PARTICIPATORY RIGHTS IN AFRICA: AN OVERVIEW OF AN EMERGING REGIONAL CUSTOM

Ndiva Kofele-Kale, Southern Methodist University
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Ndiva Kofele Kale*

ABSTRACT

International law has long recognized the right to vote in elections as a fundamental democratic right and the act of voting as the most basic form of popular participation. In post-conflict African countries as well as those struggling to make the transition from single-party autocratic rule to multiparty democracies, competitive elections have become the barometer for measuring how close they are to this goal. Yet, across Africa this internationally-protected right to vote is under siege as elections have been transformed into elaborately staged events designed to hoodwink external donors. Rather than serving as a measure of democratic participation, the act of voting in a disturbingly sizeable number of African countries has been used by cynical political leaders to provide their authoritarian regimes with a veneer of legitimacy. Despite these hiccups, this Paper will argue that a careful review of state practice in the Continent reveals an emerging regional customary law norm in support of the right to popular participation.

*Professor of Law, SMU Dedman School of Law. Special thanks to Eleanor Khainza (LL.M., SMU Dedman School of Law) for valuable research assistance and the School of Law Summer Research Program for funding.
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I

INTRODUCTION

In Kenya violence sparked by a disputed presidential election which international observers claimed was flawed\(^1\) has left hundreds of Kenyans dead and a quarter-million more displaced from their homes. A similar balance sheet, though on a smaller scale, was registered in Nigeria in the wake of that country’s general elections in April 2007 amid claims by opposition candidates that their victory was stolen through massive rigging of the vote tallies. Foreign observers would later confirm that the elections were so flawed that a rerun was necessary. Their assessment of the polls provided the spark that ignited bitter ethnic clashes that left scores of Nigerians dead and much property destroyed. This pattern of post-election violence has become a familiar ritual in Africa as these recent elections sadly demonstrate. And the rage and contempt voters have shown toward their political leaders does not bode well for the democratic march in Africa. Equally troubling, flawed elections in Africa account for the tremendous loss of faith by the public in the political process and have contributed immensely to the erosion of voter confidence in elections as the best means to bring about much desired democratic change. Electoral malpractices have also spawned much of the instability in that region, stirring long-hidden ethnic tensions and rivalries as ethnic groups are pitted against each other.

The examples of Chad, Côte d’Ivoire, the Democratic Republic of the Congo and Kenya come readily to mind.

When an elector goes to the poll to cast a ballot, she understandably expects her vote to count. And in principle, the vote of an elector should count, but, in practice, it does not always. In country after country in the continent, ordinary Africans determined to exercise their franchise have had to contend with governments just as determined to deny them this right. The intransigence of African governments is at odds with their professed attachment to the rule of law and constitutional democratic governance. This Paper will re-examine the place of participatory rights in positive international law with particular emphasis on how this right is being shaped in African state practice.² In this vein, it is submitted that the denial by some African governments of the right of their citizens to

² While publicists are in agreement that the right to political participation is firmly anchored in treaty law, Thomas Franck, “The Emerging Right to Democratic Governance,” 86 Am. J. Int’l L. 46 (1992); and Democratic Governance and International Law (Gregory H. Fox & Brad R. Roth eds. (2000)); there are some who question claims that this right also enjoys customary law status. See e.g., William D. Jackson, Book Review: Democratic Governance and International Law, Gregory H. Fox & Brad R. Roth eds. (2000), 24 Hum. Rts. Q. 304, 307 (2002). We believe that the dense network of state practice as evidenced in law-backed declarations and resolutions adopted by major regional organizations like the African Union and the Organization of American States coupled with the jurisprudence of international human rights tribunals such as the Inter-American Court on Human Rights and the African Commission on Human and Peoples’ Rights clearly support a customary international law right to political participation. See Sections III and VI infra and accompanying discussion.
vote and be voted into public office, on the basis of universal and equal suffrage, in
elections that are free, fair and transparent violates African regional customary law on
this question.

It is submitted that in the last decade or so state practice backed by the requisite *opinio juris* in favor of participatory rights has been taking root in Africa. In this sense, therefore, the Paper argues that despite the behavioral fluctuations on the part of some African States a careful review of this recurrent and concordant state practice will reveal an emerging regional custom strongly in support of the right to political participation.³ Central to this custom is the proposition that (a) political power obtained through unconstitutional means undermines democratic institutions and culture and denies the peoples of Africa the right and opportunity to elect leaders of their choice; (b) incumbent governments that refuse to cede power to the winning party after free, fair and transparent elections, and, by extension, those governments that seek to eternalize their hold on power through elections that do not meet the minimum internationally-accepted standards of free, fair and transparent polls, are in violation of the principle of popular participation.

³The reference to regional customary law is not in the sense that the Colombian Government invoked a Latin American customary law on the question of diplomatic asylum in *The Asylum Case* (Colombia v. Peru), 1950 I.C.J. 266, 1950 WL 10. In that case, the customary law rule invoked was in derogation from general international law rules. Here the African regional customary law norms with respect to elections and the right to popular participation are no different from universal rules on the same subject nor do they displace any universal rules of customary international law. Here the difference, if any, lies in the fact that these universal rules are now being applied, by common agreement of African leaders, in a continent that has not had a particularly long history of competitive multiparty elections and where regime change has traditionally been through unconstitutional means.
in decision-making processes. The discussion that follows will first situate the right to political participation in conventional international law, proceed thereafter with a review of African state practice to demonstrate the contours of this right to political participation and how it has come to take on de lege ferenda status if not lex lata. It will then conclude with a few passing remarks on the fate of participatory rights in the continent.

II

THE RIGHT TO POLITICAL PARTICIPATION IN CONVENTIONAL LAW

The right to political participation is broadly recognized as a fundamental right in numerous international and regional instruments. The Universal Declaration of Human Rights, the fountain of all subsequent human rights instruments, acknowledges:

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The will of the people … [as] the basis of the authority of government, this will shall be expressed in periodic and genuine elections which shall be universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.  

Article 25 of the International Covenant on Civil and Political Rights recognizes voting rights and establishes specific individual rights for each citizen. It embodies the core principles of political participation based on the rights of each and every citizen to participate freely in his or her government without discrimination. Pursuant to Article 2 of the Covenant, contracting States must undertake to ensure to all individuals within their territory or subject to their jurisdiction the rights recognized in the Covenant and to provide an effective remedy in case a violation has been established.

Article 25 of the Covenant reads:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

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5 Universal Declaration of Human Rights, supra note 4, art. 21.

6 Political Convention, supra note 4, art. 25.
(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

Article 25(a) guarantees every citizen the right and opportunity “to take part in the conduct of public affairs, directly or through freely chosen representatives,” without distinction of any kind and without unreasonable restrictions. This provision requires State Parties to be accountable to their citizens. Furthermore, Article 25(b) guarantees every citizen the right and opportunity “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” This right shall also be granted without distinction of any kind and without unreasonable restrictions.

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7 Id., at art. 25(a).

8 Id at art. 25(b)

9 Id. at art. 25(b).
In addition to the Covenant, virtually all the extant regional human rights instruments provide for the right to free and fair elections as the sine qua non of participatory democracy. Article XX of the American Declaration of the Rights and Duties of Man states: “Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”\(^\text{10}\) Similar language is contained in the 1969 American Convention on Human Rights which provides in its Article 23: “Every citizen shall enjoy the … [right] … [t]o vote and be elected in genuine elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voter….”\(^\text{11}\) And the more recent Banjul Charter recognizes the right of every citizen “to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law,\(^\text{12}\) while providing that “[a]ll peoples shall … freely determine their political status … according to the policy they have freely chosen.”\(^\text{13}\) In addition to


\(^{11}\) American Convention, \textit{supra} note 4, art. 23.

\(^{12}\) Banjul Charter, \textit{supra} note 4, art. 20.

\(^{13}\) \textit{Id.}, art. 20 (1).
the human rights charter, African States have also entrenched participatory rights in the
Constitutive Act of the African Union. Among the fundamental principles of the African
Union contained in Article 4 of the Constitutive Act is the obligation to function in
accordance with:

…

(m) Respect for democratic principles, human rights, the rule of law and good
governance;

…

(o) Respect for the sanctity of human life, condemnation and rejection of
impunity and political assassination, acts of terrorism and subversive
activities; and

(p) Condemnation and rejection of unconstitutional changes of governments.

Article 30 puts on notice Member States who contemplate to seize power through
unconstitutional means: “Governments which shall come to power through
unconstitutional means shall not be allowed to participate in the activities of the Union.”
The prohibition of unconstitutional changes in government “is the only commitment in
the Constitutive Act for whose breach a sanction is prescribed”\(^\text{14}\) conferring on it the
status of a fundamental principle of the African Union. Some see this prohibition of
unconstitutional changes in government as “a distinct African recognition of a right to

\(^{14}\) See Chidi Anselm Odinkalu, Concerning Kenya: The Current AU Position on Unconstitutional Changes
in Government, Open Society Institute Africa Governance Monitoring & Advocacy Project 1 (January
2008).
constitutional democratic governance in international.”\textsuperscript{15} Implicit in the right to democratic governance is the commitment to change governments only through free, fair and transparent electoral process.

International commitment to the right to political participation has also been expressed in General Assembly Resolution 45/50 which strongly affirms the conviction of the members of the United Nations:

That periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social, and cultural rights.”\textsuperscript{16}

Conventional law reveals widespread support for the right to political participation. The fact that in countries around the world, elections have failed to meet the minimum internationally-accepted standards for free, fair and transparent election does not detract from this reality nor does it diminish the international obligation States owe to each other.

\textsuperscript{15} \textit{Id., see also} N. Udombana, Human Rights and Contemporary Issues in Africa, 35-106 (2003).

\textsuperscript{16} UNGA Res. 45/150 (Feb. 21, 1991).
States on acceding to the Covenant commit themselves to respect these rights and to ensure them to all individuals in their territory and subject to their jurisdiction. The *pacta sunt servanda* doctrine\(^\text{17}\) obliges State Parties to the Covenant to give effect to their undertakings in good faith.

**III**

**PARTICIPATORY RIGHTS AS EMERGING AFRICAN REGIONAL CUSTOM**

**A. DEVELOPMENTS AT THE CONTINENTAL LEVEL**

The right of citizens to vote and be voted for in elections to various elective institutions, to participate in the formulation and implementation of government policies, and to hold public office and perform public functions at all levels of governance, is also grounded in customary international law. This right can be discerned in the practice of African and Latin American states as well as in the practice of the United Nations. Numerous declarations and resolutions adopted by various inter-governmental organizations which capture this longstanding state practice confirm a regional custom, on the one hand, and on the other, a strong international consensus at the level of the United Nations, in favor of the right to popular participation. This development happens to coincide with a global

trend to assist states making the transition from single-party dictatorships to more open, competitive multiparty systems, in reforming their electoral systems.

In Africa, this development has been at both the continental and sub-regional levels. At the pan-African level, the earliest sighting of this emerging state practice was the New African Initiative (which subsequently morphed into the New Partnership for Africa’s Development (NEPAD))\textsuperscript{18} under which African leaders pledged (through the Declaration on Democracy, Political, Economic and Corporate Governance)\textsuperscript{19} to promote democracy and its core values as well as the respect for human rights in their respective countries. Through this instrument African leaders committed themselves to respect the international standards of democracy whose core components include political pluralism and fair, open and competitive multiparty elections, periodically organized to enable the people to choose their leaders freely. More specifically, in embracing NEPAD’s democratic governance objectives, these leaders also accepted to take joint responsibility for the promotion and protection of democracy and human rights, by developing clear standards of accountability, transparency and participative governance at the national and

\begin{quote}
\texttt{\textsuperscript{18}Adopted by the Assembly of African Heads of State and Government in Lusaka, Zambia, in July 2001. NEPAD was conceived as a “Vision and Strategic Framework for Africa’s renewal.”}


13}
sub-national levels. To this end, the continent’s leaders solemnly agreed to “enforce strict adherence to the position of the African Union on unconstitutional changes of government and other decisions of [the] continental organization aimed at promoting democracy, good governance, peace and security.” Finally, these leaders committed themselves to the promotion of human rights in their respective countries “in conformity with the constitution.”

In the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, African Heads of State and Government (Lome Declaration) also stated their commitment to the practice and pursuit of democracy. This comes through in the preamble to the declaration, where these leaders acknowledge that their “review of the

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21 Id. (Declaration on Democracy, Political, Economic and Corporate Governance).

22 Id.

political developments on the continent and in particular the state of consolidating democracy in Africa” has given rise to “grave concern about the resurgence of coup d’
estat in Africa.” More importantly, the leaders also recognized that “these developments are a threat to the peace and security of the continent and they constitute a very disturbing trend and serious setback to the on-going process of democratization in the continent.”

The Lome Declaration proclaims a continent-wide commitment to democracy and proceeds to give substance to that commitment by setting out “common values and principles for democratic governance” in African countries, including respect for the constitution and adherence to the provisions of the law and other pieces of legislation adopted by national legislatures; promotion of political pluralism or any other form of participatory democracy and the role of the civil society, including enhancing and ensuring gender balance in the political process; the principle of democratic change and recognition of a role for the opposition; and the organization of free, fair and regular elections, in conformity with existing texts. Drawing on previous OAU decisions on the right to constitutional democratic governance, the Lome Declaration is equally firm in its rejection of any unconstitutional change of governments, something the leaders found

24 Id.
25 Id.
26 Id.
27 See e.g., OAU Decision AHG/Dec. 141(XXXV), adopted by the Thirty-Fifth Ordinary Session of the Assembly of OAU Heads of State and Government in Algiers, 12–14 July 1999 and Decision AHG/Dec. 142 (XXXV) also adopted at the same Session, both of which are against “unconstitutional change of government.”
“unacceptable and anachronistic act” and a contradiction of Africa’s commitment “to promote democratic principles and conditions.”

To lend weight to the prohibition of unconstitutional changes in government, the Lome Declaration spells out a range of sanctions to be applied to Member States who seize power through unconstitutional means. In unequivocal language, the declaration mandates the OAU leadership, i.e., its current Chairman and the Secretary-General to immediately and publicly condemn any unconstitutional change of government the moment it occurs and to demand a “speedy return to constitutional order.” These responsible officials are also mandated to convey, on behalf of the OAU, “a clear and unequivocal warning to the perpetrators of the unconstitutional change that, under no circumstances, will their illegal action be tolerated or recognized” by the organization. The individuals responsible for the unconstitutional change have up to six months to restore constitutional order and during this period, the government concerned would be suspended from participating in the Policy Organs of the OAU as well as in meetings of the Central Organ and Sessions of the Council of Ministers and the Assembly of Heads of State and Government. If after the expiration of the six months suspension period, the situation persists then the rogue government, in addition to its suspension from participating in all the policy organs of the OAU, would be subjected to a “range of limited and targeted sanctions” that could include “visa denials for the perpetrators of an

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28 Id.
unconstitutional change, restrictions of government-to-government contacts, trade restrictions” and so on.

Meeting in Durban, South Africa on 28 July 2002, for the 38th Ordinary Session of the Organization of African States, African Heads of State and Heads of Government adopted the Declaration on the Principles Governing Democratic Elections in Africa29 which reaffirms their commitment to principles of democratic governance in earlier instruments and asserts, inter alia, that “democratic elections are the basis of authority of any representative government … [and] should be conducted: (a) freely and fairly; (b) under democratic constitutions and in compliance with supportive legal instruments; (c) under a system of separation of powers that ensures in particular, the independence of the judiciary; (d) at regular intervals, as provided in national constitutions; and (e) by impartial, all-inclusive competent accountable electoral institutions staffed by well-trained personnel and equipped with adequate logistics.”30 This continent-wide leadership commitment to promote and practice democracy was subsequently entrenched in the Constitutive Act of the African Union31 (which replaced the Organization of African


30Id., ¶II (4).

Unity in 2002). In the preamble to this instrument, African States express their determination to “consolidate democratic institutions and culture and to ensure good governance and the rule of law.”\textsuperscript{32} Article 3 (g) captures a key objective flowing from the preamble in the emphasis it gives to the “promotion of democratic principles and institutions, popular participation and good governance.”\textsuperscript{33} Article 30 reaffirms the common understanding that governments which accede to power through unconstitutional means will barred from participating in the activities of the Union.\textsuperscript{34}

Perhaps the most far-reaching expression of African States’ commitment to democratic elections at the continental-level is the African Charter on Democracy, Elections and Governance (Elections Charter) which was adopted by the 8th Ordinary Session of the African Union Assembly which held in Addis Ababa on January 30, 2007.\textsuperscript{35} Developed as part of the AU’s stated emphasis on promoting democracy and good governance in Member States, the Elections Charter, especially its core provisions, squarely confronts the issue of elections and threats to democracy and the constitutional order, and steps to

\textsuperscript{32} Id., Preamble.

\textsuperscript{33} Id., Article 3(g).

\textsuperscript{34} Id., Article 30.

\textsuperscript{35} The document must be ratified by 15 states before it enters into effect.
be taken to prevent or reverse such actions. Although the Elections Charter has been criticized for being ambiguous in the details set forth on how the AU will deal with challenges to democratic governance,\(^{36}\) it has nonetheless been applauded as a “positive step” in the right direction with the “potential to serve as a guide and reference point for sustained and ongoing political reform on the continent.”\(^{37}\) A brief review of its core provisions on elections and democratic governance will certainly bear out this endorsement.

Chapters 7 and 8 of the Elections Charter include ten key provisions, Articles 17-26, which address issues of elections. Article 17 places the responsibility to “establish and strengthen independent and impartial national election bodies” on State Parties while Article 18 provides that the Commission (the Secretariat of the African Union) may, “in consultation” with the State Party concerned, send special advisory missions to strengthen election processes. Article 19 establishes a requirement that State Parties invite the Commission to send electoral observer missions and Article 20 underscores the importance of pre-election observation missions “given that the conditions under which the legitimacy of elections is determined do not relate simply to the immediate period around election day; they are often set in advance of this period, and continue through the


\(^{37}\) Id.
dispute resolution process subsequent to elections.”

Free and fair elections can only be conducted in a healthy environment where independent and impartial observers are free to monitor the organization and conduct of the polls. To this end, Article 22 obligates State Parties to create an environment that is conducive to “independent and impartial” domestic non-partisan monitoring.

The heart of the Elections Charter is Article 23 which describes any “illegal means of accessing or maintaining power [as] constitute[ing] an unconstitutional change of government” which would include the following: putsch or military coup d’etat against a democratically elected government; intervention by mercenaries to replace a democratically elected government; replacement of a democratically elected government by armed rebels and dissidents; the refusal of an incumbent government to surrender power after a free, fair and regular elections; and “any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.”

As has been noted elsewhere, Article 23 is

38 Id.

39 See also Article 27(5). McMahon views this aspect of the definition of an unconstitutional change in government “as open to a broader interpretation than the draft language, which only referred specifically to changes designed to prolong the tenure of office for the incumbent”. He goes on to point out that it might even be argued that a broadening this provision has the effect of watering it down (the draft provision had clearly targeted attempts to lift term limitations). “However, it can definitely also be interpreted as a step ahead as it would appear to cover possible scenarios of what has come to be known as ‘democratic backsliding’. While not as blatant as military coups, this refers to actions which have the effect of chipping away at democratic freedoms, with the cumulative effect of maintaining government in power
…based on African experiences and realities, although they have not all been played out in the context of unseating democratically elected governments. The history of military coups in Africa needs little elaboration here. The fear or reality of mercenaries overthrowing governments has a long track record in the Congo, Sao Tomé, Comoros and Benin, to cite a few examples. Similarly, there are many examples of governments being overthrown by armed rebels. Indeed, a number of current governments have come to power in these ways. It should be noted here that this article is not retroactive. Similarly, there is a long history of elections lacking legitimacy being accepted by the OAU and the AU, notwithstanding the 2000 Declaration on Unconstitutional Changes of Government and advocacy efforts by NGOs and other actors.40

Illegitimately. To cite just a few, these can include limitations on freedom of speech, provisions designed to sideline potential opposition candidates and/or parties, or limitations on the legislature to act as a meaningful check or balance on the executive branch. They can include situations in which a democratically elected government which is engaging in these anti-democratic actions.” Id. at 3.

40 Id. This singular focus on the problem of unconstitutional changes of government is not something to sneeze at. It has become the sword of Damocles hanging over the head of almost every incumbent African government. In February 2008 heavily-armed rebels matched into Ndjamen from neighboring Sudan in a bid to unseat Chadian President Idriss Deby. A couple years earlier hired South African mercenaries set out from Zimbabwe en route to Equatorial Guinea with the aim of overthrowing the Government of President Teodoro Obiang Nguema.
Article 25 spells out steps to be taken when a determination is made by the AU’s Peace and Security Council that there has been an unconstitutional change of government. This would appear, according to the definition of unconstitutional changes of government in Article 23, to include actions cited above by a sitting, democratically elected government that limit the possibility of alternating power. The Elections Charter provides that in such situations the offending government would be suspended from its activities in the AU. Furthermore, Member States that support this use of unconstitutional measures to change an incumbent government or to stay in power will also be subject to AU sanctions.41

B. SUB-REGIONAL DEVELOPMENTS

A parallel development at the sub-regional level can be seen in the Bamako Declaration adopted by the member countries of the Francophonie42 on 3 November 2000 and the Cotonou Declaration43 adopted on 6 December 2000 at the end of the 4th international conference on new or restored democracies. These were among the first of such instruments to acknowledge the will of the people as the foundation of the “powers

41 Article 30 of the Constitutive Act of the African Union provides: “Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.”

42 La Francophonie is an international organization of 55 French-speaking countries. For more information visit: http://www.francophonie.org.

vested in public authorities” which “must be freely expressed through periodic and fair elections, free of intimidation with equal right to vote by secret ballot and under the supervision of an independent” electoral organization. Two years later meeting in Mauritius, the leaders of the Southern African Development Community (SADC) adopted the SADC Principles and Guidelines Governing Democratic Elections in the SADC Region. The Mauritius Summit laid emphasis on the following principles and guidelines:

- The establishment of appropriate institutions to address thorny issues related to election management such as codes of conduct, citizenship, residency, age requirement and other voter/candidate eligibility conditions;
- The establishment of impartial, all-inclusive, competent and accountable national election management bodies staffed by qualified personnel;
- The establishment of relevant courts to arbitrate electoral disputes;
- The prevention and repression of electoral fraud;
- The provision of adequate funding for elections;
- Transparency and integrity of the entire electoral process; and
- The enhancement of the participation of women, the disabled and youth in elections.

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44 *Id.* art. 12.

At the 25th Conference of Heads of State and Government of the Economic Community of West African States (ECOWAS) held in Dakar in 2001, representatives from the Member countries signed a Protocol on Democracy and Good Governance. This instrument is supplementary to the Protocol establishing the Mechanism for Conflict Prevention, Management and Resolution, Peacekeeping and Security and is part of the “constitutional convergence principles” of all Member States to the effect that “every accession to power must be made through free, fair and transparent elections.”

The Protocol endorses the respect for freedom, civil and political rights. It recognizes the importance for political parties to participate freely without discrimination in all electoral processes. The guarantee to the right of opposition is stipulated. Article 2 of the Protocol

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46ECOWAS was created by the Treaty of Lagos on 28 May 1975 with a mandate to promote cooperation and integration in the economic, social and cultural sectors in order to form a monetary and economic union among the sixteen member states. It also aims to improve the livelihoods of its population and inter-State relationships as well as economic stability. This mandate was revised in 1993 in order to hasten the economic integration process and strengthen political cooperation.

47See Protocol A/Sp1/12/01 on Democracy and Good Governance (done at Dakar 21 December 2001), Supplementary To The Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security (done at Lomé, Togo, 10 December 1999); see also Declaration of the Political Principles of ECOWAS (Declaration A/DCL.1/7/91), made at the 14th Session of the Authority of Heads of State and Government, Abuja, 4-6, 1991.

48Id., art. 1(b).
expressly prohibits any substantial modification to the electoral laws in the last six (6) months before the elections, except with the consent of a majority of political actors while Article 3 makes clear that the bodies responsible for organizing the elections shall be independent or neutral and should enjoy the confidence of all the political actors. The Protocol puts a premium on the active involvement of all stakeholders in the democratic process by requiring that where necessary, appropriate national consultations should be organized to determine the nature and the structure of the various electoral bodies. Civil society organizations are also tasked with the training and of awareness of citizens on the need for peaceful elections. Under Article 5 voters’ lists should be prepared in a transparent and reliable manner, preferably with the collaboration of the political parties and voters may have access to them whenever the need arises. Article 6 provides that the preparation and conduct of elections and the announcement of results should be done in a transparent manner. Once the polls close, adequate arrangements must be made to hear and dispose of all petitions relating to the conduct of elections and announcement of results (article 7). Article 10 forbids the State or any of its agents to refrain from acts of intimidation or harassment against defeated candidates or their supporters.

Although the Protocol has not yet legally entered into force this has not prevented its application of several of its provisions. This was the case in ECOWAS’ election monitoring missions in certain Member States (e.g. Guinea-Bissau, Togo) which adhered to the modalities established by the Protocol. At the same time, most of the national constitutions and legislations already include the core principles set out in the Protocol.49
Furthermore, many of the Principles of ECOWAS’ Supplementary Protocol are found in the African Union’s various official texts such as Decision AHG. DEC 142 (XXV) on the framework for OAU’S reaction to unconstitutional change of government, adopted by Algiers in July 1999. They also echo the provisions contained in the Harare Declaration adopted by the Commonwealth on 20 December 1991 among others.

C. AT THE LEVEL OF THE AFRICAN HUMAN RIGHTS COMMISSION

This section will briefly explore the treatment of participatory rights in the work of the African Commission on Human and Peoples’ Rights, the body charged by the Banjul Charter to monitor the implementation of the rights secured in that instrument.\(^{50}\) To fulfill

\(^{49}\) At least nine of the sixteen Member States must ratify before the Protocol enters into force. As of 1 June 2005, the following Member States have ratified the text: Ghana (10/10/2002); Mali (30/04/2002); Guinea (2004); Sierra Leone (10/08/2004); Burkina Faso (09/09/2004); Senegal (10/09/2004) and Niger (03/2005).

\(^{50}\) The Banjul Charter makes provision for the establishment of an African Commission on Human and Peoples’ Rights, with a mandate to promote human and peoples’ rights and in particular: to collect documents, undertake studies and researches on African problems in the field of human and peoples’ rights; organize seminars, symposia and conferences; disseminate information, encourage national and local institutions concerned with human and peoples’ rights and, should the case arise, give its views or make recommendations to Governments; to formulæ and lay down, principles and rules aimed at solving legal problems relating to human and peoples’ rights and fundamental freedoms upon which African Governments may base their legislation; and cooperate with other African and international institutions concerned with the promotion and protection of human and peoples’ rights. See Banjul Charter, supra note 4, arts. 30 and 45.
this broad mandate, the Commission periodically pronounces on the state of human rights in the continent by way of resolutions, declarations; undertakes investigatory missions to various countries to conduct *in situ* investigations on alleged human rights violations; receives annual reports from State Parties describing the human rights situation in their respective countries and the progress made in protecting citizens from state-sponsored human rights abuses; and also entertains complaints in the form of communications from individuals in Member States alleging violations of the provisions of the Banjul Charter.\(^{51}\)

1. **Commission Jurisprudence on Participatory Rights**

Article 13(1) of the Banjul Charter guarantees: “[e]very citizen…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” while Article 10(1) provides [e]very individual … [with] the right to free association provided that he abides by the law.” These two articles were the subject of a complaint brought before the African Commission on Human and Peoples’ Rights by the ousted Head of State of the Republic of The Gambia. The complainant in *Dawda Jawara v. The Gambia*,\(^ {52}\) alleged *inter alia* that following the military coup of July 1994, that overthrew his government, there was

\(^{51}\) *Id.*, arts. 47-59.

“blatant abuse of power by … the military junta” as evidenced by the abolition of the Bill of Rights … contained in the 1970 Gambia Constitution by Military Decree No. 30/31, ousting the competence of the courts to examine or question the validity of any such Decree and the banning of political parties and of Ministers of the former civilian government from taking part in any political activity.” According to the complainant, these actions taken by the military junta violated Articles 10(1), 11 and 13(1) of the Banjul Charter.

Agreeing with the complainant, the Commission ruled that the banning of political parties was a violation of the complainant’s rights to freedom of association guaranteed under Article 10(1) of the Banjul Charter. On this point, the Commission was simply reaffirming its position in an earlier decision\textsuperscript{53} where it announced a general principle on the right to association, to the effect that “competent authorities should not enact provisions which limit the exercise of this freedom…. [and] should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.”\textsuperscript{54} More importantly, the Commission in its Resolution on the Right to Freedom of Association had also reiterated that: “[t]he regulation of the exercise of the right to freedom of association should be consistent with


\textsuperscript{54} Id., at ¶16.
States’ obligations under the African Charter on Human and Peoples’ Rights.”

This principle, the Commission ruled, does not apply to freedom of association alone but to all other rights and freedoms enshrined in the Charter, including, the right to freedom of assembly. As a result, the Commission found the ban on political parties an encroachment on the right to freedom of assembly guaranteed by Article 11 of the Charter which provides that “[e]very individual shall have the right to assemble freely with others.” The Commission also viewed the imposition of the ban on former Ministers and Members of Parliament as a violation of their rights to participate freely in the government of their country as provided for under Article 13(1) of the Banjul Charter.

The Commission next addressed complainant’s allegation that the actions taken by the military junta had the effect of denying the Gambian peoples’ right to self-determination in violation of Article 20(1) of the Banjul Charter which reads: “[a]ll peoples shall … freely determine their political status… according to the policy they have freely chosen.” In interpreting Article 20(1), the Commission relied on Section 62 of the Gambian Constitution of 1970 which provides for elections based on universal suffrage, and Section 85(4) which made it mandatory for elections to be held within at most five years. It observed that the military coup temporarily halted a long-standing Gambian political tradition of competitive multiparty elections that dates back to 1965 when The Gambia

achieved its independence from Britain. While it was true, the Commission noted, “that the military regime came to power by force, albeit, peacefully. This was not through the will of the people who have known only the ballot box since independence, as a means of choosing their political leaders. The military coup was therefore a grave violation of the right of Gambian people to freely choose their government as provided for in Article 20(1) of the Banjul Charter.

The message from *Dawda Jawara v. The Gambia*, one of the few cases on participatory rights to come before the African Commission, cannot be clearer: the peoples of Africa have a right to constitutional democratic governance and, implicit in that right, the companion right to participate freely in processes of decision-making in their countries. This would automatically include the right to vote and to be elected at regular elections which guarantee the free expression of their will.

2. **Commission Resolutions on Participatory Rights**

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56 A second case, also from The Gambia, alleging violation of Article 13(1) was settled amicably. *See Peoples' Democratic Organisation for Independence and Socialism v. The Gambia, African Commission on Human and Peoples' Rights, Comm. No. 44/90 (1996)* (alleging defects in the registration process which the Government conceded were valid and would be corrected). The third case calling for an interpretation of Articles 13 and 20(1) was *Civil Liberties Organization vs. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 101/93 (1995)* (Commission ruled that the military regime’s annulment of a general election midway through the announcement of results violated Articles 13 and 20(1) of the Banjul Charter).
The Commission first waded into the murky waters of contested elections in a 1994 *Resolution on the Situation of Human Rights in Africa*[^57] where it acknowledged that the human rights situation in many African countries is characterized by violations of economic, social, cultural, civil and political rights and linked the problem of refugees and internally displaced persons, the restrictions imposed by African governments on the right of freedom of expression and the persistent wars in several African countries to the problem of “illegal seizure of the reins of government.” Accordingly, it condemned the “planning or execution of Coups d’États and any attempt to seize power by undemocratic means” while calling upon all African governments to take appropriate steps in ensuring that “elections and electoral processes are transparent and fair.”[^58] In a number of subsequent resolutions, the Commission continued to publicly pronounce on the importance of elections “as the only means by which the people can elect democratically the government of their choice in conformity to the African Charter on Human and Peoples’ Rights.” Commendatory resolutions to some African governments for organizing smooth elections[^59] have also served as occasions for the Commission to


[^58]: *Id.*

[^59]: *Id.*
remind State Parties to the Banjul Charter of their obligation to that instrument to take the necessary steps to “preserve and protect the credibility of the electoral process.”

The Commission has always viewed a credible electoral process as one which ensures that elections are “free and fair.” In a 1994 resolution condemning the violence and loss of lives in South Africa in the wake of that country’s first competitive multiparty elections, the Commission urged all “political parties and others concerned in South Africa to accept the results of the election if it is declared to be substantially free and fair by the Independent Electoral Commission.” A Commission Resolution on Liberia expressed disappointment with the refusal of warring factions to disarm and cease hostilities. Noting that peace can only be restored to a war-torn Liberia, if a civil government installed through “free and fair elections,” the Commission appealed to Liberians to take all necessary steps to pave the way for “a free and fair general

59 See e.g., Resolution on Electoral Processes and Participatory Governance (1996), ACHPR/Res.23 (XIX) 96 (Commending the governments of the Republic of Benin, the Comoros and the Republic of Sierra Leone for having successfully organized free and fair elections).

60 Id.

61 Id., see also Resolution on the Ratification of the African Charter on Democracy, Elections and Governance, ACHPR/Res.115 (XXXXII) 07 (recalling Article 13(1) of the African Charter on Human and Peoples’ Rights which provides that every African shall have the right to participate in the government of her country, either directly or through freely chosen representatives).

62 See Resolution on South Africa (1994), ACHPR/Res.9 (XV) 94.
Finally, the Togo situation following the death of President Gnassingbe Eyadema in February 2005 and the ensuing constitutional crisis also provoked a public reprimand from the Commission. In its Resolution on the Human Rights Situation in Togo, the Commission did not mince words in describing the presidential election to elect Eyadema’s successor as “characterized by irregularities which call[ed] to question the integrity of the electoral process and its results, both of which … created conditions for violation of human rights in the wake of the violence and its suppression by government security forces.”

IV

THE FATE OF PARTICIPATORY RIGHTS IN AFRICA

To be sure, there is more to democracy than the regular holding of competitive elections. But, and this is an important but, most will agree that the distinctive essence of democratic government is popular sovereignty, that is, citizen consent to the exercise of “coercive power within a state.” Since popular consent is best expressed through

63 See Resolution on Liberia, ACHPR/Res.20 (XIX) 96, adopted at the Commission’s 19th Ordinary Session held from 26th March to 4th April 1996 in Ouagadougou, Burkina Faso.

64 See Resolution on The Human Rights Situation in Togo, ACHPR/Res.75 (XXXVII) 05.
competitive elections, not surprisingly scholarly discourse on democratic governance tends to dwell on the electoral process as an objective measure of a country’s progress toward a functioning and effective democratic system. International law has long recognized the right to vote in elections as a central democratic right and the act of voting as the most elemental form of democratic participation. In post-conflict African countries as well as those struggling to make the transition from single-party autocratic rule to multiparty democracies, competitive elections have become the barometer for measuring how close they are to this goal. It would appear that international financial institutions and donor governments have also made the holding of periodic elections one of the conditions for continued financial support and investment in these countries.

Yet, across Africa this internationally-protected right to vote is increasingly coming under siege as elections have been transformed into elaborately staged events designed to hoodwink external donors. Rather than serving as a measure of democratic participation, the act of voting in a disturbingly large number of African countries has been used by cynical political leaders to provide their authoritarian regimes with a veneer of legitimacy. While giving the impression that the vote does count, governments are erecting all sorts of barriers to neutralize the full enjoyment of participatory rights such as gerrymandering of electoral constituencies to dilute the voting power of opposition

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65 See Gregory H. Fox, “The right to political participation in international law” in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth, eds.) 48, 49 (2000)(hereinafter Right to Participation).

66 Id.
voters; systematic purging of voters’ registers of names of eligible voters suspected of having sympathies with the opposition; voter intimidation; hijacking of the organization and conduct of elections by a partisan government ministry, to mention but a few of the more egregious electoral malpractices.

All is not bleak, however. This brief overview of the legal backing for an African right to popular participation in the selection of political leaders supports the proposition that African governments that obtain power in violation of participatory rights (i.e., without holding proper elections) do so illegally and, presumably, those governments would themselves be considered illegal.\(^{67}\) It should be pointed out that the second part of this equation is problematic because neither conventional law nor African state practice has as yet made the leap from the holding of improper elections to the illegality of the governments elected thereof. Rather, the position of international law, from an African perspective, appears to be that an incumbent government that fails to hand over power following its defeat in a free, fair and transparent election would, in effect, be assuming power by unconstitutional means. Indeed, the Lome Declaration of 2000 is clear on this point in providing that the refusal of an incumbent government to relinquish power to the winning party after “free, fair and regular” elections would constitute an unconstitutional seizure of power opening that government up to severe sanctions by the Member States of the African Union ranging from suspension to the application of punitive economic measures. The unconstitutionality of the regime stems from the process by which it conserves its power, i.e., staying on even though it has been defeated in “free, fair and regular”

\(^{67}\) *Id.*, at 52.
transparent/genuine” elections. And this would amount to a denial of the right of its citizens to freely take part in the election of their leaders. The problem with this formula is that it leaves no room for governments that prolong their stay in power by claiming to have won elections that are judged to be neither free nor fair nor transparent. This issue was raised during the drafting of the Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government. The sub-committee report included “election rigging and electoral malpractice, duly established by the OAU or ascertained by an independent and credible body established for that purpose” as one of the categories of an unconstitutional change of government.68 This proposal never found its way into the final document that was adopted by the heads of State. In contrast, the Declaration on Democratic Elections specifically provides that “fraud, rigging or any other illegal practices throughout the whole electoral process” should be discouraged.69

The situation contemplated in the Lome Declaration is rare in the history of African elections. The more regular situation is one where an incumbent government refuses to

68 See OAU, Report of the Sub-Committee of the Central Organ on Unconstitutional Changes in Africa, ¶¶25(v)-(iv), (2000). In addition to the four categories of unconstitutional changes that were eventually adopted by the AU Assembly, the Sub-Committee’s recommendation also included the following categories of unconstitutional changes: the refusal by a government to call for general elections at the end of its term of office; any manipulation of the Constitution aimed at preventing a democratic change of government; systematic and persistent violation of the common values and principles of democratic governance; and any form of unconstitutional change as may be defined by the OAU policy organs. Id., ¶25(v)-(iv).

69 See Declaration on Democratic Elections, supra note 29, Principle III(f).
cede power after claiming victory in an election that fails to meet the minimum international standards on free, fair and transparent elections or where there is credible evidence of “election rigging and electoral malpractice,” to borrow language from the draft declaration on unconstitutional changes of government. The failure to incorporate this category of unconstitutional change in the final version of the declaration and the silence of the Lome Declaration as well as other similar documents on this question of “election rigging and electoral malpractice” presents a dilemma to African States. The dilemma is one of reconciling their well-stated preference for constitutional democratic governance, on the one hand, and the practice of ignoring governments that cling to power through flawed elections, in clear violation of their constitutions and numerous pan-African and sub-regional instruments. But the failure to expressly rule out sanctions against incumbent governments that choose to hang on to power, by relying on results obtained from rigged elections, may give rise to a possible non sequitur which is posed here in the form of a question: can the process for electing a government be legally separated from the government actually elected?⁷⁰ The straightforward answer is “No” because any Government that obtains power in violation of participatory rights, that is, without holding proper elections, does so illegally.⁷¹ Indeed, the African position on unconstitutional changes of government is in line with this reasoning since it ties the means for regime change with the ultimate outcome. Thus any regime that replaces a democratically elected government through a military coup d’etat (or any of the other

⁷⁰ See Right to Participation, supra note 65.

⁷¹ Id.
proscribed unconstitutional means) is *ab initio* illegal and unconstitutional. This formula does not contemplate a *constitutional* government rising from the ashes of a military takeover! In the contemplation of African States only a properly conducted election that satisfies international standards of freeness, fairness and transparency can transform a onetime military regime into an acceptable constitutional government worthy of membership in the AU! Anything less would be a violation the participatory rights of their citizens.

It is evident from various statements of principles, declarations, resolutions and quasi-judicial decisions discussed in the preceding sections that African leaders have reflected long and hard on issues relating to the right of their citizens to constitutional democratic governance. The prohibition of unconstitutional changes in governments found in the AU Constitutive Act as well as in numerous other Continental and sub-regional documents suggest strong support for a process of regime change through competitive multiparty elections; a process by which ordinary citizens are given the opportunity to freely vote for leaders of their choice. These statements of principles, declarations and resolutions have been stated with such consistency and frequency to suggest a clear intention to be bound by them.\textsuperscript{72} This sense of *opinio juris* is clearly expressed in the AU Declaration on Democracy, Political, Economic and Corporate Governance and has been incorporated into the fundamental laws of some African States.\textsuperscript{73} For example, the Nigerian Constitution addresses the problem of unconstitutional change of government in the

\textsuperscript{72} See e.g., The Texaco/Libya Arbitration, Award of 19 January 1977, 17 I.L.M. 1 (1978)(Some United Nations General Assembly resolutions create binding customary norms).

\textsuperscript{73} The same process of incorporating treaty law provisions into national constitutions has been going on with regard to the ECOWAS Protocol on Democracy and Good Governance, see note 47 supra and accompanying discussion.
following language: “[t]he Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this constitution.”  

74 This provision is in accord with the language and spirit of the Lome Declaration. In a similar vein, Article 150 of the Constitution of the Republic of Togo stipulates that in the event of a *coup d’État* or any use of force to overthrow the constitutionally elected government, all members of government or the National Assembly have the right and the duty to have recourse to all means to re-establish constitutional legitimacy. The article further provides that in such circumstances, these officials as well as the Togolese people have a sacred duty to disobey and organize to prevent the establishment of an illegitimate authority.  

75 **CONCLUSION**

The response of the African Union and other sub-regional institutions to “unconstitutional changes” in the governments of Member States demonstrates strong support for an African regional custom which views constitutional legitimacy as an emanation of popular consent. In country after country where regime change has occurred through unconstitutional means, the position of the African States, speaking individually and as a corporate body, in demanding an immediate return to constitutional order through free, fair and transparent elections, has been consistent and unwavering:


75 *See* Constitution of the Republic of Togo, art. 150.
military takeovers in the Central African Republic (March 2003), Mauritania (August 2005), Sao Tome and Principe (July 2003), and Togo (February 2005) were roundly condemned by peer States. These condemnations were followed by suspension or threats of suspension from all African Union or ECOWAS activities, as the case maybe. As a condition for restoring their full membership rights and the lifting of any trade sanctions imposed, the AU and/or ECOWAS demanded the restoration of constitutional order and the immediate holding of free, fair and transparent elections. The fact that these countries complied with the demands made on them by their peers is tacit admission of the binding nature of the numerous declarations and decisions prohibiting unconstitutional changes in government and in favor of participatory rights. It is submitted that these documents have received hard-law status in the Constitutive Act of the AU whose Article 23 specifically provides that “any Member State that fails to comply with the decisions and policies of the Union may be subjected to… sanctions, such as the denial of transport and communications links with other Member States, and other measures of a political and economic nature to be determined by the Assembly.”76 The obligation of Member States to organize and conduct free, fair and transparent elections is implicit in the unconditional recognition of the right to constitutional democratic governance which remains one of the fundamental objectives and common values and principles consistently mentioned in these AU decisions and policies.

76 See Constitutive Act, supra note 31, art. 23.