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Power-sharing, post-electoral contestations and the dismemberment of the right to democracy in Africa

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While Africa has made recent significant democratic gains, the problem of rigged elections tends to persist. Elections in Africa mostly tend to lack transparency and are often skewed in favour of the incumbent. Recent events on the continent have shown the tendency of incumbents to manipulate electoral processes so as to remain in power. This often leads to violent backlash from those who believe that they have been robbed of electoral victory. In some instances, the violence has spiralled out of control, requiring regional intervention. The African Union (AU) tends to resolve these disputes by resorting to power-sharing. However, power-sharing is inconsistent with the right to democracy which has emerged within the normative framework of the AU. This article argues that post-electoral power-sharing is at odds with the right to democracy. Consequently, in the resolution of post-electoral disputes, significant consideration should be given to the right to democracy and the power-sharing option should receive a minimalist consideration. More importantly, the AU should support institutional reforms and strive for more credible and transparent elections. Power-sharing should be a solution of last resort and should be crafted in such a way that it does not form an incentive for rogue leaders who, having lost elections, might tend to exploit the situation so as to force a power-sharing settlement.

Keywords: power-sharing; right to democracy; African Union; election; Africa; Kenya; Zimbabwe; unconstitutional changes of government

Introduction

Africa has had its fair share of conflicts. These conflicts range from wars of liberation, internal civil conflicts and, more recently, the degeneration of electoral contests into spiralling violence. Having gone through a long phase of authoritarian one-party and military rule, several countries on the continent embraced political pluralism in the 1990s. While this era rekindled the hope of democratic rule, political competition gave birth to new security threats. For instance, the leadership in some countries tends to resist electoral defeat. Allegations of widespread rigging of elections are a regular feature of African elections. In this regard the tendency to manipulate electoral processes in favour of incumbents, even where electoral defeat appeared certain, led to widespread violence and colossal loss of life in Kenya in 2007, Zimbabwe in 2008 and Côte d’Ivoire in 2010. The imbroglio in Kenya and Zimbabwe were settled by power-sharing governments which took on board the main protagonists to the dispute. Thus, coalitions were formed which included the incumbent regime and main opposition parties. This discussion focuses mainly on the Kenyan and Zimbabwean scenarios as these are the only two contemporary examples of the use of power-sharing to stem post-electoral violence in Africa. In relation to Côte

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d’Ivoire, a power-sharing formula was suggested by some African Union (AU) member states. This never materialised as the post-electoral standoff was brought to an end by French military intervention.

This article argues for a democratic-centred approach to the settlement of post-electoral violence. While power-sharing governments might be a politically expedient way of settling civil conflicts, different connotations exist in relation to post-electoral disputes, the settlement of which should bear relevance to the democratic rights of the people. The article, therefore, seeks to interrogate power-sharing as a response to post-electoral violence from a democratic perspective. Proceeding on the basis that in terms of the social contract the authority to govern emanates from the people; the people retain a right to participate in the selection process of their leaders. It must be noted that the right to democracy is firmly entrenched in the African regional legal doctrine. Therefore, it is impermissible that an incumbent should jettison a functional democratic system in the face of imminent electoral defeat and override the right of the people to elect their leaders. The people retain this right in uninterrupted perpetuity and any government put in place without popular participation loses its democratic credentials. Under the circumstances, power-sharing bypasses the requirement of the popular consent of the people. In this regard, power-sharing should attract minimalist consideration in the settlement of post-electoral disputes.

The second part of this article provides a foundation to the discussion by conceptualising power-sharing. The third part describes the institutionalisation of the right to democracy in Africa. The right has emerged as a clear and distinct norm on the continent. The right largely depends on representative governance and the participation of the public in the selection of their leaders. In the fourth part, the inconsistencies between power-sharing and the right to democracy are demonstrated by highlighting the underlying values of the right and the ramifications of the former on the constitutional order. The discussion notes that the application of power-sharing to post-electoral disputes is a misapplied solution. In so doing, the marked distinction between states that are wrecked by civil conflict and those that suffer from post-electoral violence is discussed. Due to the differing conditions in such states, the considerations that may permit power-sharing in the former do not apply to the latter. The fifth part examines the dilemma faced by the AU in brokering post-electoral conflict. The desire for peace appears to dictate the preference for power-sharing as opposed to the democratic will of the people. A continuation of this trend might well encourage incumbents to hijack electoral processes with the knowledge that any ensuing dispute will at worst result in a power-sharing deal. This presents a serious setback for democracy and peace. Therefore, the AU should strive towards credible elections and respect for the right to democracy. The final part proposes that the AU encourages institutional building and a strong monitoring system of African institutions. The resolution of post-electoral violence should be given human rights consideration. In this regard, power-sharing should not be employed as the immediate solution and its institutionalisation should be a temporary measure for restoring the democratic mandate.

**Conceptualising power-sharing**

Arend Lijphart’s thesis of power-sharing is centred on the notion of consociationalism. This involves various forms of institutional arrangements agreed upon by a coalition of representatives of major groups in fragmented societies. The idea of consociationalism relates to cooperation among elites when the security of a state is threatened. Thus, in states that are deeply divided along ethnic, religious and linguistic lines – with no one group being
able to form a majority – stability is maintained by consultation among the major groups. In this regard, power-sharing may be a long-term strategy, geared towards maintaining stability in ethnically fragmented societies. While Lijphart identifies institutions that may manage conflict in diversified societies, he gives no attention to societies emerging from civil strife into transition. Various scholars have conceptualised power-sharing within the context of post-conflict environments. Power-sharing may serve a short-term objective of bringing an end to hostilities and civil conflict. In times of national crisis such as armed conflict, political leaders of varying persuasions may embrace the necessity to form coalition governments. In such extraordinary situations, the unity of the state takes precedence over the principle of majority rule. Power-sharing agreements have become an integral part of peace agreements in Africa’s numerous conflicts. These agreements usually include the allocation of political power and sometimes economic and military power to top members of warring factions, including former rebel leaders. Resultantly, all groups have access to political power and other resources. Power-sharing seeks to create assurances regarding the safety of former combatants and to ensure that no group will be able to secure victories that they failed to secure on the battlefield. A balance is struck by securing guarantees that various groups are incorporated into the structure of governance and ensuring that decisions are made by consensus. The institutions employed in securing the required balance include a grand coalition, the mutual veto, a proportional electoral system, proportional distribution of administrative appointments and sometimes territorial or corporate autonomy.

Power-sharing has been open to generalised criticisms. It is said to be elitist, incorporating governments and rebel groups, while excluding the general wider populace. Their formation usually takes the form of a ‘privatised’ process that is devoid of the democratic process. Also, power-sharing rarely stands the test of time and often involves bickering among the parties, thus resulting in the replication of violence. The tendency exists for representatives of various groups to act only in their own interests with no genuine interest in the peace process. Thus, rather than serving as a short-term remedy to conflict, power-sharing might result in a prolonged and protracted dispute should the disputants have no incentives to finalise the crisis. There are very few successes of power-sharing in Africa that warrant its advocacy. Rather, there are several examples of the failure of power-sharing, thus making this formula, which is apparently attractive in theory, unattractive in reality. Africa’s experience has seen only a few successes, such as Burundi in 2002, Liberia in 2003 and Sudan in 2005. In Sierra Leone, peace was attained by the intervention of British troops and not as a result of the peace process.

The right to democracy

A definitional consensus on democracy evaded the international community for a long time mainly due to the polarised East–West philosophies of the cold war. Post-cold war developments witnessed the gradual incorporation of democracy into international law through processes of international consensus or, at least, widespread agreement. This norm finds expression in various regional and global instruments and has gained ascension in international practice by policies such as promoting democracy abroad, making democracy a qualification for membership of certain regional organisations or defending democracy through collective security mechanisms. The AU and other sub-regional African groupings have also engaged in normative embracement of democracy. Regional practice in Africa has, to some extent, embraced democracy by rejecting coups d’état and suspending countries led by regimes that came to power through coups from regional or sub-regional bodies.
Various attempts have been made to define democracy. Crawford defines democracy as a form of government in which political power is based on the will of the people and all citizens have the opportunity to participate equally in the political framework of their societies. Udombana attempts a functional definition. Accordingly, he posits that democracy is an ideology demanding that those entrusted with authority use it for the common good of the public. According to the United Nations Vienna Declaration and Programme of Action, ‘Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.’ It is hard to attach a single meaning to democracy due to the diversity of cultures and political systems. However, a regime may be termed democratic if it embodies transparent state institutions, electoral systems, political equality and governance based on the consent of the citizens.

**The institutionalisation of the right to democracy in African regional law**

**The African Charter on Human and Peoples’ Rights**

The right to democracy has attained formal legal status in the African as well as the international legal order. It is clear from the African Charter on Human and Peoples’ Rights that the right to self-determination which formed the basis of Africa’s independence movement, is part of the historic voyage of the right to democracy. The charter declares the rights of all peoples to existence. It provides for the right of colonised and oppressed peoples to free themselves from the bonds of domination by resorting to any means recognised by the international community. The charter articulates the right to self-determination in the context of the democratic imperative. Article 20, which relates to self-determination, provides that the people shall determine their political status and economic and social development according to the policy they have freely chosen. Thus, self-determination goes beyond the boundaries of liberation from colonial domination and guarantees the will of the peoples to determine their political destiny, including their system of governance and the selection of who shall govern them. As Waldehaimanot notes, ‘the right to self-determination has evolved into a more general notion of internationally validated political consultation, one that is beginning to be applied even to postcolonial states in the form of governance based on the wishes of the people’. The African Commission on Human and Peoples’ Rights, whose functions include interpretation of the charter, has interpreted the right to self-determination in light of the right to democracy. In *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, referring to article 20, the commission noted that the right of the people to determine their political status can be interpreted as the right to be able to freely choose those who will govern them. The commission confirmed that article 20 is the counterpart of article 13. Article 13 of the charter, which creates an express right of citizens to freely participate in the government of their country by freely choosing their representatives in accordance with the law, is representative of the right to democracy. Its tenet is to the effect that citizens have a right to elect their leaders in accordance with the constitutional and legal provisions of the state. The charter is aligned to general international law. Article 13 of the charter is in line with article 21 of the Universal Declaration of Human Rights (UDHR) and article 25(a) of the International Covenant on Civil and Political Rights (ICCPR), which provide for the right of all persons to participate in government as well as in periodic and genuine elections. These provisions establish the procedural mechanisms for the right to democracy to flourish.
The Constitutive Act of the African Union

The birth of the AU heralded an era of commitment to democratic values and free and fair elections, at least in principle. The Constitutive Act of the African Union, the founding document of the AU, marks a decisive effort in steering the continent away from its past of violence, instability and massive violation of human rights. Thus, its founding principles include the right of the AU to intervene in a member state in respect of grave crimes, such as war crimes, genocide and crimes against humanity; the right of member states to request intervention from the AU in order to restore peace and security; respect for democratic principles, human rights, the rule of law and good governance; and respect for the sanctity of life and condemnation of political assassination, terrorism and subversive activities.

Clearly, therefore, the commitment to democracy lies at the heart of AU doctrine. This forms part of the AU’s wider commitment to human rights values. The Constitutive Act has as its objectives the promotion of, ‘democratic principles and institutions, popular participation and good governance’. It significantly empowers the AU to take action against unconstitutional changes of government. It provides not only for the condemnation and rejection of unconstitutional changes of governments, but also bars governments ascending to power by unconstitutional means from participating in the activities of the AU. Africa’s commitment to democratic rights includes a rejection of unconstitutional changes of government which has emerged as a legal norm of the AU. This norm extends to the refusal of incumbent governments to relinquish power after regular, free and fair elections.

African Charter on Democracy, Elections and Governance

The African Charter on Democracy, Elections and Governance was adopted in 2007 and came into force on 15 February 2012, after the deposit of the 15th instrument of ratification by Cameroun. The charter seeks to give expression to the principle of democratic commitment contained in the Constitutive Act. To this extent, the charter recognises democracy as an inalienable right. It further recognises popular participation through universal suffrage as an inalienable right of the people. It calls on state parties to commit themselves to promote democracy, the rule of law and human rights. The supremacy of constitutions and the political organisations of the states are also guaranteed. To this extent, constitutional amendment should take place only by national consensus and through referenda. This derives from the fact that democratic societies function on the principle of equality of persons. Further, the charter provides for state parties to take all appropriate measures to ensure the constitutional transfer of power. It also makes a commitment to regular, transparent, free and fair elections.

As has been said before, AU doctrine rejects unconstitutional changes of governments. The AU has applied this principle stringently in relation to the overthrow of governments through coups d’etat. Consequently, it has been argued that the rejection of unconstitutional changes of government has attained the status of African customary international law. Article 23 of the African Charter on Democracy, Elections and Governance gives content to the norm. Accordingly, unconstitutional changes of government include, any putsch or coup d’état against a democratically elected government; any intervention by mercenaries to replace a democratically elected government; any replacement of a democratically elected government by armed dissidents or rebels; any refusal by an incumbent government to relinquish power to the winning candidate after free and fair elections; any amendment of the constitution that is incompatible with democratic principles relating to the change of government.
The charter provides a mechanism for the enforcement of the prohibition of unconstitutional changes of governments. In terms of article 25, the Peace and Security Council (PSC)\(^47\) is empowered to suspend the offending state party after diplomatic initiatives have failed. However, the AU should maintain diplomatic contacts and take initiatives to restore democracy. These diplomatic initiatives cannot be read to include power-sharing as the charter clearly provides that change of government should take place only by the regular electoral process. The charter further recognises the principle of constitutional supremacy and requires national consensus and referenda as prerequisites for constitutional amendment. Power-sharing on the other hand usually requires fundamental changes to constitutions. These changes are usually rushed through parliament without the consent of the people. Power-sharing does not reflect a constitutional transfer of power, a fundamental principle of the charter. In fact, the charter requires the AU to impose sanctions on those who have instigated or supported unconstitutional changes of government.\(^48\) Thus, even if it can be argued that diplomatic means required to restore democracy includes power-sharing, it is clear that the charter regards those responsible for unconstitutional changes of government as usurpers of political power.\(^49\) In my view, the only purpose for maintaining diplomatic links with such regimes is to engage them as the de facto rulers to facilitate the restoration of constitutional order.

Article 23(4) of the charter relates to the refusal of incumbents to stand down after free and fair elections. However, the question that arises is what course of action should apply where the situation is such that the elections cannot be regarded as free and fair, often due to manipulation and rigging by government. In reality, it is hard for incumbents to stay on after results have been announced declaring a new winner. More often than not, they manipulate the process, use intimidation against opposition supporters and rig the elections to get re-elected even when the reality on the ground points in another direction. Such elections often lack transparency and are often chaotic and badly managed or inconclusive, as was the case with the 2008 Zimbabwean presidential elections. This tends to create violent reactions from the public. The retention of power by such means should attract action under article 23(4) of the charter. Accordingly, Kale argues that article 23 includes actions by a sitting and democratically elected government that limit the possibility of alternating power.\(^50\) Article 23(4) can only be relevant to the present realities and challenges if it applies to incumbents who manipulate elections to retain power. This will effectively put renegade leaders on notice that the wilful manipulation of elections will attract sanctions by the AU as required by article 23 of the charter.

**The content of the right to democracy**

The content of the right to democracy for the purposes of this article is viewed from a general perspective as well as a more electoral-based perspective. In general terms, there are two fundamental values underlying the right to democracy. The first is the institutionalisation of representative government by collective participation of the public in governance. The second is holding governments accountable by empowering the public to limit governmental powers.\(^51\) These values underlie the notion that free and rational persons understand that the terms of their association with each other are governed by an initial position of equality.\(^52\) These elements are realised through the electoral process as well as other institutions such as an independent judiciary and civil service, the ombudsman, respect for human rights and the rule of law.\(^53\) The creation of space for the social action and the pursuit of individual endeavours and the possibility for the
peaceful interaction of citizens even in instances of conflicting interests is the essence of peaceful societies. Further, individual and collective action should find space in society without drawing unnecessary sanctions from those who govern. Modern democracies encompass the acceptance of diverse interests within clearly defined frameworks. These legal frameworks should be founded on the common principles that bind the nation together rather than serving the interests of a few. The protection of individual and collective action lies in the protection of human rights. Thus the general content of the right to democracy will normally include the general respect and protection of human rights. Specific rights and principles which relate to the sustainability of a democratic state include freedom of expression including a free and independent media; freedom of association; freedom from arbitrary arrest and detention; equality before the law; the guarantee of fair trials; supremacy of the constitution and constitutional civilian control over the armed and security forces.

There are also rights and principles that particularly implicate a democratic electoral process. Perhaps it is under such conditions that one can determine whether an election is free and fair. More importantly, these principles potentially form the yardstick from which the credibility of elections can be gauged. For example, during the 2011 presidential elections in the Gambia, the Economic Community of West African States (ECOWAS) Commission decided not to send an observer mission to observe the elections.\(^5^4\) This decision was made on the information received from its fact-finding mission and Early Warning System that the conditions in the country did not meet the minimum standards required by the ECOWAS Protocol on Democracy and Good Governance, which provides for the conduct of elections. Among factors cited by the commission were intimidation, control of the electronic media by the party in power, lack of neutrality of state institutions and parastatals and an electorate and opposition cowed by intimidation and repression. This demonstrates that in gauging the content of the right to democracy and democratic electoral processes, one only need look at the various regional norms. Thus the content of democratic elections should include participation of the public through universal suffrage.\(^5^5\) Strengthened, independent and impartial electoral bodies are vital.\(^5^6\) These bodies should have the confidence of all the political actors and, where necessary, consultations should be held to determine their nature and structure.\(^5^7\) Impartial courts for the timely redress of election disputes create fairness and public confidence thus reducing the tendency towards violence.\(^5^8\) Fair and equitable access by contesting parties to state-controlled media provides for equality.\(^5^9\) All elections should be organised on dates or at periods fixed by the constitution or electoral laws.\(^6^0\) Voters’ lists should be prepared in a transparent manner with the collaboration of all political parties and independent observers. Political parties and voters should have access to the list whenever the need arises.\(^6^1\) In addition, states should develop reliable registries of births and deaths.\(^6^2\) The preparation, conduct and announcement of results should be done in a transparent manner.\(^6^3\) Counting should be done at polling booths in the presence of observers of all political parties and independent observers.\(^6^4\) Results should be immediately announced and prominently displayed at polling stations and also made available to all state and private media outlets. All holders of power, including security and armed forces, should refrain from harassing and intimidating members of the public. Independent observers, including international observers, should be permitted to monitor elections.\(^6^5\) Candidates who lose in free and fair elections should concede defeat.\(^6^6\) The responsibility lies with the state to ensure compliance with these standards. More importantly, workings of state institutions and the electoral process should be transparent.
Dismembering the right to democracy

Post-elections violence and the mistranslation of the power-sharing solution

Regarding the content of democracy, it becomes clear that the mandate to govern emanates from the people and is usually expressed through the electoral process. However, it is often tenuous if not impossible to secure such a mandate in civil war situations. In this regard, it is significant to distinguish situations created by civil conflict from those created by electoral violence. They differ in substance, the situations they create and how they are inflicted. Thus, the utility of power-sharing in civil war situations is dictated by a number of underlying factors. These include the absence of structures and conditions for conducting democratic elections, widespread displacement of the population, the prevailing insecurity and heavy militarisation of the state, a tenuous process of demobilisation, a weakened or non-functional central government, the absence of a possible alternative government that has secured the democratic mandate, and warring parties being deadlocked in combat with no side being able to secure a quick and decisive victory. Under such circumstances, not only would power-sharing be required to restore normalcy, it is expected to inaugurate the democratic process. Thus, compromise governments become the utilitarian way of securing a settled peace agreement. However, post-military coup, political settlements should avoid power-sharing as much as possible and resort to a restoration of constitutional order. This may take the form of the restoration of the democratically elected government as occurred in Sierra Leone, or the installation of a transitional government headed by the speaker of parliament as a compromise candidate, as was the case in Mali, following military coups in those countries in 1997 and 2012 respectively.67

In the case of post-electoral disputes, resort to power-sharing replaces the legitimate democratic process. The power-sharing option is rushed into even though the prevailing conditions differ from post-civil conflict situations. In post-electoral contestations, the prevailing conditions underlying the conflict differ from civil war situations. Questions relating to the control of territory, economic resources and militarisation do not operate on the same dimensions as in post-civil war situations. Post-electoral uprisings are spontaneous and mainly involve rioting civilians and not fully armed combatants. The violence is more or less exacerbated by the high-handed response of the security forces and supporters of the ruling parties, as was the case in Kenya and Zimbabwe. While the chaos in Kenya and Zimbabwe led to a temporary break down of society in those countries, they were self-inflicted on the democratic process by the rigging of elections and lack of transparency, as well as the high-handed response of the security forces in response to popular agitation. While power-sharing aids countries to move out of the immediate violence and political malaise in the short term, it remains doubtful whether it provides a viable and democratic solution to a rigged election.68 Further, the process of constituting the power-sharing governments that followed did not include consultation with the people and actually overrode the electoral process. The authority to govern did not emanate from the people, a violation of the democratic imperative emanating from the electoral process.

The power-sharing and right to democracy disjoint

The disjoint between post-electoral power-sharing and the right to democracy may be viewed from three principal perspectives. First, post-electoral power-sharing overrides the process of collective participation. Second, it removes accountable governance from the political process, and third, it unnecessarily dismantles the constitutional order of
states in favour of a small political elite some of whom might be complicit to the violence that followed the elections.

The dismemberment of collective participation

The content of the right to democracy highlights a conceptual disjoint with power-sharing. This disjoint is best highlighted by comparing the underlying values of the content of democracy with power-sharing. The first underlying value discussed earlier is collective participation. The electoral process enables the public to remain relevant in governance and somewhat active in the political process. There is a correlation between the legitimacy of governments and the exercise of the democratic rights of the people they govern. Legitimacy is founded on representative governance and political accountability. In 1992, Franck wrote of the gradual transformation of the democratic entitlement from moral prescription to international legal obligation. In so doing, he linked the legitimacy of governments to the consent of the governed. According to Franck, the democratic entitlement imposed new and important obligations on states. This requires the organisation of government and attainment of power on the basis of representative democracy. Such consent is traditionally obtained by credible electoral processes. The collective participation of citizens and their determination of elected officials are crucial in modern democracies. Consequently, the right of the citizen to participate in governance and elect their leader has received firm acceptance in international law.

Waldron also lays claim to political participation as a right. According to him, the right to political participation is exercised collectively by the citizenry, as opposed to the solitary individual rights of persons. Political rights include the right to vote, self-determination and other rights related to the regulation and determination of the body politic. The recognition of political rights establishes the basis upon which ‘large numbers of right-bearers act together to control and govern their common affairs’. This arises from the fact that democracy derives its efficacy from the ability of the citizens to be active in the political process. Modern states strive on the capacity of the people to express themselves, engage with the leadership, influence national policy and demand accountability. The right to participation can only exist if one’s vote is given effect in a system of collective decision and bears weight on the determination of policy, leadership and authority. When voting is exercised in concert with others, it essentially affects or alters the allocation of power. Political participation as a right means that each individual claims a right to take part in the governance of the society in concert with others. In this regard, the tenure of leaders is determined by the electoral process. Their tenure in office is subject to termination and determined by the decision-making of voters, requiring them to vacate office when the electorate delivers an adverse verdict. Rendering the leadership susceptible to the adverse vote is the contour that delineates a democratic society from an autocratic regime. The negotiation of political power essentially strips the public of their collective right to determine governance. In several modern states, the general populace are far removed from policy making, and voting is the closest the common man may come to influencing the affairs of state. In this regard, if elections are the method chosen by a society and the citizens to govern itself, then by discarding the electoral results and renegotiating power, the people are excluded from exercising their democratic entitlement through their right to participate in the political process.

The dismemberment of political accountability

The second underlying value is accountability. The electoral process represents a period of accountability by the rulers to the governed. Thus, there exists a demand for a functional...
reciprocity between those who govern and those that are governed, to the extent that decisions made by the latter at elections are totally sacrosanct. The vote and universal suffrage establishes equality among citizens and between the citizens and those who govern them. Therefore, while the electoral process is expensive and time-consuming for the state, it is also indispensable. Due to the rise in population, it is not possible for every individual to participate directly in present day democracies. Thus, by the election of political representatives the public appoints agents of governance. In such a setting, the former remains accountable to the latter. Therefore, periodic stocktaking is necessary. The participation of the public in the political process by voting enables them to hold the rulers to account on several factors which concern the political, social and economic direction of the society in which they live. Thus voting has evolved into a civic duty. Elections are the main process of holding governments to account for their stewardship. The process enables the public to dismiss the government or renew their mandate. Any system that disvalues the verdict of the elections, removes the element of accountability. The disfranchisement of the political judgment of the electorate is a subversion of democracy. Voting and not negotiated governments provides the solution to the disagreement as to who should lead. Power-sharing takes away the mandate of the people and merely allows the elite to bypass the popular vote and escape accountability for their performance. It permits the incumbent to escape accountability and face the consequences of poor performance. The incorporation of opposition leaders into a government of national unity while the incumbent who might well have lost at the polls remains in power, retaining effective control of most of the state apparatus, effectively strips the political system of ultimate public accountability. In the Kenyan and Zimbabwean coalition apparatus, considerable power remains with the respective incumbent presidents who retain the power to appoint members of the civil service, the diplomatic service, the judiciary and the military. The incumbents in these countries merely took opposition figures under their wings in government in total disregard of the will of the people and their right to political participation. While it may be argued that the protagonists in the Kenyan and Zimbabwean power-sharing governments are representatives of their supporters, it cannot be said that they were representing their will by entering into power-sharing agreements.

The dismemberment of the constitutional order

Power-sharing results in the dismantling of the constitutional order by the minority without the consent of the majority. The power-sharing exercises in Kenya and Zimbabwe required swift constitutional changes to accommodate the parties competing for power. These changes, which required a fundamental alteration of the system of governance, were done within the ‘privatised’ corridors of a minority elite, thus shunning the participatory rights of the majority. International law, state practice and regional practice, require that changes of government occur in compliance with the constitution and laws of states. Thus, democracy is founded on continued compliance with the constitutional order of states. Franck, in observing the emergence of a democratic right, spoke of the gradual transformation of what he termed a democratic entitlement from moral prescription to international legal obligation. Udombana asserts that if a right to democracy exists, then any government that denies its citizens the right to choose its leaders through the electoral process violates a fundamental right. Time and again, the international community has reiterated that democracy is only validated by the consent of the people. In this regard, the international community has rejected coups d’état. This trend gained momentum during the 1990s with the break-up of the Soviet Union. Thus, the communist coup
against Mikhail Gorbachev and the military overthrow of Jean-Bertrand Aristide of Haiti were met with resistance from the United Nations (UN) and the Organisation of American States (OAS); the emerging trend being that democracy is a prerequisite for legitimacy.\(^8^0\) The AU has also on several occasions resorted to imposing sanctions on regimes that attained power by unconstitutional means. Consequently, the Central African Republic was suspended from the AU from March 2003 to June 2005, following a \textit{coup d’

d’état}\ in that country. Togo was also suspended from the activities of the AU following the death of its president Gnassingbe Eyadema in February 2005. This was in reaction to the action of the military which amended the constitution and took other measures to ensure that the deceased leader’s son succeeded him. The AU described this as a \textit{coup d’

d’état}. Togo remained under sanctions until May 2005, when the AU was satisfied that the country had returned to constitutional legality.\(^8^1\)

International trends clearly embody a disapproval of the accession to power by means that fall outside the ambit of state constitutions. The political incumbent in Kenya and Zimbabwe made it impossible for power to change hands in those countries through the electoral process. Clearly, this amounts to a \textit{coup d’

d’état}. What followed were unsanctioned constitutional changes, clearly violating the democratic rights of the peoples of those countries. Unfortunately, the opposition and the international community became accomplices in these coups by their participation and sanctioning of such regimes. Clearly, countenancing power-sharing governments is comparable to paying ransom money to hostage takers and pirates who have threatened to shoot their hostages.\(^8^2\) This presents a dangerous solution to the democratic question and can only create further conflicts on the continent. This results in a betrayal and dismemberment of the democratic process by the elite. While the AU has made significant commitments to democracy, its preference for power-sharing in respect of post-electoral conflicts severely dismembers the right to democracy.

The dilemma of the AU

The peace compromise

The use of power-sharing in the Kenyan and Zimbabwean electoral disputes creates a number of questions which certainly present a dilemma for the AU and peace brokers of electoral disputes on the continent. This dilemma is centred on the choices of recognising the democratic right of the people as asserted at the elections, as against a settled compromise which involves getting disputing sides on board the leadership bandwagon in order to achieve peace and stability. The AU has relied on the utility of power-sharing which in actual fact brings an end to bloodshed, thereby creating a semblance of peace and stability, as was seen in Kenya and Zimbabwe. Admittedly, power-sharing potentially provides a social necessity in bringing cessation of hostilities. The desire to end hostilities has clearly influenced the AU’s preference for power-sharing. In the heat of hostilities and bloodshed, the tendency to negotiate a compromise always exists. However, the greater threat of breeding recalcitrant leaders creates a further breeding ground for conflict. Further, the fact that the centre managed to hold in Kenya and Zimbabwe should not present platforms for the glorification of power-sharing or a model for post-electoral dispute settlement in Africa. It is hard to justify power-sharing as a social utility over democratic rights. After all, Kenya and Zimbabwe are no more democratic now than they were before the violence. In Zimbabwe, though the violence has subsided, the harassment of the opposition and routine human rights violations continue. Clearly, the events that precipitate electoral violence result from poor governance, lack of respect for the rule of law and
human rights. These conditions still prevail in Kenya, Zimbabwe and several parts of the continent.

**The utility of power-sharing versus its ‘negative incentive’ for recalcitrance**

Power-sharing potentially creates a ‘negative incentive’ for renegade incumbents. In other words, it is potentially a dangerous tool, and may well entice renegade leaders to hang on to power at all costs. This pattern of political behaviour may well recur, considering the continuing personalisation of states and weak political institutions. Recent events in Côte d’Ivoire present a classic example where the incumbent Laurent Gbagbo refused to stand down after the 2011 elections though the electoral commission had declared the opposition candidate Alhassane Ouatarra winner of the presidential elections. Consequently, the Constitutional Court, which was headed by a Gbagbo supporter, refused to confirm the results and Gbagbo refused to stand down. While ECOWAS demanded that Gbagbo stand down and announced its willingness to use military intervention to remove him from power, its position was scuttled by various countries in the AU, which called for a negotiated power-sharing agreement. The AU’s position in Kenya, Zimbabwe and Côte d’Ivoire only serves to create an incentive for African renegade leaders to reject unfavourable electoral results, knowing that they may possibly receive the lion’s share at a negotiated settlement.

While it may be argued that empirical evidence is lacking that African leaderships may tend to dodge the democratic mandate by creating situations which ultimately lead to power-sharing, the history of the continent shows that the tendency to stay in power at all costs is real. Reliance has been placed on other mechanisms in the past to perpetuate political longevity. These mechanisms include one-party states, life presidencies and the use of violence and intimidation. Surely, the AU should not wait until the tendency to use power-sharing as a means of political survival matures into a clear pattern. Perhaps, the AU should lay emphasis on giving effect to the content of the right to democracy.

**Towards more credible elections**

The AU’s dilemma is not without solutions. These solutions lie with a bold and drastic approach to the resolution of post-electoral violence. More importantly, significant reforms and monitoring should be put in place to forestall electoral disputes. Post-electoral violence is the product of poor democratic governance and lack of credible and transparent electoral processes. The AU should ensure that the principles contained in the African Charter on Democracy, Elections and Governance, the African Union Declaration on the Principles Governing Democratic Elections in Africa and other similar norms, are transformed into reality. Perhaps the stance taken by the ECOWAS Commission on the Gambian 2011 presidential elections is a useful precedent. The commission took proactive steps in assessing the political situation well before the elections, leading to the conclusion that the elections would not be free and fair. Even after such a conclusion, the commission undertook to continue to engage the Gambian government so as to ensure a level playing field for future elections.

The path to successful elections mirrors the electoral aspect of the content of democracy. Respect for the right to democracy and concurrent institution building are critical to successful and credible elections in Africa. Elections may be said to be credible when they are conducted in an open and transparent manner, reducing causes for distrust of the process and suspicion of the results. In particular, electoral commissions should be...
independent and elections transparent. Ballots should be counted immediately and at the
place of voting. Such results should be officially recorded and made available to the
public through the state and all private media houses around the clock. The judiciary
should also be independent and deliver credible and swift resolution to election petitions.
The AU, through the PSC, should stringently monitor countries so as to ensure compliance
with the minimum standards required for free, fair and transparent elections. States should
be required to report on measures taken to comply with the required standards, and PSC
monitoring missions should be granted access to countries on a regular basis. More impor-
tantly, all parties should respect the verdict of electoral commissions. States that fail to
respect the prescribed standards should be put on notice that they stand the risk of the
results being rejected by the AU.

Settling electoral disputes and restoration of the right to democracy

The right to democracy is firmly entrenched in the African legal order. This fact should
inform the approach of the AU in the resolution of electoral disputes. In this regard, the
electoral process should feature prominently in the AUs response to post-electoral crises.
The responsibility for complying with the electoral standards lies with the state. Where
the electoral standards have not been followed and violence results in breakdown in law
and order, the incumbent and those responsible for the violence on all sides should be
held to account. More often than not, incumbents do not reject the electoral verdict outright
but rather manipulate or hijack the electoral process, skewing the results in their favour.
A firm articulation of the content of the right to democracy and the demand for compliance
by states, does not afford incumbents this liberty. Conduct contrary to the expected norms
will immediately expose culprits as violators of the right to democracy. Elections held in
breach of such norms should be questioned by the AU and rejected in the event of
serious dispute. Where possible, such results must be audited. States should make a com-
mitment to permit the PSC and the local judiciaries to conduct a forensic audit to determine
the true winner of seriously disputed elections. States should bind themselves to accept the
decision of the audit. Such audit should be carried out timeously. At the conclusion of
the audit, the judiciary or other relevant institution should pronounce the actual winner
of the elections.

Concerted and systematic disregard by the governments of the standards required for a
credible electoral process should constitute an illegal means of maintaining power under
article 23 of the African Charter on Democracy, Election and Governance. It should be
noted that the circumstances listed in article 23 as constituting illegal means of accessing
or maintaining power are not exhaustive. Thus, the article should evolve to meet the
present challenges on the continent.

Where the breakdown of law and order is of such magnitude that it is not possible to
carry out an audit (or where the audit does not result in a resolution of the dispute), and
the PSC is of the view that a power-sharing government is a necessity, the formation,
mandate, component and regulatory framework of the government should have regard to
two considerations. First, it should offer minimum incentive to the incumbent and all
those who might intend to use power-sharing to circumvent the democratic will of the
people. In this vein, the life of the government should be temporary and should be
meant to gear the nation towards a new democratic government. Power-sharing govern-
ments should serve the sole aim of restoring the democratic mandate. Preferably, fresh elec-
tions should be held within six months\(^66\) to a year.\(^67\) Such elections should be organised and
conducted jointly by the national electoral commission, the AU and the UN. It might be
argued that this approach could be counter-productive, as convincing adversaries into accepting power-sharing deals is about creating incentives in the first place. Perhaps creating disincentives might have similar convincing effects. The AU is empowered under article 25(5) of the Charter on Democracy, Elections and Governance, to establish a court to try perpetrators of unconstitutional change. Perhaps it is time to establish such a court whose mandate should include holding to account those who might want to further destabilise the transition process.

Second, power-sharing arrangements should minimise the dismemberment of the democratic institutions. Such arrangements should have regard to the supremacy of the constitution of the state. This approach will symbolically uphold the right to democracy and certainly remind those in government that they are subject to the order of the state and the will of the people. Therefore, in countries where parliamentary ratification is required for cabinet posts, the pre-elections parliament should be reconvened to ratify appointment. No special cabinet posts should be created and the opposition should be allocated office within the current constitutional framework. While it may be argued that the creation of the post of a prime minister allocates an independent power base to the opposition, the power-sharing agreement may allocate significant powers to a vice presidential position that is occupied by an opposition representative.

Conclusion
The AU’s unquestionable commitment to the right to democracy lies in various regional documents, which include the Constitutive Act and the African Charter on Democracy, Elections and Governance. Further, the AU’s practice reflects a strong stance against unconstitutional changes of governments and the rejection of coups d’etat. However, peace-making is at the top of the AU’s agenda. The AU’s peace-making enterprise has been put to test by the emergence of post-electoral violence. The competition presented by multi-party democracies and political pluralism have increased electoral tensions. Anxious to settle post-electoral disputes, the AU has employed power-sharing as a remedy. Unfortunately, this approach fails to consider the relevance of the democratic process and the present normative value of the right to democracy on the continent. The conditions underlying post-electoral violence differ from post-civil war situations. Elections are founded on legal and democratic processes which ultimately determine the legitimacy of governance. Post-electoral violence often results from the indifference of the incumbent regime to the legal mechanisms required to ensure transparent and credible electoral processes. On the other hand, civil war peace-making often relates to dysfunctional states. Therefore, the wholesale transplantation of power-sharing to post-electoral disputes is at odds with the democratic imperative. Thus, even where it is agreed that power-sharing is the inexorable path to follow because of impossibly difficult situations this approach should be followed with caution.

In post-electoral crises, it must be emphasised that the democratic rights of the citizens are sacrosanct. The right to democracy is firmly established in the AU legal order. Thus, power-sharing only becomes a political necessity in very dire circumstances and not a legitimate resolution to political impasse. With this in mind, the AU should adopt three approaches in its response to post-electoral violence. These approaches are rooted on the right to democracy as expressed by the collective participation of the public at the electoral process. The approaches should operate on the principle that power-sharing is inconsistent with the right to democracy and that the right to democracy presupposes the transfer of power by constitutionally approved means. The right to democracy presupposes the
guarantee of the supremacy of the constitution as opposed to its decimation, which is required to legally constitute power-sharing governments.

The first approach involves engagement in a pro-active approach that ensures that electoral violence becomes a thing of the past. The PSC is tasked with monitoring and intervention in relation to potential conflict situations on the continent. In this regard, the PSC should scrupulously monitor and provide support to states to ensure institution building and compliance with the various norms and standards relating to the conduct of free and fair elections.

The second approach demands that the electoral mandate is carried through. Electoral processes are meant to ordain elected representatives of the people and should not be easily jettisoned in favour of negotiated processes which override the wishes of the people. Thus, post-electoral conflicts should be resolved by auditing the elections and the winner of the elections declared where it is possible to determine one. The true winner should be determined by the verdict of the electoral commission or the relevant national institutions, with the assistance of the PSC.

Third, in the event that power-sharing is viewed as the only measure of resolving post-electoral disputes, such agreements should be concluded with negative incentives. In this regard, the terms of such governments should be negotiated on principles that make such a compromise unattractive to incumbents who decide to snatch elections, as well as all protagonists of violence. This includes the opposition parties and their supporters. Power-sharing governments should be short-lived, of an interim nature, and tasked with the express purpose of restoring democratic order. Further, those who bear greatest responsibility in respect of unconstitutional change should not be allowed to participate in such governments. The prosecution of such persons should become a possible option. The AU should interpret the unconstitutional retention of power in article 23 of the African Charter on Democracy, Elections and Governance to include actions of incumbents that limit the possibility of alternating power, thus putting renegade leaders on notice that they will not be permitted to manipulate elections to their benefit.

Notes
2. Arend Lijphart, The Politics of Accommodation: Pluralism and Democracy in the Netherlands (Berkeley: University of California Press, 1968). This concept is also often referred to as consensus democracy, cooperatism or proportional democracy.
8. Ibid., 320.


12. Examples include Angola, Somalia, Ethiopia, Rwanda and Sierra Leone.


15. Ibid.; Michael Kargbo, *British Foreign Policy and the Conflict in Sierra Leone* (Bern: Lang, 2006), 320; Sriram, ‘Peace as Governance?’, 3. Power-sharing hardly creates peace as was seen with the Lome peace deal in Sierra Leone, where the rebel Revolutionary United Front (RUF) returned to violence even after been given control over diamonds and its leader Foday Sankoh was appointed Vice President and Minister of Mineral Resources.


17. Ibid.


23. Thus Franck writes about the democratic entitlement of citizens. He argues that the democratic entitlement occurred in three normative phases, i.e., the right to self-determination, free expression and entitlement to participatory electoral processes: Thomas M. Franck, ‘The Emerging Right To Democratic Governance’, *American Journal of International Law* 86, no. 1 (1992): 90; Udombana, ‘Articulating the Right to Democratic Governance in Africa’, 1233. Building on Franck’s theses, Udombana argues that democracy has or ought to acquire a degree of legitimacy in Africa. He notes that the right to democracy is a species of the right to self-determination and that democratic elections are the basis of the authority of any representative government: Rich, ‘Bringing Democracy into International Law’, 24.


27. Communication No. 102/93; see also *Dawda Jawara v. The Gambia*, Communication Nos 147/95 and 149/96.


32. Article 4(h) Constitutive Act.
34. Article 4(m) Constitutive Act.
36. Article 3(g) Constitutive Act.
41. Ibid.
42. Article 4(1) African Charter on Democracy, Elections and Governance.
43. Article 10 African Charter on Democracy, Elections and Governance.
44. Article 17 African Charter on Democracy, Elections and Governance.
47. See Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Adopted by the 1st Ordinary Session of the Assembly of the African Union, Durban, 9 July 2002. The Peace and Security Council is tasked with the promotion of peace, security and stability on the continent. Its functions include peace-making, including the use of good offices, mediation, conciliation and enquiry.
49. Article 25(4) of the charter provides that perpetrators of unconstitutional change of government should not be allowed to participate in elections held to restore democratic order or hold any position of responsibility in political institutions of their state. Also, article 25(5) of the charter makes provision for perpetrators of unconstitutional change to be tried before a court set up by the AU. Further, a recent draft Protocol to the Statute of the African Court of Justice and Human and Peoples’ Rights, which seeks to grant criminal jurisdiction to the court, provides for the criminalisation of unconstitutional changes of governments.


58. Principle III(c) AU Declaration on the Framework for an OAU Response to Unconstitutional Change of Government.

59. Article 17 African Charter on Democracy, Elections and Governance; principle 2.1.5 SADC Principles and Guidelines Governing Democratic Elections.


64. Article 9 Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, 2001; principle 2.1.9 SADC Principles and Guidelines Governing Democratic Elections.


67. It must be noted, however, that in Sierra Leone, the government of Ahmed Tejan-Kabbah was restored by military intervention sanctioned by ECOWAS, basically comprising Nigerian military forces.


70. Franck, ‘The Emerging Right To Democratic Governance’, 47.


76. Ibid.

77. Referenda, commissions of enquiry and national consultations might be said to represent other methods of accountability. However, power-sharing does not or cannot cater for these machineries.


83. Principally Angola and South Africa.

84. It must be noted that the Protocol on Amendments to the Constitutive Act of the African Union, which is yet to come into force, proposes to amend article 4(h) to expand circumstances wherein the AU may intervene in member states, to include ‘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’. There is no definition of what amounts to a ‘threat to legitimate order’. However, it may well be that the AU intends to empower itself to intervene in the event of the unlawful overthrow of governments. This being the case, the AU should similarly be able to intervene to remove incumbents in the event of unlawful retention of power.


86. The period provided by the Lome Declaration for the restoration of constitutional order subsequent to an unconstitutional change of government.

87. To allow for possible logistical challenges.

88. Such as the tendency to create a prime ministerial office.

Notes on contributor

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