INTERNATIONAL LAW AND THE CONDUCT OF DEMOCRATIC ELECTIONS IN AFRICAN COUNTRIES

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ABSTRACT

The advent of western styled democracy in Africa has been viewed as the epitome of political development. The general beliefs are that most democratic countries are developmental oriented and are less prone to internal conflicts as every individual is given an equal opportunity to participate in the governance of the country. Properly conducted elections gives legitimacy and international recognition to the elected government. At international level UN and various other international and regional organizations and agreements have given emphasis on democracy and properly conducted elections. Though international law has been heavily involved in internal elections, due to sovereignty, its full visibility is limited as individual countries still retain the power and the right to conduct elections in manners that satisfies their legislation and guidelines. In keeping with their international legal obligations on democracy and good governance, most African countries constitutionally recognize the right to vote. However, though many African countries recognize voting rights and purport to respect and follow them, implementation at the ground level paints a different picture. The majority of African elections are marred by vote rigging, violence, counter accusations, corruption and interference. Following constitutional amendments to swing support in favour of particular candidates, many challenges have compromised the flow of elections in most African countries, which in many facets violate international law and little has been done to minimise these challenges.

INTRODUCTION

Elections in any country represent an important dimension in the efforts towards democratic consolidation and international legitimacy. The manner in which the election process is

conducted determines how other countries and other international stakeholders respond or see the elected government. Traditionally, elections have been a matter of domestic jurisdiction and even a hallmark of sovereignty.[i] 'In recent decades, however, this image of elections has grown increasingly inaccurate, as elections in many countries have acquired a strong, if underappreciated, international dimension.'[ii] International election set guidelines and standards constitute the benchmarks against which states, either through ratification or membership to international or inter-governmental institutions, have agreed to be measured. In line with article 26 of the Vienna Convention on the law of treaty, by signing international or regional treaties, state parties obligate themselves to the standards set by such international treaties and are bound by the provisions of such treaties and must therefore perform them in '…good faith'.[iii] However, due to sovereignty these set obligations, as established under international legal instruments, do not fully provide detailed set guidelines that should be universally followed.[iv] This creates problems when trying to evaluate individual elections using international law, the only other comparative too that can be used are individual constitutions, which however, individual countries can change or amend if they have control of the legislature.

Without unreasonable restrictions, every citizen of any given country has a right to participate in governance and public affairs through voting or by being elected in a free and fair elections held periodically.[v] Genuinely held elections are a necessary and fundamental component of sustained efforts to protect and promote human rights. With the benefits that comes with the political offices, elections in Africa like anywhere around the world are, highly attractive. In some African countries such as Benin, Cape Verde, Ghana, Mali, Senegal, and South Africa, elections have enabled the emergence of democratic governments. In some cases, however, elections have been manipulated to legitimate autocratic regimes or to ensure dynastic successions on the continent. Violence still still dominates a number of elections in Africa, in recent times, elections in countries such as Côte d'Ivoire (2010-2011), Zimbabwe (2008), Kenya (2007), Burundi (2015), DRC (2019) and Cameroon (2018) have collectively led to thousands of death and hundreds of thousands of people displaced. 'Several irregularities were reported in (these) countries, casting serious doubts on their electoral systems. This state of affairs affirms the argument that elections in Africa are hardly democratic.'[vi] All these deaths and displacements have all happened in the face of international law, of which most of the African countries with highly contested elections are all members of a number of international and regional treaties guaranteeing the rights of citizens to participate in democratic elections.

Some of these elections have had a substantial effect on international and national peace and security. The questions now are, what is the role of international law in protecting people against greedy and selfish politicians and should human rights perpetrators be allowed to get away with murder because of sovereignty? This research focuses manly on the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Democracy, Elections and governance (ACDEG) and the manner in which African elections have been conducted. In order to understand the impact of international law on African elections, I looked at the general attitude of African leaders towards the law vis a vis sovereignty. I went on to look at the provisions of international instruments and their implementation in some African countries such as Nigeria, Zimbabwe, Uganda, Kenya among others. Lastly, I looked at the way in which African leaders violated international legal instruments and their domestic laws by tempering with the constitutions, electoral management bodies and the electoral dispute settlement systems.

SOVEREIGNTY AND THE AFRICAN ATTITUDE TOWARDS INTERNATIONAL LAW

The success of international law largely lays on its implementation by member countries. International law has been taken with a pinch of salt in many African countries who have viewed it as a tool used by powerful countries to to exert control on the affairs of the African countries. African governments have accused western governments of regime change through 'democracy' by sponsoring opposition parties against the ruling parties, and in some cases this has been used as an excuse by leaders to hang on to power citing a 'foreign hand in their domestic democratic processes.'[vii] African perspective on international law has largely been shaped by its past experiences in the hands of the Western societies. Africa has had a long history of colonialism, abuse, slavery and 'consequently, African societies, denied of sovereign status, could not participate in the making of international law, but were nevertheless bound by it…It became an object, but not a subject of international law.'[viii] African countries became members of international law through the colonial masters and never involved in the making of the law, for example the UNGA resolution 2200A(XXI) establishing the ICCPR was passed when most African countries were still under colonial rule or had just gotten independence. They had to deal with what the former colonizers had put in place, which meant accepting international law as it was seen by the West. It is further argued that, that International law is

still being used to create an exploitative relationship between the African countries and Western governments.[ix] International Humanitarian law and the actions of international Financial institutions such as the IMF and the World Bank, who have been accused of 'spreading their own neo-liberal agenda to the rest of the world,'[x] has further widened the mistrust between African governments and the Western governments who are accused of using international law to further neo-colonialism. This could explain why some African countries did not favour the idea of the ICC which has been said to be largely unfairly targeting African leaders,[xi] and is seen as a continuation of Western domination in the affairs of Africa.[xii] This history has somehow hardened the African attitude towards international law and they have continuously emphasized on 'sovereignty'[xiii] and taken a more protective approach as means of trying to regain control of their politics, economies and resources. African leaders have in numerous occasions invoked the 'African solutions for African problems,'[xiv] as a means of shifting away from from the global justice tools and a 'convenient way to exclude external scrutiny.'[xv]

According to Kaiser sovereignty is 'the supreme undivided authority possessed by a state to enact and enforce its law with respect to all persons, property, and events within its borders.'[xvi] Sovereignty allows governments to have legitimate control over all areas of governance, that includes establishing, amending or enforcing laws and conducting elections. Elections are a prerogative of sovereign governments, they can organize and sponsor periodic elections.[xvii] Interference in another state's sovereignty is a violation of international law as was put in the International Court of Justice (ICJ) 1986 case between Nicaragua and the United States that the principle of non-intervention forbids all states to intervene directly or indirectly in internal or external affairs of other States.[xviii] The centrality of sovereignty has been emphasised in many African countries, with countries such as Zimbabwe having in the past accused UK and USA of wanting to interfere in its domestic governance processes.[xix] Sovereignty has been used as a way of shying away from international condemnation and scrutiny by a number of African countries after sham elections. Sovereignty sometimes limits the impact of international law in regulating domestic elections and general human rights abuses. Historically, the Organization of the African Unity (OAU) was faced with the same problem as Article III, Section 2 of the OAU Charter on 'non-interference in the internal affairs of state,'[xx] was greatly abused.[xxi] The organization failed to deal with domestic human rights violations or electoral malpractice as these were regarded as internal affairs. If anything, the organization protected leaders more than the citizens, with genocides in Rwanda having taken place with little condemnation from

the organization, it further failed to decisively deal with Former president of Equatorial Guinea Francisco Marcias Nguema, whose human rights atrocities forced almost 1.5 Million to flee the country,[xxii] and Idi Amin in Uganda who was said to have been responsible for the death of over 300 000 people by 1974.[xxiii]

However, 'the emergence of international human rights law…challenged conventional ideas of sovereignty - particularly the idea that a sovereign state has absolute authority within its own territory with respect to its own citizens.'[xxiv] International humanitarian law has limited sovereignty as gross violations of human rights in one country can call for foreign intervention to protect the citizens. Genocides that took place in Rwanda and the former Yugoslavia widened the debates on human rights law. At continental level the coming in of the African Union (AU) tried to address this abuse and impunity through article 4(h) which allows the AU to intervene in the internal affairs of a member state in 'grave circumstances, namely: war crimes, genocide, and crimes against humanity.'[xxv] 'Theoretically then, heads of state can no longer use the non-interference clause as a shield against accountability for human rights violations.'[xxvi] Further, Article 3(g) of the Constitutive Act provides that the AU must 'promote democratic principles and institutions, popular participation and good governance.'[xxvii] and 'Internally, Africa has attempted to answer the…challenge by rewriting the constitutional order to create a more transparent and responsive state.'[xxviii] The new generation of leaders has also seen greater commitment towards human rights law and according to Daniel Abebe 'between the AU's recent attention to human rights and the rise of an African regional court system, it appears that Africa has finally committed itself to enforcing international human rights law.'[xxix] The last two decades has seen major political reforms, with constitutions being rewritten, judiciary being strengthened, respect of individual rights and opposition political parties gaining ground.[xxx] Though the AU has shown great strides in efforts towards the enforcement of democracy and good governance, scholars have agued that, 'African Union, like its predecessor the OAU, has been unable to protect human rights in Africa or ensure state compliance with the democratic and human rights principles set forth in the African Charter.'[xxxi] Apart from countries such as South Africa that have specifically incorporated international law into domestic law by obliging local court to consider international law in interpreting provisions under the bill of rights,[xxxii] many other countries do not clearly specify the position of international law.

INTERNATIONAL LAW PROVISIONS AND AFRICAN ELECTIONS

The right to participate in the national elections and governance is the cornerstone upon which democracy is built on. Without periodic elections the right to equal participation can not be put to practice. Participation entails an obligation to guarantee that all citizens have the right and the opportunity to partake in public affairs, through political parties, civil society organizations and other citizen-related initiatives. The right to vote and participate in affairs of national governance were first guaranteed by what may be regarded as the first major international pronouncement on political governance through article 21 of the Universal Declaration of Human Rights (UDHR) 1948[xxxiii] and confirmed in the *Filartiga V. Pena- Irak.*[xxxiv] Sub-paragraph 1 of the article states that, 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives.' while sub-paragraph 3 provides that, 'the will of the people shall be the basis of the authority of government,' and that this will is ascertainable through 'periodic and genuine election, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'[xxxv] These provisions recognized that, people must be under governments of their choice, governments in which they should be free to participate without any unjustifiable impediments. However, the general conduct of African election has to a greater extent fell short in satisfying and meeting the legal provisions of either international law or domestic law. Acts of intimidation, violence and manipulation of electoral processes goes against principles of democracy as it limits the participation and takes away the right of people to vote or be voted.

However, though, at the time of its inception the UDHR was non-binding it gave birth to a number of other international and regional treaties addressing the issue of democracy and elections including ICCPR. ICCPR and successive international and regional treaties, establishes obligations under which states must hold genuine elections. 'Article 25(a) of the ICCPR grants individuals the right to take part in the conduct of public affairs, not only through their representatives but also 'directly.'[xxxvi][xxxvii] Both the UDHR and ICCPR refer to the conduct of 'genuine' elections as the process by which citizens come to be freely and equally represented in government, offering a peaceful means of resolving political competition for power. While it is commonly agreed that each country has the sovereign right to choose how to conduct its election, members of the United Nations have agreed to be bound by a set of obligations and commitments to protect and promote the electoral rights of their citizens.[xxxviii]

In its resolution 68/164 on 'Strengthening the role of the United Nations in enhancing periodic and genuine elections and the promotion of democratization,'[xxxix] General Assembly members reaffirmed the particular obligation to ensure that every citizen has the effective right and opportunity to participate in elections on an equal basis.[xl] In Africa, sham elections have been held as a cover and leaders have used elections as a means to sanitize their continued stay in office. 'It is largely in Africa that political leaders unilaterally alter constitutions, bully weak legislatures and judiciaries, and openly manipulate and rig elections, often at devastating effect on human development.'[xli] In Uganda it has been said that, 'presidential electoral laws are deficient in their capacity to facilitate fair political contestation… (and) were not adequately constructed to address electoral malpractices pertaining to Uganda, and they have been interpreted to favour the incumbent.'[xlii]

The rights of people to participate in election has been limited in so many other ways due to societal polarization. The preamble of the ICCPR recognizes the importance of conditions that are created in order for people to enjoy their civil and political rights. The absence of such conditions in many African countries have limited the rights of people to fully participate in the electoral process of their countries. Violence and intimidation violets article 21 (1) of UDHR as it talks of people participating freely. According to article 22 of the ICCPR governments are further obligated to guarantee such other rights as freedom of expression, freedom of assembly and association, and freedom of movement in making sure the rights of people to vote are met. Sitting presidents have made it very difficult for opposition parties to campaign freely without fear of being attacked. 'This state of affairs limits opposition presidential candidates from enjoying the internationally recognized right to participate in an election.'[xliii] Violence and intimidation have taken away the freedom of the people, in some cases violence does not only come from ruling parties but also from opposition parties who are by nature are not subjects of international law. Violent 'trends have been recorded in Sudan, Sierra Leone, Senegal, Gambia, Rwanda, Ghana, Liberia, Zimbabwe, Burundi, the Democratic Republic of the Congo, and in others, where thousands of people have been killed and properties damaged following election violence.'[xliv] Voting by cohesion violets both international law and many domestic constitutions. Surprisingly, in most of these elections AU has declared them free and fair, including the Kenyan election that was later declared null and void by the Kenyan Supreme Court. In most cases international law has turned a blind eye on the African electorates who are at the mercy of power hungry leaders.

At regional level African countries have created a number of initiatives towards promoting democracy and good governance, the majority of them have largely failed to produce expected results. The AU's Constitutive Act (2000), which formally established the organs[xlv] of the AU, sets as its objectives the promotion of 'democratic principles and institutions, popular participation and good governance' as well as the protection of 'human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.'[xlvi] In 2007, AU members adopted the AUCDEG. The main objective of the AUCDEG is the promotion of democracy and human rights in Africa. Improvements in matters of democracy are needed in Africa, 'With the exception of a few African countries such as Mauritius, Ghana, South Africa, and Botswana, most African countries generally rank poorly on leading international democracy indices'[xlvii] Prior to the adoption of the AUCDEG, AU member states adopted a number of instruments meant to facilitate the implementation of democracy in African states, however, all of these instruments eventually failed to lead to widespread democracy in Africa.[xlviii] Lack of tangible sanctions under international law followed by politics of 'brotherhood' in Africa has resulted in impunity as many leaders continue to abuse their people in the name of sovereignty. When the SADC Tribunal issued judgments condemning Zimbabwe for its human right abuse, the regional leaders disbanded the tribunal altogether.[xlix] Under the AU's African Court of Justice and Human Rights (ACJHR), which can also hear cases under other international human rights instruments,[l] it can not prosecute leaders for human rights violations while in office. 'This policy thus gives those accused of human rights violations the incentive to serve as 'President for life.'[li] Furthermore compliance with judgments of the courts has been very poor and according to Daniel Abebe of the 337 cases he studied 'only 113 resulted in a judgment finding a violation of a regional or international human rights treaty. Relatively few of these 113 judgments were actually enforced, and according to available data, state compliance rates are poor.'[lii]

Similarly to article 25 of ICCPR many African Constitutions guarantees the right to participate in its governance to all its citizens.[liii][liv] Despite the right to vote and to be voted being guaranteed in many African constitutions, it has never been respected in many African countries as leaders have continuously disobeyed the constitutions and laws they swore to uphold and defend. 'Although most African states recognize voting rights in theory, an examination of what states do in practice paints a different picture. It shows that the process faces several challenges as a result of human interference'[lv] and electoral irregularities have

led to contestations and sometimes violence. At law, peoples right to vote can be limited based on 'objective and reasonable[lvi] criteria, which include residency, age, mental incapacity, criminal conviction, conflicts of interest, minimum amount of support from potential voters, or a reasonable monetary fee.'[lvii] Opposition leaders have been prevented from running through 'trumped up' criminal charges, in 2016 the Nigerian 'opposition leader Hama Amadou was arrested for alleged child trafficking shortly after announcing his candidacy.'[lviii] Laws must be respected and any violation must be treated as per the law, opposition members are not above the law, the question arose as to the timing and the 'intention' of such arrests. Arrests of main political opponents towards elections are likely to be interpreted as abuse. Further, laws have been used to shield incumbents from opposition, in Senegal, President Macky Sall was accused of preventing some of his main rivals from running when 'the presidential candidates of the two most important political parties in the country's political history…were denied to candidate because of criminal charges against them.'[lix] In Madagascar's 2006 election, then President Marc Ravalomanana, banished the main opposition leader Pierrot Rajaonarivelo, into exile. His candidature would have limited the chances of the incumbent president from winning. To make matters worse, the laws then required physical presence of the candidate to make an application,[lx] he could not physical come because the government prevented him. Legally, he could not run because he was not physically there to make an application, but this was a clear abuse by the incumbent president to eliminate him from the elections.

All such limitations that directly affect the right of people to select representatives of their choices are rarely considered in analysing the election processes in Africa. In many African elections, a number of opposition parties have started a culture of boycotting elections citing unfairness. Though, they can not be prosecuted for boycotting an election, such actions have to some extent robbed the people their right to freely chose their representatives. In same instances such as Zimbabwe in 2008 and Zanzibar in 2005 were an opposition boycott led to a power sharing agreement. In other cases, no significant changes have taken place and incumbents have remained in power. In Zanzibar, the opposition boycotted the election in 2016 over allegations of electoral fraud, which gave the incumbent President Ali Mohamed Shein a comfortable win with 91% of the votes. In Djibouti the 2016 elections were won by the incumbent President Omar Guelleh with 87% despite a boycott by major opposition parties. [lxi] Despite the obvious 'disfranchise' of people by the boycotting opposition parties, it is hard to

use international law to argue against the declared results as it is difficult to prove popular support outside of elections.

CONSTITUTIONAL COUPS

Constitutions have somehow failed the African democracy as some leaders have rendered constitutions dysfunctional by regularly ignoring their provisions. The failure to uphold and respect constitutions has created many conflicts in Africa in regard to elections. The presents of constitutions have not led to constitutionalism. Scholars have concluded that 'if Africa is to make any meaningful progress in governance there is the need for Africa to adopt constitution with constitutionalism because that is the only alternative option for progress in governance…'[lxii] Constitutional processes are regarded as a domestic matter and little can be done by international law to safeguard the rights of the people. Many African leaders have managed to stay in power against the will of the people through what has been termed 'Constitutional coups'. Democracy is often cited as the basis for constitutional amendments, the popular argument is premised on the 'will of the people.'[lxiii] Leaders have used their current positions and proximity to power to change the constitutions in their favour. 'Constitutional coups' takes place in Africa and have become a source of domestic violence and political instability thereby impacting negatively on the regional peace and Security. The concept of sovereignty clouds constitutional coups because, 'as long as the procedural requirements are met, constitutional amendments, for whatever reasons, including remaining in power, are perfectly legal.'[lxiv] It becomes very difficult for the international community to challenge the legality of constitutional amendments as 'the line between legal and illegal constitutional amendments is quite thin.'[lxv]

By holding referendum, Article 21 of the UDHR would have been achieved because the will of the people would be said to have been respected. The next question will be on Article 25 of the ICPCR that talks of genuine elections. In the Republic of Congo (Brazzaville), the constitution was amended in 2015 to remove term limit and age restrictions on the presidential candidate despite strong criticism and boycott by the main opposition parties. The electoral commission reported 92 percent of votes in favour of the constitutional amendment,[lxvi] and in Rwanda it was 98 percent in support of the constitutional change allowing President Kagame

to extend his rule. These numbers show an outright support and can give an impression to the outside world, but in reality there are several factors such as corruption, violence, intimidation and electoral irregularities that are not factored in. Violence and intimidation of opposition members dominated the Congolese referendum as members of the opposition were arrested just before the referendum.[lxvii] Further, the Congolese case was quite unique in the sense that article 185 of the old 2002 constitution prohibited amending the term limit,[lxviii] possibly as a way of avoiding it they had to adopt a new constitution which was legal in terms of article 186.[lxix] It is difficult to measure some of these leaders' popularity only based on votes because in Tunisia and Sudan the actions of the people contrasted the outcome of elections. In Tunisia Ben Ali who had been regarded as an autocrat[lxx] in 2009 got 89% of the votes in an election declared free and fair by the AU. Surprisingly, within two years, he was forced to resign by mass protests in what became known as the Arab Spring. Similarly, in Sudan were Omar Al-Bashir was in 2015 elected by 94% of the electorates[lxxi] was in 2019 forced out through popular uprisings.

Article 23 of the ACDEG in principles tries to address constitutional coups, as it prohibits 'any amendment or revision of the constitution or legal instruments, which is an infringement on the principles of democratic change of government.'[lxxii] Many African leaders have flouted this provision and enabled themselves to stay in power through constitutional amendments. Many countries such as Burundi, Chad, Congo, Gabon, Rwanda and Uganda among others have successfully amended their constitutions allowing their leaders to extend their rule, with little criticism from the AU. The AU has taken a soft hearted approach in matter to do with constitutional coups, despite Article 44.2 of ACDEG mandating the AU Commission to 'evaluate compliance by States Parties,'[lxxiii] 'the commission has not engaged on this and has generally been non-committal on the constitutional review processes on the continent.'[lxxiv] Given that 'neither AU law nor international law forbids a long-term tenure, even life tenure, in office.'[lxxv] African leaders have taken advantages of the failures of AU to enforce article 23, to legalize and sanitize their over stay in power. Some scholars and politicians have argued against term limits giving examples of such democracies as UK and Canada who do not have term limits and made reference to the African traditional chiefs who are allowed to rule till death. The example, however, might not be balanced because such democracies have managed to build institutions not susceptible to corruption and abuse, that play an oversight role on the executives.

The AU Charter fails to give a clear guideline and definition of what constitute a 'constitutional coup'. Some scholars as according to Pacifique Manirakiza have tried to put Article 23 into context by mainly focusing on two things that is, the intention of the constitutional change and public participation.[lxxvi] Though these could be good measures, they still fall short to be clear guidelines, it is very much difficult to measure the intention as in the case of Rwanda were the authorities reported popular support from the people thereby satisfying public participation. In the case of the Republic of Congo, despite people demonstrating against the intention, the the constitution change was approved by 92% of the votes.[lxxvii] In most of these cases you have a 'bad' intention that is 'approved' by the people and purported public support that comes through vote intimidation and corruption. In all and other cases little has been done by either the AU or the international community because these changes are legal in terms of their constitutions and procedures. Any direct interference into the constitutional processes of any country will be in violation of Article 2 of the UN Charter on sovereignty. With sovereignty, the implementation of article 23 of the ACDEG will remain problematic as external interpretations may be regarded as interference in domestic processes, unless the AU moves a step further by forbidding presidential term limits and setting guidelines on constitutional changes that affect the constitutional rights of people to vote. This will be difficult to get support considering that the proposal once failed to pass in West Africa, but however, looking at the implications and conflicts it caused in the African continent, such a move is necessary.

However, in some cases, were strong institutions and opposition parties have been built, leaders have faced resistance in their bids to extend their mandate by amending the constitution. In 2014 'hundreds of thousands of protesters gathered in the streets of Burkina Faso's capital, Ouagadougou, to protest President Blaise Compaoré's attempt to repeal a constitutional provision that limited him to two terms in office.'[lxxviii] Due to pressure from the people through popular protest, President Blaise Compaoré had to resign. Similarly, in 2012 then Senegalese President Abdoulaye Wade, was faced with popular protest when he wanted to extend his eligibility beyond the constitutional two-term limit.[lxxix] Opposition parties in some African countries have been instrumental in deepening democracy by directly challenging the incumbents. In Zambia, former President Frederick Chiluba failed to get support from his own party thereby stepping down in 2002 at the end of his two term limit. In DRC though, President Joseph Kabila managed to stay in power for two more years stating lack of resources as the main reason not to hold elections, the opposition he got from the Congolese people and the

pressure from the international community pressured him to abandon plans to amend the constitution in 2016. These and other examples shows the power of opposition in holding leaders accountable. However, the case is different in some African countries were due to weak public institutions, electorates are unable to hold their leaders accountable creating room for corruption, manipulation and electoral fraud. Countries such as Ghana and Benin are some of the countries said to have created and allowed strong political parties thereby creating real competition and allowing smooth transfer of power between parties.[lxxx] It should also be understood that African countries are young democracies with a long history of colonial repression that was followed by a long period of dictatorship and violence. These two periods combined, have limited the ability of African electorates to challenge authorities or in some cases demonstrate or show disapproval.

ELECTION MANAGEMENT IN AFRICA

Elections are a process that goes beyond the actual day of voting, it's a process that requires proper management and monitoring. Electoral management is one of the most important component of the electoral process, confidence and trust in those managing the process means less contestations. 'Popular confidence in the conduct of elections is important for the consolidation of democracies. When citizens perceive elections as free and fair they are more satisfied with democracy…and more likely to accept the defeat of favoured candidates.'[lxxxi] Effective election management in Africa are import in building legitimacy and creating credible elections, failure of which have seen post- election violence taking place in countries such as Kenya in 2007/08. African Electoral management processes have faced a number of challenges that can be divided into two, that is genuine problems such as lack of resources and sometimes expertise and those that are deliberate, such as corruption and manipulations. The ability to set up completely independent Election Management Bodies (EMB) will be the cornerstone of African democracy and promote credible elections. In some African countries such as Zimbabwe, the perceptions of citizens towards electoral management bodies is sometimes shaped by political affiliations and past experiences. The leaders that came soon after independence were confronted by a number of problems such as lack of experience, tribal division and lack of resources. In order to consolidate their hold on power, these leaders tried to reward loyalist tribesmen, which led to the creation of more division as dissatisfied people started fighting for their rights. Leaders became corrupted by power and all the other arms of

the state such as the judiciary became weapons of abuse as they were used to intimidate and stop dissenting voices.[lxxxii] Till this day many people have not yet gained confidence and trust with all state related institutions such the judiciary, or EMB as they have been used to conduct sham elections.

Article 17 (1) of the ACDEG states that 'state parties shall establish and strengthen independent and impartial national electoral bodies responsible for the management of election.' The processes of setting up these institution is an exclusive right of individual countries. Independence of the electoral bodies is subjective and there is no internationally agreed model that defines independence. It is therefore, upon each individual country to be guided by principles of democracy. 'Democracy requires free and fair elections... All of this requires a legitimate and trustworthy management of elections…'[lxxxiii] The impartiality of the electoral bodies stated under article 17 (2) of the ACDEG is heavily compromised when these bodies are appointed corruptly or based on political allegiance. In a number of countries, the laws are clear in defining the roles, impartiality and the autonomy of the EMBs, but the practice is completely different, serve for few countries such as Ghana, South Africa, Benin, Carpe Verde among others, were the bodies have managed elections relatively well. In a region with weak institutions and great interference, these bodies lack autonomy and professionalism. The impartiality is sometimes doubted in cases were the incumbent, who happens to be the appointing authority and a candidate, appoint people they are close to for instance, 'doubts apply(ied) to the Kenya situation, where the vice-chairperson of the EMB in the 2007 elections, Kihara Muttu, previously had acted as incumbent President Kibaki's counsel.'[lxxxiv] In Nigeria, The Former President Olusegun Obasanjo was accused of having used Section 154 (1) to appoint members of his party who ran the 2003, 2007 and 2011 elections.[lxxxv] 'The presidents' monopoly over the appointment process has direct implications for (Independent National Electoral Commission) INEC's popular legitimacy and its ability to impartially organize elections.'[lxxxvi] In Zanzibar after the Electoral Commission chairman unilaterally cancelled the 2016 election results, the commission was accused of siding with the ruling party and acting as 'the bull-dog of the (ruling party).'[lxxxvii] Like a true referee, EMB must make sure that laws are followed by all political players and any violation of electoral laws and guidelines meets appropriate sanctions. To build confidence, the appointment of these bodies must be done transparently with much emphasis given to individual members and their standing in the communities. This could be done through the involvement of the opposition leaders similarly

to what is done in Trinidad and Tobago,[lxxxviii] or involve the civil society as done in Mozambique.[lxxxix]

Lack of resources and expertise has been one the major hindrances in the smooth conduct of electoral processes. Educational and skills requirements have been emphasized in a number of African countries in order to build confidence and honour of the EMB.[xc] In trying to bring well qualified people the Zimbabwean constitution article 238 (2) provides that, 'the chairperson of the Zimbabwe Electoral Commission must be a judge or former judge or a person qualified for appointment as a judge,' further article 238 (4) states that, 'Members of the Zimbabwe Electoral Commission must be…chosen for their integrity and experience and for their competence in the conduct of affairs in the public or private sector.'[xci] However, a situation in a number of countries does not require educational qualification, resulting in the appointment of less qualified people,[xcii] who have failed to adopted to the new electoral technologies as was seen in Uganda when 'some election officials did not know how to use the Biometric Voter Registration technology (BVR), implying lack of forward planning and training on the part of the Electoral Commission.'[xciii] The financial dependency of EMB on the government compromises their independence as governments which are largely controlled by politicians can deliberately use funding to further their agenda. Funding has largely limited the scope of these institutions as lack of adequate resources has affected their effective planning, hiring and delivery. Access to information through voter education is limited due to funding problem, in Tanzania, Kenya and Burundi, the EMB have a responsibility to oversee voter education,[xciv] but due to lack of funding, electorates go to elections without full knowledge about the elections. 'In Tanzania, in Morogoro, for instance, some people refused to register fearing that the 'BVR Card7 would be used by the authorities to track down those who failed to pay charges and fees levied by government.'[xcv] Further, lack of information and illiteracy have also contributed to vote apathy in a number of African countries.

MANAGING ELECTORAL RELATED DISPUTES

Under international law, electoral dispute settlement is not explicitly dealt with but rather encompassed in general dispute settlement provisions.[xcvi] Though the ICCPR does not address electoral dispute managements, article 25(c) speaks of '…access, on general terms of equality, to public service in his country' the statement can be interpreted to include an independent

judiciary, meanwhile article 17(4) of the ACDEG provides that, election results can be challenged '…through exclusively legal channels'[xcvii] and article 32 (3) provides for 'an independent judiciary.'[xcviii] Article 10 of the UDHR states that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations…'[xcix] and article 8 of the same declaration provide that 'everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' The key words in these provisions are independent and impartiality. The importance of these provisions can never be overemphasized because the manner in which these disputes are managed forms the episode of serious conflicts or violence and it is at this period that the whole electoral process is examined. In principle many African countries have incorporated this into their constitutions and electoral laws.

Almost all governments agree that disputes are going to arose in every election and therefore, constitutional provisions on dispute management have been provided for,[c] save for few countries such as Tanzania that removes the judiciary from hearing electoral dispute cases as the constitution states that 'when a candidate is declared by the Electoral Commission to have been duly elected in accordance with this article, then no court of law shall have any jurisdiction to inquire into the election of that candidate.'[ci] Such provisions are against international best practices and the provisions of article 17 (2) of the ACDEG which obliges member states to establish and strengthen national mechanisms that redress election-related disputes in a timely manner. It denies people the right to be heard and 'even where grievances are ill-founded, the offer of a possible judicial remedy provides a peaceful means of venting frustration instead of resorting to violent protests.'[cii] 'In recent times, high-profile electoral crises in Kenya (2007-2008), Zimbabwe (2000 and 2008), and Côte d'Ivoire (2010-2011) have collectively led to at least four thousand deaths and hundreds of thousands displaced.'[ciii] Though, many African constitutions provide for a judiciary remedy to electoral disputes, the remedy has to a greater extent failed to satisfactorily address the challenges. The constitution of Zimbabwe provides that, an act of parliament must provide a provision for challenging election results,[civ] and Section 155(2)(e) of the Constitution requires the Electoral Act to ensure the timely resolution of electoral disputes. Despite clear and acceptable law on electoral dispute management, the process has to greater extent failed to satisfy all or the majority of electoral players.

'Election disputes are inherent to elections. Challenging an election, its conduct or its results, should however not be perceived as a reflection of weakness in the system, but as proof of the strength, vitality, and openness of the political system.'[cv] 'In order to be of any significance, the adjudication or judicial determination of election disputes must offer aggrieved persons a genuine possibility of redress for their grievances.'[cvi] Apart from the Supreme Court of the Republic of Kenya, that declared the the 2017 presidential election results invalid, null and void, many African courts have been accused of failing to uphold and protect the rights of the people through fair judicial rulings. The fact that courts fails to deliver has robbed the people of their right to participate in the national governance as stated under articles 21 of UDHR and 25 of ICCPR. Sham elections have taken place in many African countries, the judiciary has been the institution of last hope in addressing the anomalies and disputes associated with electoral results.[cvii] Unfortunately, the judiciary has failed to live up to the expectations of the electorates as most of these cases 'are dismissed on flimsy technical and procedural rules without consideration of the merits… there are delays in determining cases; and judges refrain from making any reasonable decisions.'[cviii] The 1998 *Mwai Kibaki v Daniel Toroitichi Arap Moi* was thrown out by the Kenyan court of appeal on technicalities relating to the service of the petition.[cix] This however, has been a common practice in many African countries as courts have dismissed electoral cases on technicality as opposed to the merits of the case.[cxcxi] It goes against Article 14 of ICCPR on fair hearing before the courts. Those responsible, for either political violence, mismanagement or accused of electoral malpractices have hardly been brought to book. The dismissal of electoral cases on technical basis has jeopardized the electoral democracy and promoted violence[cxii] as aggrieved parties use other methods to seek relief. In the 1998 Lesotho elections 'the allegation of rigging in this election was so serious that when the courts failed to dispense electoral justice, the aggrieved parties… organized widespread protests.'[cxiii]

CONCLUSION

The article discussed the provisions of international law in the area of democracy and governance. It further discussed the relationship between international law and the manner in which African countries have conducted their elections and concluded that many African elections fell short of satisfying both international law and domestic law provisions. In most African countries, the problem is not the law or institutions but rather the practice of the law.

Lack of tangible sanctions under international law followed by politics of 'brotherhood' in Africa has resulted in impunity as many leaders continue to abuse their people in the name of sovereignty. The impact of international law on African elections has to some extent been limited due to sovereignty and negative perceptions by African leaders towards what they call 'the use of international law to further Western Interests.' Though, under international law elections or constitutional change of governments have been widely believed to be the only legitimate means of selecting political office holders, one important area that has not been given due attention is the process in which the elections or constitutional change takes place. Elections or change of governments can be constitutional but illegal. Recognition of elected governments and international acceptance of elections should therefore, not only be limited to what would have happened on the actual day(s) of election but be informed by the whole process leading to the elections. Intimidation, abuse of power, corruption, political violence unconstitutional change of legislation has all influenced the outcome of elections in most African countries. In such violent and unfair instances where constitutions and local institutions are unable to protect the local people, the 'international community should stand ready to contain the situation and provide remedy for the local population.'[cxiv]

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