

Introduction: The African Charter on Democracy, Elections and Governance at 10

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On various continents, intergovernmental organizations resort to legal engineering in order to promote democratic governance in their member states. Those legal efforts operate in a fluctuating political and societal environment, which they seek to transform but which, in turn, shapes the authority, the effectiveness and even the very nature of the legal instruments. As this Special Issue shows, this process of mutual influencing between law and context as interdependent variables also applies to the African Union's (AU) landmark instrument for democratic governance promotion. Roughly one decade after the adoption of the African Charter on Democracy, Elections and Governance (ACDEG), fascinating developments, challenges and questions have emerged, some of which were arguably not anticipated by its drafters. For example, who envisaged that the ACDEG might become a justiciable instrument before the African Court on Human and Peoples' Rights? In the wake of popular uprisings in response to gross undemocratic practices, what normative guidance does the ACDEG offer in response to such developments?

The ACDEG was adopted on 30 January 2007 as the AU's main normative instrument to set standards for better governance across the continent. It came into

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force in February 2012 after ratification by 15 states. As of January 2019, the charter had been ratified by 32 and signed by 46 of the 55 AU member states. In terms of its scope and ambition, the ACDEG is different from other instruments as it combines, in a holistic manner, the key elements of democracy, human rights and governance. Its stated objectives are to enhance the quality of elections in Africa, promote human rights, strengthen the rule of law, and improve political, economic and social governance. To that end, it regulates both the accession to, and exercise of, political power. Particular attention is paid to unconstitutional changes of government, including through the possible use of sanctions imposed at individual and state level. Initially designed by its predecessor, the Organisation of African Unity (OAU), as a tool to counter the armed removal of incumbent leaders, including with the support of neighbouring countries, the unconstitutional change of government norm has increasingly been invoked to challenge the undemocratic practices of incumbents. The AU response to developments in The Gambia in January 2017 is the latest case in point.

At the continental and regional institutional levels, the ACDEG has provided the impetus for various policy and institutional initiatives within the AU and its regional economic communities, and has become the yardstick by which member states' progress towards democratic governance is measured. One notable outcome has been the creation of the African Governance Architecture, which constitutes the overall political and institutional framework for promoting and strengthening democracy, good governance and human rights in Africa. It provides the platform through which different AU organs and institutions support the implementation of the ACDEG at the member state level.

While the ACDEG has clearly shown its capacity to impact the behaviour of governments and political leaders in some member states, in others it has arguably had limited influence on the actual state of governance. The level of acceptance, societal ownership and implementation of the ACDEG remains highly uneven, which is one of the key challenges in making the charter's objectives a reality across Africa.

In 2017, the ACDEG celebrated the tenth and fifth anniversaries of its adoption and entry into force, respectively. These milestones offered an excellent opportunity to reflect on the instrument's past, present and future. Bringing together a group of distinguished scholars and practitioners, an expert seminar and a practitioner dialogue on "The African Charter on Democracy, Elections and Governance: The tenth anniversary" were held at the Institute of Development Policy (IOB), University of Antwerp, Belgium, on 2–3 October 2017. The expert seminar focused on the challenges and opportunities presented by the ACDEG and addressed a range of issues related to its implementation from different theoretical, empirical and country specific perspectives. Based on the academic papers discussed at the expert seminar, a policy brief was developed that synthesizes a number of key findings.¹

1 CC Aniekwe, L Oette, S Vandeginste and M Wiebusch "Policy brief: The 10th anniversary of the African Charter on Democracy, Elections and Governance" (2017), available at:

A draft of this policy brief formed the basis of the discussions during the practitioner dialogue, which was jointly organized by the AU, the IOB and the Centre for Human Rights Law at SOAS University of London. The practitioner dialogue offered a unique opportunity for engagement in the kind of conversation that is typically missing, but is needed, between the academic and policy oriented world. It welcomed senior AU officials, members of the African diplomatic community, African students and scholars as well as African non-governmental organizations.

Following close collaboration with the editorial boards of two academic journals (the *Journal of African Law* and *Africa Spectrum*),² special issues of their journals have been prepared as academic output of the expert seminar and of a larger research project financially supported by the University of Antwerp.³ Papers submitted for the special issues have been categorized in line with the disciplinary profiles of the journals. The articles published in this special issue focus on several key legal aspects of the ACDEG. This issue invites readers to gain insights and reflect on the ACDEG's significance in light of developments during the first decade of its existence. Contributions in *Africa Spectrum* focus on the use of ACDEG as a tool for political activism and empowerment at the domestic level, and on the correlation between ACDEG ratification and implementation and the democratic track record of AU member states.

As guest editors of this special issue we first offer a “biography” of the ACDEG. The adoption of the charter (which was initially envisaged as a declaration, not a treaty) did not constitute a break with the past but rather the culmination and consolidation of a series of initiatives by the AU and its predecessor to engineer continental peace, security and democratic governance. At the same time, the ACDEG was not uncontentious, in particular around the question of the extent to which domestic political governance within AU member states should be continentally regulated. Against this background, we analyse its current status in the light of three wider trends characterizing continental politics: legalization, technocratization and judicialization. Legalization creates opportunities (through the creation of authoritative monitoring and enforcement mechanisms), but also challenges, such as the complexity and length of ratification procedures. Technocratization refers to the increasingly important role taken by technical experts, bureaucrats and

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<<https://www.uantwerpen.be/images/uantwerpen/container2673/files/PolicyBrief-AfricanCharter.pdf>> (last accessed 10 January 2019).

- 2 Africa Spectrum is published by the GIGA Institute of African Affairs in Hamburg and the Arnold Bergstraesser Institute in Freiburg and is available at: <<https://journals.sub.uni-hamburg.de/giga/afsp>> (last accessed 10 December 2018).
- 3 IOB “The norms and practices of the African Union on the promotion of constitutional governance: A legal analysis”, available at: <<https://www.uantwerpen.be/en/researchgroups/iob/projects/norms-practices-africanunion/>> (last accessed 10 December 2018).

other professionals (as opposed to political and diplomatic actors) in the implementation of the ACDEG and other continental norms. Judicialization hints at the growing involvement of supranational (both continental and regional) judicial bodies in enforcing democratic governance norms, a trend that is well illustrated by the next two contributions in this special issue. This article also sketches some of the outstanding challenges for more effective implementation of the ACDEG in the near future.

The next two articles offer a unique insight into the nature of the ACDEG as a human rights instrument under the terms of the 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (ACTHPR). ACTHPR judges Ben Kioko and Gerard Niyunguko analyse the justiciability of the ACDEG in the light of the landmark judgment in the case of *Actions pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* of 18 November 2016. In this judgment, the court held that Côte d'Ivoire violated its obligation to establish an independent and impartial electoral body as provided, inter alia, by article 17 of the ACDEG. Both authors give an insider perspective into the legal arguments developed by the ACTHPR, which, it is worth recalling, the ACDEG does not itself institute as a judicial body in charge of its interpretation and enforcement. They also shed light on the broader implications of the judgment for future applications filed by individuals and legal persons on the basis of alleged violations of the human rights provisions contained in the ACDEG, including in combination with other human rights instruments.

Pacifique Manirakiza analyses whether, as part of a wider trend of legalization of (the right to) democracy on the African continent, the ACDEG also establishes, albeit implicitly, the right of African citizens to resist gross undemocratic practices. His article begins with an analysis of the underpinnings of the right to resist tyranny and oppression in philosophy, legal theory and international human rights standards. Against that background, Manirakiza turns to the ACDEG and how it contributes to the (legal) empowerment of Africans to oppose gross undemocratic practices. This question is all the more relevant in situations where incumbent leaders borrow legitimacy from and pay lip-service to the values of constitutionalism and the rule of law, but actually practise authoritarian rule by law. Although the ACDEG does not explicitly provide for it, the author concludes that the right to resist increasingly crystallizes as an *ultimum remedium*, a subsidiary right that presupposes the exhaustion of constitutionally guaranteed avenues to redress gross undemocratic practices.

Solomon Dersso's article explores further the topic of popular resistance against undemocratic practices, but from a different angle. One of the most significant political developments on the African continent during the first decade of the ACDEG was the Arab Spring, starting in December 2010 in Tunisia, followed by other (failed or successful) popular uprisings against authoritarian rule; his article also includes reference to Egypt, Burkina Faso and other cases. This constituted a serious test of the AU's legal framework on democracy and constitutional rule. The author first develops an analytical

framework to discuss popular uprisings within the ACDEG's ban on unconstitutional changes of government. He then turns to AU practice, drawing on his engagement in some of the relevant processes, and identifies a considerable degree of trial and error in the AU's responses to particular country situations. This finding invariably raises the question of how to develop more consistent normative guidance for an AU response to popular uprisings, in line with the ACDEG. Dersso develops a four prong test to determine the constitutionality of such uprisings (their last resort nature, their popularity, their peacefulness and the degree of military involvement), thus offering a most valuable contribution to AU policy reflection and decision making on this important matter.

In their chapter on presidential term limits and the AU, Micha Wiebusch and Christina Murray offer a continent-wide overview of the norms and practices of constitutional limits on the duration and number of terms a president may hold office. Their analysis covers the evolution since 2000, when the OAU adopted the Lomé Declaration on the framework for an OAU response to unconstitutional changes of government. They pay particular attention to the "constitutional manipulation" of term limits, a phrase that covers a wide variety of attempts (often successful, sometimes failed) by incumbent presidents to avoid compliance with the constitutional term limit. Article 23 (5) of the ACDEG provides for a sanctions regime in the event of "any amendment or revision of the constitution or legal instruments" that infringes the principles of democratic change of government. However, the AU has so far not applied this provision, not even in cases of blatant "constitutional coups". Wiebusch and Murray suggest a number of principles that could serve as a foundation for the development of more robust AU guidelines on the amendment of constitutions in Africa.

In summary, this special issue offers many new theoretical and policy oriented insights. We hope that they will stimulate reflection and debate, and help equip policy makers, practitioners and academics working in the areas of democratization, rule of law, human rights and development in Africa to address the multifaceted challenges of making the ACDEG's objectives a reality across the continent.