

Unconstitutional Changes of Government in Africa:

An Assessment of the Relevance of the Constitutive Act of the African Union

'Africa must unite or disintegrate individually.' Kwame Nkrumah

The Constitutive Act of the African Union marks a new era in institution-building in post-colonial Africa. It is conceived as an aspect of Africa's response to the challenges of globalisation and regional integration. The Constitutive Act, amended in January 2007 at Addis Ababa, Ethiopia, in principle is a catalyst for building a culture of peace and political stability in Africa. This policy brief explores the issues in the Constitutive Act and critically assesses its relevance for the process of democratisation in Africa. It is a significant departure from the authoritarian political order of the Organisation of African Unity (OAU) and reflects a new thinking in African politics in the 21st century.

Keywords: *Africa, Democratisation, Constitutionalism, Peace and Security and the Constitutive Act*

The Origins of the African Union

The African Union (AU) was born out of the Sirte Declaration. The 4th Extraordinary Session of the Assembly of the Organisation of African Unity (OAU) met in Sirte, Libya, on 8 and 9 September 1999 at the invitation of Colonel Muammar Ghaddafi. Here draft declaration of potentially profound significance for the African region was introduced and adopted by African leaders.¹ The Sirte Declaration of 9 September 1999 expressed the resolve of the African heads of state and government to establish the AU, and to accelerate

the establishment of the institutions of African Economic Community in terms of the Abuja Treaty. These institutions include: the African Central Bank, the African Monetary Union, the African Court of Justice, and in particular the Pan-African Parliament. Its declared purpose was 'to forge unity, solidarity and cohesion, as well as cooperation between African peoples and among African States'.²

The Constitutive Act of the AU was adopted on 11 July 2000 by the OAU Assembly at its 36th Ordinary Session. On that day 27 heads of state signed the Constitutive Act. Less than nine

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months later, on 1 March 2001, it was announced that all remaining African states had acceded to it. The OAU then declared the establishment of the AU by the unanimous will of the member states. This was the beginning of the end of OAU which had been popularly dubbed the 'Dictators' Club'.⁵

Introduction

Authoritarianism dominated African politics following political independence from colonial rule. African leaders through the OAU and later the AU were very concerned with facets of the continent's governance challenges. For the pioneer OAU, the focus had been to do away with the vestiges of colonialism in order to promote the principle of self-determination and to foster the establishment of state sovereignty, free from all forms of external interference. As opposed to the OAU whose Charter celebrated the principle of sovereignty and non-interference in the domestic affairs of member states, member states of AU pledged to respect the sovereignty of member states except in circumstances involving human rights abuse, war crimes and genocide.⁴

Self-interest and geo-strategic calculation dominated African politics during the lifespan of OAU. For example, the initial isolation of the Liberian regime of Samuel Doe in the 1980s was informed by a collective fear within the then leadership of the OAU of an indiscriminate bloody form of unconstitutional change, masterminded by junior and non-commissioned military officers.⁵ It is estimated that between 1961 and 1997, Africa experienced 78 unconstitutional changes of government. The majority of these scenarios were provoked by national political systems' *modus operandi*, national power contestation and regional dominance. The factor of exploitable natural resources has inevitably been at the centre of ethnic woes in Africa.⁶ The aim of this policy brief is to critically examine whether the Constitutive Act signed and adopted on 11 July 2000 at Lomé, Togo, has achieved its desired objective in the context of good governance in Africa. To what extent has the Constitutive Act combated the phenomenon of unconstitutional changes of government in recent times? To what extent have issues in the Constitutive Act been translated into practice?

Issues in the Constitutive Act in Relation to Unconstitutional Changes of Government in Africa

The Constitutive Act holds the principle of diminished sovereignty for all its member states by acknowledging in article 4*h*, the right of the AU to intervene in a member state, pursuant to a decision of the Assembly in respect of serious circumstances such as war crimes, genocide and crimes against humanity and 'the right of a member state to request intervention from the union in order to ensure peace and security'. The resurgence of coups in Africa prompted the AU in the Declaration on the Framework to redefine the whole concept of unconstitutional changes of government,⁷ which include:

- A military coup d'état against a democratically elected government
- Intervention by mercenaries to replace a democratically elected government
- Replacement of a democratically elected government by armed dissident groups and rebel movements
- The refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections, and
- any amendment or revision of the constitution or legal instruments is an infringement on the principles of democratic change of government.

The principle of democratic governance and the respect of human rights are well articulated in the Constitutive Act on the Charter of Democracy, Elections and Governance which states:

1. State Parties recognise democracy as a basic right and are committed to promote democracy, human rights, rule of law as a means towards achieving development and human dignity. State Parties recognise popular participation as the fundamental right of the people to fully and effectively participate in the determination of the decisions which affect their lives at all levels and at all times (article 4(1)).
2. State Parties shall embrace democratic political, economic and social governance as a critical ingredient of sustainable development; stability, peace and security amongst its basic tenets; democracy must entail regular free-and-fair elections; government based upon consent of the governed; respect and protection of human rights; and Constitutional transfer of power (article 5(1)).

Furthermore, the African Charter of Democracy, Elections and Governance set forth new mechanisms to respond to the steady erosion of democratic conditions and perpetrators of unconstitutional changes of government. These entail:

When a situation arises in a State Party that may affect its democratic political institutional arrangements or the legitimate exercise of power, the Peace and Security Council shall exercise its responsibilities in order to maintain the constitutional order in accordance with relevant provisions of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, herein after referred to as the Protocol (article 24).

Article 25 states:

1. When the Peace and Security Council observes that there has been an unconstitutional change of government in a State Party and that diplomatic initiatives have failed, it shall suspend the State Party from the exercise of its right to participate in the activities of the Union, in accordance with the provisions of articles 30 of the Constitutive Act and 7(g) of the Protocol. The suspension shall take effect immediately.
2. The suspended State Party shall continue to fulfil its obligations to the Union, in particular with regard to those relating to respect of human rights.
3. During the period of suspension of the State Party, the Union shall still maintain diplomatic contacts and take any initiatives to restore democracy in that State Party.
4. The perpetrators of unconstitutional change of government shall not be allowed to participate in elections held to restore the democratic order or hold any position of responsibility in political institutions of their State.
5. Perpetrators of unconstitutional changes of government may also be tried before the competent court of the Union.
6. The Assembly shall impose sanctions on any Member State that is proved to have instigated or supported unconstitutional changes of government in another state in conformity with article 23 of the Constitutive Act.
7. The Assembly may decide to apply other forms of sanction on perpetrators of unconstitutional changes of government, including punitive economic measures.
8. State Parties shall not harbour or give sanctuary to perpetrators of unconstitutional changes of government.

9. State Parties shall bring to justice the perpetrators of unconstitutional changes of government or take necessary steps to effect their extradition.

10. State Parties shall encourage conclusion of bilateral extradition agreements as well as the adoption of legal instruments on extradition and mutual legal assistance.

Assessing the Relevance of the Constitutive Act and the Future Prospects of Africa

Since the inception of the Constitutive Act, the ethos of democratic and good governance has to a large extent been reinforced in Africa. Zimbabwe, Guinea Conakry, Sierra Leone, Liberia, Sudan, Togo, Somalia and Central African Republic (CAR) are obvious examples. For example, in 2008 Robert Mugabe was forced through the influence of AU and Southern Africa Development Community (SADC) into a unity government with Morgan Tsvangirai, the opposition leader who is currently prime minister. The Global Political Agreement (GPA) signifies a beginning of the end of the political hegemony on the state by Zimbabwe African National Union–Patriotic Front (ZANU-PF) and offers opportunity for the people of Zimbabwe to write their own constitution.

The GPA is a development that allows for the dismantling of the Zanufication of Zimbabwe without risking a civil war. This agreement – unity government – has restored peace between the parties and created a measure of stability in Zimbabwe, even though the GPA saw Mugabe retaining the post of president after he had effectively lost the presidential election to Tsvangirai of the Movement for Democratic Change (MDC). New elections have been scheduled for 2013. In the absence of an appropriate article which states that party with the highest votes will take over power, there is no intention to articulate one either.

In a further case, the joint panel of the UN and African peacekeeping force, the United Nations-African Union Mission in Darfur (UNAMID) played an instrumental role in ending the six-year war in Darfur. A nine-member Thabo Mbeki panel worked hard to assist Sudan in organising the first democratic presidential and democratic election in 24 years, to be followed nine months later by a referendum on southern secession.

The Constitutive Act is, however, also rhetorical as demonstrated by the continent's cycle between weak constitutional democracies. The AU and ECOWAS have failed on some occasions

to penalise member states that infringed on the Constitution to extend their grip on power. This has been the case in Cameroon. This modest oil-producing Central African country's constitution requires President Paul Biya to step down in 2011. He has been at the helm for more than 25 years. However, he shocked Cameroonians when on 31 December 2007 in his end-of-year message, he unilaterally proposed a 're-examination of the constitution'.

Similarly, if article 25(4) of the Constitutive Act is applied to the case of Madagascar, then Andry Nirini Rajoelina who ousted the democratically elected leader, Marc Ravalomanana in a March coup, should be tried before a competent AU court as stipulated in article 25(5). In this case, the Maputu Political Accord on Madagascar of 9 August 2009 made a mockery of the Constitutive Act. The fact that Rajoelina went against the Maputu Agreement and no sanctions were imposed on him is something to ponder.⁸ In the absence of an appropriate forum and with no evidence of an intention to create one, it is not clear why such a provision was articulated in the Charter.

Paradoxically, in the case of the Union of the Comoros peacekeeping efforts marshalled by the AU, succeeded in excluding President Mohamed Bacar from participating in elections in Anjouan, on 15 and 29 June 2008. A new president of the Autonomous Island of Anjouan was designated thanks to military and material resources sent to Comoros by the governments of Tanzania and the Sudan, as well as Libya and Senegal. The AU disregarded the proposal of the then president Thabo Mbeki to hold new elections in May 2008, as a way to resolve the crisis and allow Bacar to contest the elections. Mbeki had tried to stop the invasion on 14 March 2008 but the AU disregarded the proposal and the invasion went ahead. The AU took a bold step in October 2007 by imposing travel sanctions on Anjouan's Bacar and other government officials, froze their foreign assets and proposed fresh elections.⁹

In a further example, the violence in Guinea that saw soldiers kill no fewer than 157 pro-democracy demonstrators and rape dozens of women in September 2009 can be blamed on the AU. The nation of ten million people had been in limbo since the assassination attempt on the military junta leader, Captain Moïse Dadis Camara, although high-level international delegations held talks in neighbouring Burkina Faso aimed at negotiating an end to the country's military rule.¹⁰ Camara and his followers – labelling themselves the National Council for Democracy and Development (CNDD) – launched a coup and seized power after the

death of long-time president and dictator, Lansana Conté, who had long been supported by western powers. Civil society welcomed Camara and the CNDD.¹¹ Recent developments after the assassination attempt on Camara on 3 December 2009 and speaking from voluntary exile in Burkina Faso, he urged Guineans to put aside ethnic differences and support the transfer to democracy. However, in line with the Constitutive Act, members of his military government have been barred from contesting the planned presidential elections.

Policy Recommendations

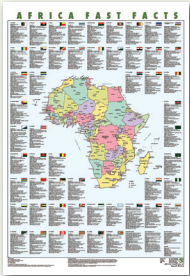
- AU should fast-track and implement the draft proposal on an African peacekeeping force and adopt a single military policy for the continent.
- The South African model of a presidential mandate of two terms should be enshrined within the Constitutive Act and adopted by member states.
- The Pan-African Parliament should fast-track the implementation of the African Court of Justice (ACJ) and clearly define its jurisdiction.
- The AU Commission should fast-track the process of implementation of Security Council Resolution 1809 of 16 April 2008 to set up an AU-UN peacekeeping operation at regional level. This peacekeeping force should be in charge of overseeing pre-election and post-election intimidation and violence.
- The AU should also assist member states with material, human and financial resources in order to speed up the process of elections, as stipulated in the Constitutive Act.

Conclusion

Thus far the Constitutive Act has served as a guideline for Africa governance. The momentum of democratisation throughout the continent has been accelerated. Neo-colonialism, however, undoubtedly still represents a challenge to regional integration, particularly in Francophone Africa. Former colonial powers still support and promote authoritarian regimes in Francophone African countries. The French government has failed time and again to condemn pre- and post-election violence and conflicts in countries such as Cameroon, Côte d'Ivoire and Gabon. These conflicts are also ignited from the West through sponsored rebel movements to destabilise the regional peace and stability.

Notes and References

1. See Sirte Declaration, 1999. 'Adoption of the Fourth Extra-Ordinary Session of the Assembly of Heads of States and Government (EAHG/Draft/Decl. (ivRev.1)'. Sirte Libya, 8–9 September 1999.
2. Corrinne, A., Packer, A. and Rukare, Donald, 2002. 'The New African Union and Its Constitutive Act' *American Journal of International Law* 370–1.
3. See Constitutive Act, n 1, article 28.
4. Shinkaiye, J.K., 2006. 'Governance Challenges in Africa and the Role of the African Union; in a public lecture to mark the 20th Anniversary of the European Centre for Development Policy Management (ECDPM)'. 19 December 2006. European Institute for Public Administration: Onze Lieve Vrouwe Plein 21, Maastricht.
5. Odinkalu, Chidi Anslem, 2008. 'Concerning Kenya: The Current AU Position on Unconstitutional Changes in Government:' *African Governance Monitoring and Advocacy Project (AfriMAP)* Open Society Institute, p. 1.
6. See, 'Unconstitutional changes of government in Africa; un-ravelling the tide'. A Joint Institute for Security Studies (ISS) and Hanns Seidel Foundation (HSF) Human Security; Nairobi, 19 November 2009.
7. See, 'African Union, African Charter on Democracy, Elections and Governance'. Adopted at the 8th Ordinary Session of the Assembly, Addis Abba, Ethiopia, 30 January 2007. Available at <http://www.unhcr.org/refworld/docid/493fe2332.html> (accessed 14 December 2009).
8. See 'SADC leaders reject Madagascar government': 9 September 2009, 8:54 am. RNW Radio Netherlands Worldwide.
9. BBC News 'Timeline: Comoros', 26 March 2008. Available at <http://news.bbc.co.uk/2/hi/africa/1070770.stm> (accessed 13 December 2009).
10. See 'Africa: Junta warns renegade soldiers to hold fire.' *City Press*, 13 December 2009, p. 9.
11. See African Press Organisation (Organisation de la Presse Africaine) 'Guinea: respect rights of opposition. Criticism of coup government leads to crackdown on dissenters, demonstrators'. Available at <http://appablog.wordpress.com/2009/08/31/guinea-respect-rights-of-opposition-criticism-of-coup-government-leads-to-crackdown-on-dissenters-demonstrators/> (accessed 31 August 2009).



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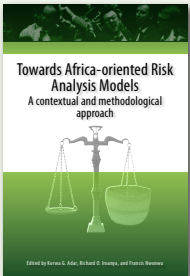
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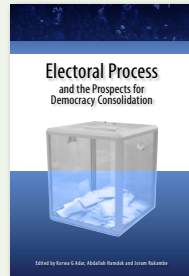
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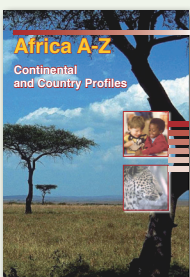
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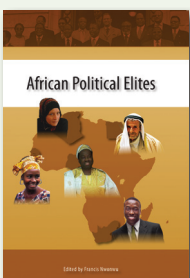
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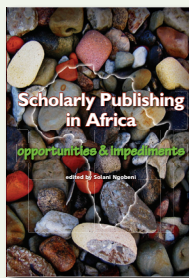
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ISSN 1998-7994



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