

# African civil society and the promotion of the African Charter on Democracy, Elections and Governance

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## Summary

*When the African Charter on Democracy, Elections and Governance was adopted on 30 January 2007 in Addis Ababa, Ethiopia, most African countries were governed by leaders who came to power or were clinging to power by coups d'état, constitutional manipulations, human rights violations or vote rigging. Africa continues to be subject to authoritarian and corrupt governance, which impact negatively on its development and on the living conditions of its people. Under these conditions, the adoption of the African Democracy Charter by those very same African leaders who were rightly or wrongly blamed for their authoritarian and corrupt governance was a miracle. The Charter came into force on 15 February 2012. In light of this, the article reflects on the African Democracy Charter, its significance, its shortcomings as well as the prospects for its implementation and the particular role that civil society organisations can and should play in promoting its values.*

## 1 Introduction

The Charter of the Organisation of African Unity (OAU), adopted in May 1963 and entering into force in September 1963, failed to take

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democracy, elections, good governance and human rights seriously. For more than two decades, authoritarianism and bad governance remained the rule, and democracy, elections and good governance the exception. In the early 1980s African leaders came to realise that this had to change.

The first major step taken by the OAU to reverse this state of affairs was the adoption of the African Charter on Human and Peoples' Rights (African Charter). Pityana revealed that when it came into operation on 21 October 1986, the African Charter was considered 'a miracle'.<sup>1</sup>

This was an extraordinary and powerful instrument of liberation, and an unprecedented event in the history of a continent famous for the gross and massive human rights violations of its leaders.

Since the establishment of the African Union (AU), African countries have adopted several conventions or treaties aimed at promoting human rights, democracy and good governance. The African Charter on Democracy, Elections and Governance (African Democracy Charter) was adopted on 30 January 2007 in Addis Ababa, Ethiopia. This was an even greater miracle as most African leaders who adopted it had come to power by undemocratic means. Some were still clinging to power through vote rigging and had become famous for their authoritarian governance. Some had not held elections since they came to power.

The African Democracy Charter was to come into operation 30 days after the deposit of the fifteenth instrument of ratification.<sup>2</sup> On 16 January 2012, following Burkina Faso, Chad, Ethiopia, Gabon, Ghana, Guinea, Guinea Bissau, Lesotho, Mauritania, Niger, Nigeria, Sierra Leone, South Africa and Zambia, Cameroon became the fifteenth country to deposit its instrument of ratification. The African Democracy Charter entered into operation on 15 February 2012. This historic moment unfortunately went unnoticed, not only by the AU, but also by the individual member states that had signed and ratified it. The African Democracy Charter could not have been less favourably received by the overwhelming majority of the African people. The few who were aware of its existence considered that there was nothing to celebrate since African leaders had signed and ratified numerous treaties that were never implemented.

The African Democracy Charter is not the first AU instrument related to democracy, elections and governance. So, what is its particular significance among different African instruments? What may be learnt from the Democracy Charter? Did Africa make any contribution to the promotion of democracy, elections and governance as it did with the African Charter in the field of human rights? What did the

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1 B Pityana 'Hurdles and pitfalls in international human rights law: The ratification process of the Protocol to the African Charter on the Establishment of the Africa Court on Human and Peoples' Rights' (2003) 28 *South African Yearbook of International Law* 112.

2 Art 48 African Democracy Charter.

African Democracy Charter add to the intellectual discourse about democracy, elections and governance? On the other hand, what are the shortcomings of the African Democracy Charter as a legal instrument that embodies a new African political discourse endorsed by African leaders? Further, the Democracy Charter would be useless if it did not contribute to consolidating democracy, improving governance, and raising the living standards of the African people. What are the challenges to its implementation and what role can civil society play in its enforcement?

The article strives to address these critical questions without pretending to provide definitive answers as it reflects on the African Democracy Charter, its significance and also its shortcomings, as well as on the prospects for its implementation and the particular role that civil society organisations can and should play in promoting the values entrenched therein.

## 2 Significance of the African Democracy Charter

The significance of the African Democracy Charter can be assessed both legally and conceptually. Legally, the Democracy Charter contributes to reinforcing the African human rights system as it complements the African Charter. Conceptually, it embodies an African vision of democracy, elections and governance that broadens the conventional liberal or Western discourse on these issues.

### 2.1 Legal and political significance of the African Democracy Charter

The African Democracy Charter enhances the declarations and decisions of the OAU/AU, including the 1990 Declaration on the political and socio-economic situation in Africa and the fundamental changes taking place in the world; the 1995 Cairo Agenda for the Re-launch of Africa's Economic and Social Development; the 1999 Algiers Decision on Unconstitutional Changes of Government; the 2000 Lomé Declaration for an OAU Response to Unconstitutional Changes of Government; and the 2002 OAU/AU Declaration on Principles Governing Democratic Elections in Africa.<sup>3</sup>

The significance of the African Democracy Charter lies in the fact that, unlike the aforementioned instruments, the Democracy Charter is a treaty. As such, it is binding on state parties which must comply with their obligations under the treaty. Moreover, the Democracy Charter is the first African treaty of its kind that specifically aims at promoting democracy, elections and good governance. Unfortunately for the African Democracy Charter, as for other AU instruments, the pace

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3 Preamble African Democracy Charter.

of ratification has been disappointingly slow, as it takes a minimum period of five years to receive the required number of instruments of ratification to bring them into operation.

The African Charter, as the founding instrument of the African human rights system, provides for civil, political and socio-economic rights as well as for individual, collective and peoples' rights. The latter include peoples' rights to equality,<sup>4</sup> self-determination,<sup>5</sup> disposal of wealth and natural resources,<sup>6</sup> the right to development,<sup>7</sup> national and international peace and security,<sup>8</sup> and their right to a general satisfactory environment favourable to their development.<sup>9</sup> The African Charter established the African Commission on Human and Peoples' Rights (African Commission) to promote human and peoples' rights and ensure their protection.<sup>10</sup> The second and most important enforcement mechanism is the African Court on Human and Peoples' Rights (African Court). The African Court was established by a protocol to the African Charter.<sup>11</sup> Unlike the decisions of the African Commission, the judgments of the African Court are final and binding on the state parties to the Protocol.<sup>12</sup>

The African Democracy Charter complements the African Charter by adding the right to democracy, free and fair elections and good governance to the human and peoples' rights provided for in the African Charter. The African Commission and the African Court as enforcement mechanisms of the African Charter should therefore also promote and ensure the protection of this right.

Further, the African Democracy Charter complements the political and legal framework adopted by the AU to promote good and democratic governance on the continent. This framework consists of the New Partnership for Africa's Development (NEPAD) Declaration,<sup>13</sup> the Declaration on Democracy, Political, Economic and Corporate

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4 Art 19 African Charter.

5 Art 20 African Charter.

6 Art 21 African Charter.

7 Art 22 African Charter.

8 Art 23 African Charter.

9 Art 24 African Charter.

10 Arts 30-63 African Charter.

11 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights adopted on 10 June 1998 and entered into force on 25 January 2004.

12 Arts 28 & 30 African Court Protocol (n 11 above),

13 This Declaration was adopted at the first meeting of the Heads of State and Government Implementation Committee of NEPAD in Abuja, Nigeria, in October 2001. See <http://www.chr.up.ac.za> (accessed 20 September 2012); C Heyns & M Killander (eds) *Compendium of key human rights documents of the African Union* (2006) 290-293.

Governance (DDPECG),<sup>14</sup> and the African Peer Review Mechanism (APRM) Base Document.<sup>15</sup>

The African Democracy Charter also aims to promote the fight against corruption in line with the AU Convention on Preventing and Combating Corruption, as corruption undermines good governance.<sup>16</sup>

## 2.2 Conceptual significance of the African Democracy Charter

Democracy, elections and governance are interrelated concepts that feature prominently in the African Democracy Charter. Of these, democracy is arguably the most important as it entails regular, competitive, free and fair elections and good governance. The Democracy Charter expresses a vision of democracy, elections and governance that African people have been longing for, though the vision is not original.

### 2.2.1 Democracy and elections

The conventional political and scientific discourse focuses on Western and liberal conceptions of democracy, elections and governance. These conceptions are mainly 'minimalist'.<sup>17</sup>

Minimalist conceptions are based on institutions of government and institutions such as political parties and pressure groups, elections and the rule of law that place emphasis on procedures and institutions to the detriment of values and substance. Democracy is defined as a specific political machinery of institutions, processes and roles.<sup>18</sup> This notion of procedural or institutional democracy is of the sort found in Dahl's concept of polyarchy.<sup>19</sup>

According to Dahl, polyarchy in a political order is characterised by seven institutions, all of which must be present. These are elected

14 Declaration adopted by the AU Assembly in Durban, South Africa, in July 2002. See Heyns & Killander (n 13 above) 293-298.

15 Document adopted at the 6th Summit of the NEPAD Heads of State and Government Implementation Committee in March 2003 in Abuja, Nigeria. See Heyns & Killander (n 13 above) 298-301.

16 See <http://www.africa-union.org> (accessed 20 September 2012); art 2 African Democracy Charter.

17 See JE Nyang'oro 'Discourses on democracy in Africa: Introduction' in JE Nyang'oro (ed) *Discourses in democracy: Africa in comparative perspective* (1996) X; RL Sklar 'Developmental democracy' (1987) 4 *Comparative Studies in Society and History* 166; IG Shivji 'State and constitutionalism: A new democratic perspective' in IG Shivji (ed) *State and constitutionalism: African debate of democracy* (1991) 27-69; AMB Mangu *The road to constitutionalism and democracy in post-colonial Africa: The case of the Democratic Republic of Congo* (2002) 172-201.

18 D Ronen 'The state and democracy in Africa' in D Ronen (ed) *Democracy and pluralism in Africa* (1986) 200.

19 See RA Dahl *Polyarchy: Participation and opposition* (1971); RA Dahl *Democracy and its critics* (1989) 220-224; G Sorensen 'Democracy and the developmental state' in Nyang'oro (n 17 above) 42; JA Wiseman *The new struggle for democracy in Africa* (1996) 8.

officials; free and fair elections; inclusive suffrage; the right to run for office; freedom of expression; alternative information; and associational autonomy.<sup>20</sup> Polyarchy is distinguished by two broad characteristics, which are that 'citizenship is extended to a relatively high proportion of adults, and the rights of citizenship include the opportunity to oppose and vote out the highest officials in government'.<sup>21</sup> In Sorensen's view, Dahl's notion of polyarchy has three elements: competition for government power; political participation in the selection of leaders and policies; and civil and political rights.<sup>22</sup>

In minimalist terms, democracy is synonymous with competitive, multiparty democracy, and elections. It is very often and abusively reduced to two components, namely, elections and a multiparty system.

Elections and democracy have become virtually synonymous in Western political thought and analysis.<sup>23</sup> Yet, the experience in many African countries has shown that authoritarianism may well and often does tie the knot with elections and an integral multipartyism.<sup>24</sup> Elections and multipartyism are not synonymous with or a guarantee for democracy, but they really matter.<sup>25</sup> In the modern era, one can have elections or multipartyism without democracy, but democracy is not possible without elections or multipartyism.<sup>26</sup>

Three chapters of the African Democracy Charter<sup>27</sup> deal with democracy. According to the Democracy Charter, democracy entails a respect for human rights,<sup>28</sup> the supremacy of the Constitution and the rule of law,<sup>29</sup> separation of powers,<sup>30</sup> gender equality,<sup>31</sup> popular participation through universal suffrage,<sup>32</sup> and political pluralism.<sup>33</sup>

20 Dahl (1989) (n 19 above) 220-224; Wiseman (n 19 above) 9.

21 As above.

22 Sorensen (n 19 above) 42.

23 See M Bratton & DN Posner 'A first look at second elections in Africa with illustrations from Zambia' in R Joseph (ed) *State, conflict, and democracy in Africa* (1999) 378; JW Harbeson 'Rethinking democratic transitions: Lessons from Eastern and Southern Africa' in Joseph (above) 39.

24 G Conac *Etat de droit et démocratie* (1993) 492.

25 See G Bauer 'Challenges to democratic consolidation in Namibia' in Joseph (n 23 above) 439-441; Bratton & Posner (n 23 above) 379; G Conac 'Introduction' in G Conac *L'Afrique en transition vers le pluralisme politique* (1993) 5; Conac (n 24 above) 492; J Pelletier *L'Afrique en mouvement* (1993) 477; G Nzongola-Ntalaja 'The state and democracy in Africa' in G Nzongola-Ntalaja & M Lee (eds) *The state and democracy in Africa* (1997) 15.

26 See Bratton & Posner (n 23 above) 379; Mangu (n 17 above) 199.

27 Art 4-16 African Democracy Charter.

28 Art 3(1) African Democracy Charter.

29 Art 3(2) African Democracy Charter.

30 Art 3(5) African Democracy Charter.

31 Art 3(6) African Democracy Charter.

32 Arts 3(7) & 4(2) African Democracy Charter.

33 Art 3(11) African Democracy Charter.

Democracy, the rule of law and human rights are interrelated.<sup>34</sup> This connection makes it clear that democracy is meaningless without respect for the rule of law and human rights. The rule of law implies that the Constitution is supreme and its amendment or revision requires national consensus, obtained, if need be, through referendum, and everyone should be equal before the law and enjoy equal protection by the law as a fundamental precondition for a just and democratic society.<sup>35</sup>

Inspired by the African Charter, the African Democracy Charter stresses that democracy requires a respect for human rights, not only individual civil and political rights, but also collective, social and economic rights, including the rights of women, ethnic, religious and racial minorities, migrants, refugees, people with disabilities, displaced persons and other marginalised and vulnerable groups.<sup>36</sup>

The African Democracy Charter deals with political culture and peace as requirements for democracy.<sup>37</sup> It requires that civic education be taken seriously and that state parties invest therein.<sup>38</sup> The link between democracy and peace is critically important for a continent plagued by numerous conflicts. Peace contributes to the creation of an environment that helps democracy prosper and *vice versa*. Violence and war are inimical to democracy. On the other hand, democratic institutions that are independent or autonomous, well-resourced to perform their missions efficiently and effectively and remain accountable to competent national organs should also be established for democracy to prosper.<sup>39</sup> Moreover, constitutional control over the armed and security forces is required to ensure the consolidation of democracy and constitutional order.<sup>40</sup>

The African Democracy Charter stresses that African states should hold democratic elections.<sup>41</sup> These should be held regularly, be free, fair, transparent and credible and be conducted by competent, independent and impartial national electoral bodies.<sup>42</sup> Elections should also be competitive. All adult citizens and legally-recognised political parties should be allowed to participate in these elections. National mechanisms should be established to deal in a timely manner with election-related disputes. These mechanisms usually are the courts of

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34 Arts 4-10 African Democracy Charter.

35 Art 10 African Democracy Charter.

36 Arts 8-9 African Democracy Charter.

37 Arts 11-13 African Democracy Charter.

38 Art 12(4) African Democracy Charter.

39 Arts 14-16 African Democracy Charter.

40 Art 14 African Democracy Charter.

41 Arts 17-22 African Democracy Charter.

42 Preamble, paras 8 & 11; arts 2(3), 3(4), 17, 23(4) & 32(7) African Democracy Charter.

law that should also be independent and impartial and subject to the Constitution which they should enforce without fear or favour.

Contesting parties and candidates should sign and abide by a code of conduct which includes a commitment to accept the results of elections or challenge them through legal channels. All contesting parties or candidates should enjoy fair and equitable access to state-controlled media during elections. Furthermore, independent observers should be allowed to monitor these elections. State parties should fully co-operate with these observers, abstain from interfering in their activities, guarantee their security and ensure that they enjoy their right to free access to information and freedom of movement.<sup>43</sup> Electoral observer missions should be conducted in an objective, impartial and transparent manner.<sup>44</sup>

The African Democracy Charter adopts a broad definition of democracy, which is both political and socio-economic, and includes competitive, regular free and fair elections, respect for the rule of law and human rights. The Democracy Charter goes far beyond a conception that defines democracy as a process or a set of institutions and focuses on political democracy emphasising individual and political rights. Its approach to democracy is close to the maximalist ones.<sup>45</sup> In maximalists' view, democracy is not just political, but also socio-economic, participative, popular or social democracy. 'Substantive democracy'<sup>46</sup> is advocated in the African Charter for Popular Participation.<sup>47</sup> According to Ake, unlike a liberal democracy that emphasises abstract individual and political rights, it stressed concrete political, social, collective and economic rights.<sup>48</sup> The African Democracy Charter adopts the same broad approach to governance.

### 2.2.2 Governance

During the first two decades of Africa's independence, many Western political leaders and intellectuals as well as international financial institutions favoured what scholars like Gregor, Nicol and Sklar refer to as 'dictatorships of development'.<sup>49</sup> The 'developmental state' or

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43 Arts 18-22 African Democracy Charter.

44 Art 21(3) African Democracy Charter.

45 See Mangu (n 17 above) 180-184; D Glaser 'Discourses of democracy in the South African left: A critical commentary' in Nyang'oro (n 17 above) 251.

46 See C Ake *Democracy and development in Africa* (1996) 137 139; IG Shivji 'Contradictory class perspectives in the debate on democracy' in Shivji (n 17 above) 254-255; IG Shivji *Fight my beloved continent: New democracy in Africa* (1992) 2.

47 ch II, 17.

48 Ake (n 46 above) 132-134.

49 See AJ Gregor *Italian fascism and developmental dictatorship* (1974) 4; D Nicol 'African pluralism and democracy' in Ronen (n 18 above) 165; Sklar (n 17 above) 1-30.



the state that was considered the most likely to achieve development had to be authoritarian. Many political scientists and legal scholars endorsed the controversial idea of a developmental or modernising oligarchy.<sup>50</sup>

Towards the end of the 1970s, African governments proved unable to deliver on their developmental objectives. Accordingly, the 'dictatorships of development' had failed.<sup>51</sup> A shift to 'governance' occurred in the discourse of Western governments and international financial institutions. 'Governance' became 'conditionality' for African governments to benefit from loans and other financial advantages from the Bretton Woods institutions.<sup>52</sup> At the beginning, 'governance' referred to the management of states' affairs or the practical exercise of power and authority to conduct public affairs.<sup>53</sup> It did not entail respect for human rights, including peoples' rights to freely elect their leaders. The emphasis was on accountability, the fight against corruption and freedom of expression. It is only in a paper read at a World Bank-sponsored conference on development economics in 1992 that Boeninger suggested that governance was the same as 'good government'.<sup>54</sup> Such governance did not necessarily mean 'democratic governance'. Most African leaders were still opposed to the discourse on 'governance' that they considered neo-colonial and unacceptable Western interference in their domestic affairs. However, this changed when they adopted the AU Constitutive Act in 2000.

After decades of authoritarianism, African heads of state and government agreed 'to promote and protect human and peoples' rights, to consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.<sup>55</sup> The objectives of the AU are *inter alia* to 'promote democratic principles and institutions, popular participation and good governance'.<sup>56</sup> One of the major principles of the AU is 'respect for democratic principles, human rights, the rule of law and good governance'.<sup>57</sup>

The African Democracy Charter drew from the AU Constitutive Act and insisted on good governance which was related to elections and democracy. This relationship was already stressed in the 2001 NEPAD Declaration and in the 2002 Declaration on Democracy,

50 See Gregor (n 49 above) 3; AJ Gregor *Democracy, dictatorship, and development: Economic development in selected regimes of the Third World* (1976); Sandbrook (n 17 above) 140; Sklar (n 17 above) 2; Sorensen (n 19 above) 31-60.

51 See Nicol (n 49 above) 165; Sklar (n 17 above) 1-30.

52 World Bank *Sub-Saharan Africa: From crisis to sustainable growth* (1987).

53 G Hyden 'Governance and the reconstruction of political order' in Joseph (n 23 above) 184.

54 See E Boeninger *Governance and development: Issues of governance* (1992) 24-38; Hyden (n 53 above) 184; Mangu (n 17 above) 48.

55 Preamble AU Constitutive Act.

56 Art 3(g) AU Constitutive Act.

57 Art 4(m) AU Constitutive Act.

Political, Economic and Corporate Governance (DDPECG). The African Democracy Charter adopts a holistic conception of governance even though it emphasises political governance.<sup>58</sup> Governance should be political, economic and social or corporate.<sup>59</sup> It should be 'good governance'<sup>60</sup> and 'democratic governance',<sup>61</sup> excluding corruption,<sup>62</sup> but requiring transparency, popular participation,<sup>63</sup> access to information, freedom of the press, accountability in the management of public affairs,<sup>64</sup> and an independent judiciary.<sup>65</sup>

### 3 Shortcomings of the African Democracy Charter

Despite its significance, the African Democracy Charter also contains a number of shortcomings. At least four shortcomings may be identified.

The first shortcoming of the Democracy Charter, as is the case with most other AU instruments, relates to sanctions against the violators of the provisions of this important instrument. When they are provided, they are vague and weak.

In its final clauses, for instance, the African Democracy Charter vaguely refers to appropriate measures that the AU Assembly and Peace and Security Council may impose on any state party that violates the Charter.<sup>66</sup> It is rather more precise and detailed on the sanctions that may be imposed in cases of unconstitutional changes of government.<sup>67</sup> These sanctions include the suspension, after diplomatic initiatives have failed, of the state party where an unconstitutional change of government was perpetrated; the interdiction of the perpetrators of unconstitutional change of government to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their state; and their prosecution before the competent court of the AU.<sup>68</sup> The principal victims of the suspension of the state where an unconstitutional change of government has been perpetrated are its citizens and not the individual perpetrators of unconstitutional changes of government since, despite their non-recognition at the regional level, the AU still maintained diplomatic

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58 Arts 27-32, 34, 35, 36 & 38 African Democracy Charter.

59 Arts 27, 33, 40, 42, 43(1) & 43(2) African Democracy Charter.

60 Preamble, paras 6 & 10; arts 2(6) & (13), 12(1), 32 & 33 African Democracy Charter.

61 Arts 36 & 44 African Democracy Charter.

62 Arts 2(9) & 33(3) African Democracy Charter.

63 Preamble, para 10 African Democracy Charter.

64 Arts 2(10) & 3(8) African Democracy Charter.

65 Art 32(3) African Democracy Charter.

66 Art 46 African Democracy Charter.

67 Arts 23-26 African Democracy Charter.

68 Arts 25(1)-(5) African Democracy Charter.

contacts with them.<sup>69</sup> They were even recognised by some African leaders opposed to the previous governments. A sanction like the interdiction to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their state applied to countries such as Guinea and Niger and not Mauritania or Madagascar.

In Mauritania, for instance, General Mohammed Ould Abdel Aziz and his colleagues who perpetrated a *coup d'état* in August 2008 were put under a sanction regime decided on by the AU Peace and Security Council. These sanctions included travel bans and the seizure of assets within AU member states that continued to recognise the deposed President Sidi Ould Cheikh Abdallahi who had been elected in April 2007 as the country's legitimate president. However, General Aziz was allowed to participate in the 2009 elections that he won.

The irony is that he was later appointed by the AU Assembly to lead an AU high-level panel to mediate in the post-electoral crisis in Côte d'Ivoire between former President Laurent Gbagbo and his then main political rival, Alassane Ouattara.

In the case of Madagascar, Andry Rajoelina, who was the Mayor of Antananarivo, benefitted from the March 2009 *coup d'état* against President Marc Ravalomanana who had been elected in February 2002. The first reaction of the international community, including the AU, the Southern African Development Community (SADC) and the United Nations, was not to recognise his government and to suspend Madagascar from participating in their activities. However, President Rajoelina later was recognised by the international community, including the AU and SADC.

The African Democracy Charter could have expressly provided for the prosecution of the perpetrators of unconstitutional changes of government before the African Court of Human and Peoples' Rights as evidence that African leaders are fully committed to democracy. It is not enough to just provide that the perpetrators of these acts will be dealt with in accordance with the law,<sup>70</sup> or that they may be tried before the competent court of the AU without any details about the court, the organ that will try them and the sanctions which may be imposed on them.<sup>71</sup> A draft protocol was adopted in May 2012 in order to amend the Protocol Establishing an African Court of Justice and Human Rights and the statute thereto,<sup>72</sup> and to provide

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69 Art 25(3) African Democracy Charter.

70 Art 14 African Democracy Charter.

71 Art 25(5) African Democracy Charter.

72 See Decisions Assembly/AU/Dec.45 (III) and Assembly/AU/Dec.83 (V) of the Assembly of the AU, adopted respectively at its 3rd (6-8 July 2004, Addis Ababa, Ethiopia) and 5th (4-5 July 2005, Sirte, Libya) ordinary sessions, to merge the African Court of Justice and Human Rights and the Court of Justice of the AU into a single court; Protocol to the African Charter on the Establishment of the African Court of Justice and Human Rights of 1 July 2008 (Merged Court Protocol); Draft

for the prosecution of the perpetrators of unconstitutional changes of government. Considering that the Protocol Establishing an African Court of Justice and Human Rights has not come into operation since its adoption in July 2008, the Protocol aimed at amending it will take even longer to come into force.

Pending the entry into force of this Protocol, perpetrators of unconstitutional changes of government will continue to enjoy immunity in Africa as there will be no competent court to prosecute and judge them.

The African Democracy Charter also provides for sanctions that may be imposed on any member state that is proved to have instigated or supported the unconstitutional change of government in any other state.<sup>73</sup> Arguably, the 'club syndrome' survived the OAU and prevails within the AU where solidarity or mutual support among African leaders remains. Due to this, the AU Assembly that takes its decisions by consensus or by a two-thirds majority of member states, will not be in a position to impose sanctions on those member states that supported unconstitutional changes of government, or harboured or gave sanctuary to their perpetrators.

On the other hand, the African Democracy Charter's definition of unconstitutional changes of government includes 'any refusal by an incumbent government to relinquish power to the winning party or candidate after 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'.<sup>74</sup> This is an important provision since military *coups d'état* have declined in Africa and most unconstitutional changes of government occur under the guise of constitutional and electoral manipulations or refusal by incumbent leaders to concede defeat and relinquish power. Vote rigging, constitutional manipulations, mismanagement, embezzlement and corruption of heads of state and government also qualify as violations of the African Democracy Charter.

As demonstrated by scholars such as Ake, Bayart, Darbon, Eilis, Fatton, Hibou, Mbembe, Médard, Shafer and William, who denounced the 'politics of the belly', 'prebendal politics', 'corruption', 'predatory rule', and the 'criminalisation of the state' in Africa where 'rulership appears to be an exercise in 'how to ruin a country',<sup>75</sup> a number

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Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Amending Merged Court Protocol) of May 2012.

73 Art 25(6) African Democracy Charter.

74 Arts 23(4)-(5) African Democracy Charter.

75 See Ake (n 46 above) 40; R Gerster 'How to ruin a country: The case of Togo' (1989) 71 *IFDA Dossier* 25; JF Bayart *The state in Africa: The politics of the belly* (1993); JF Bayart et al *La criminalisation de l'Etat en Afrique* (1997); D Darbon 'L'Etat prédateur' (1990) 39 *Politique africaine* 37-45; R Fatton *Predatory rule: State and civil society in Africa* (1992); A Mbembe 'Pouvoir, violence et accumulation' (1990) 39 *Politique africaine* 7-24; JF Médard 'L'Etat patrimonialisé' (1990) 39 *Politique*

of African leaders have specialised in vote rigging, corruption, embezzlement, bad economic governance and electoral and constitutional manipulations in order to remain in power. The African Democracy Charter did not provide for sanctions in these cases. Even if they were provided for, African leaders would have been unable to agree on a decision, let alone to enforce it against a colleague head of state or government found in breach of the provisions of the Democracy Charter.

The second shortcoming of the African Democracy Charter is that it has no efficient enforcement mechanism. As pointed out earlier, the Democracy Charter could have provided for the African Court on Human and Peoples' Rights as its enforcement mechanism. This could have resulted in an amendment to the Protocol establishing this Court. The adoption of the Democracy Charter resulted from internal and external pressure on African leaders who were required to demonstrate their commitment to democracy, free and fair elections and good governance as 'conditionality' for support from Western governments and international financial institutions.

For African leaders who adopted the African Democracy Charter, it could be a political suicide to recognise the African Court on Human and Peoples' Rights as its enforcement mechanism. They only agreed on the AU Commission as the central co-ordinating structure for the implementation of the Democracy Charter. The Chairperson of the AU Commission is appointed by the Assembly, which consists of heads of state and government of AU member states.

The AU Commission, as the central co-ordinating structure for the implementation of the African Democracy Charter, has no power or role to play when a state party violates its obligations related to economic and corporate governance. Moreover, it lacks autonomy *vis-à-vis* the Assembly and its Chairperson is too dependent on the Assembly that elects him or her and is also competent to renew his or her mandate. Accordingly, the AU Commission would do no or little wrong against non-complying state parties and their leaders. The African Democracy Charter provides, for instance, that electoral observer missions should be constituted and conducted in an objective, impartial and transparent manner.<sup>76</sup> These missions are to report to the AU Commission. No AU observer mission has ever declared an election to be unfair despite the fact that the rules of the political game in many AU member states remain vote rigging and electoral manipulations by incumbent leaders. In the Democratic Republic of Congo (DRC), for instance, the presidential and national assembly elections of 28

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*africaine* 25-36; DM Shafer 'The perverse paradox of peace and the predatory state' paper read at the American Political Science Association Annual Meeting, Washington DC, 25 September 1995; R William *Corruption and state in Sierra Leone* (1995).

<sup>76</sup> Art 21(3) African Democracy Charter.

November 2011 had been rigged by incumbent President Joseph Kabila and his majority according to several reports from Congolese electoral observers<sup>77</sup> and political leaders from both the majority and the opposition. Despite the fact that these elections were held in violation of the relevant dispositions of the African Democracy Charter, the OAU/AU Declaration on the Principles Declaration Governing Democratic Elections in Africa,<sup>78</sup> the SADC Principles and Guidelines Governing Democratic Elections,<sup>79</sup> the Economic Community of Central African States (ECCAS) Declaration on Electoral Support to Member States,<sup>80</sup> and the International Conference on the Great Lakes Region (ICGLR) Protocol on Democracy and Good Governance,<sup>81</sup> the AU, SADC, ECCAS, ICGLR and the Common Market of Eastern Africa (COMESA) unanimously applauded their results.

They declared categorically that these elections were free, fair, transparent and credible.<sup>82</sup> The 'club syndrome' referred to earlier also explains the fact that the AU has been consistent in applauding the elections held in its member states, the most recent being the 31 August 2012 general elections in the Republic of Angola. Despite the political environment that made it almost impossible for the opposition to access the media, campaign freely, and win these elections, the AU observer mission, led by Mr Pedro Verona Pires, former President of the Republic of Cape Verde, welcomed their results and unreservedly declared that they were free, fair, transparent and credible.<sup>83</sup> This statement was endorsed by the observers of SADC, ECCAS, ICGLR and the Community of Portuguese-Speaking Countries (CPLP) that congratulated the Angolan authorities and called on the losers to accept the outcome of the polls and follow legal processes in cases of dispute.<sup>84</sup>

A third shortcoming relates to a lack of funding or resources. In implementing the African Democracy Charter, the AU Commission will establish a Democracy and Electoral Assistance Unit and a Democracy

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77 See *Mission Nationale d'Observation Rapport à mi-parcours de l'observation des élections du 28 novembre 2011 (2012)*; *Mission Nationale d'Observation Observation de la Compilation des Elections Législatives du 28 Novembre 2011 (2012)*.

78 (OAU/AU) Durban Declaration on the Principles Governing Democratic Elections in Africa as adopted by the Assembly of the African Union in July 2002 (AHG/Decl.1 (XXXVIII)).

79 SADC Principles and Guidelines Governing Democratic Elections of 17 August 2004.

80 ECCAS Declaration on Electoral Support to Member States of 7 June 2005.

81 ICGLR Protocol on Democracy and Good Governance of 1 December 2006.

82 AU, SADC, ECCAS, ICGLR and COMESA Joint Declaration on the Presidential and Parliamentary Elections in the DRC, 30 November 2012.

83 AU Electoral Observer Mission to the 31 August 2012 General Elections in the Republic of Angola, Statement of 2 September 2012.

84 Joint Declaration on the 31 August 2012 General Elections of the Republic of Angola, 2 September 2012.

Assistance Fund to provide the needed assistance and resources to state parties in support of electoral processes. Admittedly, the AU has been struggling to get funding.

Many member states are in arrears with their contributions that are also insignificant. The AU has to rely on foreign donors to undertake most of its activities. Many member states rely on foreign assistance to hold regular elections. The AU Electoral Assistance Unit and Democracy Assistance Fund have not been established as yet. It is expected that they will be established under the leadership of South Africa's Home Affairs Minister, Dr Nkosazana Dlamini-Zuma, who succeeded Dr Jean-Ping of Gabon and became the first female to preside over the AU Commission.

However, the question is where these two units will get funding to provide assistance to state parties. Anyway, it is the duty of the AU Commission to take the necessary measures to ensure that the Democracy and Electoral Assistance Unit and the Democracy and Electoral Assistance Fund provide the needed assistance and resources to state parties in support of electoral processes.<sup>85</sup> Apart from financial resources, the AU Commission will also need competent personnel to perform its functions under the African Democracy Charter and work with the designated focal points in the different regional economic communities.

A fourth shortcoming of the African Democracy Charter relates to its lack of focus. If the primary aim is to promote democratic principles and institutions, popular participation and free and fair elections, the Democracy Charter should have been restricted to political governance instead of extending to economic and corporate governance. The assessment of economic and corporate governance could have been left to the African Peer Review Mechanism and other international monitoring mechanisms that deal with issues of economic and corporate governance despite their own shortcomings related to a lack of funding and sanctions.

As was pointed out earlier, the AU Commission plays no role in the implementation of the provisions of the African Democracy Charter related to economic and corporate governance and there is no sanction for those African leaders who are responsible for bad economic and corporate governance.

This 'dilution' of the African Democracy Charter that embraces so many lofty objectives is likely to run against its primary objective to promote democracy, free and fair elections, and good political governance. Any attempt to deal with the shortcomings of the Democracy Charter will result in its amendment. The Democracy Charter already took five years to get the fifteenth ratification instrument to be deposited for it to come into operation, and two-thirds

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85 Art 44(2)(A) African Democracy Charter.

AU member states have not ratified it as yet. Any campaign to amend the African Democracy Charter before it has even been implemented would be a huge waste of time and resources.

As with any legal instrument, the African Democracy Charter has its shortcomings. It remains perfectible and will ultimately be amended. For the time being, however, it may be worth focusing on its implementation or its enforcement.

## **4 Prospects for the implementation of the African Democracy Charter and the role of civil society**

### **4.1 Implementation of the African Democracy Charter**

The African Democracy Charter is to be implemented both at the national and regional levels.<sup>86</sup> At the national level, state parties should comply with their obligations under the Charter. They are required to report every two years, from the date the Democracy Charter comes into force, on the legislative or other relevant measures taken with a view to giving effect to the principles and commitments of the Charter.<sup>87</sup> A copy of this report should be submitted to the relevant organs of the AU for appropriate action within their respective mandates.

However, states' compliance with these obligations will depend mainly on African leaders' commitment to democracy, free and fair elections, and good governance. Unfortunately, vote rigging, electoral frauds, constitutional manipulation, corruption and bad governance that are still common practice across the continent demonstrate that there is still a long way to go towards implementing the African Democracy Charter.

The AU Commission is the central co-ordinating structure for the implementation of the African Democracy Charter. It is to assist state parties in this process and also to co-ordinate evaluation on implementation of the Charter with other key organs of the AU, including the Pan-African Parliament, the Peace and Security Council, the African Commission, the African Court of Justice and Human Rights, the Economic, Social and Cultural Council, the regional economic communities and appropriate national-level structures.<sup>88</sup> In implementing the African Democracy Charter, the AU Commission has a responsibility at the continental and at the regional levels.<sup>89</sup>

At the continental level, the AU Commission is required to develop benchmarks for the implementation of the commitments and principles

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86 Art 44 African Democracy Charter.

87 Art 48 African Democracy Charter.

88 Art 45 African Democracy Charter.

89 Art 44 African Democracy Charter.



of the Democracy Charter and to evaluate compliance by state parties; to promote the creation of favourable conditions for democratic governance in Africa, in particular by facilitating the harmonisation of policies and laws of state parties; to take the necessary measures to ensure that the Democracy and Electoral Assistance Unit and the Electoral Assistance Fund provide the necessary assistance and resources to state parties in support of their electoral processes; and to ensure that effect is given to the decisions of the AU in regard to unconstitutional changes of government on the continent.

At the regional level, the AU Commission should establish a framework for co-operation with regional economic communities on the implementation of the principles of the African Democracy Charter. It should commit these regional economic communities to encourage member states to ratify or adhere to the Democracy Charter and to designate focal points for co-ordination, evaluation and monitoring of the implementation of the commitments and principles in the Charter to ensure the massive participation of stakeholders, particularly civil society organisations, in the process.

The AU Commission shall prepare and submit to the Assembly, through the Executive Council, a synthesised report on the implementation of the African Democracy Charter. The Assembly shall then take appropriate measures aimed at addressing issues raised in the report.<sup>90</sup>

The African Democracy Charter only came into operation on 15 February 2012 and it is too early to assess the work of the AU Commission in implementing it at the continental and regional levels.

Arguably, the role of the AU Commission in implementing the Democracy Charter at both the continental and regional levels will depend on the commitment of its Chairperson to the values embedded in the Charter and on her leadership and courage in dealing with African heads of state and government who are not always committed to the ideals of the Charter. While Dr Zuma's personal commitment to democratic values and principles cannot be questioned, the fact that she comes from a democratic South Africa is not enough.

Considering the fact that many African leaders are reluctant or even opposed to fully embarking on democratic governance, to hold free and fair elections and to respect the rule of law, civil society will have to play an important role in promoting the African Democracy Charter.

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90 Art 49 African Democracy Charter.

## 4.2 Civil society and its role in the promotion of the African Democracy Charter

### 4.2.1 Civil society

Civil society organisations existed under colonisation, but the leaders of the newly-independent African states decided to ignore or rather oppose them as they were seen to be an obstacle to the consolidation of their authoritarian rule. The sentiment was that a strong state was better suited to achieve development and ‘starving people do not need democracy’.<sup>91</sup>

During the first two decades of independence that were dominated by one-party or military rule, Western democratic countries and international financial institutions, such as the World Bank and the International Monetary Fund (IMF) that later engineered the Structural Adjustments Programmes (SAPs), also supported this view and shared African leaders’ negative attitude towards civil society.

From ‘statist’ talk in the 1960s and 1970s, the discourse became frankly ‘anti-statist’. Subsequently, there were calls were made for less of state, which in theory and practice continued to be seen as the main obstacle to growth, development and liberty on the continent.<sup>92</sup>

This discourse dramatically contrasted with that of the modernisation and adjustment era when the state was considered to be instrumental to modernisation or development. Like the earlier pro-SAP discourse, the anti-statist discourse of good governance was mainly commissioned by developed countries and international financial institutions, namely, the World Bank and the IMF.

The conventional Western and mainly American political science discourse of the 1980s and early 1990s celebrated the ‘crisis’, ‘weakness’, ‘disintegration’, ‘failure’, ‘decline’, ‘fall’, ‘collapse’, ‘statelessness’ and ‘quasi-statehood’ in Africa.<sup>93</sup> Some scholars held that citizens were disengaging from the state<sup>94</sup> and applauded the emergence of what was assumed to be elements of a vigorous and self-reliant civil society. However, with the ‘survival’ of the embattled and collapsed African state,<sup>95</sup> some of them who argued that the state was a ‘problem’

91 Mangu (n 17 above) 194.

92 Mangu (n 17 above) 49.

93 Mangu (n 17 above) 50.

94 See TM Callagy *The state-society struggle: Zaire in comparative perspective* (1984); D Rothchild & N Chazan *Precarious balance: State and civil society in Africa* (1988); Mangu (n 17 above) 53; V Azarya & N Chazan ‘Disengagement from the state in Africa: Reflections on the experience of Ghana and Guinea’ (1987) 26 *Comparative Studies in Society and History* 106.

95 See P Quantin ‘L’Afrique central dans la guerre: Les Etats-fantômes ne meurent jamais’ (1999) 4 *African Journal of Political Science* 106; R Joseph ‘The reconfiguration of power in late twentieth-century Africa’ in Joseph (n 23 above) 68; RH Jackson & CG Rosberg ‘Why Africa’s weak states persist: The empirical and the juridical in statehood’ (1982) 35 *World Politics* 1.

changed their minds to hold that it was also a 'solution'<sup>96</sup> and had to be brought 'back in'.<sup>97</sup> The state had to be reconciled with civil society, which was considered inimical to it.<sup>98</sup> A *modus vivendi* had then to be found.

When they adopted the African Charter, African leaders recognised some role to civil society organisations among those entities that could make communications to the African Commission in cases of violations of the rights enshrined in the African Charter.<sup>99</sup> They took one step further in the Protocol to the African Charter on the Establishment of an African Court for Human and Peoples' Rights adopted in 1998. The Protocol entitles non-governmental organisations to bring cases before the African Court against a state party subject to its prior declaration recognising the competence of the Court to deal with such applications.<sup>100</sup> The AU Constitutive Act further established two organs that could work with civil society organisations, namely, the Pan-African Parliament<sup>101</sup> and the Economic, Social and Cultural Council.<sup>102</sup>

The NEPAD Declaration (2011), the DDPECG (2002) and the APRM Base Document (2003) recognise the role of civil society in promoting and assessing governance in AU member states. The African Democracy Charter makes reference to civil society organisations and stresses their role in promoting democracy, free and fair elections, and good political, economic and corporate governance.

The African Democracy Charter requires state parties to create conditions conducive for civil society organisations to exist and operate within the law.<sup>103</sup> State parties should foster popular participation and partnerships with civil society organisations.<sup>104</sup> They should ensure and promote strong partnerships and dialogue between government, civil society and the private sector.<sup>105</sup> Moreover, in implementing the African Democracy Charter, the AU Commission should commit regional economic communities to designate focal points for the co-ordination, evaluation and monitoring of the implementation of the commitments and principles enshrined in the Democracy Charter in order to ensure massive participation of stakeholders, particularly

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96 P Evans 'The state as problem and solution: Predation, embedded autonomy, and structural change' in S Haggard & RR Kaufman (eds) *The politics of economic adjustment* (1992) 139.

97 P Evans *Bringing the state back in* (1985).

98 Mangu (n 17 above) 53.

99 Arts 55-56 African Charter.

100 Arts 5(3) & 34(6) African Court Protocol.

101 Art 17 AU Constitutive Act.

102 Art 22 AU Constitutive Act.

103 Art 12(3) African Democracy Charter.

104 Art 27(2) African Democracy Charter.

105 Art 28 African Democracy Charter.

civil society organisations, in the process.<sup>106</sup> However, civil society organisations should also contribute to the promotion of the African Democracy Charter.

#### 4.2.2 Civil society and the promotion of the African Democracy Charter

Civil society organisations should contribute to raising awareness of the African Democracy Charter among the African people at the national as well as at the regional and continental levels. Democracy, free and fair elections and good governance require state parties to the African Democracy Charter to create conducive conditions for civil society organisations to exist and operate within the law.<sup>107</sup>

The African Democracy Charter is unknown to the overwhelming majority of African people. Civil society organisations, members of parliament, the government and the judiciary are not aware that such a legal instrument exists and has even come into operation.

Civil society organisations should contribute to the popularisation of the African Democracy Charter at the national level. This is critically important since the Democracy Charter is still to be signed, ratified, domesticated and enforced in two-thirds of AU member states. Democracy, free and fair elections and good governance should be promoted through the ratification and the enforcement of the African Democracy Charter at the national, regional and continental levels. Civil society organisations should engage in dialogue and co-operate with AU member states to sensitise them and get them to sign, ratify and domesticate the African Democracy Charter.

In time, they should assist state parties in reporting to the AU Commission and to regional economic communities on their compliance with the Democracy Charter. The Democracy Charter obliges state parties to foster popular participation and partnerships with civil society organisations.<sup>108</sup> Strong partnerships and dialogue should be promoted between government, civil society and the private sector.<sup>109</sup> They should do the same with the AU Commission at the continental level and assist it in performing its functions of co-ordinating the evaluation and implementation of the Democracy Charter and even in developing the benchmarks for its implementation.<sup>110</sup> They should collaborate with regional economic communities committed by the AU Commission to ensure that they encourage member states to ratify the Charter.<sup>111</sup>

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106 Art 44(B)(b) African Democracy Charter.

107 Art 12 African Democracy Charter.

108 Art 27(2) African Democracy Charter.

109 Art 28 African Democracy Charter.

110 Art 44(2)(A)(a) African Democracy Charter.

111 Art 44(2)(B)(a) African Democracy Charter.

They should participate in the process of the implementation of the commitments and principles enshrined in the African Democracy Charter through the focal points designated by the regional economic communities under the supervision of the AU Commission.<sup>112</sup>

According to Moyo, 'Africa suffers from governance crises'.<sup>113</sup> Critical among them is the crisis of democracy or good political governance. There is an acute 'democratic deficit' and many countries are yet to make substantive democratic progress as opposed to the cosmetic changes that are currently in place. In many instances, democratic gains already achieved are being eroded.<sup>114</sup>

Despite what they have achieved thus far, African civil society organisations need to meet several challenges in order to promote democracy, free and fair elections and good governance in Africa through the implementation of the African Democracy Charter.

The first challenge relates to capacity building. It would be difficult to promote the African Democracy Charter if civil society organisations, themselves, are not conversant with the commitments and principles enshrined in the Charter. Popularisation of the Democracy Charter by civil society organisations should start among their members and the civil society movement as a whole. Civil society organisations should start by appropriating the Charter before taking it to or engaging with the people, AU member states, regional economic communities' focal points and the AU Commission. Civil society organisations also lack skills to lobby state parties' officials, those of regional economic communities and the AU to get the Democracy Charter implemented fully.

Civil society organisations should take up the challenge of networking. They tend to work in isolation, without any common agenda, and to fight among themselves to attract the rare resources coming from Western donors. They suffer from the same wrongs that affect political parties and leaders.

Networking is required at the national, regional and continental levels to better promote democracy, free and fair elections, good governance and other developmental objectives in Africa. While civil society organisations should co-operate among themselves, they should also develop new ways to co-operate with the state. Over the years, African governments dealt with civil society organisations as opposition parties and civil society organisations behaved themselves as such.<sup>115</sup> Yet, even when they rightly challenge the *status quo* which runs against the interests of their members, in particular, and society, in general, civil society organisations do not form a society against the

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112 Art 44(2)(B)(b) African Democracy Charter.

113 B Moyo *Introduction: Governing the public sphere: Civil society and regulation in Africa* (2010) 3.

114 As above.

115 JW Harbeson *Civil society and the state in Africa* (1994).

state. They are part of the state. However, they are not the government. Nor should they behave like political parties. They should collaborate with the government to help it deliver on its development objectives or criticise and advise when it fails to do so.

On the other hand, many civil society organisations are poorly equipped in terms of financial and material resources. To achieve their objectives, civil society organisations should be able to raise funds internally before resorting to foreign and Western donors. There is no reason why civil society organisations should not be funded from the national budget when public funding is provided for political parties.

A lack of resources makes civil society organisations vulnerable and heavily dependent on national authorities, Western governments and donors that tend to dictate their agendas.

Closely related to the previous is the challenge concerning the autonomy of civil society organisations and their 'political' independence or loyalty. Many civil society organisations are allied to the government, the opposition, Western governments and donors. Some actually operate as branches or sections of the opposition.<sup>116</sup> Yet, they should emancipate and remain responsible for their agendas instead of losing their identity and subjecting themselves to their funders.

Another challenge relates to the legitimacy of civil society organisations. Many are unknown to the people they pretend to serve and are not credible, making it difficult to support their work. Many civil society organisations that pretend to promote democracy, good governance, accountability, respect for human rights and the rule of law fail to lead in this regard. There is no democracy in their functioning. Like political parties' leaders, the leaders of the civil society movement tend to consider their organisations as a personal or family affair to help them improve their living conditions or access power. They do not feel they should be accountable and hardly abide by the constitutions of their organisations. Many are also corrupt and do not respect the principles of good governance. This is the 'un-civic face'<sup>117</sup> or the *Janus* face<sup>118</sup> of several civil society organisations in Africa. Failure to set an example contributes to making some civil society organisations illegitimate and undermining their contribution to democratic governance.

Perhaps the most critical challenge is the one that relates to the enabling of the public sphere that would help civil society to operate freely. In their reflection on the legal environment in African countries such as Angola, Cameroon, DRC, Ethiopia, Gabon, Kenya, Madagascar, Mauritius, Mozambique, Tanzania and Zambia, Moyo and other

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116 Moyo (n 113 above) 8.

117 Moyo (n 113 above) 6.

118 See M Duverger *Janus, les deux faces de l'Occident* (1972).

authors find that the public sphere in many African countries has been '(dis)enabling' rather than 'enabling'.<sup>119</sup>

According to Machel, the space for citizens has been shrinking through restrictive regulatory instruments, and bad behaviour within both society and the state.<sup>120</sup> Yet, as she emphasises, 'for Africa to develop there is a need for her citizens to be enabled to utilise their capabilities in ways that are not restrictive, controlling and disempowering'.<sup>121</sup> In Machel's view, Africa is set to develop only if her citizens play active roles in their governance and enabling spaces to collaboration, critical thinking, association and challenges are created.<sup>122</sup>

The above challenges are serious, but they are not insurmountable. While civil society organisations should do their best to overcome their own internal challenges (legitimacy, transparency, accountability, good governance, democracy, capacity building, autonomy and networking), the governments of AU member states, regional economic communities and the AU Commission should create the necessary conditions to operate freely and partner with them in the promotion of democracy, free and fair elections and good governance in Africa. Foreign governments and institutions interested in good and democratic governance in Africa may also assist without dictating to them or using them as instruments of foreign policy in exchange for funding.

## 5 Conclusion

The adoption on 30 January 2007 of the African Democracy Charter and its coming into force on 15 February 2012 constitute a major step in the protracted struggle for democracy, free and fair elections and good governance that African peoples embarked on since independence.

The African Democracy Charter is now binding on 15 AU member states who are therefore bound to comply with its provisions. As a treaty, the primary responsibility for its implementation lies with state parties. This is why most of its provisions are directed to them.

However, this is not the first time that AU member states have adopted an international instrument related to the promotion of democracy and good governance. Since the adoption of the African Charter on Human and Peoples' Rights, the African legal system has developed tremendously. Many declarations and treaties were

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119 B Moyo (*Dis*) *Enabling the public sphere* (2010).

120 G Machel 'Foreword' in S Parmar *et al* (eds) *Children and transitional justice: Truth-telling, accountability and reconciliation* (2010) I.

121 Machel (n 120 above) I-II.

122 Machel (n 120 above) II.

adopted. African history is littered with declarations and conventions which have never been implemented. It is one thing to adopt a legal instrument – and African leaders have done exceptionally well in this regard – but another to enforce or implement it. This is unfortunately where they have failed dramatically.

The adoption and entry into force of the African Democracy Charter came as good news, some of the few that we have heard from the AU since it was established a decade ago. The majority of African leaders who constitute the AU Assembly did not come to power through free and fair elections and specialist in vote rigging, electoral and constitutional manipulations in order to retain power. Some had never organised an election. Most of them had a poor track record in terms of governance. It was therefore a miracle that the AU Assembly could agree on a regional convention that was expected to bind and compel them to promote democracy, elections and governance. This arguably resulted mainly from intense pressure from Western governments and international organisations and also from African peoples who had been demanding democracy and good governance for decades during which they could not be heard because both the West and East unreservedly supported authoritarian leaders allied to them. African leaders came to realise that their own survival and that of their people required them to firmly embark on the road to democracy and good governance as a prerequisite for peace and development.

The African Democracy Charter is to play a crucial role in the promotion of democracy, free and fair elections and good governance in Africa. It complemented and enriched the African human rights system and features among the most important AU instruments.

Unfortunately, its entry into operation went unnoticed by African leaders, the majority of African peoples and civil society organisations who have been demanding democracy, free and fair elections and good governance, by most governments that present themselves as democratic, and to national institutions established to support democracy. It also failed to attract special and sustained attention from African political scientists, legal scholars and democracy militants, including those who had been prolific against authoritarianism and championed good political governance, a respect for human rights and the rule of law in Africa as if there was nothing worthy of celebration.

This article intended to break this relative silence<sup>123</sup> and to turn the spotlight on the African Democracy Charter as it reflected on its

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123 See UNESCO *The African Charter on Democracy, Elections and Governance: The role of national human rights institutions* (2010); S Saungweme *A critical look at the African Charter on Democracy, Elections and Governance in Africa* (2007); T Alemu *The African Charter on Democracy, Elections and Governance: A normative framework for analysing electoral democracy in Africa* (2007); L Ajong Mbatndah & E Ngonji Nyungwe 'Applying the African Charter on Democracy, Elections and Governance to dictatorships: The Cameroonian experience' (2008) 2 *Cameroon Journal on Democracy and Human Rights*; B Tchikaya 'La charte africaine de la démocratie, des



significance, but also on its shortcomings, on the prospects for its implementation at the national, regional and continental levels, and on the crucial role that civil society should play in the promotion of democracy, free and fair elections and good governance in AU member states, which is the overall objective of the African Democracy Charter.

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élections et de la gouvernance' (2008) 54 *Annuaire français de droit international*.