAU in 2000 crystallised its emerging rejection of military coups into the Lome Declaration on Unconstitutional Change of Government. This became the first continental document to formally reject unconstitutional governments. The Declaration recognised four instances of assumption of office it categorises as unconstitutional changes of government. These are military coup against a democratically elected government; intervention by mercenaries to replace a democratically elected government; replacement of a democratically elected government by armed dissidents and rebels; and the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.⁸⁰⁰

In 2000 the OAU heads of state and government adopted the Constitutive Act of the African Union, which transformed the OAU into the AU. The Constitutive Act's objectives and principles include rejection of unconstitutional changes of government and the enshrining of provisions to the effect that the will of the people expressed through regular, free and fair elections is the sole basis upon which legitimate governments should base their authority for assuming office. The AU has taken a strong stance against unconstitutional changes of government and has since 2003 consistently rejected all such governments. In some cases, it has imposed sanctions and authorised military interventions.

In 2007 the AU adopted the ACDEG, a comprehensive continental democratic treaty. It generally consolidates and pools into one binding document all the major AU norms around democracy and elections. ACDEG, however, is more heavily weighted against military coups at the expense of defective elections. While it provides for sanctions for unconstitutional changes of government, it provides no discernible enforcement mechanism where an election is in dispute and there is need to find out the legitimate winner.

The Chapter also looked at democratic normative frameworks at sub-regional level. Five sub-regions were discussed and these are the East African Community (EAC), the Economic

⁸⁰⁰ Declaration on Unconstitutional Change of Government 2000

Community of West African States (ECOWAS), the Southern African Economic Community (SADC), the Economic Community of Central African States (ECCAS), and the Arab Maghreb Union (UMA). In terms of the level of advancement in the development of sub-regional norms, there is no single thread that runs through all the sub-regions. Perhaps what can be said with certainty is that ECOWAS and SADC generally have more advanced frameworks setting standards for democratic elections while at the other extreme end, UMA and ECCAS completely lack any reasonable standard on democratic elections. EAC is in the process of developing its own sub-regional democratic standards. However, even ECOWAS and SADC with relatively more advanced frameworks still struggle with enforcement issues.

Therefore, without an effective enforcement of democratic norms at both continental and sub-regional level, the norms are of little use. The next chapter takes up the issue of the inadequacy of the enforcement mechanism of the AU standards by proposing the creation of a supranational electoral dispute resolution mechanism under the AU.

Chapter Five

Exploring the Viability of Establishing an African Elections Supranational Court

5.1 Introduction

The preceding chapter discussed African electoral and democratic normative frameworks in place. The frameworks establish valuable electoral standards. However, it was indicated there that the whole framework lacks an efficient enforcement mechanism. This section is an attempt at overcoming that challenge. It proposes the establishment of a continent supranational mechanism for adjudication of disputed presidential elections.

This chapter is divided into seven sections. The first section discusses the value or benefit of supranational adjudication. The second section reviews sub-regional courts to understand how far their establishment and experience would support the idea of a continental supranational court. In the third section, the views from the review of sub-regional courts are synthesised to draw common lessons. The fourth section discusses the continental judicial framework and proposes ways of how supranational adjudication could be integrated into the already existing judicial framework. The fifth section looks at the possible relations the proposed court would have with other AU organs, particularly the Assembly, the Pan-African Parliament, the Peace and Security Council and the AU Commission. The sixth section highlights some of the major shortcomings or criticisms of supranational adjudication. The seventh and final section is the summary of the chapter.

5.2 The Value of Supranational Adjudication

The concept of supranationalism has already been extensively discussed in the second chapter of this thesis. There it was indicated that supranationalism ultimately constitutionalises international law by passing laws and creating institutions that are enabled to exercise binding and authoritative power over member states. Supranational law thus has direct effect in member states; is considered superior to municipal law; and pre-empties the application of municipal law in areas where it applies.⁸⁰¹

⁸⁰¹ Weiler and Trachtman "European Constitutionalism and Its Discontents" 354

This section looks at the value or benefit of supranational adjudication. This is particularly significant considering that in the previous chapter, it was shown that despite having fairly good democratic norms in Africa that would support the holding of free and fair elections, there is no efficient enforcement mechanism for those standards. At the heart of supranational adjudication is a supranational tribunal or court. Alter considers that a supranational court has at least five properties or characteristics. These are that:

- It must be a permanent institution
- Composed of independent judges
- Adjudicates disputes between two or more entities, including member states or international organisations
- Works on the basis of predetermined rules of procedure; and
- It renders decisions that are binding.⁸⁰²

Manifestly missing from Alter's list is that supranational adjudication confers on litigants in member states direct access to the court. The state, therefore, does not play a gate keeping role to prevent its citizens from accessing the court.

In order to appreciate the value of supranational adjudication, it is important to understand what constitutes effective supranational adjudication. Effective supranational adjudication means the ability of a legitimate court to compel litigants and other concerned parties to comply with its decisions.⁸⁰³ A court whose decisions are routinely disregarded serves no purpose. In order to be effective, a court will need to be seen as legitimate in the eyes of litigants and this legitimacy is considered as the court's ability "to command acceptance and support from the community so as to render force unnecessary."⁸⁰⁴ The factors that contribute to a supranational court's legitimacy and effectiveness have already been discussed in chapter two above.

Effectiveness of a tribunal or enforcement of its decisions is always work in progress. Koh considers that the concept of enforcing international law entails its obedience. Koh postulates at least four related stations in the continuum of enforcement.⁸⁰⁵ The first is *coincidence*, which means that behaviour that appears to conform to certain rules or standards may not

⁸⁰² Alter "Agents or Trustees? International Courts in Their Political Context" 33-63

⁸⁰³ Helfer and Slaughter "Toward a Theory of Effective Supranational Adjudication" 273-391

⁸⁰⁴ Ibid

⁸⁰⁵ Koh "How is International Human Rights Law Enforced?" 1397-1417.

actually be occasioned or directly triggered by that rule or decision but may be mere behavioural coincidence. The second is *conformity*, which simply indicates that people are aware of a rule and conform their behaviour to the rule when it is convenient, but disobey when it is inconvenient.⁸⁰⁶ The third is *compliance*, which denotes obeying a rule or decision because doing so has benefits or at least avoids certain sanctions.⁸⁰⁷ Finally, the fourth is *obedience*. Obedience means that a person or entity adopts and internalises the rule or decision and makes it part of their inner value system.⁸⁰⁸

According to Koh the move on the continuum from *coincidence* to *obedience* is accompanied with norm internalisation. This basically means that one passes from begrudgingly ‘obeying’ a rule to habituated obedience of the rule as a matter of internal imperative.⁸⁰⁹ The rule or decision, therefore, is no longer seen as an external command or sanction but gets integrated into someone’s value or normative system.

The value or benefit of supranational adjudication flows from the very nature of supranational adjudication. At least three benefits can be noted here. The first, is the ability of supranational adjudication to interact directly with litigants within states and make directly binding decisions. This demonstrates that the norms the states jointly agree upon are not just lofty declarations, but serious undertakings that must be realised.⁸¹⁰ Allowing supranational adjudication over norms and standards set by states shows clear commitment by states to those norms. It demonstrates that states are serious in pursuit of their collective aims and are prepared to let those standards directly shape their national policies, political and legal choices.⁸¹¹ Supranational tribunals, therefore, enhance the credibility of undertakings states make with each other at the international level.

Second, unlike diplomatic ways of resolving conflict, adjudication determines an outcome on the basis of evidence and applicable law. As such, adjudication ensures that violations of agreed upon common standards are correctly “detected and accurately labelled as non-compliance.”⁸¹² Correctly detecting violations may ultimately lead to future compliance with

⁸⁰⁶ Ibid

⁸⁰⁷ Ibid

⁸⁰⁸ Ibid

⁸⁰⁹ Ibid

⁸¹⁰ Supra note 3, p 273-391

⁸¹¹ Slaughter and Burke-White “The Future of International Law is Domestic (Or the European Way of Law)” 328-351

⁸¹² Helfer and Slaughter “Why States Create International Tribunals: A Response to Professors Posner and Yoo” 1-58

the relevant normative standards. Helfer and Slaughter consider that the drive towards compliance in the long term may be spurred on by two costs any legitimate state would wish to avoid. The first cost is that where the violation is a major one, it increases the possibility of sanctions on the erring state. This could either be through the tribunal itself imposing a sanction such as a fine or it could be through a unilateral or multilateral process such as reduction in aid, trade and other areas of cooperation.⁸¹³ The second cost is that states that are correctly labelled through the adjudication process as having violated set norms suffer loss of reputation.⁸¹⁴ This in turn means that very few states and international organisations would be willing to enter into future agreements with the affected state.

Third, and finally, judges of independent supranational tribunals are not chosen by one state. The process of selecting, electing or appointing judges involves a shared task involving all member states. As a result, a supranational tribunal is generally insulated from the direct control or influence of any interested state in a specific matter.⁸¹⁵ The insulation of judges from direct influence of individual states makes it more likely that their decisions will be based on the merits of a case than on extraneous political considerations.

In the case of this research, the proposal is to subject African democratic norms, especially as relates to the conduct of democratic presidential elections, to supranational adjudication. This implies that the values of supranational adjudication discussed here will coalesce with other existing efforts aimed at concretising democracy into enhanced realisation of democratic elections in Africa in the long term. Supranational adjudication is, therefore, not being proposed as a magical wand that would resolve all problems relating to disputed presidential elections in Africa and would not take away the existing municipal and international mechanisms for realising democratic standards. Instead, supranational adjudication, like a strand in a rope, would work with other strands to ensure the strength of the entire rope.⁸¹⁶

As will be seen when discussing sub-regional courts, supranational adjudication is a contextual endeavour as it is undertaken to address specific challenges in each region. Although this section has highlighted some advantages of supranational adjudication, it does not mean that there is universal consensus about them. Many criticisms have been raised and these are discussed later within this chapter.

⁸¹³ Ibid

⁸¹⁴ Ibid

⁸¹⁵ Supra note 2, p 33-63

⁸¹⁶ Cassel "Does International Human Rights Law Make a Difference?" 121-135

5.3 Building on the Experiences of Current African Sub-Regional Courts

This section seeks to locate the proposal for supranational adjudication of presidential elections in the experiences of the current sub-regional efforts. It discusses the experiences of five sub-regional tribunals, that is, the Court of Justice of the East African Community, the Court of Justice of the Common Market for East and Southern Africa, the ECOWAS Court, the SADC Tribunal, and the OHADA Common Court of Justice. These have been chosen because they are relatively the best established and functioning sub-regional courts on the continent. Each of these courts has been in existence for more than a decade and has evolved its own jurisprudence. The courts also give a feel of the experience of supranational adjudication across the continent as these courts generally represent the major regional blocs of the continent. The East African Court, the ECOWAS Court and the SADC Tribunal are sub-regional courts with member states largely geographically connected, while the OHADA Common Court of Justice and the COMESA Court are primarily about market (economic) integration.

The discussion of the experiences of these sub-regional courts will help in understanding what is already acceptable, and what areas still need consensus building and agreement in the process of integration and supranational adjudication.

This discussion of sub-regional courts will focus on the following elements, which have a bearing on the concept of supranational adjudication:

- Establishment and Organisation of the Court;
- Jurisdiction of the court (focusing more on *jurisdiction rationae materiae* or material jurisdiction and *jurisdiction rationae personae* or personal jurisdiction);
- Enforcement of Court Decisions and Relations with National Courts
- Independence and Relations with National Governments of Member States

5.3.1 The East African Court of Justice

5.3.1.1 Establishment and Organisation of the Court

The East African Court of Justice (EACJ) was established as one of the seven organs of the East African Community (EAC).⁸¹⁷ It is the judicial body responsible for interpreting and applying the EAC treaty law.⁸¹⁸ Although the court was created by the 1999 treaty, it was only formally inaugurated on 30 November, 2001, when the first judges and the Registrar of the court, were sworn in.⁸¹⁹ The temporary seat of the court is in Arusha, Tanzania, and the decision as to the permanent seat of the court is yet to be made.⁸²⁰

The court is divided into two chambers or divisions, which are the First Instance Division and the Appellate Division.⁸²¹ The First Instance Division hears and determines all matters relating to the interpretation and application of the EAC Treaty, and appeals from there lie to the Appellate Division.⁸²²

There is, however, a lacuna as regards the appropriate court in which to file references from either national courts or partner states and also requests for advisory opinions, as the EAC Treaty is silent on the issue. The problem was occasioned by the 2007 amendment to the treaty which introduced the Appellate section without taking into account the need to provide for these matters. In order to overcome the ambiguity, the Court took it upon itself in the Rules of Procedure to require that both requests for advisory opinion and references from national courts and partner states shall be filed in the Appellate Division.⁸²³

The Court has also clarified that the Appellate Division only has competence to hear appeals from the First Instance Division and only in relation with matters affecting the interpretation of the EAC Treaty. In *Sitenda Sebalu*⁸²⁴ case, a Ugandan national had applied to the EACJ against a decision of the Ugandan Supreme Court that went against him in a parliamentary election petition. The court indicated that the appellate jurisdiction of its Appellate Division was internal, within the EAC itself, that is, from the First Division to the Appellate

⁸¹⁷ Article (1)(e) Treaty for the Establishment of the East African Community 1999

⁸¹⁸ Article 23(1) Treaty for the Establishment of the East African Community 1999

⁸¹⁹ Saende "Dispute Settlement Within the East African Community: The East African Court of Justice and Its Jurisdiction" 35

⁸²⁰ Ibid

⁸²¹ Article 23(2) Treaty for the Establishment of the East African Community 1999(as amended)

⁸²² Article 23(3) Treaty for the Establishment of the East African Community 1999

⁸²³ See Rules 75 and 76 The East African Court of Justice Rules of Procedure 2013

⁸²⁴ *Sitenda Sebalu vs. Secretary of the East African Community and Others* [East African Court of Justice] Reference No.1 of 2010 [Judgment of 30 June 2011]

Division.⁸²⁵ The Court is, therefore, not competent to hear appeals from decisions of national courts.

The EACJ is composed of a maximum of 15 judges, whereby not more than 10 are appointed to the First Instance Division and not more than five are appointed to the Appellate Division.⁸²⁶ Two judges of the Appellate Division are designated by the Summit (of heads of state) as the President and Vice-President respectively, and are responsible for the supervision of functions of the Appellate Division. Similarly, the Summit designates two judges of the First Instance Division as Principal Judge and Deputy Principal Judge respectively to oversee the affairs of the First Instance division.⁸²⁷

Once appointed into office, judges serve a maximum and non-renewable term of seven years.⁸²⁸ Judges are required to vacate office upon attaining the age of 70 years.⁸²⁹ The requirement for judges to serve only a maximum of seven years without any possibility of reappointment is problematic as it means the expertise and experience on the bench keeps being lost. This was well stated by the President of the EACJ, Justice Harold Nsekela:

The current arrangement where judges work on a non-renewable seven years term does not help the Court or the Community and has to be revisited. The Court is slowly becoming a training ground for judges to undergo intensive capacity building with a view to preparing them for effective discharge of their mandates, but before they can deliver, their terms come to an end.⁸³⁰

In order to improve the accessibility of the Court, the Rules of Procedure provide for the establishment of sub-registries within national judiciaries of partner states.⁸³¹ Sub-registries were formally launched in all five member states in 2012, starting with Rwanda and closing with Burundi.⁸³² The opening of sub-registries makes the EACJ reasonably accessible as litigants do not have to travel to the seat of the Court in order to file documents.

In addition to the opening of sub-registries in partner states, the Court has also developed the practice of hearing and delivering judgments, where possible, in partner states where the

⁸²⁵ Ibid page 21

⁸²⁶ Article 24 (2) Treaty for the Establishment of the East African Community 1999

⁸²⁷ Article 24(4)(7)and (8) Treaty for the Establishment of the East African Community 1999

⁸²⁸ Articles 24(2) and 25(1) Treaty for the Establishment of the East African Community 1999

⁸²⁹ Article 25(2) Treaty for the Establishment of the East African Community 1999

⁸³⁰ Nsekela "Overview of the East African Court of Justice" 5

⁸³¹ Rule 6(2) The East African Court of Justice Rules of Procedure 2013

⁸³² Ruhangisa "Rule of Law and Access to Justice in East Africa: The East African Court of Justice" 35 and 37

litigants are based. The Appellate Division in August 2010, for example, delivered a judgement in Nairobi, Kenya, where all the parties were based.⁸³³

The EAC Treaty states that EACJ judges serve on an ad hoc basis until such time as the Council of Ministers shall determine otherwise.⁸³⁴ Only the Registrar of the Court served full time while judges maintained their full-time assignments in their home countries. In 2011 the Council of Ministers decided that the President and Principal Judge of the EACJ should serve fulltime, starting from 1 July 2012.⁸³⁵ However, the fact that the other judges are still ad hoc still makes it difficult to compose panels of judges as their full time assignments home dictate when they shall be free to attend to the EACJ business. The EACJ recognises this challenge, and has requested that it be attended to as “litigation before the EACJ has been building up but cases cannot be heard as they come....”⁸³⁶

5.3.1.2 Jurisdiction of the Court

Jurisdiction clauses determine which cases a court is competent to hear and determine. Jurisdiction is usually clustered into three categories. These are jurisdiction *rationae materiae* (or material jurisdiction) which indicates the norms and facts over which a court may adjudicate; jurisdiction *rationae personae* (or personal jurisdiction), which determines parties to cases or persons who are competent to litigate before the court; and jurisdiction *rationae temporae* (temporal jurisdiction) which denotes the time during which the facts in issue are said to have occurred.⁸³⁷ Of interest to this section are jurisdiction *rationae materiae* jurisdiction *rationae personae*.

In terms of jurisdiction *rationae materiae*, the EAC Treaty provides as follows:

1. The Court shall initially have jurisdiction over the interpretation and application of this Treaty:

Provided that the Court’s jurisdiction to interpret under this paragraph shall not include the application of any such interpretation to jurisdiction conferred by the Treaty on organs of partner states.

⁸³³ Ibid, page 8

⁸³⁴ Article 140(4) Treaty for the Establishment of the East African Community 1999

⁸³⁵ Supra note 32, p 21

⁸³⁶ *Sitenda Sebalu vs. Secretary General of the East African Community and Others* [East African Court of Justice] Reference No.1 of 2010 [Judgment of 30 June 2011] page 39

⁸³⁷ *Bartels Review of the Role, Responsibilities and Terms of reference of the SADC Tribunal* 19

2. The Court shall have such other original, appellate, human rights and other jurisdiction as will be determined by the Council at a suitable subsequent date. To this end, the partner states shall conclude a protocol to operationalise the extended jurisdiction.⁸³⁸

This provision on the jurisdiction of the Court makes it clear that it only has jurisdiction to interpret and apply the EAC Treaty. The jurisdiction of the Court to interpret other matters under the jurisdiction of Organs of partner states is expressly ousted. This provision ousting the jurisdiction of the Court over actions of organs of partner states would be problematic where these actions appear to be contrary to other provisions and spirit of the EAC Treaty. Where this has occurred, it seems the EACJ has resolved the dilemma in favour of granting itself jurisdiction and thus competence to hear and determine such matters. As seen above when discussing the evolution of the concept of supranationalism, this development resembles the approach that was taken by the European Court of Justice when it crafted the doctrine of direct effect.

Two cases can be given as examples. The first case is that of *Anyang'Nyong'o*.⁸³⁹ This case involved the election of Kenyan representatives to the East African Legislative Assembly, which is the legislative organ of the EAC. The EAC Treaty, in the relevant part, prescribes how the election should be conducted as follows:

The National Assembly of each partner state shall elect, not from among its members, nine members of the Assembly, who shall represent as much as it is feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in that partner state, in accordance with such procedures as the National Assembly of each partner state may determine.⁸⁴⁰

In furtherance of this provision Kenya passed “The Treaty for the Establishment of the East African Community (Election of Members of the Assembly) Rules 2001.” Pursuant to these Rules three political parties eligible to send candidates under the Rules submitted names to the House Business Committee of the Kenyan National Assembly. However two parties had submitted two parallel lists. One party withdrew the second list while the other party did not. With regard to the party that still had two lists, one list was submitted by the party leader

⁸³⁸ Article 27 (1)(2) Treaty for the Establishment of the East African Community 1999

⁸³⁹ Peter Anyang'Nyong'o and Others Vs Attorney general of Kenya and Others [East African Court of Justice] Reference No. 1 of 2006 [Judgment of 30 March 2007]

⁸⁴⁰ Article 50 (1) Treaty for the Establishment of the East African Community 1999

while the other by the government chief whip. The House Business Committee, without advancing any reasons, approved the list that was submitted by the government chief whip.⁸⁴¹

The list approved by the House Business Committee was then tabled in the Kenyan National Assembly on the same day in a ministerial statement by the Vice President, in his capacity as leader of Government Business Committee, and subsequently submitted to the EAC as members of the EAC Assembly elected by the National Assembly.⁸⁴²

The Kenyan government contended that the procedure of electing its representatives was under its own discretion and included an option for the National Assembly to assign that function to any other body. The EACJ disapproved. It held that the requirement under Article 50(1) of the EAC Treaty for the National Assembly to “elect” members of the Assembly meant that the National Assembly of each partner state constituted itself into an electoral college for electing its representatives to the EAC Assembly. The Court found that the Kenyan National Assembly did not, therefore, “carry out an election within the meaning of Article 50 of the Treaty” and thus its Rules and behaviour infringed Article 50 of the Treaty.⁸⁴³

The second case example is that of *The East African Law Society*.⁸⁴⁴ This case arose from the circumstances of the *Anyang’ Nyong’o* case, where the court had granted an injunction restraining the inauguration of the EAC Assembly, pending the hearing and determination of the case.⁸⁴⁵ In response to this development, the then three partner states (Kenya, Uganda and Tanzania) speedily amended the EAC Treaty to broaden grounds for the removal of judges and introduced an Appellate Division in the Court.

Article 150 of the EAC Treaty confers on partner states exclusive jurisdiction in amending the Treaty and prescribes the procedure thereof. The applicants in this case challenged the manner the treaty was amended, alleging that it violated both the spirit of the Treaty and settled practice in the Community of consulting the people on major developments in the Community. The respondents contended that the claim was barred on the ground of

⁸⁴¹ Peter Anyang’Nyong’o and Others Vs Attorney general of Kenya and Others [East African Court of Justice] Reference No. 1 of 2006 [Judgment of 30 March 2007]

⁸⁴² Ibid, page 5

⁸⁴³ Ibid, pages 29, 30, 34 and 43.

⁸⁴⁴ The East African Law Society and Others vs. The Attorney General of the Republic of Kenya and Others [East African Court of Justice] Reference No. 3 of 2007

⁸⁴⁵ Ibid, p 2

sovereignty of partner states as the duty of amending the Treaty was under the exclusive jurisdiction of the partner states, and not open to the review of the Court.⁸⁴⁶

The Court held that to the extent that the application alleged that the prescribed procedure of amending the Treaty was not followed, that would have amounted to infringement of the Treaty and, therefore, the Court had jurisdiction to entertain the matter. In the view of the Court, although the partner states have exclusive authority to amend the Treaty, the question as to whether or not the amendment process “amounts to an infringement of the Treaty is justifiable and cannot be barred on the ground of sovereignty of the partner states.”⁸⁴⁷ The Court then went on to hold that the speedy procedure used to amend the Treaty violated the spirit of the Treaty and the settled practice in the Community of consulting the people on all intended major developments.⁸⁴⁸ The people, therefore, had the right to be consulted and the governments of the member states had the duty to consult widely before amending the Treaty.

Another issue to be noted about Article 27 is that it indicates that at some future dates the Court’s jurisdiction will be expanded to, inter alia, include human rights.⁸⁴⁹ To achieve this, it would require elaborating and adopting a Protocol to that effect. The Court, has, however, taken a somewhat expansionist approach to its human rights jurisdiction. A good example is the *James Katabazi*⁸⁵⁰ case.

The *James Katabazi* case involved Ugandan nationals who were being tried for treason and misprision of treason. While the Ugandan High Court was in the process of granting them bail, the Court premises were surrounded by military officers who re-arrested the claimants and charged them with unlawful possession of firearms and terrorism, both offences arising from the same facts which led to the treason trial.⁸⁵¹ The Ugandan Constitutional Court had ruled that the actions of the military were unconstitutional, but the military still did not release the claimants and hence the application to the EACJ.

⁸⁴⁶ Ibid, page 13

⁸⁴⁷ Ibid

⁸⁴⁸ Ibid, page 30

⁸⁴⁹ Article 27(2) Treaty for the Establishment of the East African Community 1999

⁸⁵⁰ *James Katabazi and 21 Others vs. Secretary General of the East African Community and the Attorney General of the Republic of Uganda* [East African Court of Justice] Reference No. 1 of 2007 [Judgment of 2 November 2007]

⁸⁵¹ Ibid, page 2

The EACJ admitted categorically that it did not have jurisdiction to deal with human rights.⁸⁵² The Court, however, indicated that while it will not assume jurisdiction to adjudicate on human rights violations, it will not abdicate “from exercising its jurisdiction under Article 27(1) merely because the reference includes allegations of human rights violations.”⁸⁵³ It held that interventions by the Ugandan forces to prevent the Court from issuing lawful orders violated the principles of the rules of law and, therefore, contravened the EAC Treaty.⁸⁵⁴

The personal jurisdiction of the EACJ is restricted to the following categories of persons as competent to litigate before the Court:

- Partner states,⁸⁵⁵
- The Secretary General of the EAC,⁸⁵⁶
- Legal and natural persons,⁸⁵⁷
- Employees of the EAC in matters of employment contracts;⁸⁵⁸ and
- Parties to arbitration or special agreements which confer jurisdiction on the EACJ.⁸⁵⁹

A partner state can refer a matter to the court for adjudication where it considers that another partner state or an organ or institution of the EAC has failed to fulfil an obligation under the EAC Treaty.⁸⁶⁰

Although the Secretary General is empowered to refer a matter to the EACJ, the process is circuitous, such that it is rendered of very little practical value. Where the Secretary General considers that a partner state has failed to fulfil an obligation under the EAC Treaty or has violated a Treaty provision, he or she is required to submit the finding to that effect to the concerned partner state and request it to submit its observations.⁸⁶¹ If the concerned partner state fails to respond within four months, or the Secretary General finds the response unsatisfactory, he or she shall then refer the matter to the Council of Ministers, which in turn has to determine whether to handle the matter itself or authorise the Secretary General to

⁸⁵² Ibid, page 14

⁸⁵³ Ibid, page 16

⁸⁵⁴ Ibid, page 23

⁸⁵⁵ Article 28 Treaty for the Establishment of the East African Community 1999

⁸⁵⁶ Article 29 Treaty for the Establishment of the East African Community 1999

⁸⁵⁷ Article 30 Treaty for the Establishment of the East African Community 1999

⁸⁵⁸ Article 31 Treaty for the Establishment of the East African Community 1999

⁸⁵⁹ Article 32 Treaty for the Establishment of the East African Community 1999

⁸⁶⁰ Article 28(1) Treaty for the Establishment of the East African Community 1999

⁸⁶¹ Article 29(1) Treaty for the Establishment of the East African Community 1999

immediately submit it to the Court.⁸⁶² Where the Council of Ministers fails to resolve the matter, it shall then direct the Secretary General to refer the matter to the Court.⁸⁶³

Of much significance, however, is the Treaty's provision giving legal and natural persons direct and unconstrained access to the Court thus:

Subject to the provisions of Article 27 of this Treaty, any person who is a resident in a partner state may refer for determination by the Court, the legality of any Act, regulation, directive, decision or action of a partner state or an institution of the Community on the grounds that such act, regulation, directive, decision or action is unlawful or an infringement of the provisions of this Treaty.⁸⁶⁴

The provision is remarkable for at least three reasons. First, it confers access to any person "resident" in a partner state. Therefore, litigants do not necessarily have to be citizens of partner states. Mere maintenance of residence suffices. Second, the provision has no requirement for exhaustion of local remedies. So a concerned litigant complaining of violation of a Treaty provision does not have to, for example, first litigate in municipal courts before approaching the EACJ. The EACJ confirmed this position when it held that the provision confers on a litigant in any partner state the "right of direct access to the Court" and, therefore, there was no requirement for exhaustion of local remedies.⁸⁶⁵

Third, the provision does not require a litigant to "show a right or interest that was infringed and/or damage that was suffered as a consequence of the matter complained of."⁸⁶⁶ It is sufficient to allege that the matter complained of violated a provision of the EAC Treaty.⁸⁶⁷

5.3.1.3 Enforcement of the Court's Decisions and Relations with National Courts

The EAC Treaty requires a partner state or Council of Ministers to take, without delay, the measures required to implement a decision of the EACJ.⁸⁶⁸ As regards judgments of the Court that impose a monetary obligation, the Treaty requires that the execution of such shall

⁸⁶² Article 29(2) Treaty for the Establishment of the East African Community 1999

⁸⁶³ Article 29(3) Treaty for the Establishment of the East African Community 1999

⁸⁶⁴ Article 30(1) Treaty for the Establishment of the East African Community 1999

⁸⁶⁵ Peter Anyang' Nyong'o and Others vs. Attorney General of Kenya and Others [East African Court of Justice] Reference No. 1 of 2006 [Judgement of 30 March 2007] page 21. See also van der Mei "Regional Integration: The Contribution of the Court of Justice of the East African Community" 409

⁸⁶⁶ *Ibid*, page 16

⁸⁶⁷ Sitendu Sebalu vs. Secretary General of the East African Community and Others [East African Court of Justice] Reference No. 1 of 2010 [Judgment of 30 June 2011] page 19

⁸⁶⁸ Article 38(3) Treaty for the Establishment of the East African Community 1999

be governed by the rules of civil procedure in force in a partner state in which the execution is to take place.⁸⁶⁹ What is required is simply a verification of the authenticity of the judgement by the Registrar, whereupon the party in whose favour the execution is to take place may proceed to execute it.⁸⁷⁰ This provision is progressive as it ensures that decisions of the EACJ are not subject to further litigation at national level before being recognised. This is more advantageous, for example, compared to the rules under the defunct SADC Tribunal where its judgements are considered as foreign judgments and therefore subject to registration requirements in member states, and potentially, further litigation.⁸⁷¹

The EACJ has confirmed that although the EAC Treaty has no express provision allowing it to hold anyone in contempt of Court for disregarding its orders, it has inherent jurisdiction to do so. In the case of *Sitenda Sebalu*,⁸⁷² for example, the Court had made orders as to costs in favour of the applicant which orders were not obeyed. The Court held that “in the absence of any plausible explanation, the Court holds that disobedience of those orders...constitutes contempt of court.”⁸⁷³

Another area of interface between the National Courts and the EACJ is the practice or process of preliminary rulings. A court or tribunal in a partner state is required to request the EACJ to give a preliminary ruling where a question is raised before it concerning the interpretation or application of the EAC Treaty or the validity of the regulations, directives, decisions or actions of the Community.⁸⁷⁴ The reference, however, is only required if the national court or tribunal considers it necessary to enable it give appropriate judgment in the parent mater.⁸⁷⁵

The preliminary ruling mechanism is a great opportunity for collaboration between the national courts and the EACJ and ensures the joint shaping and development of the EAC jurisprudence and integration of the EAC. It is also an opportunity for increased integration of EAC law into the municipal sphere. Statistics, however, indicate that national courts have not seized this opportunity. Between 2001 and 2012, only one case (from Kenya) was

⁸⁶⁹ Article 44 Treaty for the Establishment of the East African Community 1999

⁸⁷⁰ Ibid. See also Rule 74 The East African Court of Justice Rules of Procedure 2013

⁸⁷¹ Bartels *Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal* 53

⁸⁷² *Sitenda Sebalu vs. The Secretary General of the East African Community* [East African Court of Justice] Reference No.1 of 2010 [Judgment of 22 November 2013]

⁸⁷³ Ibid, page 7

⁸⁷⁴ Article 34 Treaty for the Establishment of the East African Community 1999

⁸⁷⁵ Ibid

referred by a national court to the EACJ for preliminary determination.⁸⁷⁶ John Ruhangisa, the Registrar of the EACJ, has suggested that this poor record is not due to indifference of the national courts but is actually due to the ignorance of EAC law in partner state judiciaries.⁸⁷⁷

The EAC Treaty grants national courts of partner states jurisdiction to settle disputes concerning EAC law in the following words:

1. Except where jurisdiction is conferred on the court by this Treaty, disputes to which the Community is a party shall not on that ground alone, be excluded from the jurisdiction of the national courts of the partner states.
2. Decisions of the court on the interpretation and application of this treaty shall have precedence over decisions of national courts on a similar matter.⁸⁷⁸

Although national courts retain jurisdiction to hear and determine disputes concerning EAC law, the provisions makes it clear that decisions of the EACJ shall have precedence over decisions of national courts. The EACJ has suggested that it may actually not just have primacy but supremacy over the interpretation of the provisions of the EAC Treaty.⁸⁷⁹ The purpose of this is “obviously to ensure uniform interpretation and avoid conflicting decisions and uncertainty in the interpretation of the same provisions of the Treaty.”⁸⁸⁰

5.3.1.4 Independence and Relationship with National Governments

Independence of the Court for present purposes denotes the court’s ability for independent fact finding capacity, without undue political influence or considerations. To this effect, this section looks at three possible areas where a court is potentially open to external influence. These are the appointment of judges, the removal of judges and the possibility of backlash or efforts from partner states to deliberately influence the outcome of judicial process.

The judges of the Court are appointed by the Summit of heads of state, from among persons recommended by partner states.⁸⁸¹ Judges should be persons of proven integrity, impartial, independent minded and qualified to be judges under rules applicable in their home countries,

⁸⁷⁶ Supra note 32, p 15

⁸⁷⁷ Ibid, 15

⁸⁷⁸ Article 33(1)(2) Treaty for the Establishment of the East African Community 1999

⁸⁷⁹ Peter Anyang’ Nyong’o and others vs. The Attorney General of the Republic of Kenya and others [East African Court of Justice] Reference No. 1 of 2006 [Judgment of 30 March 2007] page 30

⁸⁸⁰ Ibid, page 20

⁸⁸¹ Article 24(1) Treaty for the Establishment of the East African Community 1999

or must be jurists of recognised competence.⁸⁸² No more than two judges in the First Instance Division and no more than one judge in the Appellate Division shall be appointed on the recommendation of the same partner state.⁸⁸³

Limiting the number of judges appointed on the recommendation of one state reduces the possibility that one state will exert overt influence on the court. But, as shall be discussed below, the EAC heads of state have demonstrated that they are capable of mobilising to collectively undermine the independence of the Court where it passes a decision unfavourable to anyone of the member states.

Initially, judges of the EACJ could only be removed by the Summit of heads of state on grounds of misconduct or inability to perform the functions of their office due to infirmity of mind or body.⁸⁸⁴ The removal process requires the setting up of an ad hoc independent tribunal composed of three eminent judges from the common wealth tradition, who should carry out an independent investigation. A judge would then only be removed where the tribunal recommends his or her removal.⁸⁸⁵

The grounds for removal of judges were expanded in 2006 when the EAC Treaty was amended to include the following further grounds:

- (b) in case of a judge who holds judicial office or other public office in a partner state—
 - (i) Is removed from that office for misconduct or due to inability to perform the functions of the office for any reason; or
 - (ii) Resigns from the office following allegations of misconduct or inability to perform the functions of the office for any reason;
- (c) if the judge is adjudged bankrupt under any law in force in a partner state; or
- (d) if the judge is convicted of an offence involving dishonesty or fraud or moral turpitude under any law in force in a partner state.⁸⁸⁶

The amendment further requires that where the tribunal has been seized with the process of removal of a judge, the Summit may suspend such judge from performing judicial functions.⁸⁸⁷

⁸⁸² Ibid

⁸⁸³ Ibid

⁸⁸⁴ Article 26(1)(a) Treaty for the Establishment of the East African Community 1999

⁸⁸⁵ Ibid.

⁸⁸⁶ Article 26(1)(b)(c)(d) Treaty for the Establishment of the East African Community 1999

The amendments were a reprisal by heads of state of partner states in response to the Court's decision in *Anyang' Nyong'o* case, where the Court's injunction effectively suspended the inauguration of the EAC Assembly. Soon after the *Anyang' Nyong'o* decision, the Summit directed that the EAC Treaty be reviewed with the aim of introducing an appellate division as well as to increase the grounds for removal of judges in order to include "all possible reasons for removal than those provided in the Treaty."⁸⁸⁸

It should be understood that the amendments were targeted primarily at two members of the bench who were also judges in their Kenyan national courts. The two judges were victims of the "radical surgery" on Kenyan judiciary in 2003 which led to the suspension of 23 judges on general allegations of corruption.⁸⁸⁹ The allegations were supposed to be investigated by a Tribunal. However, one of the judges was cleared of the allegations even before the Tribunal started its work. He subsequently voluntarily retired from the Kenyan judiciary. The inquiry against the other judge had not progressed for at least five years preceding the *Anyang' Nyong'o* decision.⁸⁹⁰

To its credit, the EACJ found a creative way of handling the situation which avoided escalation and direct confrontation with the heads of state. In the *East African Law Society*⁸⁹¹ which challenged the legality of the heads of state to amend the treaty in that manner, the EACJ held that the amendment was a violation of the spirit and intendment of the EAC Treaty as well as the established practice of consulting people. Despite this finding, the court did not go ahead to annul the treaty amendment. It held that not all the amendments were incompatible with the Treaty objectives, and those which were incompatible, were capable of rectification.⁸⁹² It creatively invoked the doctrine of prospective annulment, whereby its decision will only have prospective application.⁸⁹³ The Court justified this approach as "particularly beneficial for our stage of developing integration and the emerging Community

⁸⁸⁷ Article 26(2) Treaty for the Establishment of the East African Community 1999

⁸⁸⁸ Joint Communiqué of the 8th Summit of the East African Community Heads of State Held in Arusha, Tanzania (30 November 2006)

⁸⁸⁹ *The East African Law Society and Others vs. The Attorney General of the Republic of Kenya and others* [East African Court of Justice] Reference No. 3 of 2007, page 33

⁸⁹⁰ *Ibid*

⁸⁹¹ *The East African Law Society and Others vs. The Attorney General of the Republic of Kenya and others* [East African Court of Justice] Reference No. 3 of 2003

⁸⁹² *Ibid*, para 43/44

⁸⁹³ *Ibid*, para 44

jurisprudence.”⁸⁹⁴ This is a very significant statement as it signifies the contextual nature of supranationalism and supranational adjudication.

The approach taken by the Court to resolve the matter seems to have benefitted the Court in the long run as the heads of state since then have not taken any further measures to encroach on the court, despite the Court making strong decisions against governments of partner states in subsequent cases.⁸⁹⁵

5.3.2 The Court of Justice of the Common Market for East and Southern Africa

5.3.2.1 Establishment and Organisation of the Court

The Court of Justice of the Common Market of East and Southern Africa (COMESA Court) is created as one of the eight organs of COMESA.⁸⁹⁶ Although the Treaty establishing the Court was adopted in 1994, the Court only became operational in 1998 when on 30 June of the same year the first judges of the Court were appointed.⁸⁹⁷ The Court was initially, although temporarily, seated at the COMESA secretariat in Lusaka. In 2003, however, COMESA decided that Khartoum, in Sudan, should be the permanent seat of the Court.⁸⁹⁸

The COMESA Court of Justice was created to ensure adherence to law in the interpretation and application of the Treaty Establishing the Common Market of East and Southern Africa (COMESA Treaty).⁸⁹⁹ It is composed of seven judges (one of whom is appointed as President of the Court).⁹⁰⁰ The Authority (composed of heads of state and government of member states) may appoint more judges, upon the request of the Court.⁹⁰¹ The President and judges of the COMESA court hold office for a period of five years and are eligible for re-appointment for a further final period of five years.⁹⁰²

Having judges serve uniform and un-staggered terms is manifestly problematic as their terms of office all expire at the same time. This can have a disruptive effect on the smooth running

⁸⁹⁴ Ibid

⁸⁹⁵ See for example the case of Sitenda Sebalu vs. Secretary general of the East African Community and Others [East African Court of Justice] Reference No. 1 of 2010 [Judgement of 30 June 2011]

⁸⁹⁶ Article 7(1)(c) Treaty Establishing the Common Market of East and Southern Africa 1994

⁸⁹⁷ Maonera “Dispute Settlement Under COMESA” 2

⁸⁹⁸ Ibid

⁸⁹⁹ Article 19 COMESA Treaty 1994

⁹⁰⁰ Article 20(1) COMESA Treaty

⁹⁰¹ Article 20(3) COMESA Treaty

⁹⁰² Article 21(1) COMESA Treaty

of the Court. In 2003, for example, the terms of office of all the initial judges appointed in 1998 expired at the same time. Due to bureaucracy, it took two years for new judges to be appointed by the Authority, thereby sending the Court into abeyance for two years.⁹⁰³

The COMESA Court is required to deliver only one judgment in respect of every matter referred to it, which shall be the decision of the majority.⁹⁰⁴ This effectively means that dissenting judgments or opinions are not allowed. The rule banning dissenting opinions is not unique to the COMESA Court as it is also practiced by the European Court of Justice.⁹⁰⁵ It is usually argued that its main benefits are to allow the Court to speak as a uniform voice of law, and to insulate individual judges from political pressure from their governments.⁹⁰⁶ This, however, may make judgments less clear cut as judges try to make compromises in order to accommodate each other. It has the potential consequence of engaging judges into diplomatic exchanges which may affect the development of the law. In common law traditions, dissenting opinions are usually respected as they may indicate the likely future direction of the law.

The COMESA Court has no appellate jurisdiction. It is, however, entitled to revise its judgement provided the application for revision is made within three months of the passing of the judgment and it is based:

... upon the discovery of some fact which by its nature might have had a decisive influence on the judgment if it had been known to the Court at the time the judgment was given, but which fact, at that time, was unknown to both the Court and the party making the application, and which could not, with reasonable diligence, have been discovered by that party before the judgment was made, or on account of some mistake or error on the face of the record.⁹⁰⁷

The Court thus can only revise its judgment either on discovery of some new facts or on account of some mistake on the face of the record. What constitutes these ingredients warranting revision was propounded by the COMESA Court in the case of *Mwencha v. Kabeta*⁹⁰⁸ where it stated that:

⁹⁰³ Maonera "Dispute Settlement under COMESA"23

⁹⁰⁴ Article 31(2) COMESA Treaty

⁹⁰⁵ Helfer and Slaughter "Toward a Theory of Effective Supranational Adjudication" 273-391

⁹⁰⁶ Ibid

⁹⁰⁷ Article 31(3) COMESA Treaty

⁹⁰⁸ The Common Market for Eastern and Southern Africa and Erastus Mwencha vs. Kabeta Muleya [2002] COMESA CJ3 Judgment of 16 October 2002

In our view, a mistake or error on the face of the record is not a matter that affects the substance of the issues before the Court or the validity of its judgment. They must be formal such as a misnaming of parties, errors in calculation, clerical mistakes or obvious slips that appear on the face of the record which can be corrected without changing the validity or effect of the judgment.⁹⁰⁹

This means that the Court may not reverse its judgment, even if sound and convincing arguments were presented which may ordinarily have compelled an appellate court to reverse an earlier decision. The Court emphasized this point by noting that “an error on the face of the record, justifies a revision. An erroneous view, justifies an appeal, where an appeal lies.”⁹¹⁰ But since the COMESA Court lacks appellate jurisdiction, there is no opportunity for the Court to correct an erroneous view that may have been passed at first instance.

5.3.2.2 Jurisdiction of the Court

With regard to jurisdiction *rationae materiae*, the COMESA Treaty simply states that “the Court shall have jurisdiction to adjudicate upon all matters which may be referred to it pursuant to this treaty.”⁹¹¹ This means the Court has jurisdiction to adjudicate on all matters brought before it in relation to the interpretation and application of the COMESA Treaty, provided the cases are brought by persons entitled to audience of the court.

The Court has personal jurisdiction with respect to five categories of institutions or persons. In the first instance the COMESA Court is competent to hear and determine a reference from any member state, where a member state alleges that another member state has failed to fulfil an obligation under the COMESA Treaty or has violated the same Treaty.⁹¹² A member state may seek the determination of the Court the legality of any act, regulation, directive or decision of the Council of Ministers on the ground that such act, regulation, directive or decision is *ultra vires*, unlawful or in violation of the provisions of the COMESA Treaty.⁹¹³

The second person entitled to bring a case before the Court is the Secretary General of COMESA. Just as under the EAC, the process of the COMESA Secretary General referring the matter to the Court is circuitous. Where the Secretary General considers that a member

⁹⁰⁹ Ibid, page 2

⁹¹⁰ Ibid, page 4

⁹¹¹ Article 23 COMESA Treaty

⁹¹² Article 24(1) COMESA Treaty

⁹¹³ Article 24(2) COMESA Treaty

state has failed to fulfil or has actually violated a provision of the COMESA Treaty, he or she shall submit his or her finding to that effect to the concerned state.⁹¹⁴ The concerned state is in turn required to submit its observations to the Secretary General. Where the concerned state fails to submit its observations to the Secretary General within two months, or if the observations from the state are unsatisfactory, the Secretary General shall then refer the matter to the Bureau of the Council of Ministers which shall then determine whether the matter shall be referred to the Council of Ministers or allow the Secretary General to refer the matter immediately to the Court.⁹¹⁵ If the Council fails to resolve the matter, it shall then direct the Secretary General to refer the matter to the Court.⁹¹⁶

The third categories of persons entitled to audience in the COMESA Court are legal and natural persons. Any resident of member state may bring an action before the Court challenging the legality of any act, regulation, directive, or decision of the Council or of a member state that violates a provision of the COMESA Treaty.⁹¹⁷ Just like under the EAC Treaty, mere residence in a member state suffices; the person bringing the action does not need to be a citizen of any member state. The Court re-affirmed this in the case of *Republic of Kenya and Another vs Coastal Aquaculture*⁹¹⁸, where the applicant, a corporate entity registered in Kenya sought to prevent the compulsory acquisition of its land by the Kenyan government. The Court dismissed the Kenyan government's argument that the applicants, as a corporate entity, lacked locus standi. It held that any legal person resident in a member state had locus standi to bring an action before the COMESA Court.⁹¹⁹

Unlike the EAC Treaty that gives persons in member states unconstrained access to the Court, the COMESA Treaty requires that such persons should first exhaust local remedies in national courts and tribunals. The COMESA Court in the case of *Polytol Paints and Adhesives Manufacturers Co. Ltd Vs The Republic of Mauritius*⁹²⁰ has, however, ruled that, where legal or natural persons have exhausted national remedies, they are entitled to audience in the COMESA Court even if the member countries of their residence have not passed any

⁹¹⁴ Article 25(1) COMESA Treaty

⁹¹⁵ Article 25(2) COMESA Treaty

⁹¹⁶ Article 25(3) COMESA Treaty

⁹¹⁷ Article 26 COMESA Treaty

⁹¹⁸ The case is discussed in detail in Onoria "Locus Standi of Individuals and Non- State Entities Before Regional Economic Integration Judicial Bodies in Africa" 143- 169

⁹¹⁹ Ibid

⁹²⁰ *Polytol Paints and Adhesives Manufacturers Co. Ltd vs. The Republic of Mauritius* Reference No. 1of 2012 [First Instance COMESA Court of Justice]

enabling legislation allowing them to approach the COMESA Court.⁹²¹ Member states should therefore not use national laws to deny residents recourse to the Court when they have a grievance related to a provision of the COMESA Treaty.

The fourth category persons entitled to bring an action before the COMESA Court are COMESA employees who can bring an action in relation to employment disputes.⁹²² The provision also entitles any person aggrieved by acts of COMESA employees committed in the course of their duties to bring an action.

The fifth and final categories of persons entitled to seek audience of the Court are parties to an arbitration or special agreement which confers competence on the court to preside over their disputes.⁹²³

5.3.2.3 Enforcement of the Court's Decisions and Relations With National Courts

Where the COMESA Court makes a judgement, except in relation to an advisory opinion, a member state concerned or the Council of Ministers shall take necessary measure to implement the judgment of the Court, without delay.⁹²⁴ The Court has power to impose sanctions it considers necessary against a party which defaults in implementing its decision.⁹²⁵ The possible sanctions open to the Court are, however, not mentioned.

Where the Court renders a judgment which imposes a pecuniary obligation on a person, execution shall be governed by the rules of procedure in force in a member state where the execution shall take place.⁹²⁶ This rule is the same as under the EAC Treaty. The decision of the Court is, therefore, considered as one that has been rendered by a national court in a member state.

Like the EAC treaty, the COMESA Treaty provides for connection between the national courts and the COMESA Court through the practice of national courts referring cases to the COMESA Court for preliminary rulings.⁹²⁷ A national court faced with the question of application or interpretation of the COMESA Treaty or the validity of the regulations,

⁹²¹ Ibid, page 19

⁹²² Article 27(1) COMESA Treaty

⁹²³ Article 28 COMESA treaty

⁹²⁴ Article 34(3) COMESA Treaty

⁹²⁵ Article 34(4) COMESA Treaty

⁹²⁶ Article 40 COMESA Treaty

⁹²⁷ Article 30(1) COMESA Treaty

directives, and decisions of the COMESA, and if the Court considers it necessary to enable it to give judgment in the main matter, shall request a preliminary ruling from the COMESA Court.⁹²⁸

National courts may also hear and determine disputes relating to the interpretation and application of the COMESA Treaty. However, decisions of the COMESA Court on the interpretation of the Treaty take precedence over those of national courts.⁹²⁹ This provision aims at uniform interpretation and application of the Treaty law across all member states.

5.3.2.4 *Independence and Relations With National Governments*

The appointment and removal process of the COMESA court judges is identical to that of the EACJ.⁹³⁰ There is, therefore, no need to repeat here. Perhaps, in terms of experience, the only major difference is that the COMESA Court has not faced any open hostility or backlash from governments of member states as a result of any decisions rendered.

5.3.3 The Community Court of Justice of the Economic Community of West African States

5.3.3.1 *Establishment and Organisation of the Court*

The Community Court of Justice of West African States (ECOWAS Court) was provided for in the original 1975 ECOWAS Treaty but never took off until the late 1990s. It has been argued that the Court failed to take off because it was understood then that the main goal of ECOWAS regional integration was largely to foster economic development, which was considered to generate very few disputes requiring adjudication.⁹³¹ The few disputes that might arise could then be resolved through arbitration and other non-contentious forms of dispute resolution.

It was only in 1991 that ECOWAS adopted the Protocol⁹³² formally establishing the Court. The 1991 Protocol entered into force in November 1996. The Court, however, existed only on paper as no judges were appointed. The first set of seven judges were appointed in

⁹²⁸ Ibid

⁹²⁹ Article 129 COMESA Treaty

⁹³⁰ See Articles 20, 21 and 22 COMESA Treaty

⁹³¹ Alabi *Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa* 92

⁹³² Protocol on the Community Court of Justice (A/P.1/7/91) 1991

December 2000, and sworn into office in January 2001.⁹³³ Notwithstanding the appointment of judges, the Court, however, remained largely idle for the next three years, mainly due to rules restricting access, as shall be discussed below.

The ECOWAS Court is one of the nine institutions of ECOWAS, and is created as the principal judicial organ of the community.⁹³⁴ The ECOWAS Court is without an appellate division and is composed of seven judges, no two of whom may be nationals of the same state.⁹³⁵ Judges were initially appointed for a period of five years and were eligible for another final five years term.⁹³⁶ In order to ensure that the terms of judges do not all expire at the same time, the terms of four members from the first set of judges, picked by lot, were to expire at the end of three years.⁹³⁷ The five year renewable term was abandoned in 2006 in preference for a four year non-renewable term.⁹³⁸ When the term of office of a judge expires, he or she remains in office until the replacement judge is appointed.⁹³⁹

The judges of the Court elect from among themselves a President and a Vice-President who serve renewable terms of two years.⁹⁴⁰ The seat of the Court is Abuja, Nigeria.

5.3.3.2 Jurisdiction of the Court

Compared to both the EACJ and the COMESA Court, the ECOWAS Court has much broader jurisdiction *rationae materiae*. Originally the Court's material jurisdiction only related to the interpretation and application of the ECOWAS Treaty.⁹⁴¹ This interpretation and application was limited to inter-state disputes.

The 2005 Protocol expands on this jurisdiction. It first of all broadly, but specifically, lists aspects of jurisdiction that would ordinarily constitute interpretation and application of the

⁹³³ Alter, Helfer and McAllister "A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice" 747 and 748

⁹³⁴ Articles 6(1)(e) and 15(1) Revised Treaty of the Economic Community of West African States 1993

⁹³⁵ Article 2 Supplementary Protocol A/SP.2/06/06 of the Protocol on the Community Court of Justice 2006

⁹³⁶ Article 4(1) Protocol on the Community Court of Justice (A/P.1/7/91) 1991

⁹³⁷ Ibid

⁹³⁸ Article 4(1) Supplementary Protocol A/SP.2/06/06 of the Protocol on the Community Court of Justice 2006

⁹³⁹ Article 4(3) Supplementary Protocol A/SP.2/06/06 of the Protocol on the Community Court of Justice 2006

⁹⁴⁰ Article 3(2) Supplementary Protocol A/SP.2/06/06 of the Protocol on the Community Court of Justice 2006

⁹⁴¹ Article 9(1) Protocol on the Community Court of Justice (A/P.1/7/91)1991

ECOWAS Treaty.⁹⁴² But more significantly, the 2005 Protocol vests the Court with jurisdiction “to determine cases of violation of human rights that occur in member states.”⁹⁴³ Considering that ECOWAS does not have a sub-regional human rights treaty for the Court to apply, this provision gives the Court an expansive and indeterminate human rights jurisdiction.

Although the Court has an indeterminate human rights jurisdiction, many cases that have been brought under this head of jurisdiction have often cited violation of human rights provisions of the African Charter on Human and Peoples’ Rights. For example, in the case of *Manneh*,⁹⁴⁴ a national of the Gambia state brought an action before the Court following his indefinite incommunicado detention by government security agencies. He, inter alia, cited violations of Articles 6 (right to liberty) and 7 (right to be heard and presumed innocent) of the African Charter on Human and Peoples’ Rights.⁹⁴⁵ The Court upheld his claim and ordered the Gambia to release and compensate him.⁹⁴⁶

The Court has clarified that its jurisdiction over human rights, relates only to the violation of the rights of individual human beings and not corporate entities. In *Ocean King*,⁹⁴⁷ the Court dismissed the case of a corporate entity which had brought a case of violation of its rights under the African Charter on Human and Peoples’ Rights following seizure of its vessel on the high seas and its subsequent sale. The Court held that its human rights jurisdiction did not extend to violations against corporate entities.⁹⁴⁸

With regard to personal jurisdiction, the Court started out with very narrow jurisdiction. Only a member state, on behalf of its nationals, could institute proceedings against another state or

⁹⁴² Article 3(1) of the 2005 Protocol states: “The Court has competence to adjudicate on any dispute relating to the following: (a) The interpretation and application of the Treaty, convention and Protocols of the Community; (b) The interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS; (c) The legality of regulations, directives and other legal instruments adopted by ECOWAS; (d) The failure by member states to honour their obligations under the treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS; (e) The provisions of the Treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS member states; (f) The Community and its officials; and (g) The action for damages against a Community institution or an official of the Community for an action or omission in exercise of official functions.

⁹⁴³ Article 3(4) Supplementary Protocol A/SP.1/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice 2005

⁹⁴⁴ *Manneh vs. The Gambia* (2008) AHRLR 171 [ECOWAS Court 2008]

⁹⁴⁵ *Ibid*, paras 13, 21 and 23

⁹⁴⁶ *Ibid*, para 44

⁹⁴⁷ *Ocean King Ltd vs. Republic of Senegal* Judgement No. ECW/CCJ/JUD/07/11 of 8 July 2011

⁹⁴⁸ *Ibid*, paras 5, 47, 48 and 50

institution of the Community, relating to the interpretation or application of the provisions of the Treaty.⁹⁴⁹ Individuals, therefore, could not directly approach the Court.

The case of *Olajide Afolabi*⁹⁵⁰ is credited with having sparked the drive that led to reforms which provided for individuals' direct access to the Court.⁹⁵¹ In this case, the applicant, Afolabi, was a Nigerian businessman who had secured business interests in the Republic of Benin. In furtherance of his business interests, he left for Benin, but found the border between Nigeria and Benin had been closed by Nigerian authorities and was thus blocked from entering from Benin. Aggrieved, Afolabi brought an action before the ECOWAS Court seeking, inter alia a declaration that the closure of the border was unlawful and in breach of the ECOWAS Treaty and a clear violation of his freedom of movement as guaranteed by the same Treaty.⁹⁵²

The Court struck out the case for lack of jurisdiction; that it was only clothed with jurisdiction to hear and determine cases instituted by member states on behalf of its nationals, and not the other way round.⁹⁵³

The dismissal of the case revealed the inherent flaw of the Court's personal jurisdiction in that governments, which had the capacity to bring cases before the Court, had no incentive to do so.⁹⁵⁴ But at the same time individuals aggrieved by violation of their human rights and other Community norms had nowhere to seek redress. The case also exposed an anomalous situation where Nigeria, if it had brought the case on behalf of Afolabi, would have been both defendant and plaintiff, as it was the culprit and subject of the complaint.

Despite dismissing the case, the Court, with support of bar associations and NGOs, engaged in advocacy urging member states to amend the Court Protocol and allow for individual access to the Court.⁹⁵⁵ The 2005 Protocol was largely in response to this advocacy. Under the 2005 Protocol, access to the Court is now open to member states, the ECOWAS Secretary General, The Council of Ministers, corporate bodies, and individuals.⁹⁵⁶

⁹⁴⁹ Article 9(3) Community Court of Justice Protocol A/P.1/7/91 on the Community Court of Justice 1991

⁹⁵⁰ *Olajide Afolabi vs. Federal Republic of Nigeria* ECW/CCJ/JUD/01/04 Judgment of 27 April 2004

⁹⁵¹ *Supra* note 133, p 750 and 752

⁹⁵² *Olajide Afolabi vs. Federal Republic of Nigeria* ECW/CCJ/JUD/01/04 Judgment of 27 April 2004 para 7

⁹⁵³ *Ibid* paras 61, 62 and 69

⁹⁵⁴ *Supra* note 133, p 750

⁹⁵⁵ *Ibid*

⁹⁵⁶ Article 4(1) Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice 2005

In relation to individuals and corporate entities, the Protocol gives them access to the Court without indicating any requirement as to their nationality or citizenship in a member state. They can bring an action for determination by the Court simply by alleging that “an act or inaction of a Community official...violates the rights of individuals or corporate bodies.”⁹⁵⁷ Arguably, any person or corporate entity from anywhere can bring an action before the Court, provided they allege violation of their rights by an act or omission of any ECOWAS official. However, since the Court is set up for the ECOWAS integration process, it seems reasonable to assume that access may be restricted to persons or corporate entities with at least a residence connection to any of the ECOWAS member states.

Individuals have also been granted a further access point to the ECOWAS Court. Individuals have been granted access to the Court “on the application for relief for violation of their human rights.”⁹⁵⁸ Access to the Court on the basis of alleged human rights violations, as noted above (*Ocean King* case), does not extend to corporate entities.

Access to Court for individuals alleging violation of human rights has two conditions to it. First, the application should not be anonymous;⁹⁵⁹ and second, the application should not relate to a matter which has been instituted already before another court for determination.⁹⁶⁰ Although not expressly prohibited to hear and determine cases that have been heard by national courts, the ECOWAS Court has evolved jurisprudence that excludes it from determining cases on national matters that have already been settled by national courts.

For example, in the case of *Sa’adatu Umar*,⁹⁶¹ the applicant brought an action about violation of her right to the ECOWAS Court, the substance of which she had filed in a Nigerian High court, which in fact found in her favour and awarded her some damages. The Court noted that the substance of the allegations and reliefs sought before it were essentially the same as those sought and decided upon by a Nigerian High Court.⁹⁶² The Court, therefore, declined to be

⁹⁵⁷ Article 4(1)(c) Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice 2005

⁹⁵⁸ Article 4(1)(d) Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice 2005

⁹⁵⁹ Article 4(1)(d)(i) Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice 2005

⁹⁶⁰ Article 4(1)(d)(ii) Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 Relating to the Community Court of Justice 2005

⁹⁶¹ *Sa’adatu Umar vs. The Federal Republic of Nigeria* Judgment No. EWC/CCJ/JUD/17/12 [ECOWAS Judgment of 14 December 2012]

⁹⁶² *Ibid* para 19

seized with the matter since it “had already been adjudicated upon in a National Court of a member state.”⁹⁶³

Although the ECOWAS Court evolved jurisprudence declining to be seized with cases already adjudicated upon by national courts, there is at the same time no requirement for applicants to the ECOWAS Court to exhaust national remedies before approaching the ECOWAS Court. As the ECOWAS Court stated in *Ocean King*, the provisions granting individuals access to the Court, “do not require, directly or even indirectly, the exhaustion of local remedies before an action could be brought before this Court.”⁹⁶⁴

5.3.3.3 *Enforcement of the Court’s Decisions and Its Relations with National Courts*

The ECOWAS Court is bound to give only one judgment arrived at in secret.⁹⁶⁵ It therefore allows for no dissenting judgments or opinions. The judgments of the Court are binding on all member states, institutions of the Community, individuals and corporate bodies.⁹⁶⁶ When a dispute has been submitted to the Court for settlement, member states and institutions of ECOWAS are to desist from any action that is likely to aggravate or militate against its settlement.⁹⁶⁷ And once judgment has been rendered, member states and institutions should take immediate and all necessary measures to ensure the execution of the decisions of the Court.⁹⁶⁸ However, consequences for disobeying a decision of the Court are not stated.

Judgements of the Court with financial implications for nationals of member states and member states themselves are binding. The judgments of the Court are executed in form of a writ of execution, according to the relevant rules of procedure in each member state.⁹⁶⁹ This means that decisions of the Court are enforced as if they were rendered by a national court and, therefore, do not require a registration or recognition process, as is usually with the case with the execution of foreign judgments. All that is required is verification that the said

⁹⁶³ Ibid para 21

⁹⁶⁴ *Ocean King Nigeria Ltd vs. Republic of Senegal* Judgment No. ECW/CCJ/JUD/07/11 Judgment of 8 July 2011, para 38

⁹⁶⁵ Article 19(3) Protocol (A/P.1/7/91) On The Community Court of Justice 1991

⁹⁶⁶ Article 15(4) Revised Treaty of ECOWAS 1993

⁹⁶⁷ Article 22(2) Protocol (A/P.1/7/91) on the Community Court of Justice 1991

⁹⁶⁸ Article 22(3) Protocol (A/P.1/7/91) on the Community Court of Justice 1991

⁹⁶⁹ Article 6(1)(2) Supplementary Protocol A/SP.1/01/05 Amending Protocol (A/P.1/7/91) Relating to the Community Court of Justice 2005

judgment was in fact rendered by the ECOWAS Court.⁹⁷⁰ A writ of execution duly issued by the ECOWAS Court can only be revoked by the same Court.

The main mechanism linking national courts with the ECOWAS Court is the device of references to the ECOWAS Court. The 2005 Protocol states that:

Where in any action before a court of a member state, an issue arises as to the interpretation of a provision of the Treaty, or other Protocols or Regulations, the national court may on its own or at the request of any of the parties to the actions refer the issue to the Court for interpretation.⁹⁷¹

The manner this provision is crafted is problematic in at least two ways. First of all, it is crafted in discretionary terms, such that it is up to the Court to decide to refer or not refer. There are no mandatory circumstances envisioned requiring a national court to refer a matter to the ECOWAS Court. In fact, even where a reference has been made, and opinion given by ECOWAS Court, there is no clarity as to the status of such decision. Are national courts bound by to decide cases in line with opinion given by the ECOWAS Court or these are mere guidelines national courts could forego? Where national courts handling disputes relating to the interpretation of ECOWAS instruments do not refer or even defer to the ECOWAS Court on the interpretation of certain provisions, it makes it difficult to evolve uniform or common jurisprudence to aid the legal integration process of member states.

Second, the provision, unlike in the case of the EACJ, does not clarify which of the Courts (national or ECOWAS court) has precedence or superiority. This lack of clarity can easily lead to avoidable misunderstandings between the roles and status of the national courts and the ECOWAS Court. However, since as stated above, member states and institutions are unconditionally required to implement the decisions of the ECOWAS Court, it can only be assumed that they take precedence over national Court's decisions.

In order to build relations of mutual respect with national courts, the ECOWAS Court has developed jurisprudence to the effect that it would not interfere with decisions of the national courts, because such matters are largely in the exclusive competence of the national courts.⁹⁷²

⁹⁷⁰ Article 6(3) Supplementary Protocol A/SP.1/01/05 Amending Protocol (A/P.1/7/91) Relating to the Community Court of Justice 2005

⁹⁷¹ Article 6(3) Article 6(3) Supplementary Protocol A/SP.1/01/05 Amending Protocol (A/P.1/7/91) Relating to the Community Court of Justice 2005

⁹⁷² Alabi *Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa* 216

The *Ugokwe*⁹⁷³ case is a good example of this approach. In this case, Ugokwe had his election to the Nigerian House of Representatives annulled by an Elections Tribunal, whose decision was also upheld by the Nigerian Court of Appeal. Ugokwe then brought this action before the ECOWAS Court alleging violation of his right to fair hearing by the manner the Nigerian courts handled his case.⁹⁷⁴ The ECOWAS Court held that the kind of relationship existing between it and national courts is not of a vertical nature and, therefore, the ECOWAS court does not entertain appeals against decisions of national courts.⁹⁷⁵

This, however, does not mean that the ECOWAS Court will automatically decline to entertain every case that has been litigated in national courts. In *Sikiru Alade*⁹⁷⁶, the applicant was held in detention indefinitely on the basis of “holding charges”,⁹⁷⁷ under which the Nigerian magistrate’s court remanded him into indefinite custody lasting from 2003 until the determination of this case by the ECOWAS Court in 2011. The Court considered the case admissible and found the Nigerian state to have violated the applicant’s right to fair trial within a reasonable time, his presumption of innocence and personal liberty. It ordered his immediate release and compensation.⁹⁷⁸ The Nigerian government released the applicant in line with the ECOWAS Court decision.⁹⁷⁹

5.3.3.4 *Independence and Relations with National governments*

Initially, the appointment and removal process of ECOWAS Court judges was largely in the hands of the Authority (of heads of state). The Authority appointed judges selected from a list of persons nominated by governments of member states.⁹⁸⁰ The appointment process did not indicate how member states were to nominate candidates in order to ensure the selection of credible, competent and well respected judges. In the absence of such standards, the process

⁹⁷³ Jerry Ugokwe vs. The Federal Republic of Nigeria Judgment No.ECW/CCJ/JUD/03/05[Judgement of 7 October 2005]

⁹⁷⁴ Ibid para 6

⁹⁷⁵ Ibid para 32

⁹⁷⁶ Sikiru Alade V. The Federal Republic of Nigeria suit No. ECW/CCJ/APP/05/11 [Judgment of June 2011]

⁹⁷⁷ Ibid, para 3: A holding charge is a process under Nigerian law where a suspect is brought before a magistrate court that lacks jurisdiction over the offence for which the suspect has been detained. The magistrate cannot, therefore, release the suspect, but only remand him/her in custody on the basis of the holding charge.

⁹⁷⁸ Ibid, para 79

⁹⁷⁹ <http://www.opensocietyfoundations.org/litigation/alade-v-federal-republic-nigeria> (Date of use: 9 April 2015) and <http://www.opensocietyfoundations.org/press-releases/after-nine-years-awaiting-trial-man-walks-free> (Date of use: 9 April 2015)

⁹⁸⁰ Article 3(4) Protocol (A/P.1/7/91) On the Community Court of Justice 1991

could turn to political considerations and consequently, potentially affect the independence of judges appointed to the ECOWAS Court.

With regard to the removal of judges, the 1991 Protocol required that:

In the event of gross misconduct, inability to exercise his functions or physical or mental disability on the part of one of its members, the Court shall meet in plenary session to take cognisance of the fact. The Court shall then draw a report which shall be transmitted to the Authority which may decide to relieve the member in question of his duties.⁹⁸¹

Although on the face of it this provision seems to give the Court a prominent role in the removal process, a careful look at it reveals that the role of the court is perfunctory and superficial. The Court simply meets “to take cognisance” or in other words, makes itself aware of the allegations or the situation. It does not give the Court power to investigate, call witnesses or make its own findings. It is simply required to render a report to the Authority. It is then at the sole discretion of the Authority to determine whether to remove a judge or not. This removal process, did not shield judges from the likely reach of disgruntled member states.

Both the appointment and removal processes were reformed by the 2006 Protocol. The 2006 reforms were informed by the felt need for a recruitment criteria that “would allow for selection of the most suitable persons as judges” who are capable of “consolidating and speeding up the regional integration process.”⁹⁸² At the heart of all this change is the establishment of the Judicial Council of the Community (JCC) which plays a significant role in both the recruitment and removal process of judges.

Under the new system, member states are allocated vacant posts by the Authority. The JCC is composed of Chief Justices of Supreme Courts of member states to which the vacancy or posts have not been allocated. It then selects three candidates per country from nationals of countries to which posts have been allocated.⁹⁸³ The JCC has made the recruitment and selection process very transparent. Vacancies are advertised in the Official Journal of the Community as well as in some widely circulated newspapers in member countries to which

⁹⁸¹ Article 4(7) Protocol (A/P.1/7/91) On the Community Court of Justice 1991

⁹⁸² Preamble to the Supplementary Protocol A/SP.2/06/06 Amending the Protocol on the Community Court of Justice 2006

⁹⁸³ Article 2 Supplementary Protocol A/SP.2/06/06 Amending the Protocol on the Community Court of Justice 2006

the vacancies have been allocated.⁹⁸⁴ The adverts indicate the needed qualifications and are open to all eligible citizens of the concerned countries.⁹⁸⁵ The JCC then shortlists, interviews and recommends one candidate per state for appointment to the allocated vacancy.⁹⁸⁶

This appointment process ensures that judges are not nominated by governments of their countries. They consequently do not have the pressure to make decisions out of a sense of loyalty or for political considerations. The transparent and elaborate nature of the recruitment process in the long term would increase public esteem and legitimacy of the Court as judges are seen to be appointed on merit and not political considerations.

The JCC is equally involved with the removal of a judge for cause or on disciplinary grounds. When engaged in the removal process, the JCC is composed of the Chief Justices of Supreme Courts of member states without representation on the ECOWAS Court bench, plus one representative of the judges elected by the judges themselves.⁹⁸⁷ Thus composed, the JCC is vested with powers to hear allegations of misconduct, inability to perform functions or commission of crimes by judges. After examining such cases, the JCC makes recommendations to the Authority.⁹⁸⁸

Just like the EACJ, the ECOWAS Court has received an amount of backlash from some governments of member states. Perhaps the most noteworthy has to do with the government of the Gambia. The Gambian Republic has generated several cases of serious human rights violations of its nationals and the court has made decisions finding its behaviour short of the ECOWAS Treaty standards. For example, in the case of *Manneh*,⁹⁸⁹ the Court found the Gambia to have violated the rights of the applicant who it had detained incommunicado and indefinitely without charge or trial. It ordered his immediate release and payment of damages to the applicant of USD 100,000.⁹⁹⁰

In response to such decisions, The Gambia in 2009 submitted a proposal to reform the ECOWAS Court Protocol. It specifically proposed that individuals' access should be subject

⁹⁸⁴ Alabi *Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa* 147

⁹⁸⁵ *Ibid* 147

⁹⁸⁶ *Ibid*

⁹⁸⁷ *Ibid* 150

⁹⁸⁸ *Ibid*

⁹⁸⁹ *Manneh vs. The Gambia* AHRLR 171 [ECOWAS Court 2008]

⁹⁹⁰ *Ibid* para 44

to the exhaustion of the local remedies rule.⁹⁹¹ It also proposed that access to the Court on allegations of human rights violations should be restricted to human rights instruments member states have specifically signed.⁹⁹² The second proposal was particularly concerning because The Gambia at the time was facing another human rights case in the ECOWAS Court which had allegations of torture, while Gambia is not a state party to the UN Convention Against Torture, Cruel, Inhuman and Degrading Treatment.⁹⁹³ However, in October 2009, the Council of Ministers of Justice of ECOWAS as well as the Council of Foreign Ministers of ECOWAS in November 2009 unanimously rejected the proposals from the Gambia.⁹⁹⁴

5.3.4 The OHADA Common Court of Justice and Arbitration

5.3.4.1 *Establishment and Organisation*

The Common Court of Justice and Arbitration (OHADA Court) is the Judicial arm of the Organisation for the Harmonisation of Business Law in Africa (Organisation Pour L'harmonisation en Afrique du Droit des Affaires), which is better known by its French acronym of OHADA. OHADA was created through the adoption of the Treaty on the Harmonisation of Business Law in Africa.⁹⁹⁵ Although membership is predominantly French speaking African countries, it is open to AU members, as well as any other state invited on the basis of a common agreement of all OHADA members.⁹⁹⁶

The main purpose of OHADA is to harmonise business laws in member countries so as to reduce business uncertainty and expenses in order to encourage investment. This is largely through the passage of Uniform Acts, which cover a wide array of commercial areas.⁹⁹⁷

⁹⁹¹ See "ECOWAS Court and the Promise of the Local Remedies Rule" <http://hrbrief.org/2009/11/ecowas-court-and-the-promise-of-the-local-remedies-rule/> (Date of use: 18 November 2014)

⁹⁹² Ibid. See also "Four IFEX Members, Civil Society Groups Fear Gambia Proposal Will Prevent ECOWAS Court from Ruling in Saidykhan Case" http://www.ifex.org/west_africa/2009/09/28/ecowas_court_jurisdiction/ (Date of use: 18 November 2014)

⁹⁹³ See the case of *Musa Saidykhan vs. The Republic of the Gambia* Judgment no.ECW/CCJ/JUD/08/10 [Judgement of 16 December 2010]

⁹⁹⁴ *Supra* note 133, p 763

⁹⁹⁵ Adopted on 17 October 1993 at Port Louis in Mauritius

⁹⁹⁶ Article 53 Treaty on the Harmonisation of Business Law in Africa 1993

⁹⁹⁷ Article 5 Treaty on the Harmonisation of Business Law in Africa 1993

These areas include company law, trade, credit and debt recovery, bankruptcy, receivership, arbitration, employment law, accounting and transportation laws.⁹⁹⁸

The OHADA Court, as the judicial arm of OHADA, is tasked with the realisation of the OHADA objectives through its interpretation and application of both the OHADA Treaty and the subsequent Uniform Acts.⁹⁹⁹ The Court has no appellate chamber or division. It is composed of seven judges, elected for a seven year term, from member states.¹⁰⁰⁰ Once elected, judges are eligible to serve one more term. The terms of the initial seven judges were staggered, ranging from a minimum of three years to a maximum of nine years.¹⁰⁰¹ This ensures that the mandate of the judges does not expire at the same time, as happened under COMESA Court.

Judges elect from among themselves, for a term of three and a half years, the President and two Vice-Presidents. The Court has its seat in Abidjan, Ivory Coast.

5.3.4.2 Jurisdiction of the Court

The OHADA Treaty lacks specific clauses vesting both material and personal jurisdiction. Instead, indications of material and personal jurisdiction are weaved through other provisions throughout the document. In terms of material jurisdiction, the Court is competent to hear and determine matters related to the OHADA Treaty itself as well as the implementation of Uniform Acts.¹⁰⁰² In relation to Uniform Acts, the OHADA Court does not only handle disputes arising from them but is supposed to be consulted in their development and adoption.¹⁰⁰³ Before the Uniform Acts are formally adopted, they are forwarded to the Court, which gives its opinion on the draft Uniform Acts.¹⁰⁰⁴ The OHADA Uniform Acts, implementation over which the OHADA Court has jurisdiction, are directly applicable in member states and override any contrary municipal laws.¹⁰⁰⁵

The Court has personal jurisdiction in cases brought by member states, the Council of Ministers, national courts and private litigants who are parties to a contract out of which a

⁹⁹⁸ Article 2 Treaty on the Harmonisation of Business Law in Africa 1993

⁹⁹⁹ Article 3 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰⁰⁰ Article 31 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰⁰¹ Article 38 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰⁰² Articles 3, 5 and 14 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰⁰³ Article 6 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰⁰⁴ Article 7 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰⁰⁵ Article 10 Treaty on the Harmonisation of Business Law in Africa 1993

dispute has arisen. The Court has jurisdiction to hear and determine matters brought before it relating to the interpretation and enforcement of the OHADA Treaty as well as the Uniform Acts.¹⁰⁰⁶ Although it is not expressly stated, it seems the member states can only bring such cases against other member states, as it would be unconscionable for a state to bring an action against an individual for not implementing the Treaty standards.

National courts may also make a reference to the OHADA Court with regard to matters it is seized with, without having to wait for the case to be disposed of and appealed to the OHADA Court.¹⁰⁰⁷ The national courts can also send cases to the OHADA Court by way of appeal, either at the request of litigants or of the Court's own motion, provided the matters concerned relate to the application of Uniform Acts.¹⁰⁰⁸

Parties to any dispute in national courts that relate to the application of Uniform Acts may approach the OHADA Court. However, this can only be by way of appeal from decisions of national courts.¹⁰⁰⁹ This effectively means that, in matters where it has jurisdiction, the OHADA Court displaces Supreme Courts of member states as the final courts of appeal.¹⁰¹⁰ This is radically different from the situation under the ECOWAS Court and the EACJ, where these Courts do not sit as appellate courts over decisions of national courts.

Parties to a contract that provides for arbitration or who wish to settle a dispute out of court may approach the OHADA Court, provided at least one party to the dispute is domiciled or has habitual residence in a member state.¹⁰¹¹ The Court itself does not arbitrate but simply appoints arbitrators from a pre-approved list of arbitrators. An arbitrator appointed by the OHADA Court is required to submit his/her proposed award or finding to the OHADA court, which can propose amendments to his/her proposed awards.¹⁰¹²

¹⁰⁰⁶ Article 14 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰⁰⁷ Ibid

¹⁰⁰⁸ Article 15 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰⁰⁹ Ibid

¹⁰¹⁰ Rudahindwa "International Commercial Arbitration in Africa: The Organisation for the Harmonisation of Business Law in Africa (OHADA) Sets The Tone" 15

¹⁰¹¹ Article 21 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰¹² Article 24 Treaty on the Harmonisation of Business Law in Africa 1993. See also Ogwezzy "Common Court of Justice and Arbitration: A Supranational Institution for the Administration of Commercial Disputes in Africa" 5

5.3.4.3 Enforcement of the Court's Decisions and Relations with National Courts

Decisions or judgments of the OHADA Court are considered “final and conclusive.”¹⁰¹³ Member states are required to execute and enforce them in their territories. It is further required that a decision contrary to the judgment of the OHADA court shall not be lawfully executed in the territory of a member state.¹⁰¹⁴ Decisions of the OHADA Court are enforced as if they were rendered by national courts.

The main device by which national courts interface with the OHADA Court is the practice of referrals and appeals (from national courts to the OHADA Court). The OHADA Treaty provides for three different situations of how this could occur. In the first instance, parties to a dispute can directly appeal to the OHADA Court, once the domestic appeal processes have been completed. Where the OHADA Court quashes a decision of the national court, it means the case will commence afresh in the national courts.¹⁰¹⁵

In the second instance, parties to a dispute in a national court may appeal to the OHADA Court, arguing that the national court veered into the sphere of the exclusive jurisdiction of the OHADA Court. If the OHADA Court agrees that the national court truly lacked jurisdiction, it will annul the decision.¹⁰¹⁶ In the third instance, a supreme court of a member state, when faced with matters that relate to implementation of the OHADA Treaty or the Uniform Acts, may stay its own proceedings and refer the case to the OHADA Court on subject-matter or material jurisdiction. Where the OHADA court finds that it (OHADA Court) has no jurisdiction to hear the referred matter, then the case will resume before the national court.¹⁰¹⁷

The OHADA Court, therefore, in relation to matters where it has jurisdiction, sits as a final appellate court for all courts of member states. It is thus, somewhat integrated into the judicial hierarchy of each member state as a court of final resort and appeal.

5.3.4.4 Independence and Relations with National Governments

Only nationals of member states with a minimum of fifteen years of experience as judges, legal practitioners or law professors are eligible to be elected as judges of the OHADA

¹⁰¹³ Article 20 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰¹⁴ *Ibid*

¹⁰¹⁵ Articles 14- 18 Treaty on the Harmonisation of Business Law in Africa 1993. See also Ogwezy and Bello “OHADA’s Common Court of Justice and Arbitration: Is it a Supranational Institution for the Administration of Commercial Disputes in Africa?” 23-24

¹⁰¹⁶ *Ibid*

¹⁰¹⁷ *Ibid*

Court.¹⁰¹⁸ No more than one national of the same state shall be elected at the same time to the bench of the Court. Judges are elected by secret ballot by the Council of Ministers from a roll of candidates nominated by member states.¹⁰¹⁹ The Permanent Secretary of OHADA prepares a list of nominated candidates, in alphabetical order, and submits it to member states at least one month before the election.¹⁰²⁰

Once elected, judges take oath undertaking to discharge their functions impartially.¹⁰²¹ This effectively means that judges are not representatives of member states, but once elected, should perform their functions according to the law. The OHADA appointment method where states nominate candidates, unlike the situation under ECOWAS, could be criticised for not setting standards states should follow in recruiting the most competent candidates. States may, therefore, nominate candidates on the basis of political considerations than legal and judicial competence.

When it comes to the removal of judges (for inability or cause), the OHADA Treaty vests the removal process largely in the hands of the Court itself. Outside the cases of death and resignation, where a judge has to be removed for whatever cause, the President of the Court shall invite the concerned judge to give his/her oral submissions to the Court. On the unanimous finding/recommendation of the court that the concerned judge should be removed, the President of the Court shall then inform the Permanent Secretary of OHADA, who shall then declare the seat held by the removed judge as vacant.¹⁰²² Having the Court itself at the heart of the removal process increases the stature and sense of independence of the Court as it reduces the possibility of judged fearing removal at the instigation of governments not happy with their decisions.

The OHADA Court, unlike the SADC Tribunal, EACJ and the ECOWAS Court, has not faced any backlash from governments of member states as a result of its decisions. Perhaps this could be due to the nature of cases it handles, which are mostly commercial cases while the other courts have handled politically sensitive cases. It seems the biggest challenge the OHADA Court faces in terms of effectiveness is being inundated with cases. The Court in its

¹⁰¹⁸ Article 31(1)(2) and (3) Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰¹⁹ Article 32 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰²⁰ Article 33 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰²¹ Article 34 Treaty on the Harmonisation of Business Law in Africa 1993

¹⁰²² Article 35 Treaty on the Harmonisation of Business Law in Africa 1993

first 12 years rendered about 600 judgments and its docket has continued to swell.¹⁰²³ As a result of the swelling docket, the Court is currently suffering from a huge case backlog.¹⁰²⁴

5.3.5 The SADC Tribunal

5.3.5.1 Establishment and Organisation of the Court

The Tribunal of the Southern Africa Development Community (SADC Tribunal) was established as one of the institutions of the SADC.¹⁰²⁵ At this point it is significant to note that the original SADC tribunal was dissolved and reconstituted by the SADC heads of state and government through the adoption of a new SADC Tribunal Protocol.¹⁰²⁶ The reconstituted Tribunal is yet to be formally inaugurated. As will be discussed below, this change is a massive reversal not only to the project of legal integration, but the manner the Tribunal was dissolved signals lack of respect for rule of law, judicial independence and human rights. Circumstances leading to the dissolution are discussed later below.

In terms of composition, there is no change between the original tribunal and the reconstituted one. The Tribunal consists not less than ten judges, appointed from nationals of member states of SADC and who possess qualifications required for appointment to the highest judicial offices in their respective member states or are jurists of recognised competence.¹⁰²⁷ The Council of Ministers designates five of the judges as regular judges to sit on the Tribunal, while the additional five constitute a pool from which the president of the Court may invite a member to sit on the Tribunal whenever a regular member is temporarily absent or unable to discharge his or her responsibilities.¹⁰²⁸ The number of judges may be

¹⁰²³ Ogwezy and Bello "OHADA's Common Court of Justice and Arbitration: Is it a Supranational Institution for the Administration of Commercial Disputes in Africa?" 20

¹⁰²⁴ Ibid

¹⁰²⁵ Article 9(1)(f) Treaty of the Southern African Development Community 1992; and as provided for under 9(1)(g) Agreement Amending the Treaty of the South African Development Community 2001.

¹⁰²⁶ On 28 August 2014, in the Resort town of Victoria Falls, Zimbabwe, the SADC heads of state and government adopted the Protocol on the Tribunal in the Southern Africa Development Community 2014.

¹⁰²⁷ Article 3(1) Protocol on the Tribunal 2000. See also Article 3(1) Protocol on the Tribunal in the Southern Africa Development Community 2014

¹⁰²⁸ Article 3(2) Protocol on the Tribunal 2000

increased by the Council of Ministers on request by the Tribunal.¹⁰²⁹ No more than two judges may be nationals of the same member state.¹⁰³⁰

Once appointed, judges ordinarily serve a term of five years, which may be renewed for another final five years.¹⁰³¹ The terms of judges are staggered by requiring that from the first pool of judges, two regular and two additional judges' terms shall expire at the end of three years.¹⁰³² The judges of the Tribunal are part time.¹⁰³³

The Tribunal does not have an appellate division. While the SADC Secretariat has its seat in Gaborone, Botswana, the SADC Tribunal has its seat in Windhoek, Namibia.

The first judges of the original Tribunal were appointed by the Summit (of heads of state and government) on 18 August 2005. Their swearing in ceremony and inauguration took place on November 2005 in Windhoek, Namibia.¹⁰³⁴

5.3.5.2 *Jurisdiction of the Court*

The material jurisdiction of the original SADC Tribunal was stated in the following terms:

The Tribunal shall have jurisdiction over all disputes and all applications referred to it in accordance with the Treaty and its Protocol which relate to:

- (a) The interpretation and application of the Treaty;
- (b) The interpretation, application or validity of the Protocols, all subsidiary instruments adopted within the framework of the Community, and acts of the institution of the Community;
- (c) All matters specifically provided for in any other agreements that Member States may conclude among themselves or within the Community and which confer jurisdiction on the Tribunal.¹⁰³⁵

¹⁰²⁹ Article 3(5) Protocol on the tribunal 2000

¹⁰³⁰ Article 3(6) Protocol on the Tribunal 2000

¹⁰³¹ Article 6(1) Protocol on the Tribunal 2000; and Article 7(1) Protocol on the Tribunal in the Southern African Development Community 2014

¹⁰³² Article 6(1) Protocol on the Tribunal 2000; and Article 8(1) Protocol on the Tribunal in the Southern African Development Community 2014

¹⁰³³ Article 6(4) Protocol on the Tribunal 2000; and Article 9(1) Protocol on the Tribunal in the Southern African Development Community 2014

¹⁰³⁴ Ruppel and Bangamwabo "The SADC Tribunal: A Legal Analysis of Its Mandate and Role in Regional Integration" 1

¹⁰³⁵ Article 14 Protocol on the Tribunal 2000. See also Bartels *Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal* 24

The provision is clear in conferring jurisdiction in the Tribunal to interpret and apply the SADC Treaty, subsequent Protocols and other agreements to be concluded by member states. A controversy arose as to whether or not the provision conferred the Tribunal with competence to hear and determine human rights violation cases. The issue arose in the *Campbell*¹⁰³⁶ case where the applicants had their farms expropriated by the Zimbabwean government without compensation and under a law that ousted the jurisdiction of national courts to review the actions of the government.¹⁰³⁷ The applicants challenged the Zimbabwean government's action on grounds that it, inter alia, was a violation of their rights of access justice and was discriminatory. It was argued for the Zimbabwean government that the Tribunal lacked jurisdiction to hear the matter because it lacked jurisdiction over human rights issues as SADC had not elaborated and adopted a specific human rights treaty enumerating applicable human rights.¹⁰³⁸ The Court held that it did not "consider that there should be a Protocol on human rights in order to give effect to the principles set out in the Treaty."¹⁰³⁹ The fact that the SADC Treaty required member states to adhere to principles of "human rights, democracy and rule of law" was sufficient foundation for the Tribunal to adjudicate on human rights and develop its own jurisprudence.¹⁰⁴⁰

The new 2014 Protocol, however, significantly revises the provision on material jurisdiction of the Tribunal. The new Tribunal "shall have jurisdiction on the interpretation of the SADC Treaty and Protocols relating to disputes between member states."¹⁰⁴¹ The new SADC Tribunal is, therefore, only vested with jurisdiction to interpret the SADC Treaty and Protocols only in the context of inter-state disputes. This effectively means that the Tribunal shall never handle matters of human rights violations.

In terms of personal jurisdiction, the Tribunal was empowered to receive applications from institutions of the SADC Community, member states and natural or legal persons.¹⁰⁴² No member state has brought a case against another at the Tribunal. Most of the cases were brought by natural or legal persons. Where legal or natural persons bring a case, it is required that the dispute should be between a natural or legal person and a member state.¹⁰⁴³ This was

¹⁰³⁶ Mike Campbell (Pvt) Ltd and Others vs. The Republic of Zimbabwe SADC (T) Case No. 2/2007

¹⁰³⁷ Ibid page 23

¹⁰³⁸ Ibid

¹⁰³⁹ Ibid page 24

¹⁰⁴⁰ Ibid pages 23 and 25

¹⁰⁴¹ Article 33 Protocol on the Tribunal on the Southern African Development Community 2014

¹⁰⁴² Articles 15, 17, 18 and 19 Protocol on the Tribunal 2000

¹⁰⁴³ Article 15(2) Protocol on the Tribunal 2000

asserted by the Court in the *Chirinda*¹⁰⁴⁴ case where the applicants sought to intervene in the Campbell case on grounds that they had an interest in that case. The Court dismissed their application on the ground that natural or legal persons could only bring cases against member states and not against other natural or legal persons.¹⁰⁴⁵

Natural or legal persons bringing an application before the SADC Tribunal against a member state had first to exhaust all available remedies under the domestic jurisdiction.¹⁰⁴⁶ The rationale for the exhaustion of local remedies is “to enable local courts to first deal with the matter because they are well placed to deal with the matter because they are well placed to deal with the legal issues involving national law before them” and ensures that the international Tribunal does not deal with cases which could easily have been disposed of by national courts.”¹⁰⁴⁷

The Tribunal, however, has indicated that an applicant is not required to exhaust local remedies where “municipal law does not offer any remedy or the remedy that is offered is ineffective” or it is obvious that the procedure for achieving the remedy would be unduly prolonged.¹⁰⁴⁸ The Tribunal has also held that the granting of interim orders to protect the rights of applicants is not subject to the rule of exhaustion of local remedies.¹⁰⁴⁹

The new Tribunal Protocol does not have a provision on personal jurisdiction. But the scope of personal jurisdiction of the new Tribunal is implied under Article 33 which provides for the material jurisdiction of the Tribunal in the following terms: “The Tribunal shall have jurisdiction on the interpretation of the SADC Treaty or Protocols relating to disputes between member states.”

By clothing the Tribunal with competence to only deal with cases involving disputes between member states, it means natural and legal persons are now excluded from accessing the Court. Considering that during the life of the Tribunal no member state ever brought a case against another member state, this change effectively strips the Tribunal of its relevance in

¹⁰⁴⁴ Nixon Chirinda and Others vs. Mike Campbell (Pvt) Ltd SADC (T) Case No.09/08 [Judgment of 17 September 2008]

¹⁰⁴⁵ Ibid pages 3 and 4. The Tribunal stated as follows: “the alleged dispute in the application is between the present applicants and the applicants in the Campbell case. Since the dispute is not between persons and state, the tribunal has no jurisdiction to hear the application....”

¹⁰⁴⁶ Article 15(2) Protocol on the Tribunal 2000

¹⁰⁴⁷ Mike Campbell (Pvt) Ltd and Others vs. The Republic of Zimbabwe SADC (T) Case No. 2/2007

¹⁰⁴⁸ Ibid, page 21

¹⁰⁴⁹ Mike Campbell (Pvt) Ltd and William Michael Campbell vs. The Republic of Zimbabwe Case No. SADC (T): 2/07

the integration process. It will most likely just exist on paper without any meaningful prospect of any docket to process.

5.3.5.3 Enforcement of the Court's Decisions and Relations with National Courts

Decisions of the SADC Tribunal are considered final and binding.¹⁰⁵⁰ Unlike the EACJ and ECOWAS Court, decisions of the SADC Tribunal are supposed to be enforced under rules of procedure in national courts pertaining to the enforcement of foreign judgments.¹⁰⁵¹ Thus decisions of the SADC Tribunal potentially have to go through a process of registration and recognition as other judgment rendered by foreign Courts.

This approach of enforcing the Tribunal's decisions as foreign judgments is also problematic especially in countries where the subject matter of the judgment in the international Court is at variance with a matter of public policy at national level, where only the executive can venture (because, for example, the powers of the Courts have been ousted). At least such was the situation in the *Campbell* case relating to the situation in Zimbabwe. Where a domestic Court's jurisdiction is ousted in this manner, it is impossible that a national court will then enforce a foreign judgement and allow it to override public policy considerations.

Member states and institutions of the SADC are required to take all necessary measures to ensure the execution of decisions of the Tribunal.¹⁰⁵² Any party to a dispute may refer a failure by a member state to comply with a decision of the Tribunal to the Tribunal itself.¹⁰⁵³ Where the Tribunal establishes the existence of such failure, it shall report its finding to the Summit for it to take appropriate action.¹⁰⁵⁴ The new SADC Tribunal Protocol re-enacts these provisions on the enforcement of the Tribunal's decisions.¹⁰⁵⁵

Although the kind of action the Summit may take is not specified, the SADC Treaty's provision on sanctions is indicative of what could be done in such circumstances. Sanctions may be imposed on a member state that, inter alia, "persistently fails, without reason, to fulfil

¹⁰⁵⁰ Article 24(3) Protocol on the Tribunal 2000

¹⁰⁵¹ Article 32(1) Protocol on the Tribunal 2000. See also Bartels *Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal* 53 and 54

¹⁰⁵² Article 32(2) Protocol on the Tribunal 2000

¹⁰⁵³ Article 32(4) Protocol on the Tribunal 2000

¹⁰⁵⁴ Article 32(5) Protocol on the Tribunal 2000

¹⁰⁵⁵ Article 44 Protocol on the Tribunal in the Southern African Development Community 2014

obligations assured under this Treaty.”¹⁰⁵⁶ The applicable sanctions are not enumerated but are to be determined by the Summit on a case-by-case basis.¹⁰⁵⁷

Just like other sub-regional Tribunals discussed above, the SAC Tribunal’s main mechanism for interacting with national courts is through the process of references.¹⁰⁵⁸ However, of all the cases handled by the Tribunal, there was none that was referred to the Tribunal by a national court. All the cases were brought by natural or legal persons against either the member states or SADC institutions, outside of the framework of reference by national courts.¹⁰⁵⁹

The mechanism of references by national courts has proved problematic in the SADC context, where in the majority of member states, international agreements are not self-executing unless concerned states pass enabling legislation. Lorand Bartels, the University of Cambridge legal scholar who was engaged by SADC to review the Tribunal’s mandate in 2010, discovered that actually none of the SADC member states had passed any enabling legislation “incorporating SADC law en bloc into its domestic legal system.”¹⁰⁶⁰ Where international agreements are not self-executing and enabling legislation has not been passed, national courts will have no legal basis for referring cases to an international Tribunal. In this context, the effectiveness of the reference system turns on the willingness of member states to pass national laws enabling national courts to refer cases to the Tribunal. It goes without saying that without an effective reference mechanism, there is no effective reception of Community law into the municipal sphere and the integration process therefore suffers.

Since the 2014 SADC Tribunal Protocol does away with the right of access for natural and legal persons to the Tribunal, it invariably removes the reference mechanism

5.3.5.4 *Independence of the Court and Relations National Governments*

The judges of the SADC Tribunal are appointed by the Summit on the recommendation of the Council of Ministers.¹⁰⁶¹ The Council of Ministers selects candidates from the list of

¹⁰⁵⁶ Article 33(1)(a) Treaty of the Southern African Development Community 1992

¹⁰⁵⁷ Article 33(2) Treaty of the Southern African Development Community 1992

¹⁰⁵⁸ Article 16 Protocol on the Tribunal 2000

¹⁰⁵⁹ Wet “The Rule of Law and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa” 14 and 15

¹⁰⁶⁰ Bartels *Review of the Role, Responsibilities and Terms of Reference of the SADC Tribunal* 17

¹⁰⁶¹ Article 4(4) Protocol on the Tribunal 2000

names nominated and proposed by member states for appointment.¹⁰⁶² The nomination and appointment process is required to give due consideration to fair gender representation.¹⁰⁶³ Unlike ECOWAS which has put in place a more transparent appointment system, SADC's appointment system is solely in the hands of governments of member states. How each state identifies candidates for possible appointment is entirely under its discretion. The 2014 Protocol makes no changes to the appointment mechanism of judges.¹⁰⁶⁴

When it comes to removal of judges from office, the 2000 SADC Tribunal protocol seems to only contemplate two circumstances under which judges could vacate office: death and resignation.¹⁰⁶⁵ There is no provision for removal of judges on any other ground other than those two. The 2014 Tribunal Protocol, however, introduces a clause on removal for incapacity and misconduct. Under the 2014 Protocol, a judge may be removed from office if he/she is permanently incapacitated from exercising his or her functions or has committed a serious breach of his or her duties or a serious act of misconduct.¹⁰⁶⁶ What constitutes a serious breach of duty or serious misconduct is not defined. It is, however, required that a judge shall only be removed if the question of his/her removal from office is referred to an ad hoc independent tribunal appointed specifically for this purpose by the Summit, and the ad hoc tribunal recommends that the judge be removed from office following due process.¹⁰⁶⁷

Of all regional tribunals under consideration, the SADC Tribunal has suffered the most devastating backlash from the governments of member states, which in fact led to the dissolution of the original SADC Tribunal and the creation of a new one with a limited mandate. Circumstances leading to the dissolution merit narrating in summary here.

The backlash against the SADC tribunal was triggered by the Tribunal's decision in the *Campbell*¹⁰⁶⁸ case. In this case a group of white farmers brought an action before the Tribunal challenging the Zimbabwean constitutional amendment and government policy that allowed for the expropriation of white-owned farms without compensation, and ousted the jurisdiction of the courts from reviewing this decision of government. The applicants alleged that the actions of the Zimbabwean government were in violation of human rights, particularly the

¹⁰⁶² Article 4(3) Protocol on the Tribunal 2000

¹⁰⁶³ Article 4(2) Protocol on the Tribunal 2000

¹⁰⁶⁴ Article 4 Protocol on the Tribunal in the Southern African Development Community 2014

¹⁰⁶⁵ Article 8(1)(2)(3) Protocol on the Tribunal 2000

¹⁰⁶⁶ Article 11(1) Protocol on the Tribunal in the Southern African Development Community 2014

¹⁰⁶⁷ Article 11(2) Protocol on the Tribunal in the Southern African Development Community 2014

¹⁰⁶⁸ Mike Campbell (Pvt) Ltd and Others vs. The Republic of Zimbabwe SADC (T) Case No.2/2007

rights of access to justice and non-discrimination. The Tribunal found for the applicants and ordered the Zimbabwean government to halt the expropriation of farms and to compensate the affected farmers.¹⁰⁶⁹

The Zimbabwean government reacted angrily against the judgement. President Mugabe referred to the decision as an “exercise in futility.”¹⁰⁷⁰ The Zimbabwean Justice Minister announced that Zimbabwe would withdraw from the jurisdiction of the SADC Tribunal and embarked on a tour of member states lobbying for their support against the decision of the Tribunal.¹⁰⁷¹

When Zimbabwe failed to honour the decision of the Tribunal, the Tribunal on at least three occasions wrote to the Summit for it to take appropriate action against Zimbabwe. Instead, in 2010, the Summit decided to defer action against Zimbabwe and ordered a review of the Tribunal’s role, responsibilities and terms of reference by an independent consultant.¹⁰⁷² The consultant who was engaged, Lorand Bartels, found no fault in how the Tribunal discharged its responsibilities and actually recommended reforms to strengthen the Tribunal.¹⁰⁷³

Zimbabwe’s lobbying against the Tribunal began to bear fruit as some member states began to speak openly against the Tribunal and in solidarity with Zimbabwe. The Tanzanian President, Jakaya Kikwete, for example, is reported to have stated that: “We have created a monster that will devour us all. Can our justice ministers make sure that his is destroyed before it devours us all.”¹⁰⁷⁴

In 2010 the Summit suspended the operations of the Tribunal, pending the review of its mandate and decided that it would not reappoint Tribunal judges whose terms of office had expired in August 2010, nor would it replace judges whose terms of office would expire in October 2011.¹⁰⁷⁵ The Summit also ordered the Tribunal not to hear any new cases. In May 2011, once again the Summit decided to extend the suspension of the Tribunal for another year and held to its earlier position not to reappoint judges whose terms were due to expire and asked the Tribunal not to hear any cases, whether new or pending. The Summit also

¹⁰⁶⁹ Ibid pages 21, 22, 41, 52, 53, 57, 58 and 59

¹⁰⁷⁰ As cited in Nathan “Solidarity Triumphs Over Democracy- The Dissolution of the SADC Tribunal” 5

¹⁰⁷¹ Ibid

¹⁰⁷² Pillay “SADC Tribunal Dissolved by Unanimous Decision of SADC Leaders” 3

¹⁰⁷³ Supra note 260

¹⁰⁷⁴ As cited in Msipa “Contextualising the SADC Tribunal and the Land Issue in Zimbabwe- A Socio-Legal Perspective” 5

¹⁰⁷⁵ Nathan “Solidarity Triumphs Over Democracy- The Dissolution of the SADC Tribunal” 9

asked the SADC Ministers of Justice and Attorneys General to begin the process of amending the Tribunal Protocol and submit to the Summit a progress report.¹⁰⁷⁶

During a Summit meeting in August 2012 in Mozambique, the SADC heads of state and government received and considered a report from the Ministers of Justice and Attorneys General and agreed that a new Protocol on the Tribunal be developed and that “its mandate should be confined to the interpretation of the SADC Treaty and Protocols relating to the disputes between member states.”¹⁰⁷⁷ In August 2014 the SADC Council of Ministers during a meeting held at Victoria Falls in Zimbabwe, approved a new draft Protocol on the Tribunal and recommended its adoption by the Summit.¹⁰⁷⁸ The Summit, following the recommendation of the Council of Ministers, adopted and signed the new Protocol on the SADC Tribunal.¹⁰⁷⁹ The most significant change the new Protocol introduced, as already discussed, is the removal of access to the Tribunal by natural and legal persons.¹⁰⁸⁰

It should also be noted that there were advocacy and lobbying activities by civil society organisations within the SADC region to save the Tribunal from being dissolved. In one effort, civil society organisations sought an advisory opinion from the African Court of Human and Peoples’ Rights on whether the decision of the SADC leaders to suspend the SADC Tribunal and terminate terms of office of judges was in line with the African Charter on Human and Peoples’ Rights.¹⁰⁸¹ Unfortunately the Court declined to give an opinion on the ground that the African Commission on Human and Peoples’ Rights had a case before it which was materially the same as this one presented to it.¹⁰⁸²

¹⁰⁷⁶ Wet “The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa” 3

¹⁰⁷⁷ Final Communiqué of the 32nd Summit of SADC Heads of State and Government of 18 August 2012 (Maputo, Mozambique), para 24

¹⁰⁷⁸ Outcome [Communiqué] of the SADC Council of Ministers Meeting Held on August 14-15 2014, Victoria Falls, Zimbabwe

¹⁰⁷⁹ Communiqué of the 34th Summit of SADC Heads of State and Government of 17-18 August 2014 [Victoria Falls, Zimbabwe]. See also Protocol on the Tribunal in the Southern African Development Community 2014

¹⁰⁸⁰ Article 33 Protocol on the Tribunal in the Southern African Development Community 2014

¹⁰⁸¹ Request for an Advisory Opinion No.002/2012 by Pan African Lawyers’ Union and Southern African Litigation Centre [African Court of Human and Peoples’ Rights] Order of 15 March 2013

¹⁰⁸² *Ibid*, para 6

5.4 The Viability of An Elections Supranational Tribunal Emerging From the Review of Sub-Regional Courts

This section looks at the emerging picture from the review of sub-regional courts to see if it is favourable to the creation of a continental supranational court with a mandate to adjudicate presidential election disputes.

As already discussed, supranational adjudication hinges on affording nationals of member states direct access to the supranational court or tribunal, which in turn is empowered to make binding decisions on individual litigants and member states concerned. Thus considered, then all the five sub-regional courts (with the exception of the recreated SADC Tribunal) qualify to be considered as supranational courts. Therefore, outside of the new SADC Tribunal, it is clear that at sub-regional level, supranational adjudication is the dominant judicial model for resolving legal disputes in the integration process.

These sub-regional courts, although on paper may have been established many years ago, are a new millennium phenomena in terms of actual operationalisation. All the tribunals assessed here, except COMESA Court (1998), had had the first set of judges appointed post-2000. Naturally, therefore, as a new phenomenon, the courts are still trying to establish themselves and assert their legitimacy and build viable relations with national courts and other relevant stakeholders.

Despite being relatively new, the sub-regional courts have rendered remarkable and valuable decisions that have aided the process of integration, at least at the legal level. Although some of the decisions rendered may not have been in the immediate or short term interests of member states, in the long term they stand to benefit the sub-regional integration process. These decisions have enabled holding member states to respect the standards they had agreed to in various constitutive documents and subsequent protocols.

Although no regional economic community has given express jurisdiction to a sub-regional court to entertain election petitions, election cases as seen in the *Ugokwe* case above could still reach these courts by way of raising violations, such as human rights, over which the courts already have jurisdiction. It could, therefore, be argued that although governments may have adverse feelings about granting jurisdiction to supranational courts, certain aspects of the conduct of elections (such as the rights to participation, freedom of expression,

association as well as access to tribunals when aggrieved with the conduct of elections) will continue to reach these supranational courts.

Although, with the exception of the recreated SADC tribunal, all the sub-regional courts reviewed would qualify as supranational tribunals, they have nuanced differences. For example, when it comes to accessing the Courts, ECOWAS and EACJ give unfettered access to the Courts, while for COMESA and SADC (before dissolution) access is subject to exhaustion of local remedies. The OHADA Court is unique in the sense that it serves as an appellate court for member states in relation to matters over which it has jurisdiction.

Supranational courts, as noted already, are the dominant model of tribunals at the sub-regional level. It can thus be argued that this model can easily be replicated at continental level, considering that regional communities are regarded as building blocks for ultimate continental integration. However, the experiences of the SADC Tribunal and to some extent EACJ and ECOWAS Court indicates that the more a supranational court asserts its authority over matters with significant political implications, the more the court may suffer reprisals from governments of member states. In the case of ECOWAS, the backlash from The Gambia never materialised as other states rejected the proposals to constrain the jurisdiction of the Court. For the EACJ, the backlash and subsequent reforms appear not to have damaged the Court significantly. It could actually be stated that, on the contrary, the reforms strengthened the stature of the court by creating an appellate division. It is, therefore, only in the case of SADC that the backlash against the tribunal was fatal.

Helfer and Slaughter propose at least two factors that could explain why the SADC Tribunal never survived the backlash. These are what they call “incrementalism” and “nature of violations” brought before the Court.¹⁰⁸³ Incrementalism means that bold judgments against state interests must be tempered with awareness of political boundaries. The court thus should not act too fast and too far or else member states may act to curtail its jurisdiction or vary the composition of judges.¹⁰⁸⁴

But how fast and far a court pushes is in part dependent on the “nature of violations” that come before it for adjudication. It is argued that, while a supranational court is still young and still trying to assert its legitimacy, this process is aided if only minor case of little consequence to the states are dominant. If from the start, a supranational court, which is not

¹⁰⁸³ Helfer and Slaughter “Toward a Theory of Effective Supranational Adjudication”50-57

¹⁰⁸⁴ Ibid

yet engraved in the minds and hearts of many stakeholders, takes up politically sensitive cases, and then fails to tailor its judgments “incrementally” to balance with the immediate interests of the concerned states and individual litigants, then the court may suffer a fatal backlash.¹⁰⁸⁵

It would appear that the SADC judges failed this test while the EACJ judges passed it with distinction. The SADC Tribunal judges faced hard cases arising from the poor governance situation in Zimbabwe just two years after it became operational. The Tribunal made bold decisions, without tailoring the decisions to accommodate both the aggrieved litigants and the concerned state (without of course betraying its mandate).¹⁰⁸⁶

The EACJ judges, on the other hand, seem to have passed the test and enabled the court to survive the backlash and consolidate its legitimacy. In the *East African Law Society*¹⁰⁸⁷ case the EACJ had to determine the validity of the amendments to the EAC Treaty. Although the court annulled the amendments introduced by member states, it creatively invoked the doctrine of “prospective annulment,” which effectively meant that the interests of both the member states and the litigants were taken on board.

The approach taken by the EACJ demonstrates that it is possible for courts to make bold, but creative decisions that enable the balancing of immediate state (‘sovereign’) interests and at the same time serve the values or norms that underpin the regional integration process. It is not an easy task but it is necessary if the goals set between states, both at sub-regional and continental level are to be realised. The EACJ, in this respect aptly remarked:

...we are constrained to say that when the partner states entered into the Treaty, they embarked on the proverbial journey of a thousand miles which of necessity starts with one step. To reach the desired destination they have to ensure that every subsequent step is directed forward towards that destination. There are bound to be hurdles on the way. One such hurdle is balancing individual state sovereignty with integration. While the Treaty upholds the principle of sovereign equality, it must be acknowledged that by the very nature of the objectives they set out to achieve, each

¹⁰⁸⁵ Ibid

¹⁰⁸⁶ See the case of Mike Campbell (Pvt) Ltd vs. The Republic of Zimbabwe SAC (T) Case No.2/2007

¹⁰⁸⁷ The East African Law Society and others vs. The Attorney General of the Republic of Kenya and others Reference No. 3 of 2007

partner state is expected to cede some amount of sovereignty to the Community and its organs albeit in limited areas to enable them play their role.¹⁰⁸⁸

This review of sub-regional courts indicates that at the formal level, supranational adjudication is to a great extent already accepted at sub-regional level and is in fact the dominant judicial model as seen in the treaties and jurisprudence of sub-regional organisations reviewed. Although it seems difficult to gauge how popular supranational tribunals are with citizens of member states, it is clear that almost all cases settled by the courts were brought by private persons as opposed to member states. Although this is not conclusive evidence of popularity, it could be argued that private individuals who have had cause to litigate before the sub-regional courts are inclined favourably to the supranational tribunals. This, however, does not conclusively indicate the level of support in a particular state for supranational adjudication. In the case of the ECOWAS Court and the EACJ, as discussed above, the support for expanding the jurisdiction of the court or advocacy against narrowing its jurisdiction welled-up from private persons and civil society organisations within member states. Similarly, efforts to save the SADC Tribunal were undertaken by civil society organisations and bar societies in member states. In the next section, an attempt is made to escalate supranational adjudication to the continental level using the already existing continental judicial framework.

5.5 Integrating the Elections Supranational Court Into the AU Judicial Framework

This section looks at how the proposed supranational elections tribunal could relate to and be integrated into the AU judicial framework. It should be recalled that the elections supranational court is suggested to be at the continental level and have jurisdiction over the implementation of continental democratic and elections norms. This section, therefore, looks at the judicial structures already in existence at the continental level and proposes how they can be adjusted in order to accommodate supranational adjudication over presidential election disputes.

The first African continental court to be established is the African Court on Human and Peoples' Rights (ACtHPR). The establishment of the Court sprung from a growing sense of

¹⁰⁸⁸ Anyang' Nyong'o and others V. The Attorney General of the Republic of Kenya and Others reference No.1 of 2006 [Judgment of 30 March 2007] pages 43 and 44

“the inadequacy of the protection and enforcement of human rights offered” by the African Commission on Human and Peoples’ Rights (The Commission), the treaty body responsible for supervising the implementation of the ACHPRs.¹⁰⁸⁹ The Commission has no power to make legally binding decisions and its decisions amount to nothing more than recommendations. It thus lacks power to award or order compensation to victims of human rights abuse.¹⁰⁹⁰ In the words of Udombana: “The Commission stands as a toothless bulldog. The Commission can bark- it is, in fact barking. It was not, however, created to bite.”¹⁰⁹¹

The African Court on Human and Peoples’ Rights (ACtHPR) was established through adoption by the African heads of state and government of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights (ACHPR Protocol), which was adopted on 9 June 1998 in Ouagadougou, Burkina Faso.¹⁰⁹² The ACHPR Protocol entered into force in January 2004.

The ACtHPR was established to complement the protective mandate of the Commission.¹⁰⁹³ Its material jurisdiction extends to the interpretation and application of the ACHPR, the ACHPR Protocol and any other relevant human rights instrument ratified by concerned states.¹⁰⁹⁴ Presumably this includes human rights treaties agreed at sub-regional level.

In terms of personal jurisdiction, the Court is accessible to the following entities:

- (a) The Commission;
- (b) The state party which has lodged a complaint to the Commission;
- (c) The state party against which the complaint has been lodged at the Commission;
- (d) The state party whose citizen is a victim of human rights violation;
- (e) African intergovernmental organisations.¹⁰⁹⁵

As can be seen, this list excludes individuals from direct access to the Court. Individuals and Non Governmental Organisations (NGOs), however, may still access the Court, but only where the concerned member state has made a declaration to this effect when ratifying the

¹⁰⁸⁹ O’Shea “A Critical Reflection on the Proposed African Court of Human and Peoples’ Rights 285-298

¹⁰⁹⁰ Udombana “Toward the African Court on Human and Peoples’ Rights: Better Late than Never” 67

¹⁰⁹¹ Ibid 64

¹⁰⁹² Ibid 45. See also Wachira “African Court on Human and Peoples’ Rights: Ten Years on and Still No Justice” 5

¹⁰⁹³ Article 2 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights 1998

¹⁰⁹⁴ Article 3(1) Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights 1998

¹⁰⁹⁵ Article 5(1) Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights 1998

ACHPR Protocol.¹⁰⁹⁶ In order for an NGO to access the Court, it must have observer status with the Court.¹⁰⁹⁷ In the *Association Juristes D’Afrique Pour La Bonne Gouvernance*¹⁰⁹⁸ case the Court partly dismissed the case because the applicant organisation did not have observer status before the Court.

Conditioning individuals’ access to the Court on state declaration is probably the biggest challenge to the effectiveness of the Court. Individuals (and groups) are usually the victims of human rights violations, and, therefore, would naturally be in the forefront to vindicate their rights. Subjecting the vindication of their rights to state declarations means that in practice many victims will not have a chance to present their cases before the Court.

This has been the experience of the ACtHPR so far. Of the 26 member states, only a paltry six¹⁰⁹⁹ have made declarations allowing their nationals and NGOs access to the Court.¹¹⁰⁰ The Court has actually reported that the majority of cases it has received have been brought by individuals whose states have not given the requisite declaration.¹¹⁰¹ Lacking declaration from a concerned state is fatal to a case. This was the fate of the first case that confronted the ACtHPR. In the *Michelot Yogogombaye*¹¹⁰² case, the applicant sought, inter alia, to prevent the former Chadian leader, Hissein Habre, from prosecution for crimes against humanity by Senegal on the basis that it was a retroactive prosecution contrary to the ACHPR. The Court held that since Senegal, the concerned state in this case, had not made the requisite declaration, it thus lacked jurisdiction to determine the case.¹¹⁰³

The ACtHPR is composed of eleven judges who are nationals of AU member states, but elected in individual capacity, from among jurists of high moral standing and recognised competence in the field of human and peoples’ rights.¹¹⁰⁴ The judges are elected by the AU

¹⁰⁹⁶ Articles 5(3) and 34(6) Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights 1998

¹⁰⁹⁷ Article 5(3) Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights 1998

¹⁰⁹⁸ *Association Juristes D’Afrique Pour La Bonne Gouvernance vs. Republic of Cote D’Ivoire* Application no. 006/2011 [African Court on Human and Peoples’ Rights] paras 7, 8, and 9

¹⁰⁹⁹ The six are: Burkina Faso, Malawi, Mali, Tanzania, Ghana, Rwanda and Ivory Coast.

¹¹⁰⁰ AU “Status of Ratification Process of the Protocol Establishing the African Court” 3

¹¹⁰¹ Justice Akuffo “Report of the African Court on Human and Peoples’ Rights on the Relevant Aspects Regarding the Judiciary in the Protection of Human Rights in Africa” para 13

¹¹⁰² *Michelot Yogogombaye vs. The Republic of Senegal* Application No. 001/2008 [The African Court on Human and Peoples’ Rights]

¹¹⁰³ *Ibid* paras 36 to 40 and 46

¹¹⁰⁴ Article 11(1) Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights 1998. The following are the current judges of the Court: Augustino Ramadhani, President (Tanzania); Elsie Nwanwuri Thompson, Vice President (Nigeria); Gerard

General Assembly by secret ballot, taking into account and ensuring that the Court as a whole there is representation of the main regions and their principal legal traditions as well as adequate gender representation.¹¹⁰⁵

Judges are ordinarily elected for a period of six years. However, the terms of four judges from the first set of judges expired at the end of two years and the terms of another four judges expired after four years.¹¹⁰⁶ The varying of terms of office of judges ensures that the terms of judges do not all expire at the same time. A judge of the ACtHPR cannot be suspended or removed from office unless the concerned judge has been found to be no longer fulfilling the requisite conditions to be a judge by a unanimous decision of the Court.¹¹⁰⁷ The seat of the Court is Arusha, Tanzania.

Although the ACtHPR does not have express jurisdiction over electoral disputes, election disputes alleging violation of recognised human rights could still reach the Court. Such was the case in *Mtikila*,¹¹⁰⁸ where Mtikila, the applicant, challenged the Tanzanian Constitutional amendment restricting presidential candidacy to those sponsored by political parties, thereby excluding independent candidates.¹¹⁰⁹ The applicant, inter alia, alleged violation of the right to political participation as enshrined under the ACHPR. The Court found for the applicant and ruled that the restriction or prohibition of independent candidates was not proportional to the alleged aim of fostering national unity and was, therefore, a violation of the right to participate freely in the government of one's country.¹¹¹⁰ The Tanzanian government responded positively to this decision and omitted the impugned provision in its draft constitution, which shall be subjected to a referendum in April 2015.

The second continental court established in Africa is the African Court of Justice (ACJ). The Court was established by the Constitutive Act of the AU and in July 2003 the AU Assembly

Niyungeko (Burundi); Fatsah Ouguergouz (Algeria); Duncan Tambala (Malawi); Sylvain Ore (Ivory Coast); El Hadji Guisse (Senegal); Ben Kioko (Kenya); Rafea Ben Achour (Tunisia); Solomy Balungi Bossa (Uganda); and Angelo Vasco Matusse (Mozambique).

¹¹⁰⁵ Articles 13(2), 14(1)(2)(3) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998

¹¹⁰⁶ Article 15(1) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998

¹¹⁰⁷ Article 19(1) Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights 1998

¹¹⁰⁸ Christopher Mtikila and The Tanganyika Law Society vs. The United Republic of Tanzania Consolidated Applications Nos. 009/2011 and 011/2011 [African Court of Human and Peoples' Rights]

¹¹⁰⁹ *Ibid* para 107.2

¹¹¹⁰ *Ibid* para 111

adopted the Protocol on the Court of Justice of the African Union.¹¹¹¹ The ACJ was established as the principal judicial organ of the AU.¹¹¹²

However, before the ACJ was inaugurated, the AU in July 2004 decided to merge the ACtHPR with the ACJ,¹¹¹³ in order to create one continental court, the African Court of Justice and Human Rights (ACJHR). In 2008, the AU adopted the Protocol on the Statute of the African Court of Justice and Human Rights,¹¹¹⁴ together with the Statute of the African Court of Justice and Human Rights (annexed to the Protocol), which formally merged the two Courts.

There are several justifications given in support of the merger. These include the need to avoid splitting the already stretched human and financial resources towards supporting two courts; the need to avoid proliferation of international judicial institutions with overlapping mandates; and the need to avoid the possibility of conflicting jurisprudence from two continental courts.¹¹¹⁵

The ACtHPR will continue to operate and its judges will continue in office until the judges of the ACJHR are sworn in and take office.¹¹¹⁶ Cases pending before the ACtHPR that would not have been concluded at the time of transitioning into the new merged Court will be transferred to the Human Rights Section of the ACJHR.¹¹¹⁷

The ACJHR is established as the main judicial organ of the AU.¹¹¹⁸ It is composed of 16 judges, with each geographical region of the continent, where possible, represented by three judges, except the Western Region, which shall have four judges.¹¹¹⁹ Judges are elected from among persons of high moral character, who possess the qualifications required for appointment to the highest judicial offices in their country, or are jurists of recognised competence and experienced in international law and human rights law.¹¹²⁰ Each state party may nominate up to two candidates, taking into account gender representation. The

¹¹¹¹ Adopted in Maputo, Mozambique.

¹¹¹² Article 2(2) Protocol on the Court of Justice of the African Union 2003

¹¹¹³ Wachira "African Court on Human and Peoples' Rights: Ten Years On and Still No Justice" 5

¹¹¹⁴ Adopted by the 11th Ordinary Session of the Assembly of the Union in Sharm El-Shekh, Egypt on 1 July 2008. See also Article 2 Protocol on the Statute of the African Court of Justice and Human Rights 2008

¹¹¹⁵ Kindiki "The Proposed Integration of the African Court of Justice and the African Court of Human and Peoples' Rights: Legal Difficulties and Merits"

¹¹¹⁶ Article 4 Protocol on the Statute of the African Court of Justice and Human Rights 2008

¹¹¹⁷ Article 5 Protocol on the Statute of the African Court of Justice and Human Rights 2008

¹¹¹⁸ Article 2(1) Statute of the African Court of Justice and Human Rights 2008

¹¹¹⁹ Article 3(1) and (3) Statute of the African Court of Justice and Human Rights 2008

¹¹²⁰ Article 4 Statute of the African Court of Justice and Human Rights 2008

Chairperson of the AU Commission, from the nominated persons, draws two lists of candidates. One list (list A) contains the names of candidates with recognised competence in international law, while the second list (list B) contains the names of candidates with recognised competence in human rights law.¹¹²¹ Judges are then elected by the Executive Council and formally appointed by the AU Assembly.¹¹²²

Judges are elected for a period of six years and may be re-elected for one more term. The term of office of eight judges (four from each section of the court) from the first set of judges is designed to last four years.¹¹²³ All the judges, except the President and the Vice President, shall serve on a part-time basis.¹¹²⁴ A judge of the ACJHR shall not be suspended or removed from office, except on the recommendation of two-thirds majority of other judges on a finding that the concerned judge no longer meets the requisite conditions to be judge.¹¹²⁵ The Court and the judges, in performance of judicial functions, shall not be subject to the direction or control of any person or body.¹¹²⁶

The ACJHR has two sections. These are the General Affairs Section composed of eight judges and the Human Rights Section composed of the remaining eight other judges.¹¹²⁷ Although this is the current status, as shall be discussed below, the AU adopted another Protocol in 2014 that increases the sections of the Court to three. The 2014 Protocol is however, not yet in force. The Human Rights Section is competent to hear all cases relating to human and/or peoples' rights while the General Affairs Section hears all other cases the Court is competent to hear.¹¹²⁸ The ACJHR has not yet become operational as the required minimum number of 15 ratifications to trigger it into operation has not been reached. By end of February 2014, only five states had ratified the Protocol on the ACJHR.¹¹²⁹ These are Benin, Burkina Faso, Congo, Libya and Mali.¹¹³⁰

The material jurisdiction of the ACJHR is set out in Article 28, which clothes the Court with competence to adjudicate on the following:

¹¹²¹ Article 6(1) Statute of the African Court of Justice and Human Rights 2008

¹¹²² Article 7 (1) Statute of the African Court of Justice and Human Rights 2008

¹¹²³ Article 8(1) Statute of the African Court of Justice and Human Rights 2008

¹¹²⁴ Article 8(4) Statute of the African Court of Justice and Human Rights 2008

¹¹²⁵ Article 9(2) Statute of the African Court of Justice and Human Rights 2008

¹¹²⁶ Article 12(3) Statute of the African Court of Justice and Human Rights 2008

¹¹²⁷ Article 16 Statute of the African Court of Justice and Human Rights 2008

¹¹²⁸ Article 17 Statute of the African Court of Justice and Human Rights 2008

¹¹²⁹ http://www.au.int/en/sites/default/files/Protocol%20on%20Statute%20of%20the%20African%20Court%20of%20Justice%20and%20HR_0.pdf (Date of use: 9 April 2015)

¹¹³⁰ *Ibid*

- (a) The interpretation and application of the Constitutive Act;
- (b) The interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the OAU;
- (c) The interpretation and application of the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on human and Peoples' Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the state parties concerned;
- (d) Any question relating to international law;
- (e) All acts, decisions, regulations and directives of the organs of the Union;
- (f) All matters specifically provided for in any other agreement that states parties may conclude among themselves, or with the Union and which confer jurisdiction on the Court;
- (g) The existence of any fact which, if established, would constitute a breach of an obligation owed to a state party or to the Union;
- (h) The nature or extent of the reparation to be made for the breach of an international obligation.¹¹³¹

Although the Court's competence to adjudicate over ACDEG, for example, is not expressly stated, it can be assumed to be competent to adjudicate on disputes relating to its provisions considering that it has jurisdiction over "other Union Treaties and subsidiary legal instruments."¹¹³²

In terms of personal jurisdiction, there are two sets of entities entitled to bring disputes before the Court. The first list opens the Court to state parties to the Protocol; the Assembly, Parliament and other AU organs; and AU employees in relation to labour disputes.¹¹³³ These can bring cases relating to the general material jurisdiction of the Court.

The second list is for entities that can bring human rights violation cases before the Court. These are:

- (a) State parties to the Protocol;
- (b) The African Commission on Human and Peoples' Rights;
- (c) The African Committee of Experts on the Rights and Welfare of the Child;
- (d) African Intergovernmental Organisations accredited to the Union or its organs;
- (e) African National Human Rights Institutions;

¹¹³¹ Article 28 Statute of the African Court of Justice and Human Rights 2008

¹¹³² Article 28(b) Statute of the African Court of Justice and Human Rights 2008

¹¹³³ Article 29(1) Statute of the African Court of Justice and Human Rights 2008

(f) Individuals or relevant Non-Governmental Organisations accredited to the African Union or its organs, subject to Article 8 of the Protocol.¹¹³⁴

As was with the ACtHPR, access of individuals and NGOs to the ACJHR is subject to the concerned state making a declaration to that effect. The challenges concomitant with this mechanism have already been discussed in relation to the ACtHPR.

The ACJHR has a time limit within which to render a decision after hearing a case. It is required to give its judgement within 90 days of completing the hearing.¹¹³⁵ The decision of the Court shall be made by the majority of judges present.¹¹³⁶ However, where the judgment does not represent in whole or in part the unanimous opinion of judges, any judge is entitled to deliver a separate or dissenting opinion.¹¹³⁷

Decisions of the ACJHR are final and binding on the parties. The parties are supposed to comply with the decisions of the Court within the time stipulated by the Court.¹¹³⁸ Where a party has failed to comply with a judgment, the Court is required to refer the matter to the AU Assembly, which should decide upon the measures to be taken to enforce the judgment. The Assembly may impose sanctions for failure to comply with a decision of the Court.¹¹³⁹

It should be noted that the relationship between the ACJHR with national courts is not indicated anywhere in the ACJHR Protocol. This could be problematic when it comes to the execution of the decisions of the Court at national level, as only national courts are available on the ground to directly enforce its decisions. There is equally no indication of the supremacy or superiority of the ACJHR's decisions in relation to matters where both itself and national courts have jurisdiction. However, considering that it is an established principle in public international law that states cannot plead inconsistency with their laws in defence of failure to comply with international obligations, it can thus be assumed that decisions of the ACJHR would take precedence over those of national courts. This also dovetails with the supranational aspirations of the African people through the AU.

While this exposition represents the current status of the AU judicial framework in terms of treaties in force, there was a major development in 2014, when the African leaders decided to

¹¹³⁴ Article 30 Statute of the African Court of Justice and Human Rights 2008

¹¹³⁵ Article 43(1) Statute of the African Court of Justice and Human Rights 2008

¹¹³⁶ Article 42(1) Statute of the African Court of Justice and Human Rights 2008

¹¹³⁷ Article 44 Statute of the African Court of Justice and Human Rights 2008

¹¹³⁸ Article 46(1)(2)(3) Statute of the African Court of Justice and Human Rights 2008

¹¹³⁹ Article 46(4)and(5) Statute of the African Court of Justice and Human Rights 2008

cloth the ACJHR with criminal jurisdiction. This was done through the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (the 2014 Protocol) on 27 June 2014. The Protocol is yet to come into force. The development is largely in response to the indictment and trial of African leaders at the International Criminal Court (ICC). The African leaders' mobilisation against the ICC began in reaction to the ICC indictment of Sudanese President Omar Al Bashir in 2009¹¹⁴⁰ for crimes against humanity, war crimes and genocide, and gained momentum with the indictment and trial of Kenyan President, Uhuru Kenyatta and his vice, William Ruto for crimes against humanity since 2011.¹¹⁴¹ The ICC, however, withdrew the charges against Uhuru on 5 December 2014.¹¹⁴²

The 2014 Protocol renames the ACJHR as the African Court of Justice and Human and Peoples' Rights (ACJHPR).¹¹⁴³ The Protocol vests the court with jurisdiction over international crimes.¹¹⁴⁴ The international crimes over which the court shall have jurisdiction are:

- Genocide;
- Crimes against humanity;
- War crimes;
- The crime of unconstitutional change of government;
- Piracy;
- Terrorism;
- Trafficking in persons;
- Trafficking in drugs;
- Trafficking in hazardous wastes;
- Illicit exploitation of natural resources; and
- The crime of aggression.¹¹⁴⁵

¹¹⁴⁰ See the case of The Prosecutor v. Omar Hassan Ahmad Al Bashir ICC-02/05-01/09

¹¹⁴¹ See the cases of The Prosecutor v. Uhuru Muiqai Kenyatta ICC-01/09-02/11 and The Prosecutor v. William Samoei Ruto and Joshua Arap Sang ICC-01/09-01/11

¹¹⁴² http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/related%20cases/icc01090211/Pages/icc01090111.aspx (Date of use: 9 April 2015)

¹¹⁴³ Article 8 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014

¹¹⁴⁴ Article 3(1) Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights 2014

¹¹⁴⁵ Article 14 Statute of the African Court of Justice and Human and Peoples' Rights 2014

Each of the listed crimes is further defined in the Protocol. But of interest to this research is the crime of unconstitutional change of government, which is defined further in the following terms:

For the purposes of this statute, unconstitutional change of government means committing or ordering to be committed the following acts, with the aim of illegally accessing or maintaining power:

- a) A putsch or coup d'état against a democratically elected government;
- b) An intervention by mercenaries to replace a democratically elected government;
- c) Any replacement of a democratically elected government by the use of armed dissidents or rebels or through political assassination;
- d) Any refusal by an incumbent government to relinquish power to the winning party or candidate after free, fair and regular elections;
- e) Any amendment or revision of the Constitution or legal instruments, which is an infringement on the principles of democratic change of government or is inconsistent with the Constitution;
- f) Any substantial modification of the electoral laws in the last six (6) months before the elections without the consent of the majority of the political actors.¹¹⁴⁶

These grounds of what constitutes an unconstitutional change of government are the same as those listed under ACDEG, except for ground (f) which is a new inclusion and seems to have been borrowed from the ECOWAS Governance Protocol discussed above. The decision by African leaders to prosecute unconstitutional changes of government as an international crime could be taken as fulfilling a growing desire of African peoples to ensure that Africa is rid of governments that ascend to power unconstitutionally. This then reinforces the importance of democratic elections as the sole legal basis for ascending into power in Africa. This notwithstanding, there are at least two points that need to be noted as they might militate against this development.

First, while prosecuting those assuming office unconstitutionally might be a positive development, it leads to an anomaly. That is, it creates a situation where alleged perpetrators of unconstitutional change of government may be tried but there is at the same time no forum for those alleging, for example that the election was stolen by the incumbent, to seek redress. When an election is disputed, it is usually difficult to determine who truly won without a credible adjudication process. This is more significant, especially in relation to ground (d) of

¹¹⁴⁶ Article 28E Statute of the African Court of Justice and Human and Peoples' Rights 2014

unconstitutional change of government which relates to an incumbent refusing to relinquish power having lost an election. Where there are competing claims about who won, as was the case, in Kenya in 2007, there would be no basis for determining if an incumbent holds power legitimately unless there is first a determination of who won the election.

The second point to note is that the 2014 Protocol provides for the prosecution of those who come into office unconstitutionally. Where the unconstitutionality alleged relates to disputed elections, such leaders will in reality not be prosecuted as the 2014 statute offers them immunity. The Protocol provides incumbent African leaders immunity in the following terms:

No charge shall be commenced or continued before the Court against any serving AU Head of State or Government, or anybody acting or entitled to act in such capacity, or other state officials based on their functions, during their tenure of office.¹¹⁴⁷

It was noted in chapter three that in many African countries, the president elect is promptly sworn into office, usually within 24 hours of the results being declared. Assuming the candidate announced as winner by the EMB is not really the winner but the declaration was orchestrated by the incumbent through coercion, threats or fraud, such a president clearly assumes office unconstitutionally. But once sworn into office, such a person becomes a sitting head of state and/or government and thus entitled to immunity from prosecution. Article 46B (2), however, states that “the official position of an accused person shall not relieve such person of criminal responsibility nor mitigate punishment.” This suggests that those who assume office unconstitutionally still face the prospect of prosecution after leaving office. This, however, carries with it the potential danger that such leaders may want to cling to power in perpetuity in order to avoid prosecution once they are out of office.

In order to accommodate the criminal jurisdiction of the Court, changes have been made to the structure (sections) of the court, as well as the appointment and qualifications of judges. In addition to the General Affairs as well as the Human and Peoples’ Rights sections, a third section called the International Criminal Law Section¹¹⁴⁸ has been added which shall have primary responsibility over prosecution and adjudication of international crimes. When it comes to the appointment of judges, instead of just the two lists discussed above, there is an additional third list (list C) which shall contain names of candidates having expertise in

¹¹⁴⁷ Article 46A bis Statute of the African Court of Justice and Human and Peoples’ Rights 2014

¹¹⁴⁸ Article 6 Statute of the African Court of Justice and Human and Peoples’ Rights 2014

international criminal law.¹¹⁴⁹ Judges to the International Criminal Court Section of the Court shall then be elected from this list.

In order to cater for the specific needs of criminal trials, the 2014 statute creates two new offices. These are the Office of the Prosecutor,¹¹⁵⁰ which shall be responsible for the investigation and prosecution of international crimes, as well as the Defence Office which shall be responsible for ensuring respect for “the rights of suspects and accused and any other person entitled to legal assistance.”¹¹⁵¹

This overview of the continental judicial framework reveals at least four things in relation to supranational adjudication. The first point to note is that there is an existing judicial framework in place. The framework, however, is still relatively young and at the same time undergoing restructuring, following the merger of the ACtHPR with the ACJ to form the ACJHPR, and the adoption of the 2014 Protocol, which confers criminal jurisdiction on the court. Second, access of individuals to the ACJHPR is constrained by the requirement of state declaration. Although this could have been designed as an incentive to encourage ratification by states, it is at the same time constraining the Court from being fully supranational and relevant to individuals in member states. There can be no supranational adjudication where individuals have no access to an international court.

Third, the ACJHPR, as well as the two courts it subsumed, has no clear or express mandate to enforce the continental electoral and democratic normative frameworks (such as ACDEG). It was noted in the preceding chapter that ACDEG lacks an efficient enforcement mechanism. Giving the Court express mandate over the continental electoral and democratic norms would help mitigate the weak enforcement mechanism for ACDEG and other democratic norms.

Fourth and finally, ACJHPR and its two predecessors, lack a clear indication of how to relate with national courts and sub-regional courts. Without a clear indication of relations with national courts, it is difficult to see how decisions of the Court could legally be enforced at national level. The lack of clarity with sub-regional courts could also be problematic for concerned states in situations where the continental and the sub-regional courts develop contradictory or inconsistent jurisprudence. Which one should a state follow? It could, however, be argued that since RECs are building blocks for ultimate continental integration,

¹¹⁴⁹ Article 4(1) (iii) Statute of the African Court of Justice and Human and Peoples’ Rights 2014

¹¹⁵⁰ Article 22A Statute of the African Court of Justice and Human and Peoples’ Rights 2014

¹¹⁵¹ Article 22 C(1) Statute of the African Court of Justice and Human and Peoples’ Rights 2014

the promulgation of the Constitutive Act heralds an era where the AU institutions will supersede sub-regional and national institutions. In that case decisions of the AU courts will supersede those of sub-regional ones.

In order to transform the current judicial framework into a fully-fledged supranational adjudication judicial framework, that can be counted on to support the resolution of presidential election disputes in Africa, it is suggested that the following two elements must be attended to:

- (a) The material and personal jurisdiction of the Court; and
- (b) Cooperation mechanism with national courts and sub-regional courts

With regard to the first element (material and personal jurisdiction), it has already been noted that the ACJHPR does not have express jurisdiction to hear and determine electoral disputes in member states. The Court, however, has jurisdiction over the interpretation and application of “other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union.”¹¹⁵² This arguably includes all the binding AU electoral and democratic normative frameworks. If that were the case, it would mean the ACJHPR already has jurisdiction to hear and determine electoral disputes that would allege violation of AU normative frameworks like ACDEG.

However, giving the Court express jurisdiction in the Court Protocol could arguably be advantageous as it would remove any ambiguity and clearly indicate how the Court should go about in resolving such disputes. It would also be advantageous in that it would possibly give the Court jurisdiction in electoral matters where a concerned state would have ratified the Court Protocol but not the democratic frameworks like ACDEG. This approach is affirmed in the jurisprudence of both the EACJ and the ECOWAS Court.¹¹⁵³

However, even if the Court was clothed with jurisdiction over electoral matters, it would be of little use if individuals and civil society organisations had no direct access to it. Electoral disputes affect individuals and political parties. It is the nature of political disputes that claims would almost always be brought by the losing party or individuals. That being the case, it is unlikely that a government occupied by the ‘winning’ party would bring a case,

¹¹⁵² Article 28(b) Statute of the African Court of Justice and Human Rights 2008

¹¹⁵³ See the cases of *James Katabazi and 21 Others vs. Secretary General of the East African Community and the Attorney General of the Republic of Uganda* Reference No. 1 of 2007 [Judgment of 1 November 2007]; and *Musa Saidykhan vs. The Republic of The Gambia* Suit No. ECW/CCJ/APP/11/07 [Judgment No.ECW/CCJ/JUD/08/10 of 16 December 2010]

effectively against itself at the international level in order to vindicate the rights and claims of the 'losing' party or individual. That would make the concerned state both claimant and defendant in the same suit. The only way out of this quagmire is to allow individuals and civil society organisations (including political parties) unconstrained access to the Court, without the encumbrance of requiring state declarations.

This proposal could be open to criticism that it risks opening the proverbial flood-gates as the Court would be inundated with elections disputes. While it is true that there would definitely be an increase in the case docket of the Court, the cases would at the same time be limited as the AU has a limited number of member states. With just 54 member states having elections approximately every five years means that at most there could only be about 10 election petitions per year. However, it is unlikely that every election would lead to a petition. It is also possible that even if a lot of presidential elections lead to petitions in the short and medium term, in the long run the number of petitions may reduce. Once the Court's legitimacy is established and its jurisprudence settles down, national courts may start rendering more courageous and satisfactory decisions in line with the continental court and municipal institutions may begin adjusting to the continental standards. If this were to happen, the need to escalate disputes to the continental level may diminish.

The second element that would require attention is the cooperation mechanism between the ACJHPR on the one hand with the national and sub-regional courts on the other hand. This would first of all require clarification on the status and primacy of ACJHPR decisions in national courts. Naturally decisions of a supranational court take precedence over those of national courts (and presumably over sub-regional courts). This would need to be expressly stated in the Court Protocol.

It was seen when reviewing sub-regional courts that they generally allow for local courts to refer cases to sub-regional courts, and the latter directly depend on the former for enforcement of its decisions. In the case of the ECOWAS Court, the EACJ and the COMESA Court of Justice, their decisions are enforced as if they were rendered by national courts. In the case of the OHADA Court, it is set up as an appellate Court of member states. The ACJHR could adopt the approaches of these courts. Local courts handling election disputes, for example, could refer cases to the ACJHPR.

The complication would still remain with regard to sub-regional courts, which in the supranational hierarchy could be considered as being in between national courts and the

continental court. Perhaps the puzzle can be resolved by applying the principle of subsidiarity. Subsidiarity in its basic sense denotes that “decisions are taken as closely as possible to citizens [...]”¹¹⁵⁴ Its objective is to ensure that social problems are dealt with at the most immediate or local level and only referred to the higher body if not resolved satisfactorily at the lower level.¹¹⁵⁵

Applying the subsidiarity principle would require that when electoral disputes arise, national courts would take the first bite. Where sub-regional courts are empowered to hear and determine electoral disputes, then nationals and civil society organisations from concerned member states should be allowed to move the sub-regional courts to hear their cases when not satisfied with decisions of national courts. Where sub-regional courts lack this mandate, cases could then move directly to the ACJHPR. This suggested approach means there will be two mechanisms by which the supranational court will relate with national and sub-regional courts. These are by way of reference and by way of ‘appeal.’ The system of references may, if effective, even reduce cases that reach the ACJHPR by way of ‘appeal’.

In order for the suggested mechanisms to be of benefit, there would be need for clear time limits and speedy resolution of disputes at every level. The ACJHPR is already enjoined to render a judgment within 90 days of completing the hearing of a case.¹¹⁵⁶ Perhaps what needs to be added to this is the need to also limit the time within which a case can be heard.

As can be seen so far, the suggestion for supranational adjudication over electoral disputes does not propose the creation of a brand new court. Rather, the suggestion is to improve and expand the mandate of the existing judicial framework. The ACJHPR already has three sections, that is, the General Affairs Section, the Human and Peoples’ Rights and the International Criminal Law Section.¹¹⁵⁷ To accommodate supranational adjudication over electoral disputes, it may not be necessary to create a new Democracy and Elections Section. The General Affairs Section could be assigned to handle election disputes. What may be required would be to ensure appointing at least some of judges with expertise in the continental democratic framework to the General Affairs Section. In that way, the expansion

¹¹⁵⁴ International IDEA *Inclusive Political Participation and Representation: The Role of Regional Organisations* 161

¹¹⁵⁵ *Ibid.* See also “The Principles of Subsidiarity” http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf (Date of use: 13 December 2014)

¹¹⁵⁶ Article 43(1) Statute of the African Court of Justice and Human Rights 2008

¹¹⁵⁷ Article 16 Statute of the African Court of Justice and Human Rights 2008

of the mandate of the ACJHPR to cover elections disputes would not require stretching further the already stretched material and personnel resources of the Court.

Before leaving this section, a word could be said on how supranational adjudication would work in countries like Morocco, Swaziland and Lesotho which practice the monarchical system of governance. With regard to Morocco, although geographically located on the African continent, it is not a member of the AU, as noted in the second chapter. It is, therefore, not bound by AU democratic normative standards. Swaziland and Lesotho, however, are states parties to the AU Constitutive Act and hence members of the AU.¹¹⁵⁸ Lesotho is also a state party to ACDEG while Swaziland is yet to ratify the treaty.¹¹⁵⁹ Although by not ratifying ACDEG, Swaziland is not bound by its provisions, to the extent that ACDEG articulates norms found in the Constitutive Act, which have been discussed above, then Swaziland is bound. Moreover, Swaziland could still ratify ACDEG in future and be bound directly by its standards. In any case, both Lesotho and Swaziland are states parties to the African Charter on Human and Peoples' Rights (the Charter) and are bound by democratic norms enshrined in there. Assuming that supranational adjudication over AU democratic norms comes into force as advocated here; does it necessarily mean the end of the hereditary monarchical system of governance? It is submitted that it is not necessary to abolish hereditary monarchy system of governance in order to comply with requirements for democratic governance. What may be required, as noted when discussing Lesotho above, is that the monarch may remain with nominal and largely ceremonial powers while there ought to be an elected government that shall be responsible for routine running of government. An absolute monarch allowing for no or little participation of the people in the selection of their governors is manifestly at variance with democratic norms set in the Charter and the AU Constitutive Act. Lesotho already has a system for an elective government headed by a democratically elected prime minister. Swaziland will have to develop along the same lines.

5.6 Possible Relationships with Other AU Organs

The ACJHPR is not the only organ of the AU. The AU has many other organs which are dedicated to the realisation of the AU objectives in various ways. These various organs are:

- The Assembly of the Union;

¹¹⁵⁸ http://au.int/en/sites/default/files/treaties/7758-sl-constitutive_act_-_final.pdf (Date of use: 12 October 2015)

¹¹⁵⁹ http://au.int/en/sites/default/files/treaties/7790-sl-charter_on_democracy_and_governance.pdf (Date of use: 12 October 2015)

- The Executive Council;
- The Pan- African Parliament;
- The Commission;
- The Permanent Representatives Committee;
- The Specialised Technical Committees;
- The Economic, Social and Cultural Council; and
- The Financial Institutions.¹¹⁶⁰

Although all these organs are important as they are designed to assist in the realisation of the objectives of the Union, there are however four organs that either have or can potentially play a significant role in the life and operation of the Court. These are the Assembly of the Union (the Assembly), the Pan-African Parliament (PAP), the Peace and Security Council (PSC), and the AU Commission. This is due to the fact that the current or prospective mandates of these institutions have direct relevance and possible influence on the work of the Court.

The Assembly is the supreme organ of the Union.¹¹⁶¹ It is composed of heads of state and government of member states.¹¹⁶² The Assembly meets at least once in ordinary session. It may, however, meet in ordinary session at the request of a member state, provided that that request is approved by two-thirds of the members.¹¹⁶³

The Assembly is vested with numerous powers and functions.¹¹⁶⁴ At least three of these powers have a direct or indirect relationship with the Court. The first is that the Assembly is tasked with responsibility to “monitor the implementation of policies and decisions of the Union as well as ensure compliance by all member states.”¹¹⁶⁵ Arguably, the decisions and policies of the Union the Assembly has to ensure implementation and compliance with are not just those of the Assembly itself. The “Union” is constituted by its organs. This, therefore, would mean that the decisions of the Court would fall within those decisions of the Union the Assembly has power to ensure concerned member states adhere to. Thus, if the Court were given power to adjudicate disputed presidential elections, the Assembly would have the power and responsibility to ensure compliance with the decisions of the Court.

¹¹⁶⁰ Article 5(1) Constitutive Act of the African Union 2000

¹¹⁶¹ Article 6(2) Constitutive Act of the African Union 2000

¹¹⁶² Article 6(1) Constitutive Act of the African Union 2000

¹¹⁶³ Article 6(3) Constitutive Act of the African Union 2000

¹¹⁶⁴ These are listed under Article 9 Constitutive Act of the African Union 2000

¹¹⁶⁵ Article 9(e) Constitutive Act of the African Union 2000

Tasking the Assembly with the responsibility to ensure compliance with decisions of the Court in elections cases could be a double edged sword. In one sense, having the supreme organ of the Union perform this role raises the profile of the Court and could possibly help to ensure the decisions of the Court are taken seriously. On the other hand, the Assembly, composed of heads of member states, is a political body that may take a ‘diplomatic’ approach to the implementation of the decisions of the Court and instead negotiate compromises. Thus, where a Court may rule in favour of one candidate, the Assembly may instead decide, for example, to set up a “Power-Sharing government.” The SADC heads of member states’ response to the *Campbell* case discussed above could be an extreme example of that possibility of compromise. However, if the Assembly takes a robust stand to implement elections decisions of the Court, akin to the way the AU has taken strong positions against military coups since 2003, then that would give great effectiveness to the work of the Court.

The second function of the Assembly relevant to the life of the Court is that of adopting the budget of the whole Union.¹¹⁶⁶ The relevance of this function requires little explanation. Without allocation of adequate funds, the Court cannot function efficiently and effectively and cases could stall.

Finally, the Assembly has the power to “appoint and terminate the appointment of the judges of the Court of Justice.”¹¹⁶⁷ The appointment and removal of judges, as noted already, is an important ingredient of the independence of any Court. A transparent, fair and legitimate appointment and removal process enhances the stature and independence of the Court and potentially the quality of justice the Court dispenses. The Assembly’s power of appointment and removal, therefore, has potential to influence the quality of the justice that will be dispensed by the Court. It is suggested that the appointment and removal process of judges under ECOWAS is preferable and the AU should consider adopting it. If that fails, the task could be entrusted to the Pan-African Parliament (PAP), which will ultimately be the peoples’ representative.

The second institution that has potential relevance to the work of the ACJHPR is the Pan-African Parliament (PAP). PAP is provided for both under the Treaty Establishing the African Economic Community (1991) and the Constitutive Act of the African Union

¹¹⁶⁶ Article 9(1) (f) Constitutive Act of the African Union 2000

¹¹⁶⁷ Article 9(h) Constitutive Act of the African Union 2000

(2000).¹¹⁶⁸ However, the actual Protocol Establishing PAP¹¹⁶⁹ was only adopted in 2001, and entered into force in 2003. PAP was formally launched in March 2004 and its seat is in South Africa. In 2014 the AU adopted a Protocol to replace the 2001 Protocol Establishing PAP.¹¹⁷⁰ The 2014 Protocol has not yet entered in force.

PAP was established to “represent all peoples of Africa”¹¹⁷¹ and its ultimate aim “shall be to evolve into an institution with full legislative powers, whose members are elected by universal suffrage.”¹¹⁷² However, until the member states decide otherwise, PAP for the time being only has consultative and advisory powers.¹¹⁷³

All AU member states have equal representation in the PAP and each is represented by five members, at least one of whom should be a woman.¹¹⁷⁴ Members of PAP are currently elected or designated from the members of National Parliaments and the tenure of office runs concurrently with their term of office in their National Parliaments.¹¹⁷⁵ The 2014 Protocol, however, requires that of the five members from each member state, at least two shall be women,¹¹⁷⁶ and that the members shall be elected from outside the membership of the National Parliaments.¹¹⁷⁷ PAP members are required to vote in their personal and independent capacity and not representatives of their states.

Although PAP was established to ultimately exercise full legislative authority, it was determined that this was to be done incrementally and, therefore, PAP started its first term as an advisory and consultative forum.¹¹⁷⁸ Its functions include discussing matters relating to respect for human rights and consolidation of democracy; discussion of its budget and that of

¹¹⁶⁸ Article 5(1)(c) Constitutive Act of the African Union 2000

¹¹⁶⁹ Protocol on the Treaty Establishing the African Economic Community in Relation to the Pan-African Parliament 2001

¹¹⁷⁰ Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament 2014

¹¹⁷¹ Article 2(2) Protocol on the Treaty Establishing the African Economic Community in relation to the Pan-African Parliament 2001

¹¹⁷² Article 2(3) Protocol on the Treaty Establishing the African Economic Community in relation to the Pan-African Parliament 2001

¹¹⁷³ Article 2(3)(i) Protocol on the Treaty Establishing the African Economic Community in relation to the Pan-African Parliament 2001

¹¹⁷⁴ Article 4(1)and(2) Protocol on the Treaty Establishing the African Economic Community in relation to the Pan-African Parliament 2001

¹¹⁷⁵ Article 5 Protocol on the Treaty Establishing the African Economic Community in relation to the Pan-African Parliament 2001

¹¹⁷⁶ Article 4(3) Protocol to the Constitutive Act of the African Union Relating to the Pan-African Union 2014

¹¹⁷⁷ Article 5(1)(a) Protocol to the Constitutive Act of the African Union Relating to the Pan-African Union 2014

¹¹⁷⁸ Article 11 Protocol on the Treaty Establishing the African Economic Community in Relation to the Pan-African Parliament 2001

the Union; working towards the harmonisation of the laws of member states; and working towards the harmonisation of policies and activities of Regional Economic Communities.¹¹⁷⁹

The 2014 Protocol takes minor steps towards making PAP a truly legislative body. It names it unconditionally as the legislative organ of the Union.¹¹⁸⁰ In exercising this power, the Assembly has power to determine which areas PAP shall focus on and propose model laws. PAP is also free to propose model laws and recommendations to the Assembly.¹¹⁸¹ The language of the Protocol (2014) is unambiguous that PAP can only recommend and, therefore, does not have definitive powers over legislation. It is thus still far from being a fully developed legislative body even under the 2014 Protocol.

Parliaments are symbols of democracy as they ideally represent popular democracy, provide oversight over public resources and hold the executive branch in check. Through parliament, the people are able to influence how they are governed. PAP in its current form is clearly constrained from performing this role. As Walraven has rightly observed in relation to the current functions and powers of PAP:

The powers are essentially external: they relate to what is happening in member states or outside bodies, not to the internal functioning of the Union and its organs. Arguably, what makes for a real parliament are control of the budget and supervision of the executive.¹¹⁸²

More specifically, in relation with PAP's legislative and budget oversight, the 2014 Protocol categorically exempts the Assembly and the Court from the powers and functions of the PAP.¹¹⁸³ As it is, there is very little, if not nothing, linking PAP and the Court. It is suggested here that PAP should have power over the Union budget, including allocation of budgets to the Court. PAP could also be assigned some role in the appointment process of judges. It could have the role of vetting applicants and passing their names to the Assembly for formal appointment. Removing these functions from the Council and Assembly and assigning them to PAP potentially mean that the Assembly is deprived of tools that could be used in reprisal against the Court or to unduly control the Court. Thus heads of state, whose elections may be

¹¹⁷⁹ Article 11 Protocol on the Treaty Establishing the African Economic Community in Relation to the Pan-African Parliament 2001

¹¹⁸⁰ Article 8(1) Protocol to the Constitutive Act of the African Union Relating to the Pan-African Union 2014

¹¹⁸¹ *Ibid*

¹¹⁸² Van Walraven "From Union of Tyrants to Power to the People? The Significance of the Pan-African Parliament for the African Union" 208

¹¹⁸³ Article 8(5) Protocol to the Constitutive Act of the African Union Relating to the Pan-African Union 2014

challenged before the Court, would not have the power to choose the judges who may determine their legitimacy to hold power.

The suggested role of PAP in the appointment of judges reflects what obtains in other well established independent supranational tribunals such as the European Court of Human Rights (ECHR). The Parliamentary Assembly of the European Council of Europe (the Assembly) is responsible for electing judges of the ECHR.¹¹⁸⁴ It follows a process which requires that vacancies are openly advertised in wide circulating media in concerned member states. Applicants are then shortlisted and interviewed by a special parliamentary committee to ensure they meet the minimum qualifications. Thereafter, the Assembly proceeds to vote on the candidates in a secret ballot.¹¹⁸⁵

The third organ of the AU which has potential relevance to the work of the Court is the Peace and Security Council (PSC), established through the adoption of the Protocol Relating to the Establishment of the Peace and Security Council (PSC Protocol) of the African Union of 9 July 2002.¹¹⁸⁶ It was created as a “standing decision-making organ for the prevention, management and resolution of conflicts” and that it shall be “a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.”¹¹⁸⁷

The PSC is composed of 15 members elected by the Assembly on the basis of equitable regional representation and rotation.¹¹⁸⁸ The functions of the PSC are stated as:

- a. Promotion of peace, security and stability in Africa;
- b. Early warning and preventive diplomacy;
- c. Peace-making, including the use of good offices, mediation, conciliation and inquiry;
- d. Peace support operations and intervention, pursuant to Article 4(h) and (j) of the Constitutive Act;
- e. Peace-building and post-conflict reconstruction;
- f. Humanitarian action and disaster management; and
- g. Any other function as may be decided by the Assembly.¹¹⁸⁹

¹¹⁸⁴ “Election of Judges: How are Judges of the European Court of Human Rights Elected?” http://website-pace.net/en_GB/web/as-jur/echr-judges-election (Date of use: 4 March 2015)

¹¹⁸⁵ *Ibid*

¹¹⁸⁶ Article 2(1) Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2002

¹¹⁸⁷ *Ibid*

¹¹⁸⁸ Article 5(1) and (2) Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2002

Although none of these functions indicate a clear relationship between the PSC and the Court, there is a possibility of a relationship between the two organs. The PSC has power to “institute sanctions whenever an unconstitutional change of government takes place in a member state.”¹¹⁹⁰ It should be recalled that an unconstitutional change of government can be committed by an incumbent refusing to relinquish power having lost an election. In the event that the Court is granted jurisdiction over disputed presidential elections, as proposed under this research, and the Court finds against the incumbent in an election petition, but the incumbent refuses to abdicate, this should trigger the role of the PSC. This is because the refusal would be a clear unconstitutional change of government. Thus the PSC has a potentially significant role in ensuring the enforcement of the Court’s decisions in disputed election petitions by instituting sanctions against regimes that may disregard judgments of the Court and as a result hold power unconstitutionally.

The fourth and final organ of the AU that has relevance to the mandate of the Court is the AU Commission. It was established as the secretariat of the Union and replaces the former OAU secretariat seated in Ethiopia.¹¹⁹¹ The Commission is composed of the chairperson, the deputy chairperson and eight other commissioners.¹¹⁹² The tenure of office for the members of the Commission is four years, renewable once.¹¹⁹³

The Commission is assigned more than 30 functions relating to the routine management of the affairs of the Union.¹¹⁹⁴ Of all those functions, the following may impact the operations of the Court:

- a. Initiate proposals for consideration by other organs;
- b. Implement the decisions taken by other organs;
- c. Coordinate and monitor the implementation of the other organs of the Union;
- d. Prepare the Union’s programmes and budget for approval by policy organs; and
- e. Manage the budgetary and financial resources including collecting the approved revenues from various sources.¹¹⁹⁵

¹¹⁸⁹ Article 6 Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2002

¹¹⁹⁰ Article 7(1)(g) Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2002

¹¹⁹¹ Articles 5 and 20 Constitutive Act of the African Union 2000

¹¹⁹² Article 2(1) Statutes of the Commission of the African Union 2002

¹¹⁹³ Article 10(1) Statutes of the Commission of the African Union 2002

¹¹⁹⁴ Article 3(2) Statutes of the Commission of the African Union 2002

These functions can be clustered into three categories: a) initiating proposals for consideration by other organs; b) implementing and supporting the implementation of decisions made by other organs of the Union; and c) preparing and managing the budget and financial resources of the Union. The Commission's mandate to initiate proposals for consideration by other organs places it in a strategic position to raise the recommendations of this research of introducing supranational adjudication of disputed presidential elections. The Commission could potentially play a cardinal role in advocating for reform of the mandate of the continental Court in order to allow it resolve disputed presidential elections.

The second cluster relates to the implementation of the decisions of other organs of the AU. This implies that the Commission will have a role in the implementation of the decisions of other organs of the Union and presumably this includes judgments of the Court. In order to do this, the Commission would have to collaborate with the concerned member states as well as other AU organs such as the PSC and the Assembly.

The third cluster relates to the management of budgets and finances of the Union. In order for the Court to receive sufficient funds to ensure it carries out its mandate efficiently and effectively, it needs a Commission that is convinced and appreciates its role and sees the need to allocate the Court adequate funds. Although the Commission can only plan and propose the budget figures, an indication of the need for sufficient funding to the Court by the Commission could be persuasive and influence the Assembly to approve the funding.

Although the Commission has wide functions that could contribute to the welfare and stature of the Court, its powers are limited. The AU is still largely an intergovernmental organisation whose key decisions are made by political representatives of member states through organs such as the Assembly. This effectively means that even if the Commission may be well intentioned about something, if it is at variance with the wishes of the Assembly or if there is no consensus in the Assembly, the good intentions of the Commission will most likely not materialise.

¹¹⁹⁵ Ibid

5.7 Criticism Against Supranational Adjudication

Supranational adjudication is not a perfect venture. Like every significant undertaking, it has its own challenges. The major criticisms of supranational adjudication have usually been around the following three ideas:

- That supranational adjudication is expensive as international tribunals need a lot of resources to run;
- That supranational adjudication can unwittingly be a danger to international cooperation;
- That supranational adjudication is ill-equipped to solve underlying issues that gave rise to a legal dispute; and
- That supranational adjudication may scare away many states from ratifying or acceding to human rights and democratic governance norms.

The first major criticism of supranational adjudication relates to costs, that supranational or international tribunals are extremely expensive and gobble resources that could be applied in other needy areas. The expenses of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are usually given as examples. Within the first ten years of their existence, the two tribunals were consuming more than USD250 million per year, which constituted about 15 percent of the United Nations general budget.¹¹⁹⁶ The ICTY alone is estimated to have been spending about USD10 million per defendant,¹¹⁹⁷ and collectively, within the first eight years both tribunals had gobbled more than USD1.6 billion.¹¹⁹⁸

Considering these figures, and taking into account that many organs of the AU are persistently underfunded, partly due to many member states who routinely default on their annual contributions to the organisation,¹¹⁹⁹ the arguments to forego establishing supranational tribunals on account of costs look persuasive. However, it can be argued, to the contrary, that securing peaceful resolution of electoral disputes through a legitimate process

¹¹⁹⁶ Crocket "Are International Courts Effective?" <http://e-ir.info/2011/11/27/are-international-courts-effective/> (Date of use: 3 February 2015)

¹¹⁹⁷ "Bassiouni Quite Doubtful International Criminal Court Will Succeed- The Failures, Challenges, and Future of International Criminal law" <http://www.inisdejustice.com/intl/2010/03/31/cherifbassiouni/internationalcriminal/> (Date of use: 3 February 2015)

¹¹⁹⁸ Burke-White "Regionalisation of International Criminal law Enforcement: A Preliminary Exploration" 739

¹¹⁹⁹ Biswaro *Perspectives on Africa's Integration and Cooperation from OAU to AU: Old Wine in a New Bottle?*

of adjudication cannot be too expensive as compared to the price states would pay if disputed elections led to the eruption of violence and instability. In any case, this research, as noted above, does not propose the creation of a new AU court but simply to expand the mandate of the existing court.

The second criticism against supranational adjudication is that it may inadvertently engender conflict between states and endanger international cooperation. Adjudication by its nature leads to the passing of a legally binding decision which may require other states to act against another state in order to enforce the decision. This view has been strenuously argued by Posner and Yoo. According to the two authors, supranational adjudication is simply an attempt to submit international politics to judicial powers and the tyranny of the judges.¹²⁰⁰ In their view, independent supranational tribunals have a weaker incentive to serve the interests of states “and are more likely to allow moral ideals, ideological imperatives...to influence their judgment.”¹²⁰¹ The authors are of the view that instead, states should choose from a wide range of traditional dispute resolution mechanisms such as diplomacy, mediation, conciliation and arbitration in order to resolve disputes.¹²⁰² They argue that states will ultimately evaluate their cooperation with the tribunal and either opt out of such a tribunal or significantly water down its powers.

It is not clear why interests of an independent supranational tribunal are considered at variance with the interests of states. Equally, supranational adjudication is not mutually exclusive with other non-contentious traditional dispute resolution mechanisms. However, looking at what happened to the SADC Tribunal in the aftermath of the *Campbell* case, one could be tempted to agree with Posner and Yoo. President Jakaya Kikwete’s words, that “we have created a monster that will devour us,”¹²⁰³ would seem to render further credence to this view. But a nuanced reading of the *Campbell* case as noted above clearly indicates that the judges acted within the confines of the SADC Treaty and not in pursuit of moral, personal interests or ideological imperatives of their own.

The third criticism of supranational adjudication is directly related to the second one. It argues that supranational adjudication is “at variance with the main purpose of dispute

¹²⁰⁰ Posner and Yoo “Judicial Independence and International Tribunals” 1-75. See also Posner and Yoo “Reply to Helfer and Slaughter” 957-974.

¹²⁰¹ Ibid

¹²⁰² Ibid

¹²⁰³ As cited in Msipa “Contextualising the SADC Tribunal and the Land Issue in Zimbabwe- A Socio-Legal Perspective” 5.

settlement.”¹²⁰⁴ This is because adjudication is considered as ill-equipped to settle underlying problems that gave rise to the legal dispute and instead focuses more on answering legal questions and clarifying the law.¹²⁰⁵ Adjudication is further seen as an escalation of a dispute as it implies failure to amicably settle a dispute. It is argued that diplomatic approaches are more appropriate to resolving disputes than resort to adjudication.¹²⁰⁶

This argument is somewhat self-negating. If adjudication is seen as an indication of failure to resolve disputes amicably, it surely suggests that there may be disputes bitterly contested and thus impervious to amicable resolution. Thus it would not make much sense to remit such cases back to diplomatic mechanisms. Even at municipal level, alternative dispute resolution mechanisms have not displaced the need for litigation and adjudication. It is, however, conceded that the nature of adjudication is to resolve disputes on the basis of reasoned legal argument, based on evidence, predetermined procedural rules and law. This may not necessarily address the underlying historical, institutional and political factors that gave rise to a dispute. However, there is nothing about adjudication that would prevent addressing those underlying factors in addition to adjudication. If anything, adjudication can clearly show where the problems lie.

The fourth criticism against supranational adjudication is that it may scare away states from ratifying international human rights and democratic governance treaties. This is because adjudication may be perceived as a strict form of enforcing norms that leaves little or no room for negotiated settlement of disputes. African countries already have problems ratifying or acceding to human rights and democratic governance treaties. For example, the AU adopted the African Charter on Democracy, Elections and Governance (ACDEG) in January 2007. It, however, took five years to secure a minimum of 15 ratifications needed for the treaty to enter into force in 2012.¹²⁰⁷ By March 2014, out of 54 AU member states, only 23 had ratified the treaty.¹²⁰⁸ This represents less than half of the AU membership. It is thus possible that further subjecting such normative standards to enforcement through adjudication may further scare away African states from acceding to such norms, which they are already reluctant to fully embrace.

¹²⁰⁴ Tumonis “Adjudication Fallacies: The Role of International Courts in Interstate Dispute Settlement” 35-64

¹²⁰⁵ Ibid

¹²⁰⁶ Ibid

¹²⁰⁷ “List of Countries which have signed , Ratified/Acceded to the African Charter on Democracy, Elections and Governance” www.africa-union.org (Date of use: 2 March 2014)

¹²⁰⁸ Ibid

This criticism appears to have merit and needs to be had in mind. But the other side to that argument is that it implies that African states ratify treaties they have no intention of implementing. If that is the case, it could be argued that there is no major value in having as many states as possible to ratify treaties they have no genuine intention of implementing. However, in the case of the AU, subjecting human rights and democratic norms to adjudication, as seen above, has already been set in motion. As seen, the AU recently added criminal jurisdiction to the mandate of the continental court. This research simply urges expanding that mandate of the Court to include jurisdiction over presidential elections.

5.8 Summary

Africa has developed valuable treaties, such as ACDEG, setting democratic standards for conducting credible elections. However, these frameworks lack an efficient and effective enforcement mechanism. When presidential elections are disputed, and domestic courts are unable to offer impartial and credible adjudication, the continental ‘judiciary’ has equally been unavailable to offer meaningful assistance.

The chapter proposes that the continental judicial system should play a role in enforcing continental electoral standards and thus help in resolving disputed presidential election disputes, which have for long bedevilled the continent. The review of sub-regional courts indicates that Africa already has a valuable experience with supranational courts. At continental level, there is very little in terms of experience with supranational adjudication as individuals have generally been constrained from accessing the courts. In order for the continental judicial mechanism to be of help, it will require turning the African Court of Justice and Human and Peoples’ Rights into a fully-fledged supranational court accessible to nationals of concerned states; with clear material jurisdiction over electoral disputes; and a defined mechanism for cooperation with both national and sub-regional courts.

An effective continental supranational court offers the possibility of strengthening domestic courts, especially in states where courts lack democratic space for independent fact finding and decision. Such national courts may be enabled to “to take risky and courageous steps by relying on a continental jurisprudence.”¹²⁰⁹ The very nature of supranational adjudication entails that the continental court ‘pierces’ the state veil of judicial sovereignty and interacts directly with nationals of the concerned state. This ultimately ensures that standards agreed

¹²⁰⁹ Viljoen *International Human Rights Law in Africa* 463

upon by African leaders do not just end up as paper commitments, but that people participate meaningfully in their realisation and effectuation.

The next chapter, which is the conclusion, will pool together suggestions that have emerged in this chapter on how the suggested supranational Court would be concretely organised and turns them into recommendations.

Chapter Six

General Conclusion and Recommendations

“If we never do anything which has not been done before, we shall never get anywhere”¹²¹⁰

6.1 Introduction

Africa is still struggling to perfect its electoral democracy. Although a lot has been achieved since decolonisation, many African countries still suffer from the scourge of defective and fraudulent elections. When elections are disputed as a result of these defects, domestic judiciaries have routinely been unable to resolve the disputes in a fair, transparent and well-reasoned manner. At the same time, African leaders have set fairly progressive democratic normative standards at the continental, and in some cases, sub-regional levels as well, for the conduct of democratic elections. These standards, however, lack an efficient and effective enforcement mechanism. To overcome this deficiency, this research has proposed setting up supranational mechanisms to adjudicate disputed presidential elections.

The purpose of this final chapter of the thesis is to pool together what has been discussed in the chapters preceding it. It does this by way of giving a summary of key finds of the research and makes recommendations in relation to the proposed supranational adjudication of disputed presidential elections in Africa.

6.2 Summary of Key Finding

This research started with a discussion of three key concepts that underpin the whole study. These are the concepts of regionalism (or regional integration), supranationalism, and elections. Regional integration has been defined by Haas as “the process whereby political actors...are persuaded to shift their national loyalties, expectations and political activities to a new larger centre.”¹²¹¹ In the African context, regional integration is rooted in the idea of pan-Africanism, which originally appeared during colonialism as a form of the African people’s reaction to domination, racism, oppression and exploitation. In order to overcome

¹²¹⁰ Lord Denning, in *Packer vs. Packer* [1954] All ER Page 15

¹²¹¹ See Haas *International Integration: The European and the Universal Process* 366- 392. See also Haas “The Uniting of Europe: Political, Social and Economic Forces 1950- 1957;” and Haas “International Integration: The European and Universal Process” 93-130. See also Sweet and Saudholtz “European Integration and Supranational Governance” 297- 317

these challenges, Africans considered it necessary that they unite and develop collectively. The formation of the OAU was in furtherance of the pan-African idea and it sought to completely rid the African continent of colonial oppression and set it in motion towards development and progress as a united continent.

The concept of supranationalism represents a more advanced form of regionalism. It entails a formal penetration of international or regional standards into the domestic sphere, whereby these take pre-eminence over domestic laws and policies. This research, however, is primarily concerned about supranational adjudication. In essence, under supranational adjudication, international courts or tribunals created by states are allowed to operate independent of the direct influence of states and are accessible to both state and non state entities and individuals. This differs significantly from traditional or classical international adjudication where adjudication only involved inter-state litigation.

It was shown that because supranational adjudication is beyond the direct and immediate influence of states, supranational courts have a rare opportunity “where regular politics and the power disparities in the world do not shape how the law is interpreted and applied.”¹²¹² Thus, unlike traditional international adjudication where states control access to international tribunals, supranational courts are protected from the direct interference of individual states and, on the basis of pre-determined rules, make autonomous binding decisions on all the parties.

The final concept is that of elections. In a democratic state, elections are an institutionalised method of realising the democratic norm of “rule of the people by the people.”¹²¹³ Elections are the only democratically legitimate procedure for translating popular sovereignty into workable executive and legislative powers.¹²¹⁴ For purposes of this research, it was indicated that an election is considered as a method or means by which eligible nationals or citizens of a state choose the person or persons to assume the highest office in government, particularly the presidency.

The discussion of the three concepts was followed by a historical analysis of the context in which presidential elections in Africa have been held. It was shown that since the era of independence, the African continent has gone through various leadership trends. The

¹²¹² Alter “Agents or Trustees? International Courts in their Political Context” 33-63

¹²¹³ Lindberg *Democracy and Elections in Africa* 1-2

¹²¹⁴ *Ibid*

independence era of the 1950s and 1960s was pregnant with euphoria and great expectation for genuine democratic governance. This era, however, was disappointingly followed by the negation of the promise of independence through the establishment of dictatorships, military and one-party regimes from the 1960s to the 1980s. The wind of change in the 1980s and 1990s, which was characterised by the demise of dictatorships and one party-rule, led to a wave of democratisation. In this era several countries reformed their electoral laws and held defining elections, which in some cases led to replacement of old regimes. The democratic wave of the 1980s and 1990s has, however, not resolved all underlying problems to democratic consolidation in Africa. Military coups, defective elections and violence still occur in many countries on the continent.

The approaches or systems used to elect or choose leaders of government were discussed in the second chapter. There it was shown that there are structurally three broad systems under which heads of government or state are elected in Africa. These are the presidential, parliamentary and 'monarchical' systems. Under the presidential system, the president is elected directly by the people while under the parliamentary system, the president or prime minister is elected by members of the legislative branch of government. In case of the monarchical system, a hereditary monarch is head of state, leaving only room for the possibility of electing a prime minister as head of government. The examples of this are Swaziland, Morocco and Lesotho.

The second chapter also discussed factors that have had a negative bearing on the conduct of presidential elections in Africa. It was established that these factors are ethnicity; the simple majority electoral system; the military engaging in partisan politics; and compromised electoral management bodies.

The third chapter looked at the challenges associated with adjudicating disputed presidential elections in domestic courts. Defective elections are still common in Africa and election results are in many countries usually disputed. When this occurs it usually falls on the judiciary to protect the right of people to choose their leaders in a free and transparent atmosphere. The research has shown that the record of the judiciary in Africa has been overwhelmingly disappointing. The judiciary has routinely upheld clearly defective elections, erroneously considering it their duty to salvage defective elections as a matter of public policy. To achieve this, the courts have largely applied two techniques. The first one is to simply dismiss election petitions on flimsy procedural technicalities, without considering

merits of the case. Second, the courts have wrongly applied the substantial effect rule to uphold disputed elections, even in the face of glaring evidence indicating serious violations of Constitutional and other statutory provisions. In other circumstances, judges have simply constrained themselves from making an appropriate decision. Further, while in some countries judges have been exemplary in determining cases efficiently, in many countries, such cases are still characterised by inordinate delays that negate the whole purpose of adjudication.

There are several possible reasons that may account for this poor judicial record on presidential election disputes. These may include judicial corruption; intimidation of judges; and lack of independence and impartiality. This has consequently led to erosion of public confidence in the judiciary as an impartial custodian of the rule of law; the entrenchment and rewarding of culprits as they continue to benefit from their wrong doing; and in extreme cases the breakdown of violence and threat to national cohesion. Ultimately, consolidation of democracy suffers a setback with the full complicity of the judiciary.

The fourth chapter looked at the democratic normative frameworks in Africa. It considered both the sub-regional and continental standards. At the continental level, the OAU initially approached the subject of democracy and elections with indifference and routinely recognised governments that came to power through military interventions. Legitimate winning of elections was not a pre-requisite for OAU recognition of regimes.

This slowly began to change. The adoption of the ACHPR in 1981 was the first continental framework that had provisions relevant to the conduct of democratic elections. Although assailed with drafting weaknesses, the Charter provided for the rights to political participation and self-determination. The African Commission on Human and Peoples' Rights, which has responsibility for enforcement of the Charter developed progressive jurisprudence in favour of democratic elections. Despite this, the OAU continued to recognise governments that came into office by means other than free and fair elections.

In the 1990s, however, the OAU began to shift its stance in favour of democratic constitution of government by rejecting governments that came to power through military coups. The first instance to trigger a unanimous OAU response occurred in 1997 when President Kabbah was ousted by the military in Sierra Leone. The OAU for the first time unanimously condemned the coup and authorised military action to restore democracy, and President Kabbah was duly restored to office the following year.

The OAU in 2000 crystallised its emerging rejection of military coups into the Lome Declaration on Unconstitutional Change of Government. This became the first continental document to formally reject unconstitutional governments. The Declaration recognised four instances of assumption of office it categorises as unconstitutional changes of government. These are military coup against a democratically elected government; intervention by mercenaries to replace a democratically elected government; replacement of a democratically elected government by armed dissidents and rebels; and the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections.¹²¹⁵

In 2000 the OAU heads of state and government adopted the Constitutive Act of the African Union, which transformed the OAU into the AU. The Constitutive Act's objectives and principles include rejection of unconstitutional changes of government and the enshrining of provisions to the effect that the will of the people expressed through regular, free and fair elections is the sole basis upon which legitimate governments should base their authority for assuming office. The AU has taken a strong stance against unconstitutional changes of government and has since 2003 consistently rejected all such governments. In some cases, it has imposed sanctions and authorised military interventions.

In 2007 the AU adopted the ACDEG, a comprehensive continental democratic treaty. It generally consolidates and pools into one binding document all the major AU norms around democracy and elections. ACDEG, however, is more heavily weighted against military coups at the expense of defective elections. While it provides for sanctions for unconstitutional changes of government, it provides no discernible enforcement mechanism where an election is in dispute and there is need to find out the legitimate winner.

The fourth chapter also looked at democratic normative frameworks at sub-regional level. Five sub-regions were discussed and these are the East African Community (EAC), the Economic Community of West African States (ECOWAS), the Southern African Economic Community (SADC), the Economic Community of Central African States (ECCAS), and the Arab Maghreb Union (UMA). In terms of the level of advancement in the development of sub-regional norms, there is no single thread that runs through all the sub-regions. Perhaps what can be said with certainty is that ECOWAS and SADC generally have more advanced frameworks setting standards for democratic elections while at the other extreme end, UMA and ECCAS completely lack any reasonable standard on democratic elections. EAC is in the

¹²¹⁵ Declaration on Unconstitutional Change of Government 2000

process of developing its own sub-regional democratic standards. However, even the ECOWAS and SADC which have more advanced frameworks still struggle with enforcement issues.

The fifth chapter explored the viability of setting up an elections supranational court at the continental level. Africa has developed valuable treaties, such as ACDEG, setting democratic standards for conducting credible elections. However, these frameworks lack an efficient and effective enforcement mechanism. When presidential elections are disputed, and domestic courts are unable to offer impartial and credible adjudication, the continental ‘judiciary’ has equally been unavailable to offer meaningful assistance.

The chapter proposes that the continental judicial system should play a role in enforcing continental electoral standards and thus help in resolving disputed presidential election disputes, which have for long bedevilled the continent. The review of sub-regional courts indicates that Africa already has a valuable experience with supranational courts. At continental level, there is very little in terms of experience with supranational adjudication as individuals have generally been constrained from accessing the courts. In order for the continental judicial mechanism to be of help, it will require turning the African Court of Justice and Human and Peoples’ Rights into a fully-fledged supranational court accessible to nationals of concerned states; with clear material jurisdiction over electoral disputes; and a defined mechanism for cooperation with both national and sub-regional courts.

An effective continental supranational court offers the possibility of strengthening domestic courts, especially in states where courts lack democratic space for independent fact finding and decision. Such national courts may be enabled to “to take risky and courageous steps by relying on a continental jurisprudence.”¹²¹⁶ The very nature of supranational adjudication entails that the continental court ‘pierces’ the state veil of judicial sovereignty and interacts directly with nationals of the concerned state. This ultimately ensures that standards agreed upon by African leaders do not just end up as paper commitments, but that people participate meaningfully in their realisation and effectuation. This may also potentially play a major role in ensuring that nationals of AU member states are aware of the transnational institutions.

¹²¹⁶ Viljoen *International Human Rights Law in Africa* 463

6.3 Key Recommendations

From the foregoing discussions, this section pools together four recommendations deemed necessary in order to realise an effective supranational adjudication of presidential election disputes. It also makes short to medium term recommendations to member states.

6.3.1 Jurisdiction of the court

It has been shown that the current framework for the ACJHPR does not expressly vest the Court with material jurisdiction over the enforcement of continental democratic norms (such as ACDEG) and adjudication of disputed presidential elections. It has also been established that the Court does not give unconditional access to individual litigants and civil society organisations, except where concerned states have given an appropriate declaration allowing such access. It is here recommended that the Protocol establishing the ACJHPR be amended to give the Court express jurisdiction over disputed presidential elections. This amendment, however, would be of limited value if individuals and civil society organisations are not given access to the Court as states are unlikely to bring a case against another state with regard to the conduct of elections. It is, therefore, recommended that individuals and civil society organisations, including political parties, be allowed unconditional access to the Court.

6.3.2 Relations With National Courts

It has been shown that the ACJHPR lacks a mechanism for cooperation with national courts. Without this mechanism, it becomes difficult for continental laws and decisions to penetrate into the domestic sphere. It is recommended that the ACJHPR Protocol be amended in order to provide for national courts to refer cases for preliminary rulings to the ACJHPR. It should further be required that where the ACJHR has rendered a ruling, it should be mandatory for the domestic courts to follow it.

6.3.3 Appointment and Removal of Judges

Under the current arrangement, the Assembly has ultimate power over the appointment and removal of judges. This potentially creates a conflict of interest as the Assembly is a political body made up of heads of state and government whose elections could potentially be challenged before the Court. It is proposed that the appointment and removal of judges be in the hands of an independent organ which should have transparent and fair appointment and

removal process. It is recommended that the ECOWAS model of the Judicial Council of the Community be adopted, with the necessary modifications. This will allow for judges to be appointed in the most transparent and meritorious way. It will also allow for a fair and transparent removal system that will increase the sense of independence and insulation of judges.

6.3.4 Easing Access to the Court

International courts tend to be difficult to access by many people largely because of travel and logistical expenses involved. It is recommended that the Court should adopt the practice adopted by the EACJ of opening or using registries of courts of member states as sub-registries of the Court. The Court may, for example, designate the registries of Supreme Courts of member states as sub-registries of the Court. That way, litigants would not need to travel long distances to file documents. The Court could further adopt the EACJ's flexibility which allows it to sit in member states where the case has originated from and render judgment in that country. This will not only allow justice to be done but will enable the citizens of the concerned country to see that justice is done. This, however, should be subject to the security and safety of the judges.

6.3.5 Short and Medium Term Recommendations to AU Member States

Pending the establishment of the continental supranational mechanism for the adjudication of disputed presidential elections, it is recommended that AU member states take measures to enhance the conduct of democratic elections. Member states that have not yet done so should promptly ratify all AU norms on democracy, including ACDEG. They should also ratify the Protocols establishing the continental Court and make declarations allowing their nationals access to the Court. Further, African states should pass enabling legislation translating AU norms into the domestic sphere, and consequently allowing for the reception of continental norms.

6.4 Contributions to Practice

Although this research has predominantly applied legal analysis skills, it has at the same time integrated skills from other related disciplines. Within the field of law, the research has integrated the approaches of public international law, human rights law, jurisprudence and legal theory, as well as comparative constitutional law. Apart from these legal approaches,

the study has benefited from the application of skills from other disciplines such as international relations, history, political science and political philosophy. This multi-disciplinary approach has enriched the research and enabled it to make findings and propose solutions that would benefit scholarship not just in the legal field but in these other disciplines.

While the subject of this research, that is, disputed presidential elections in Africa, has been subjected to a fair amount of scholarly inquiry, there does not seem to be any existing scholarly literature that has inquired into how African courts resolve such disputes. Where literature on disputed elections does exist, it is usually narrowly focused on one case study such as Kenya (in 2007) and Zimbabwe (in 2008). This study has, therefore, cut a new approach in that it has demonstrated that defective and disputed elections are a general problem in Africa and that domestic courts have generally made decisions that do not advance electoral democracy on the continent.

The research has also not just exposed weakness and challenges but has proposed a radical solution, that is, supranational adjudication of presidential election disputes under the AU judicial framework. This radical approach may unsettle some as it is novel and has not been tried elsewhere, but it has been demonstrated that at sub-regional level supranational adjudication is already a relatively common practice (although it does not extend to deciding disputed elections). However, without serious efforts to try new ways to resolve challenges, human progress would stagnate and human society would surrender to the spirit of fatalism. The radical approach proposed under this research dovetails with the immortal words of Lord Denning: “If we never do anything which has not been done before we shall never get anywhere.”¹²¹⁷

It is hoped that this study will not only bring a new idea into scholarly discourse but it will also stimulate further debate and more research on how the African regional integration frameworks and mechanisms can be adjusted to respond to democratic challenges and serve the hopes, aspirations and interests of the African people.

¹²¹⁷ As cited in *Amaechi vs Independent National Electoral Commission and Others* Supreme Court of Nigeria SC 252/2007 Judgment of 18 January 2008, page 22

Selected Bibliography

Books

Ackerman B (ed) *Bush v. Gore: The Question of Legitimacy* (Yale University Press New Haven 2002)

African Union Panel of the Wise *Election-Related Disputes and Political Violence: Strengthening the Role of the African Union in Preventing, Managing, and Resolving Conflict* (International Peace Institute New York 2010)

AU *African Union Handbook: A Guide for Those Working With and Within the African Union* (2014)

Barnett H *Constitutional and Administrative Law* 5th ed (Cavendish Publishing Ltd London 2004)

Biswaro JM *Perspectives on Africa's Integration and Cooperation from OAU to AU: Old Wine in a New Bottle?* (Tanzania Publishing House Ltd Dar es Salaam 2005)

Collier P and Sambanis N (eds) *Understanding Civil War: Evidence and Analysis* Vol 1 (The World Bank Washington DC 2005)

Cervenka Z *The Unfinished Quest for Unity: Africa and the OAU* (Julian Friedmann Publishers Ltd London 1977)

Curtis M (ed) *The Great Political Theories: From the Greeks to the Enlightenment* (Harperperennial Modern Classics New York 1981)

Dicey AV *Introduction to the Study of the Law of the Constitution* (MacMillan and Co. Ltd London 1908)

Ebobrah ST and Tanoh A (eds) *Compendium of African Sub-Regional Human Rights Documents* (Pretoria University Law Press Pretoria 2010)

Encyclopaedia Britannica Volume 8 (Encyclopaedia Britannica Ltd London 1961)

Freeman MDA *Lloyd's Introduction to Jurisprudence* 7th ed (Sweet and Maxwell Ltd London 2001)

Guest SFD, Geary A, Morrison W and Penner JE *Jurisprudence and Legal Theory* (University of London Press London 2004)

Harris DJ *International Law: Cases and Materials* 6th ed (Sweet and Maxwell London 2004)

Hart HLA *The Concept of Law* 2nd ed (Oxford University Press Oxford 1961)

- Hatchard J, Ndulo M and Slinn P *Comparative Constitutionalism and Good Governance in the Commonwealth: An Eastern and Southern African Perspective* (Cambridge University Press Cambridge 2004)
- Handbook on Election Disputes in Kenya: Context, Legal Framework, Institutions and Jurisprudence (2013)
- Hay P *Federalism and Supranational Organisations* (University of Illinois Press Chicago 1966)
- Haynie SL *Judging in Black and White: Decision Making in the South African Appellate Division 1950-1990* (Peter Lang Publishing Inc New York 2003)
- International Commission of Jurists *Kenya: Judicial Independence, Corruption and Reform* (ICJ Nairobi 2005)
- International Institute for Democracy and Electoral Assistance *Inclusive Political Participation and Representation: The Role of Regional Organisations* (International IDEA Stockholm 2014)
- Kijo-Bisimba H and Peter C M *Justice and Rule of Law in Tanzania: Selected Judgements and Writings of Justice James L. Mwalusanya and Commentaries* (Mkuki na Nyota Publishers Dar es Salaam 2007)
- Lindberg SI *Democracy and Elections in Africa* (The Johns Hopkins University Press Baltimore 2006)
- Manby B *Was the APRM Process in Kenya a Waste of Times? Lessons that Should be Learned for the Future*(AfriMAP and OSISA Johannesburg 2008)
- Manin B *The Principles of Representative Government* (Cambridge University Press Cambridge 1997)
- Masunungure EV (ed) *Defying The Winds of Change: Zimbabwe's 2008 Elections* (Weaver Press Harare 2009)
- Mbaku JM and Ihonvbere JO (eds) *Multiparty Democracy and Political Change: Constraints to Democratisation in Africa* (Africa World Press Inc Trenton 2006)
- Mackenzie WJM *Free Elections* (George Allen and Unwin Ltd London 1958)
- Meredith M *The State of Africa: A History of Fifty Years of Independence* (Jonathan Ball Publishes Cape Town 2006)
- Msekwa P *Reflections On The First decade of Multi-Party Politics in Tanzania* (Plus International Ltd Dar es Salaam 2007)
- Morrison W *Jurisprudence and Legal Theory* (University of London Press London 2006)

Przeworski A, Stokes SC and Manin B (eds) *Democracy, Accountability and Representation* (Cambridge University Press Cambridge 1999)

Paine T *Common Sense* (Fall River Press New York 1995)

Peter MC and Kijo-Bisimba H (eds) *Law and Justice in Tanzania: Quarter of a Century of the Court of Appeal* (Mkuki na Nyota Publishers Dar es Salaam 2007)

Shezongo-MacMillan J *Zambia: Justice Sector and Rule of Law* (AfriMAP/OSISA Johannesburg 2013)

Stiff P *Cry Zimbabwe: Independence- Twenty Years On* (Galago Publishing Alberton 2000)

Sekaggya M *Uganda Management of Elections* (Open Society Initiative for Eastern Africa 2010)

Sewanyanga L and Awori T “Uganda: The Long and Uncertain Road to Democracy” in An-Naim A (ed) *Human Rights Under African Constitutions: Realising the Promise for Ourselves* (University of Pennsylvania Press Philadelphia 2003)

Schmitter PC “Neo-neo-Functionalism” in Wiener A, Diez T (eds) *European Integration Theory* (Oxford University Press Oxford 2003)

Shaw MN *International Law* 4th ed (Cambridge University Press Cambridge 1997)

The Carter Centre *Guide to Electoral Dispute Resolution* 2010

The World Bank *Sub-Saharan Africa: From Crisis to Sustainable Growth* (The World Bank Washington DC 1989)

Van Puymbroeck RV (ed) *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21st Century* (The World Bank Washington DC 2010)

Vickery C (ed) *Guidelines for Understanding, Adjudicating and Resolving Disputes* (International Foundation for Electoral Systems Washington 2011)

Viljoen F *International Human Rights Law in Africa* (Oxford University Press Oxford 2007)

Wachira GM *African Court on Human and Peoples’ Rights: Ten Years On and Still No Justice* (Minority Rights Group International London 2008)

Young C *The Postcolonial State in Africa: Fifty Years of Independence 1960-2010* (University of Wisconsin Press Wisconsin 2012)

Journal Articles

Abraham G “Lines Upon Maps: Africa and the Sanctity of African boundaries” 2007 (61) *Journal of International and Comparative law*

Adejo AM “From OAU to AU: New Wine in Old Bottles?” 2001 (4) *AJIA* 120-141

Ake C “The Unique Case of African Democracy” 1993 (69) *International Affairs* 239-244

Ake C “What is the Problem of Ethnicity in Africa?” 1993 (22) *Transformation* 1-14

Alter JK “Agents or Trustees? International Courts in Their Political Context” 2008 (14/1) *European Journal of International Relations* 33-63

Alter KJ “Who are the Masters of the Treaty?: European Governments and the European Court of Justice” 1997 *International organisation* 1-31

Alter KJ, Helfer LR and McAllister JR “A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice” 2013 (107) *The American journal of International Law* 737-779

Adejumobi S “Elecions in Africa: A Fading Shadow of Democracy?” 2000 (21) *International Political Science Review* 59-73

Akokpari JK “The AU, NEPAD and The Promotion of Good Governance in Africa” 2004 (13) *Nordic Journal of African Studies* 243-263

Alter KJ “Delegation to International Courts: Self-Binding vs Other-Binding Delegation” 2008 (71) *Law and Contemporary Problems* 38-76

Anderson L “Demystifying the Arab Spring” 2011 (May/June) *Foreign Affairs* 1-5

Baimu E and Sturman K “Amendment to the African Union’s Right to Intervene: A Shift from Human Security to Regime Security?” 2003 (12/2) *African Security Review* 37-95

Bankole T “Economic Integration Efforts in Africa: A Milestone-The Abuja Treaty” 1993 (743) *African journal of International and Comparative Law* 743-767

Banjo E “The ECOWAS Court and the Politics of Access to Justice in West Africa” 2007 (XXXII) *Africa Development* 69-87

Barria LA and Roper SD “How effective are International Criminal Tribunals? An Analysis of the ICTY” 2005 (9/3) *The International Journal of Human Rights* 349-368

Barrie GN “Paradise Lost: The History of Constitutionalism in Africa Post Independence” 2009 (292) *Journal of South African Law* 289- 322

Branch D and Cheeseman N “Democratisation, Sequencing, and State Failure in Africa: Lessons From Kenya” 2008 (108/430) *African Affairs* 1-26

Benchemsi A “Morocco: Outfoxing the Opposition” 2012 (23) *Journal of Democracy* 56-69

Brown N “Tracking the Arab Spring: Egypt’s Failed Transition” 2013 (24) *Journal of Democracy* 45-58

- Bekker G “The African Court on Human and Peoples’ Rights: Safeguarding the Interests of African States” 2007 (151) *Journal of African Law* 151-172
- Burley AM and Mattli W “Europe Before the Court: A Political Theory of Legal Integration” 1993(47) *International Organisation* 41-76
- Bratton M, Bhavnani and Chen T “Voting Intentions in Africa: Ethnic, Economic or Partisan?” 2012 (50) *Commonwealth and Comparative Politics* 27-52
- Cassel D “Does International Human Rights Law Make a Difference?” 2001 (2) *Chicago Journal of International Law* 121- 135
- Cheeseman N “The Internal Dynamics of Power-sharing in Africa” 2011 (18) *Democratisation* 336-365
- Cheeseman N and Tendi B “Power-sharing in Comparative Perspective: The Dynamics of Unity Government in Kenya and Zimbabwe” 2010 (48) *Journal of modern African Studies* 203-229
- Clark CE “The Handmaid of Justice” 1938 (23) *Washington University Law Quarterly* 297-320
- Cowell F “The Impact of the ECOWAS Protocol on Good Governance and Democracy” 2011 ((19.2) *African Journal of International and Comparative Law* 331-342
- Diamond L “Why are there No Arab Democracies?” 2010 (21) *Journal of Democracy* 93-104
- Dirar L “Common Market for Eastern and Southern African Countries: Multiplicity of Membership and Choices” 2010 (18.2) *African journal of International and Comparative Law* 217-232
- Ebobrah ST “IS Democracy Now An Issue in Africa? An Evaluation of the African Charter on Democracy, Elections and Governance” 2007 (1) *Malawi Law Journal* 131-153
- Ebobrah ST “Litigating Human Rights Before Sub-Regional Courts in Africa: Prospects and Challenges” 2009 (17) *Journal of International Comparative Law* 79-101
- Elsheikh IAB “The Future Relationship Between the African Court and the African Commission” 2002 (252) *African Human Rights Law Journal* 252-260
- Falk RA “Domestic Courts, The Modern State, and World Legal Order” 1964 (14) *The International Legal Order* 14-20
- Fombad CM “Internationalisation of Constitutional Law and Constitutionalism in Africa” 2012 (60) *The American journal of Comparative Law* 439-474
- Fombad CM “Constitutional Reforms and Constitutionalism: Reflections On Some Current Challenges and Future Prospects” 2011 (1007) *Buffalo Law Review* 1007-1108

Fombad CM “The Swaziland Constitution of 2005: Can Absolutism be Reconciled with Modern Constitutionalism?” 2007 (93) *African Journal on Human Rights* 93-115

Fombad CM “Some Perspectives on the Prospects for Judicial Independence in Post-1990 African Constitutions” 2001-2003 (17) *Denning Law Journal* 17-43

Fombad CM “Election Management Bodies in Africa: Cameroon’s National Elections Observatory in Perspective” 2003 (25) *African Human Rights Law Journal* 25-51

Franck T “The Emerging Right to Democratic Governance” 1992 (86) *The American Journal of International Law* 46-91

Fuller LL “The Forms and Limits of Adjudication” 1978 (92) *Harvard Law Review* 353-409

Gathii JT “The Dream of Judicial Security of Tenure and the Reality of Executive Involvement in Kenya’s Judicial Process” 1994 (II) *Thoughts on Democracy* 1-29

Glen P J “Institutionalising Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance” 2012 (5) *African Journal of Legal Studies* 119-146

Gonidec PF “The Relationship of International Law and National Law in Africa” 1998 (244) *African Journal of International and comparative Law* 243-249

Golder M “Democratic Electoral Systems Around the World 1946-2000” 2005 (24) *Electoral Studies* 103-121

Hansungule “The Ordeal of State Party Reporting in Africa: A Cat and Mouse Relationship” 2012 (Article on file)

Hellwig and Sammuels “Electoral Accountability and the Variety of Democratic Regimes” 2007 (37) *British Journal of Political Science* 1-25

Helfer LR and Alter KJ “Legitimacy and Lawmaking: A Tale of Three International Courts” 2013 (14) *Theoretical Inquiries in Law* 479-503

Helfer LR and Slaughter A “Toward a theory of effective Supranational Adjudication” 1997-1998 (107) *The Yale Law journal* 273-391

Helfer LR and Slaughter A “Why States Create International Tribunals: A Response to Professors Posner and Yoo” 2005 (93) *California Law Review* 1-58

Huefner SF “Remedying Election Wrongs” 2007 (44) *Harvard Journal on Legislation* 265-325

Ipinyomi F “Is Cote d’Ivoire a Test Case of R2P? Democratisation as Fulfilment of the International Community’s Responsibility to Prevent” 2012 (2012/02) *Journal of African Law* 151-174

- Joseph R “Progress and Retreat in Africa: Challenges of a Frontier Region” 2008 (19) *Journal of Democracy* 94-108
- Jarstad AK “The Prevalence of Power-Sharing: Exploring the Patterns of Post-Election Peace” 2009 (44/3) *Africa Spectrum* 41-62
- Jenkins S “Ethnicity, Violence , and the Immigrant-Guest Metaphor in Kenya” 2012 (Advance access Publication) *African Affairs* 1-21
- Kabunda A M N “The Integration of the Democratic Republic of Congo in ECCAS: Treaty, Areas of Cooperation, Future Prospects, Innovations and Peculiarities” 2010 (5) *African Law Study* 45-60
- Kindiki K “The Proposed Integration of the African Court of Justice and the African Court of Human and Peoples’ Rights: Legal Difficulties and Merits” 2007 (138) *African Journal of International and Comparative Law* 138-146
- Keohane RO, Moravcsik A and Slaughter A “Legalised Dispute Resolution: Interstate and Transnational” 2000 (54) *International Organisation* 457- 488
- Killander M “The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward” 2008 (30) *Human Rights Quarterly* 41-75
- Kiryu MT “The Independence and Accountability of the Judiciary in Uganda: Opportunities and Challenges (Undated; on file with author)
- Koh HH “How is International Human Rights Law Enforced?” 1999 (74) *Indiana Law Journal* 1397-1417
- Kufour K O “The OAU and the Recognition of Governments in Africa: Analysing Its Practice and Proposals for the Future” 2002 (17/2) *American University International Law Review* 369-401
- Kufour KO “Securing Compliance With the Judgments of the ECOWAS Court of Justice” 1996 (1) *African Journal of International and Comparative Law* 1-12
- Lamin AR “West Africa in context: Elections and the Challenges of Democratic Governance” 2011 (10) *Journal of African Elections, Special issue West Africa* 1-6
- LeVan AC “Power Sharing and Inclusive Politics in Africa’s Uncertain Democracies” 2011 (24) *Governance: An International Journal of Policy, Administration and Institutions* 31-53
- Levitt J I “Pro- Democracy Intervention in Africa” (2006) (24/3) *Wisconsin International Law Journal* 785-833
- Levitt J I “The Peace and Security Council of the African Union: The Known Unknown” 2003 (13) *Transitional Law and Contemporary Problems* 109-138

- Lindberg S “The Surprising Significance of African Elections” 2006 (17) *Journal of Democracy* 139-151
- Matlosa K and Zounmenou DD “The Tension Between Militarisation and Democratisation in West Africa: A Comparative Analysis of Niger and Guinea” 2011 (10) *Journal of African Elections, Special Issue West Africa* 93-114
- Mbondenyi MK “The Right to Participate in the Government of One’s Country: An Analysis of Article 13 of the African Charter on Human and Peoples’ Rights in Light of Kenya’s 2007 Political crisis” 2009 (183) *African Human Rights Law Journal* 183-202
- Mhango M “Governance, Peace and Human Rights in Africa: Addressing the Application of the Right to Self-Determination in Post-Independence Africa” 2012 (5) *African Journal of Legal Studies* 199-214
- Mangu AM and Budeli M “Democracy and Elections in Africa in the Democratic Republic of Congo: Lessons for Africa” 2006 (6) *Law, Democracy and Development* 93-116
- Mbondenyi MK “The Right to Participation in the Government of One’s Country: An Analysis of Article 13 of the African Charter on Human and Peoples’ Rights in the Light of Kenya’s 2007 Political Crisis” 2009 (183) *African Human Rights Law Journal* 183-202
- Mei APVD “Regional Integration: The Contribution of the Court of Justice of the East African Community” 2009 (69) *ZAORV* 403-425
- Maogoto JN “Democratic Governance: An Emerging Customary Norm?” 2003 (5) *Notra Dame Australia Law Review* 55-79
- Moravcsik A “Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach” 1993 (31) *Journal of Common market Studies* 474-524
- Mueller SD “Dying to Win: Election, Political Violence, and Institutional Decay in Kenya” 2011 (29) *Journal of Contemporary African Studies* 99-117
- Nathan L “Solidarity Triumphs Over Democracy- The Dissolution of the SADC Tribunal” 2011 (December) *Development Dialogue* 123-137
- Ndulo M “The Democratisation Process and Structural Adjustment in Africa” 2003 (10) *Indiana Journal of Global Legal Studies* 315-368
- Ndulo M “Harmonisation of Trade Laws in African Economic community” 1993 (42) *International and Comparative Law Quarterly* 101-118
- Ndulo M and Kent BK “Constitutionalism in Zambia: Past, Present and Future” 1996 (256) *Journal of African Law* 256-278
- Ndulo M “The Democratic State in Africa: The Challenges for Institution Building” 1998-2000 (16) *National Black Law Journal* 70-101

- Ndulo M “Presidentialism in the Southern African States and Constitutional Restraint on Presidential Power” 2001-2002 (26) *Vermont Law Review* 769-802
- Nowrof K and Schbacker E W “The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone” 1998 (14/2) *American University International Law Review* 312-412
- Ogwezzy MC and Bello SA “OHADA’s Common Court of Justice and Arbitration: Is it a Supranational Institution for the Administration of Commercial Disputes in Africa?” 2014 (5) *Open University Law Journal* 1-24
- Okolo BS and Onunkwo RO “The 2011 Nigerian Elections: An Empirical Review” 2011 (10) *Journal of African Elections, Special Issue West Africa* 54-72
- Olowu D “Regional Integration, Development, and the African Union Agenda: Challenges, Gaps, and Opportunities” 2011 (13) *Journal of Transnational Law and Contemporary Problems* 211-254
- Omorogbe E Y “A Club of Incumbents? The African Union and Coups d’état” 2011 (44) *Vanderbilt Journal of Transnational Law* 123-254
- Onoria H “Locus Standi of Individuals and Non-State Entities Before Regional Economic Integration Judicial Bodies in Africa” 2010 (18) *African Journal of International and Comparative Law* 143-169
- O’Shea A “A Critical Reflection On The Proposed African Court on Human and Peoples’ Rights” 2001 (285) *African Human Rights Law Journal* 285-298
- Oloka-Onyango J “Constitutional Transition in Museveni’s Uganda: New Horizons or Another False Start?” 1995 (39) *Journal of African Law* 156-172
- Oloka-Onyango J “Uganda” 1996 (365) *Human Rights Development yearbook* 365-410
- Prempeh HK “Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa” 2008 (35:4) *Hastings Constitutional Law Quarterly* 761-834
- Pedersen T “Cooperative Hegemony: Power, Ideas and Institutions in Regional Integration” 2002 (28) *Review of International Studies* 677-696
- Posner EA and Yoo JC “Judicial Independence in International Tribunals” 2005 (93) *California Law Review* 1-75
- Posner EA and Yoo JC “Reply to Helfer and Slaughter” 2005 (93) *California Law Review* 957-974
- Reyntjens F “The Winds of Change: Political and Constitutional Evolution in Francophone Africa 1990-1991” 1991 (35) *Journal of African Law* 44-55

- Read JS “Revolutionary Legality in Lesotho: A Fresh Look at Constitutional Legitimacy” 1991 (209) *Journal of African Law* 209-212
- Rousselot J “The Impact of French Influence on State of Democracy and Human Rights in Cameroon” 2010 (4) *Cameroon Journal of Democracy and Human Rights* 59-71
- Rugege S “Judicial Independence in Rwanda” 2007 (19) *Global Business and Development Law Journal* 411-425
- Ruppel OC and Bangamwabo FX “The SADC Tribunal: A Legal Analysis of its mandate and Role in Regional Integration” 2008 *Monitoring Regional Integration in Southern Africa Year Book* Chapter 8
- Sweet AS and Brunnel TL “Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community” 1998 (92) *American Political Science Review* 63-81
- Stallberg J “Delegation to Supranational Institutions: Why, How and With What Consequences?” 2002 (25) *West European Politics* 23-46
- Slaughter A “Judicial Globalisation” 1999-2000 (40) *Virginia Journal of International Law* 1103-1124
- Slaughter A and Burke-White W “The Future of International Law is Domestic (or, The European Way of Law)” 2006 (47) *Harvard International Law Journal* 327-352
- Souare IK “The 2011 Presidential Election in Benin: Explaining the Success of One of Two-Firsts” 2011 (10) *Journal of African Elections, Special issue West Africa* 73-92
- Southall R and Fox R “Lesotho’s General Election of 1998: Rigged or De Rigueur?” 199 (37/4) *The journal of Modern African Studies* 669-696
- Stepan A “Tunisia’s Transition and the Twin Tolerations” 2012 (23) *Journal of Democracy* 89-103
- Slaughter A and Burke-White W “The Future of International Law is Domestic (or , the European Way of Law)” 2006 (47) *Harvard International Law journal* 328-351
- Sturman K “The African Union and the Arab Spring: An Exception to the New Principles or Return to Old Rules?” 2012 (108) *Instituto Per Gli Studi Di Politica Internazionale* 1-6
- Sweet AS and Sandholtz “European Integration and Supranational Governance” 1991 (1-1) *Journal of European Public Policy* 297-317
- Sweet AS and Sandholtz “European Integration and Supranational Governance” 1997 (4/3) *Journal of European Public Policy* 297-317

Tessler M “Islam and Democracy in the Middle East: The Impact of religious Orientations on Attitudes Toward Democracy in four Arab Countries”2002 (34) *Comparative Politics* 337-354

Twinomugisha BK “The Role of the Judiciary in the Promotion of Democracy in Uganda”2009 (1) *African Human Rights Law Journal* 1-23

Udombana N J “Articulating The Right to Democratic Governance in Africa” 2002-2003 (24) *Michigan Journal of International Law* 1209-1288

Udombana N J “Can the Leopard Change Its Spots? The African Union Treaty and Human Rights” 2002 (17) *American University International Law Review* 1177-1261

Udombana N J “Toward the African Court on Human and Peoples’ Rights: Better Late than Never”2000 (3/1) *Yale Human Rights and Development Journal* 45- 111

Vines A “A Decade of African Peace and Security Architecture” 2013 (89) *International Affairs* 89-109

Weiler JHH “The Community System: the Dual Character of Supranationalism” 1981 *YEL* 267-280

Weiler JHH and Trachtman J “European Constitutionalism and Its Discontents” 1997 (17) *Northwestern Journal of International Law and Business* 354

Weiler JHH “The Transformation of Europe”1990-1991 (100) *The Yale Law Journal* 2403-2483

Wet ED “The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa” 2013 *ICSID* 1-19

Zounmenou DD and Lamin AR “Cote D’Ivoire ‘s Post-Electoral Crisis: Outtara Rules but can He Govern?”2011 (10) *Journal of African Elections, Special Issue West Africa*

Theses and Dissertations

Alabi MOA *Analysis of the Role of the ECOWAS Court in Regional Integration in West Africa* (PhD Thesis University of Leicester 2013)

Fagbayibo B A *Politico-Legal Framework for Integration in Africa: Exploring The Attainability of a Supranational African Union* (LLD Thesis University of Pretoria 2010)

Musarurwa TTG *Creating Sustainable Democracy in Africa- An African Supranational Body for the Effective Supervision of Elections in Africa* (LLM Thesis University of Pretoria 2008)

Rudahindwa JB *International Commercial Arbitration in Africa: The Organisation for Harmonisation of Business Law in Africa (OHADA) Sets the Tone* (LLM Thesis Indiana University School of Law Indianapolis 2011)

Saende GP Dispute Settlement Within The East African Community: The East African Court of Justice and Its Jurisdiction (LLM Dissertation University of Nairobi 2012)

Communiqués and Policy Documents

Communiqué of the 34th Summit of SADC Heads of State and Government 17-18 August 2014 (Victoria Falls Town)

Communiqué of the Eighty-Ninth Ordinary Session of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial level of 15 January 2003 (Central Organ/MEC/AMB/Comm. LXXXIX)

Communiqué of the Ninetieth Ordinary Session of the Central organ of the Mechanism for Conflict Prevention, Management and Resolution at Ambassadorial Level of 17 March 2003 (Central Organ/MEC/AMB/Comm.XC)

Communique of the Ninety-Fifth Ordinary Session at Ambassadorial Level of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution of 18 September 2003, Addis Ababa, Ethiopia (Central Organ/MEC/AMB/COMM.XCV)

Communique of the Ninety-third Ordinary Session at Ambassadorial Level of the Central Organ of the Mechanism for Conflict Prevention, Management and Resolution of 24 July 2003, Addis Ababa, Ethiopia (Central Organ/MEC/AMB/COMM.XCIII)

Communiqué of the Peace and Security Council of the 221st Meeting Held on 17 march 2010, Addis Ababa, Ethiopia (PSC/PR/COMM.CCXXI)

Communiqué of the Peace and Security Council of the 297th Meeting Held on 20 October 2011, Addis Ababa, Ethiopia (PSC/PR/COMM/2.CCXC VII)

Communique of 7 February 2005 of the Twenty-Fourth Meeting Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.XXIV)

Communique of 25 february 2005 of the 25th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.XXV)

Communique of 26 April 2011 of the 275th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/MIN/COMM.2CCLXXV)

Communique of 19 February 2010 of the 216th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.2CCXVI)

Communique of 22 December 2008 of the 163rd Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/MIN/COMM.3CLXIII)

Communique of 8 September of the 37th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.1XXXVII)

Communique of 19 February 2010 of the 216th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.2 CCXVI)

Communique of 16 February 2011 of the 260th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.CCLX)

Communique of 9 December 2010 of the 252nd Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.1CCLII)

Communique of 13 August 2007 of the 87th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM/LXXXVII)

Communique of 22 September 2008 of the 151st Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/MIN/COMM.2 CLI)

Communique of 4 August 2005 of the 36th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/Stat.XXXVI-ii)

Communique of 15 January 2011 of the 257th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.2 CCLVII)

Communique of 21 July 2010 of the 237th Meeting of the Peace and Security Council, Kampala, Uganda (PSC/PR/COMM.2 CCXXXVII)

Communique of 23 March 2013 of the 362nd Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.CCLXII)

Communique of 5 July 2013 of the 384th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.CCCLXXXIV)

Communique of 25 March 2013 of the 363rd Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.CCCLXIII)

Communique of 16 August 2013 of the 390th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/BR.CCCXC)

Communique of 24 April 2012 of the 319th meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/MIN/COMM/2/CCCXIX)

Communique of 3 April 2012 of the 316th Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.CCCXVI)

Communique of 23 February 2011 of the 261st Meeting of the Peace and Security Council, Addis Ababa, Ethiopia (PSC/PR/COMM.CCLXI)

EAC Development Strategy 2011-2016, Deepening and Accelerating Integration: One People, One Destiny (August 2011)

Final Communiqué of the 32nd Summit of SADC Heads of State and Government (18 August 2012 Maputo)

Joint Communiqué of the 8th Summit of the East African Community Heads of State Held on 30 November 2006 (Arusha, Tanzania)

Outcome [Communiqué] of the SADC Council of Ministers Meeting Held on 14-15 August 2014 (Victoria Falls Town)

Reports, Working and Conference Papers

Akandes F “The Roots of Military-Political Crises in Cote D’Ivoire” Nordiska Afrikainstitutet Research Report No. 128 (2004)

Alter KJ “The Global Spread of European style International Courts” Buffet Centre for International and Comparative Studies Working Paper NO 11-003 (2011)

Alunni A and Mezran K *Post-Qadhafi Libya: The Electoral Dilemma* (ISPI Analysis No. 114 2012)

Babaride O “The European Union as a Model for The African Union: The Limits of Imitation” (Unpublished paper delivered at the EUSA Tenth Biennial International Conference 17-19 May 2007 Montreal)

Bartels L *Review of the Roles, Responsibilities and Terms of Reference of the SADC Tribunal: Final Report* (March 2011)

Bekoe D *Trends in Electoral Violence in Sub-Saharan Africa* (United States Institute of Peace Brief No. 13 March 2010)

Best E “Supranational Institutions and Regional Integration” Paper Presented at the ECLAC-DFID Workshop on Experiences and Processes of Regional Integration and Impacts on Poverty, Lima Peru, 3-4 March 2005

Bujra A *Pan-African Political and Economic Visions of Development From the OAU to the AU: From the Lagos Plan of Action (LPA) to the New Partnership for African Development (NEPAD)* (DPMF Occasional Paper No. 13)

Commonwealth Observer Group Lesotho Parliamentary Elections (May 2012)

Congressional Research Service “Kenya: The December 2007 Elections and the Challenges Ahead” (September 2008)

Congressional Research Service *Kenya: The December 2007 Elections and The Challenges Ahead* (2008)

Electoral Reforms Society (ERS) *The UK General Election of 5 May 2005: Report and Analysis* (June 2005)

Erasmus G “Another Chapter in the SADC Tribunal Saga: South African Court Confirms the Court’s Costs Order” Tralac Working Paper No. S12WP0/2012 (October 2012)

European Union Election Observation Mission, Uganda 2011 General Elections: Improvements Marred by Avoidable Failures (February 2011)

Freedom House *Swaziland: A Failed Feudal State* (September 2013)

Gruzd S “The African Peer Review Mechanism: Development Lessons from South Africa’s Remarkable Governance Assessment System” South African Institute of International Affairs Research Report 15 (January 2015)

Hazan P *Morocco: Betting on a Truth and Reconciliation Commission* (Special Report United States Institute of Peace July 2006)

Hanlon Q “Security Sector Reform in Tunisia: A Year After the Jasmine Revolution” (United States Institute of Peace Special Report 304 March 2012)

Ibrahim J “Nigeria’s 2007 Elections: The Fitful Path to Democratic Citizenship” (United States Institute for Peace Special Report No.182 January 2007)

International Crisis Group *Zimbabwe: Engaging the Inclusive Government* (Africa Briefing No.59 April 2009)

IFES “The Electoral Framework in Egypt’s Continuing Transition: February 2011-September 2013” (October 2013)

International Crisis Group *Marching in Circles: Egypt’s Dangerous Second Transition* (Middle East/North Africa Briefing No.35 August 2013)

Judges and Magistrates Vetting Board *Interim Report September 2011- February 2013* (2013)

Kenya National Commission on Human Rights *On The Brink of the Precipice: A Human Rights Account of Kenya’s Post-2007 Election violence* (August 2008)

Laremont RR “Morocco After the Arab uprisings: Evolution Rather than Revolution” (Unpublished Paper Delivered at the Fund for Peace Roundtable on the Future for Morocco 27 September 2013 Washington DC)

LeVan AC and Assenov A “The Consequences of Political Inclusion in Africa 1990-2008” (Unpublished paper presented at the workshop on the consequences of political inclusion in Africa 24-25 April 2009 American University, Washington DC)

Leal-Arcas R “Theories of Supranationalism in the EU” Paper 1790 Berkeley Press Legal Series, 2006.

Linz “Democracy: Presidential and Parliamentary: Does it Make a Difference?” Paper Presented for the project “The Role of the Political Parties in the Return to Democracy in the Southern Cone” for the Woodrow Wilson Center for Scholars and the World Peace Foundation, 1985

Matlosa K “Democratisation at the Crossroads: Challenges for the SADC Principles and Guidelines Governing Democratic Elections” Institute for Security Studies Paper 118 (October 2005)

Matlosa K “Survey of Electoral Systems and Reform Imperatives in the SADC Region” (EISA Occasional Paper No. 12 2003)

Matlosa K “Pan-Africanism, the African Peer Review Mechanism and the African Charter on Democracy, Elections and Governance: What Does the Future Hold?” SAIIA Occasional Paper No. 190 (June 2014)

Maru MT *China-Africa Relations: Democracy and delivery* (Al Jazeera Centre for Studies April 2013)

Maonera F “Dispute Settlement Under COMESA” Tralac Working Paper No. 7 (October 2005)

Masterson G “An Analysis of the Implementation of the African Peer Review Mechanism in Ghana, Kenya and Mauritius” *EISA Occasional Paper Number 29* (February 2005)

Moyo G “Corrupt Judges and Land Rights in Zimbabwe” in Transparency International *Global Corruption Report: Corruption in the Legal System* (2007)

Masunungure EV “Zimbabwe’s Power Sharing Agreement” (Unpublished paper presented at the workshop on the consequences of political inclusion in Africa 24-25 April 2009 American University Washington DC)

Ndulo M “Judicial Reform, Constitutionalism, and the Rule of Law in Zambia: From a Justice System to a Just System” (Paper delivered at the Law Association of Zambia Annual General Assembly 27 April 2012 Livingstone)

Nsekela H “Overview of The East African Court of Justice” (unpublished paper delivered during the Sensitisation Workshop on the Role of the EACJ in the EAC Integration 1-2 November 2011 Kampala)

Odoki BJ “Developing International Jurisprudence: A Case for an East African Court of Appeal” (Unpublished paper delivered at the Annual Kenyan Judges’ Colloquium 14-19 August 2011 Mombasa)

Parliamentary Development Unit *Report of the African Charter on Democracy, Governance and Elections: A Case Study of 12 African Countries* (2009)

Parliamentary Development Unit *Report On The African Charter on Democracy, Governance and Elections: A Case Study of 12 African Countries* (2009)

Report of the Independent Review Commission on The General Elections Held in Kenya on 27 December 2007 (September 2008)

Report of the Chairperson of the Commission on the Situation in Madagascar to the 394th Meeting of the Peace and Security Council of 5 September 2013, Addis Ababa, Ethiopia (PSC/PR/2. CCCXCIV)

Report of the Ministerial Meeting on the Draft African Charter on Democracy, Elections and Governance and on the revision of the Lome Declaration on Unconstitutional Changes of Government in Africa Submitted to the Executive Council at the Ninth Ordinary Session, 25-29 June, 2006, Banjul, The Gambia (EX.CL/258/IX)

Report of the National Commission on the Establishment of a One-Party Participatory Democracy in Zambia (Mainza Chona Commission) October 1972

Report of the (Nigerian) Electoral Reform Committee (Uwais Report) December 2008

Report of the Independent Review Commission on the General Elections Held in Kenya on 27 December 2007 (September 2008)

Ruhangisa JE “Rule of Law and Access to Justice in East Africa: The East African Court of Justice”(unpublished paper delivered during the Premier Course on the East African Community organised by the Kituo cha Katiba 12-15 September 2012 Kampala, Uganda)

Sedra M “Security sector Transformation in north Africa and Middle East” (United States Institute of Peace Report No.296 November 2011)

Sato J, Shiga H, Kobayashi T and Kondoh H *How Do Emerging Donors Differ From Traditional Donors?* (JICA-RI Working Paper No.2 2010)

Sturman K “Unconstitutional Changes of Government: The Democrat’s Dilemma in Africa” SAIIA Policy Brief 30 (March 2011)

The Justice and Reconciliation Commission *Report of the Truth, Justice and Reconciliation Commission* (May 2013)

The Electoral Integrity Group “Towards An International Statement of the Principles of Electoral Justice (Accra Guiding Principles)” 15 September 2011

Turianskyi Y “South Africa’s Implementation of the APRM: Making a Difference or Going Through the Motions?” SAIIA Policy Briefing 99 (July 2014)

Vickery C “Understanding, Adjudicating and Resolving Election Disputes” (Unpublished IFES Conference Paper February 2011)

USAID *Guidance for Promoting Judicial Independence and Impartiality* (November 2001)

Wing SD “Mali’s Precarious Democracy and the Causes of Conflict” (United States Institute of Peace Report No.331 May 2013)

Internet Sources

Abuya EO “The Role of the Judiciary in Promotion of Free and Fair Elections”
<http://www.juridicas.unam.mx/wcc/ponencias/1/1.pdf> (Date of use: 20 January 2013)

Adejumo BA “The Judiciary and the Rule of Law: Challenges of Adjudication in the Electoral Process” <http://blog.nicn.gov.ng/?p=34> (Date of use: 21 September 2012)

Campbell PJ “Morocco in Transition: Overcoming Democratic and Human Rights Legacy of King HassaII” <http://www.africa.ufl.edu/asq/v/7/ila3.htm> (Date of Use: 17 December 2013)

Crocket S “Are International Courts Effective?” <http://www.e-ir.info/2011/11/27/are-international-courts-effective/> (Date of use: 3 February 2015)

Eggers A and Spirling A “The Judicialisation of Electoral Dispute Resolution: Partisan Bias and Bipartisan Reform in 19th Century Britain”
<http://www.learningace.com/doc/5588624/6d4bc1a516dd83f30755582c82a09cf5/pets> (Date of use: December 2011)

Fombad CM “The African Union, Democracy and Good Governance”
<http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=96254> (Date of use: 13 March 2013)

“Four IFEX Members, Civil Society Groups Fear Gambia Proposal Will Prevent ECOWAS Court from Ruling in Saikyhan Case”
http://www.ifex.org/west_africa/2009/09/28/ecowas_court_jurisdiction/ (Date of use: 18 November 2014)

Fox GH “The Right to Political Participation in International Law”
<http://www.wcl.american.edu/humright/hracademy/documents/GarberClass1-GregFox-TheRighttoPoliticalParticipationinInternationalLaw.pdf> (Date of use: 12 May 2013)

“In South Africa, High Level of Confidence in Judiciary”
<http://www.gallup.com/poll/110968/South-Africa-High-Level-Confidence-Judiciary.aspx>
(date of use: 25 September 2014)

Kam C “Four Lessons about Corruption from Victorian Britain”
http://www.indiana.edu/workshop/colloquia/materials/papers/kam_paper.pdf (Accessed 23 August 2014)

“Less Than Half in Africa Confident in Their Judicial System”
<http://www.gallup.com/poll/174509/less-half-africa-confident-judicial-systems.aspx> (Date of use: 25 September 2014)

Loschky J “Less Than Half in Africa Confident in Their Judicial Systems”
<http://www.gallup.com/poll/174509/less-half-africa-confident-judicial-systems.aspx> (Date of use: 20 October 2014)

Maki AW “ECOWAS Court and the Promise of the Local Remedies Rule”
<http://hrbrief.org/2009/11/ecowas-court-and-the-promise-of-the-local-remedies-rule/> (Date of use: 18 November 2014)

Msipa L “Contextualising the SADC Tribunal and the Land Issue in Zimbabwe- A Socio-Legal Perspective” <http://msipa.blogspot.com/2009/10/contextualising-sadc-tribunal-and-land.html> (Date of use: 10 September 2014)

Nwabueze B “Nature and Forms of Elections Rigging”
http://www.nigerdeltacongress.com/narticles/nature_and_forms_of_elections_ri.htm (Date of use: 21 June 2014)

Oyebode A “The Role of the Judiciary in the Electoral Process in Nigeria” <http://www.nigeriavillagesquare.com/articles/akin-oyebode/the-role-of-the-judiciary-in-the> (Date of use: 21 September 2012)

Pillay AG “SADC Tribunal Dissolved By Unanimous Decision of SADC Leaders”
<http://www.osisa.org/sites/default/files/article/files/Speech%20by%20former%20President%20of%20SADC%20Tribunal.pdf> (Date of use: 13 October 2014)

The Principle of Subsidiarity http://www.europa.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf (Date of use: 13 December 2014)

Ugochukwu B “Reforming Nigeria’s Election Tribunals”
<http://www.utexas.edu/conferences/africa/ads/1164.html> (Date of use: 21 September 2012)