**Regional consultation on draft guidelines on the effective implementation
of the right to participate in public affairs**

**Economic Commission for Africa** **(ECA)
Addis Ababa, Ethiopia**

**6 and 7 September 2017**

[edit 5 September]

**Study on the Right to Equal Participation in Political and Public Affairs in Africa**

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1. **Introduction**

The scope of the right of participation in political and public affairs is traditionally considered to include the following three elements: 1) to vote and be elected; 2) to be consulted about public affairs; and 3) appointment in the public service.[[2]](#footnote-2)

Participation in political and public affairs, according to General Comment 25 of the United Nations Human Rights Committee, ‘is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers.’[[3]](#footnote-3) What is at stake is therefore the ability of members of civil society – ‘ordinary people’ - to have a potential influence over decisions that affect them.

The right to equal participation in political and public affairs can only be realized in conjunction with a range of other rights, including freedom of expression and information, assembly, association, equality, non-discrimination and socio-economic rights. It is traditionally seen as an individual right, but as will be discussed below, in Africa it also has a group or ‘peoples’ dimension.

The underlying concern is enhancing human agency; that people can influence their future and assume responsibility for it, as opposed to being the object of or at the receiving end of decisions by others. ‘Participation’ thus refers to involvement is the exercise of power. Instead of exercising no agency, on the one extreme, or simply taking matters into one’s own hands, on the other, participation entails having the ability to influence the way in which the system functions. Participation is thus an antidote to alienation, which especially in the case of Africa has resulted in many of its best and brightest leaving their countries of origin and going into the diaspora, but also in many millions of those for whom this was not an option in resorting to resignation or resitance.

In a democratic process, the basis of the legitimacy of the State and its exercise of power is participatory decision-making. To serve as such a basis, participation must provide real and meaningful opportunities to influence outcomes. Participation must thus be of such a nature that the authority of the State and its exercise of power can truthfully be said to rest in the will of the people on whose behalf the power is exercised and those who are subjected to such exercises of power.

The right to participate in political and public affairs can be exercised by the individual acting alone, or by the individual acting as a part of a group, such as a political party, a trade union, an NGO, or a gathering. Participation in elections is clearly a central part of such participation, but political participation also relates to the various ways in which there is civil participation in governance outside the scope of elections, throughout the different policy cycles (such as formulation, realization, and evaluation). It has various components, such as access to information, consultation, active involvement, and dialogue.[[4]](#footnote-4) Exercising this right is not a once-off affair; it should rather be seen as steps in an ongoing cycle in which people make decisions, then live with the consequences, and based on that experience take future decisions, and so it continues. The long term value of participation rests on the assumption that we learn from our mistakes and our achievements.

However, it should also be kept in mind that what is at stake is equality of participation. In the words of Justice Albie Sachs of the South African Constitutional Court, the underlying philosophy is that ‘everybody counts’[[5]](#footnote-5) – and that they matter equally. Elections and other similar processes offer varying prospects for taking control over of one’s life for different members in the society. Even if on a formal level everyone has the opportunity to participate, individuals and sectors of society who are marginalized may find themselves at such an imbalance of power that further steps are needed before they can be said to have a meaningful hold over their fate. If that were not the case, the various forms of participation would be empty or could indeed serve as a vehicle of repression.

The proper realization of this right can enhance ownership, responsive and inclusive decision-making, accountability, the exercise of individual and group autonomy, and the legitimacy of the exercise of State power. There is no guarantee that participation will lead to acceptance of each outcome by all participants, and in fact that rarely happens in practice, but the underlying idea is that because it is an ongoing process, even if one’s objectives are not met in a particular case, there will be other opportunities in the future to secure a more favorable outcome. They feel they can live with the system in th longer run.

For all its attractions, the requirement of participation is thus not without limits. Not everyone can participate in all decisions, or even if they do, have a veto over decisions. It can also not always be direct, and in some cases has to be representative if society is not to be ungovernable. Participation is thus not an absolute right and can and should under closely guarded circumstances be limited.

Many obstacles to the realization of participation can be identified, such as authoritarian government (those in power often do not want to share such power), discrimination, socio-economic inequalities, protracted violence and insecurity, a lack of education or of information, to name a few. Participation is aimed at offering people a way out these very impediments, but where these obstacles impede their ability to participate they are stuck in a vicious cycle. It is thus of great importance to break the cycle by ensuring equal opportunities to participate.

‘Participation’ in the world in which we live does not only relate the State on the national level. It also relates to more local forms of government. But conversely, in a globalized world our daily lives are increasingly determined by forces much greater than the nation state. International organisations play an increasing role in global peace and security, and has powers and abilities to affect people’s lives which did not exist a few decades ago. The environmental future of the planet, and of generations to come, to cite another example, is largely in the hands of the international community, raising far-reaching questions about the level of participation in decision-making of those will be at the receiving end of those decisions.

Clearly, major parts of public power today are also exercised by domestic as well as international corporations, and the question what influence those who are affected by those decisions have over their fate must be part of the equation. The result of the above is the participation is a much broader concept today than a few decades ago, and what may have been sufficient then will no longer suffice.

## This study sets out some of the issues relevant to the realization of the right to political participation in the African context, as part of the process towards developing draft guidelines on the effective implementation of the right to participate in political and public affairs’ as envisaged by Human Rights Council resolution 33/22.

Within the limited available space, the scope of the study encompasses all African countries except those which belong to the Middle East and Northern African Region,[[6]](#footnote-6) as well as African inter-governmental bodies and the United Nations as far as it relates to Africa.

First there is an overview of some salient aspects of political participation in Africa, followed by an exposition of the relevant legal regimes, a conclusion and then recommendations.

1. **Salient features of political and public participation in Africa and indicators of a healthy democracy**

As in many other parts of the world, political legitimacy was not based on elections in traditional African societies, though participation in governance did occur in other forms. Slavery and colonialism, which affected large parts of Africa, entailed a whole-sale denial of individual and group autonomy. As colonialism came to an end and African States became independent, especially in the 1960s, many of the new States experienced autocratic governments. Military governments, one-party States and *coup d’états* were present on a large scale.

Since the end of the cold war undeniable progress has been made on may fronts. In it latest (2017) report Freedom House has ranked 59% of Sub-Saharan States as free or partly free. This is significantly different from its estimate in 1988 that only 34% were at the time in that category. Yet many problems remain. Out of the ten ‘worst of the worst’ countries listed by Freedom House, six are in Africa (Eritrea, South Sudan, Somalia, Sudan, Equatorial Guinea, and Central African Republic). An estimated 900 million members of Africa’s population live in countries described as ‘not free’ or ‘partly free’. [[7]](#footnote-7)

The year 2017 marked the tenth anniversary of the African Charter on Democracy, Elections and Governance. In celebrating this event, the African Union released a communique in which it stated that only ‘modest gains’ have been made when it comes to democracy.[[8]](#footnote-8)

Elections which were largely seen as free and fair were held in Benin, Sao Tome and Principe, and Cape Verde. The elections in the Gambia somewhat surprisingly brought long-needed change, and the elections in Ghana were much praised. Kenyan were much less violent than in 2008, though the future is uncertain after the annulment of the results of the elections by the Supreme Court. The number of coups on the continent have significantly declined.

However, there is a trend towards removing or ignoring constitutional restrictions on power such as the extension of term limits by Presidents in the Congo, Gabon, Chad, Djibouti, Equatorial Guinea, Burundi and the DRC. Elections in a number of States have prompted widespread violence, and opposition parties have refused to accept the outcome of elections. It is widely believed that a change of government has not implied a more meaningful role for the opposition in countries such as Egypt, Tunisia, Libya, Nigeria, South Sudan.

Space for civil society in many countries has been shrunk through the repression of opposition parties and movements, especially in countries with long-serving heads of State such as Zimbabwe. In some cases, this has taken the form of targeting of political opponents and tit for tat assassinations, for example in Mozambique. Mass demonstrations have become a preferred tool of political participation in many situations. Protests are often met with excessive force, which escalates the situation, as in Ethiopia. There are also restrictions on NGOs, as in Burundi, and internet and media shutdown during 2016 elections in Republic of Congo, Chad, and Uganda. Human rights defenders experience persecution and restrictions on funding. Because participation deals with the role of members of civil society, pressure on civil society by its very nature adversely affects participation.

Journalists, as in the rest of the world, is experiencing increased repression,[[9]](#footnote-9) but at least as far as killings in the line of duty are concerned, Africa, like the rest of the world, has experienced a welcome decline in numbers.[[10]](#footnote-10)

Measures with varying degrees of success have been taken to ensure the greater participation of women in positions of leaderships in public and private life, for example provisions on quotas for women in parliament and in the cabinet, as in Rwanda, and based on race/ethnicity in Burundi.

It remains a challenge in many African countries to ensure equal participation of people who are often marginalised, such as women, indigenous people, minorities, people with disabilities, and the poor.

Of great importance in ensuring participation is institutions, for example National Human Rights Institutions, and Courts. In Burundi, in the case concerning the third term the court eventually budged under pressure. Corruption is a major destroyer of trust in institutions. The 2016 Corruption Index by Transparency International shows no progress in big countries such as South Africa, Nigeria and Kenya. Botswana and Cape Verde are leaders on the continent, but many others are at the bottom of the Index.

It is widely recognized that education and, in particular civic education, is a key element for effective participation. Education enables informed choices. Civic education in schools allow people to navigate their way within the State system and to influence their environment in an effective way. Innovative ways to achieve this in the Africa context are called for.

1. **International participation**

As was stated above, in a globalized world, international organisations play an increasingly important role in the lives of people wherever they are, which raises the question to what extent there is participation in these structures by civil society members in Africa. Some aspects of participation in international organisations from an African perspective will now be highlighted.

There are few opportunities for civil society to engage with the African Union, and one of the criticisms when it was set up, was that this was largely done behind closed doors by government representatives, with little input from civil society. The Economic, Social and Cultural Council of the African Union (ECOSOCC) mentioned below, is intended to give civil society a greater role in continental governance, but has so far not played a significant role.[[11]](#footnote-11)

The picture looks better as far as the African Commission on Human and Peoples’ Rights is concerned. One of the positive features of the African Charter system (see below) is the extent to which civil society participates in its activities – more so than any other regional system. This is most visible in the bi-annual NGO Forum, when civil society meets for three days at a time directly before the session of the Commission.[[12]](#footnote-12)

One often hears the comment in Africa that the UN and its human rights mechanisms – largely based in Geneva – are ‘very far’, not only in terms of geography, but also in terms of relevance and impact. It may is useful in this context to mention the proposal that the UN treaty bodies should hold some of their meetings outside Geneva, in order to bring the system closer to the people, and to ensure that there can be better participation.[[13]](#footnote-13) The experience with the African Commission on Human and Peoples’ Rights – which rotates its meeting between the Gambia and other States - partly served as a model for this idea.

Clearly the issue of UN Security Council reform has strong participation elements. This is a complicated topic which requires extensive discussion, and it merely flagged here for the time being.

1. **The legal framework relating to participation**

**4.1 The United Nations human rights system and African States**

The United Nations has developed a comprehensive body of standards and jurisprudence around the concept of equal participation in political and public affairs. Much of it deals with article 25 of the Covenant of Civil and Political Rights. This broader body of jurisprudence will not be set out here. Instead we will focus on some aspects of the work of the Human Rights Committee as applied to Africa in the recent past.

***Annexure ‘A’*** sets out some of the concluding observations and views adopted by the UN Human Rights Committee concerning African countries.

A recurring theme of these concluding observations was the need for States to involve those who are seen as victims of human rights abuses more in the decision making process. For example, the Committee urged States to involve women in the review of customary practices which can be seen as discriminatory (Botswana, Zambia, Sudan, Tanzania, Chad, Cape Verde, DRC, CAR). Likewise, States were urged to take special steps to increase participation by indigenous groups in decisions that affect them (Rwanda, Benin) and the same for ethic and linguistic minorities (Ethiopia). More generally, States were encouraged to take special temporary measures to increase the level of women’s participation in public and private life (Botswana, Benin, Sierra Leone, Kenya, Madagascar, Rwanda, Angola, Mauritius, Madagascar, Sudan).

The Committee also emphasised the need for States to ensure political participation by political opponents of the current Government (Djibouti, Burkina Faso, Seychelles) and not to harass opposition leaders (Djibouti).

As far as views on individual communications are concerned, the Committee has held that persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliations (Mauritius). Persons who are deprived of liberty but have not been convicted should not be excluded from exercising the right to vote (Cameroon).

**4.2 The African Union**

**4.2.1 General provisions on participation and democracy**

The African regional inter-governmental body, the African Union, has recognized the importance of political participation and of democracy in general in a variety of key instruments.[[14]](#footnote-14) This is in contrast with the the 1963 Charter of the predecessor of the AU, the Organization of African Unity, which contained little on the topic.

The *Constitutive Act of the African Union* (2000/2001) provides as follows:

*Article 3: Objectives*

*The objectives of the Union shall be to:*

*(g) promote democratic principles and institutions, popular participation and good governance;*

*(i) ensure the effective participation of women in decision-making, particularly in the political, economic and socio-cultural areas;*

*Article 4: Principles*

*The Union shall function in accordance with the following principles: (m) respect for democratic principles, human rights, the rule of law and good governance; (p) condemnation and rejection of unconstitutional changes of governments*

*Article 30: Suspension*

*Governments which come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.*

The Economic, Social and Cultural Council of the African Union (ECOSOCC) was established in 2004 by the AU Assembly, under article 22(2) of the Constitutive Act to provide a voice for civil society in the AU. As mentioned above, it has not yet had much impact.

The African equivalent of the Sustainable Development Goals of the United Nations, *Agenda 2063*, the strategic framework adopted in 2013 by the AU for the socio-economic development of the continent, lists as *ASPIRATION 3*:

 *Africa will be a continent where the institutions are at the service of its people. Citizens will actively participate in social, economic and political development and management. Competent, professional, rules and merit-based public institutions will serve the continent and deliver effective and efficient services. Institutions at all levels of government will be developmental, democratic, and accountable.*

The *African Charter on Democracy, Elections and Governance* (2007/2012) is central to the issue of participation. One of its objectives is to:

*3. Promote the holding of regular free and fair elections to institutionalize legitimate authority of representative government as well as democratic change of governments.*

*The Charter requires State parties to commit to democratic institutions, (chapter 6) and democratic elections (chapter 7) and provides for the imposition of sanctions in cases of unconstitutional changes of government.*

According to article 17 of the Charter:

*State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union’s Declaration on the Principles Governing Democratic Elections in Africa.*

**4.2.2 The regional human rights system**

The main human rights instrument of the AU is the *African Charter on Human and Peoples’ Rights* (1981/86). The Charter recognizes various rights that are complimentary to the right to political participation contained in article 13, such as non-discrimination (art 2); freedom of information and expression (art 9); association (art 10); assembly (art 11); and socio-economic rights (arts 15 - 17). To this should be added, as is set out below, various peoples rights.

Of special interest to our present inquiry is the Charter’s formulation of the right to political participation itself. Article 13 (1) provides as follows:

*Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. 2. Every citizen shall have the right of equal access to the public service of his country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.*

The difference between the wording of article 13 of the African Charter and article 25 of the International Covenant on Civil and Political Rights is striking.[[15]](#footnote-15) Article 25 (b) of the UN instrument – unlike its AU counterpart - explicitly guarantees the right of every citizen

*To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.*

The fact that such a guarantee of periodic elections based on universal franchise is not contained in article 13 of the African Charter reflects the fact that most States in Africa at the time of the drafting of the Charter were under military or one-party rule. The Charter, however, provides for its own interpretation in accordance with contemporary international law standards, and as such this requirement has simply been read into the Charter.[[16]](#footnote-16)

Importantly, the African Charter also recognizes peoples’ or collective rights, and ‘peoples’ also have the right to self-determination. Article 20 (1) provides as follows:

*All peoples shall have the … unquestionable and inalienable right to self-determination. They shall freely determine their political status and and shall pursue their economic and social development according the policy they have freely chosen.*

A further distinctive feature of the African Charter is that it recognizes, in article 22, ‘the right to development’, specifically as a peoples’ right:

*(1) All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.*

*(2) States shall have the duty, individually or collectively, to ensure the exercise of the right to development.*

As a result, it can be said that political participation is not simply an individual right under the African Charter – it also has a collective element.

The Charter, given its historical setting, takes strong issue with the impositions of colonialism. Article 20, in the part not quoted above, provides a veritable rallying call against such infringements of self-determination:

1. *Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.*
2. *All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.*

The Charter, unlike many other human rights treaties, moreover recognizes dignity as a substantive right, not merely as a guiding consideration. Participation in determining one’s fate can readily be seen as matter of ensuring one’s dignity.

The rights of women to participation enjoys special protection under the African Charter system. The *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (2003/2005), which supplements the African Charter and is monitored by the same supervisory bodies, provides as follows in article 9:

*Right to participation in the political and decision-making process 1. States parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that: (a) women participate without any discrimination in all elections; (b) women are represented equally at all levels with men in all electoral processes; (c) women are equal partners with men at all levels of development and implementation of state policies and development programmes. 2. States parties shall ensure increased and effective representation and participation of women at all levels of decision-making.*

The African Court has the authority not only to adjudicate on possible violations of the African Charter and its protocols, but also ‘any other relevant Human Rights instrument ratified by the States concerned,’[[17]](#footnote-17) and the African Commission has a strong mandate to ‘draw inspiration from international law on human and peoples’ rights, particularly the provisions of various African instruments’.[[18]](#footnote-18) As a result he various UN and AU instruments cited above are all relevant to the rulings made by the Commission and the Court.

The *African Charter of the Rights and Welfare of the Child* (1990/99), the implementation of which is monitored by the Committee on the Rights and Welfare of the Child, does not have any specific provisions dealing with political participation by children. However, the *African Youth Charter* (2006/2009), which does not have its own monitoring body, provides in article 11:

*Youth participation 1. Every young person shall have the right to participate in all spheres of society. 2. States parties shall take the following measures to promote active youth participation in society: They shall: (a) Guarantee the participation of youth in parliament and other decision-making bodies in accordance with the prescribed laws; (b) Facilitate the creation or strengthening of platforms for youth participation in decision-making at local, national, regional, and continental levels of governance; (c) Ensure equal access to young men and young women to participate in decision-making and in fulfilling civic duties.*

Like the UN, the Commission is active in developing standards that are relevant to various aspects of participation. In March 2017 the Commission adopted an important set of Guidelines for the Policing of Assemblies by Law Enforcement Officials,[[19]](#footnote-19) aimed at ensuring that assemblies are well managed and do not escalate into violent confrontations. The Commission has in 2011 also developed a model law on access to information.[[20]](#footnote-20)

***Annexure ‘B’*** provides a summary of the jurisprudence of the supervisory bodies of the African Charter – the African Commission on Human and Peoples’ Rights as well as the African Court on Human and Peoples’ Rights – concerning article 13 dealing with the individual right to political participation.

The Commission has found (as is reflected in Annexure ‘B’) that it violates article 13 of the Charter when a State on arbitrary grounds deprives an opponent of the governing party of nationality, resulting in him not being able to stand for political office (Botswana); or bans ministers from a former government from standing for office (Gambia) or to require a candidate to prove that both parents are nationals by birth (Zambia and Cote d’Ivoire). Likewise, it violates article 13 to ban political parties (Swaziland); or to prevent people with mental incapacity from political participation (Gambia). The State may be held accountable for a violation of article 13 for the conduct of supporters of the ruling party if it is directly connected to the State (Zimbabwe).

The Commission has implied that a lack of political participation in violation of article 13 beyond a certain point could potentially justify self-determination and indeed seccession by a sub-set of the community, but did not make such a ruling (DRC and Cameroon).

It is a violation or article 20 (the peoples’ right to self-determination) when the duly elected government of the country is deposed in a *coup*, as is the case when the results of a free and fair election are annulled (Nigeria).

Indigenous people must in terms of article 22 be consulted in matters relating to their development (Kenya).

In its first case where it found a violation on the merits, the African Court on Human and Peoples’ Rights ruled that nullifying the right of an independent candidate (one who is not a member of a political party) to stand for political office, violates article 13.

**4.2.3 Sub-regional systems in Africa**

Some of the relevant human rights provisions applicable under the Economic Community of West African States as well as the East African Community and the decisions of their courts are provided in ***Annexure ‘C’***.

1. **African domestic legal systems**

For an overview of the current provisions on political participation in African constitutions, see ***Annexure ‘D’***.

Based on a study published ten years ago the following figures can be provided about constitutional provisions in African constitutions, here excluding those in the MENA region.

The principle of constitutional supremacy, in terms of which the constitution is the highest law of the land, wass recognized in the constitutions of 40 of the countries currently under review here.[[21]](#footnote-21)

Popular sovereignty, or the concept that the people are the source of political power, was recognized in 39 of these countries.[[22]](#footnote-22) The phrase 'government of the people, by the people and for the people', wass to be found in 14 of the constitutions, mainly of francophone countries.[[23]](#footnote-23)A total of 43 constitutions recognised the independence of the courts,[[24]](#footnote-24) 22 provided for electoral commissions.[[25]](#footnote-25) Remarkably, 16 constitutions recognised a right of resistance, should the constitution or constitutional values be overthrown.[[26]](#footnote-26)

The right to freedom of association and related rights were recognised in a total of 45 constitutions.[[27]](#footnote-27) The constitutions of 38 of the states under review explicitly recognised the right to form trade unions.[[28]](#footnote-28)

While international instruments rarely explicitly provides for the right to establish and be a member of a political party, this right is protected in various forms in 41 constitutions.[[29]](#footnote-29)

The right to freedom of assembly is protected in 42 constitutions.[[30]](#footnote-30)

A total of 38 constitutions recognise the right to political participation in one form or another.[[31]](#footnote-31)

The right to vote is not always provided for within the bill of rights; in some cases the provision appears in other sections of the constitution, such as sections on 'The State and Sovereignty' or 'Elections'.[[32]](#footnote-32)

In certain constitutions, universal suffrage or the eligibility criteria for voting provide the basis from which the right can be derived.[[33]](#footnote-33)

As is the case in many parts of the world, the mere fact that certain rights are recognized in the constitution (or in international treaties ratified by the State in question) does not in itself guarantee that these rights are protected in practice. Whether that is the case, depends *inter alia* on the extent to which there are supporting laws, fully functional and independent courts and enforcement by the executive and administration or, to put it more broadly, whether there is a culture of human rights in the society.

African States as a general rule have adopted laws regulating their elections. For an overview of some of these laws, see ***Annexure ‘E’***.

In some cases, domestic law in African States is clearly inadequate in matters relating to participation. The extent to which laws on matters such as freedom of information and the establishment of independent electoral commissions are in existence in these State was not investigated for this study. However, an overview of legislation currently in place in Africa on the use of force by law enforcement officials, for example in the context of demonstrations, reveals that in the majority of States those laws come from colonial times, and pre-date the human rights era. They are highly permissive of the use of force by the police, and often leave it to the sole discretion of the police officer on the spot whether force is appropriate. Moreover, accountability mechanisms to establish whether excessive force was used are often not in place, or accountability of police officers is expressly excluded by law.[[34]](#footnote-34)

The decision of the Supreme Court of Kenya on 1 September 2017 to annul the elections in Kenya is a first in Africa,[[35]](#footnote-35) and has thrown into stark relief the role of the courts, who are not elected themselves, in the electoral process.

A number of specialized issues about political participation have come up in the domestic courts of Africa: In the South African Constitutional Court, for example, it was held in two separate cases that ambiguous electoral laws must be interpreted in favour of enfranchisement rather than disenfranchisement. The public has a right to be involved in legislative processes, by having the opportunity of commenting on draft laws.[[36]](#footnote-36) In discussing article 13 of the African Charter, the Court implied that the State must take steps, through teaching, education and publication, to facilitate participation in the government of one’s country.[[37]](#footnote-37)

1. **Conclusion**

Securing the effective realization of the right to equal participation in political and public affairs is crucial to the legitimacy of any State, wishing to call itself democratic and to the success of the human rights project. One of the functions of such legitimacy is to ensure that people will be willing to accept the outcomes of the system in which they live, even if it goes against them in particular cases.

There is a duty on the State not merely to tolerate but also to facilitate this right. The State has a negative duty to respect the right in question, by not violating it itself. This would occur for example if the State arbitrarily prohibits some people from participation. The State also a positive duty to ensure that everyone can exercise the right equally, for example by organizing elections. Moreover, the right must be protected against infringement by private individuals, who may want to stop people from voting, expressing themselves or demonstrating, for example when private individuals break up demonstrations.

Political participation also in international structures is increasingly important. There are strong forces at work which place ownership and the legitimacy of the political systems in which we live in question. A different psychology applies in an age of technology and globalization, where it is very easy for people to feel they are at the mercy of forces beyond their control. Participation is also required in the broader global processes to counter such alienation.

Institutions, and the way in which they are run, are often the key to success. This includes courts, national human rights institutions, electoral commissions, political party and civil society structures. Innovative educational programmes are also central to ensuring effective political and public participation.

Key elements of a functioning system of political participation include the following: constitutional recognition of the right to equal participation in political and public affairs, an independent electoral commission, capacity to resolve disputes during in the electoral process in a credible way, access to information, space for civil society, and a system of public consultation when new laws and other significant new projects are undertaken.

The legal and policy framework underpinning these elements must be in place. Of paramount importance is the political message that goes out from those in power, and in particular from the head of State: namely that all good faith inputs are welcome, that being in political opposition does not mean one is an enemy, that there is space for contestation and the exchange of ideas.

Urgent attention is due specifically to the management of protest in Africa. In many cases demonstrations are managed in a way that escalates rather than de-escalates tensions. The UN and African Commission have developed extensive and useful documents providing guidance in this regard. However, domestic laws, especially on the use of force during demonstrations remain largely inadequate, and do not meet the requirements posed by international human rights law. Excessive use of force and a failure to ensure accountability where lives are lost, invariably leads to an escalation of the situation.

Based on the above, some concrete suggestions to improve equal participation may be considered:

1. During elections, electoral procedures should be followed; peaceful demonstrations allowed; candidates allowed to make speeches and hold public meetings; any violence against political actors must be investigated as a matter of priority. States should ensure that enabling legislation and policies are in place, and independent institutions that enable participation are in place, and are well resourced and staffed with competent people.
2. Electoral systems should be designed to meet the needs of the local population. There is no single right answer as to the extent to which they should be representative or direct, fist past the post of proportional, etcetera, and considering the alternatives and where necessary appointing a body to investigate the options can lead to greater effectiveness.
3. States that have not ratified the African Charter on Democracy, Elections and Governance should do so, and those who have already done so should recommit themselves to its values.
4. The distinction between State and government should be maintained, also in public rhetoric by political leaders.
5. Discrimination in all its forms must be addressed. If there is a general culture of discrimination on any grounds, it is bound to translate also into discrimination in terms of participation. Special temporary measures must be taken where necessary to provide redress for discrimination in the past and to ensure that the marginalized have a voice.
6. Technology should be used where appropriate to enhance participation, by making information available, and to allow people to exchange ideas on a large scale and express preferences. This should always be done keeping in mind the local conditions, and the assumption should not be made that because it worked elsewhere it is appropriate under local conditions. Technology should also be used to ensure the dissemination of information, and access to official documents, including legislation and regulations.
7. There is an urgent and wide-spread need to bring the domestic laws of many African States on the use of force by law enforcement officials during demonstrations into conformity with the international standards. The African Commission on Human and Peoples’ Rights or the Pan African Parliament should develop a model law or guiding principles on the use of force and firearms by law enforcement officials. UNODC and others with capacity should provide technical assistance to States in bringing about such law reforms.
8. There must be maximum transparency on decisions that will affect individuals and communities to allow informed decision-making. This entails proper communication channels and strategies, and allowing time for messages to be digested and responded to.
9. The independence and impartiality of NGOs must be maintained and secured. When NGOs are under the clandestine control of governments the role of civil society as a whole is undermined.
10. In appropriate cases, steps have to be taken to lower the political and economic stakes involved in winning or losing an election or other similar processes. This may take the form of decentralizing the government, finding a more appropriate electoral system, or even measures such as ensuring pensions for retired politicians.
11. Weeding out corruption remains a key precondition for people to be expected to trust the system.
12. The African Union should take measures to ensure more public participation in its activities.
13. Innovative educational programmes should expose students to the workings of a constitutional democracy and human rights. Human rights moot courts in secondary schools in countries across the continent are a low cost, effective way of getting the message across. National human rights institutions, the universities and in particular the law faculties of the continent are well placed to arrange this.

**List of annexures:**

**Annexure ‘A’: The UN Human Rights Committee: Concluding observations and views on the right to political participation under the ICCPR in African Sates**

**Annexure ‘B’: The African Charter system and the right to political participation**

**Annexure ‘C’: African Sub-regional human rights systems and the right to political participation**

**Annexure ‘D’: The constitutions of African States and the right to political participation**

**Annexure ‘E’: African electoral laws**

1. Professor of human rights law, University of Pretoria and member of the United Nations Human Rights Committee. The views expressed here are personal. The author wants to thank Alexia Katsignis for her research assistance. [↑](#footnote-ref-1)
2. Article 25 of the International Covenant on Civil and Political Rights provides as follows: Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country. [↑](#footnote-ref-2)
3. para 6. [↑](#footnote-ref-3)
4. See e.g. Council of Europe ‘Civil participation in decision-making processes’ May 2016, available at https://rm.coe.int/168068690f. [↑](#footnote-ref-4)
5. *August & Another v Electoral Commission & Others* 1999 (3) SA 1 (CC) at para 17. [↑](#footnote-ref-5)
6. Following the approach used by the OHCHR in describing the MENA region, this means the following African countries are excluded from consideration here: Algeria, Egypt, Libya, Mauritania, Morocco, and Tunisia. See [http://www.ohchr.org/EN/Countries/MenaRegion/Pages/MenaRegionIndex.aspx](https://www.ohchr.org/EN/Countries/MenaRegion/Pages/MenaRegionIndex.aspx). [↑](#footnote-ref-6)
7. See <https://freedomhouse.org/report/freedom-world/freedom-world-2017>. [↑](#footnote-ref-7)
8. See <https://www.au.int/web/en/pressreleases/20170216/au-commemorates-10th-anniversary-adoption-african-charter-democracy-elections>. [↑](#footnote-ref-8)
9. See <https://freedomhouse.org/report/freedom-press/freedom-press-2017>. [↑](#footnote-ref-9)
10. See <https://cpj.org/reports/2016/12/journalists-killed-murdered-syria-most-deadly-war.php>. [↑](#footnote-ref-10)
11. See <https://au.int/en/organs/ecosocc>. [↑](#footnote-ref-11)
12. See <http://www.acdhrs.org/>. [↑](#footnote-ref-12)
13. See <http://www.universal-rights.org/blog/by-invitation/bringing-un-treaty-body/>. The author wishes to disclose his involvement in promoting this idea. [↑](#footnote-ref-13)
14. Not all the relevant documents are covered in the text. For example, the predecessor of the AU, the Organization of African Unity, in 1990 adopted the *African Charter for Popular Participation in Development and Transformation.* The Executive Council of the AU in July 2004 adopted *Guidelines for African Union Electoral Observation and Monitoring Missions*. [↑](#footnote-ref-14)
15. [↑](#footnote-ref-15)
16. See *Constitutional Rights Project and Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998) para 50. [↑](#footnote-ref-16)
17. Art 3, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights. [↑](#footnote-ref-17)
18. Article 60/61. [↑](#footnote-ref-18)
19. See <http://www.achpr.org/instruments/policing-assemblies-in-africa/>. [↑](#footnote-ref-19)
20. See <http://www.achpr.org/files/instruments/access-information/achpr_instr_model_law_access_to_information_2012_eng.pdfin>. [↑](#footnote-ref-20)
21. Christof Heyns and Waraguru Kaguongo ‘Constitutional human rights law in Africa’ 22 *South African Journal on Human Rights* (2006) 673 [↑](#footnote-ref-21)
22. Angola (art 3), Benin (art 3), Burkina Faso (art 32), Burundi (art 7), Cameroon (art 2), Cape Verde (art 3(1)), Central African Republic (art 18), Chad (art 3), Comoros (art 3), Congo (art 3), Côte d'lvoire (art 31), Democratic Republic of Congo (art 5), Djibouti (art 3), Equatorial Guinea (art 2), Eritrea (art 1(4)), Ethiopia (art 8), Gabon (art 3), The Gambia (sec 1(2), Ghana (art 1(1)), Guinea (art 2), Guinea-Bissau (art 2), Liberia (art 1), Madagascar (art 6), Malawi (art 12), Mali (art 26), Mozambique (art 2), Namibia (art 1(2)), Niger (art 5), Nigeria (see 14(2)(a)), Rwanda (art 2), São Tomé & Príncipe (art 6(2)), Senegal (art 3), Sierra Leone (sec 5(2)(a)), Somalia (art 1.1), Sudan (art 4), Tanzania (art 8(l)(a)), Togo (art 4), Uganda (art 1) and Zambia (art 1(2)). [↑](#footnote-ref-22)
23. Benin (art 2), Burundi (art 6), Central African Republic (art 18), Chad (art 7), Congo (art 2), Côte d'Ivoire (art 30), Djibouti (art 1), Gabon (art 2), Guinea (art 1), Mali (art 25), Niger (art 4), Rwanda (art 1), Senegal (art 1) and Togo (art 2). [↑](#footnote-ref-23)
24. Angola (arts 120, 127), Benin (art 125), Burkina Faso (art 125), Burundi (art 209), Cameroon (art 37(2)), Cape Verde (art 210), Central African Republic (art 75), Chad (art 146), Comoros (art 28), Congo (art 137), Côte d'lvoire (art 101), Democratic Republic of Congo (art 149), Djibouti (art 71), Equatorial Guinea (art 83), Eritrea (arts 10, 48(2)), Ethiopia (art 78(1)), Gabon (art 68), The Gambia (sec 120(3)), Ghana (arts 125, 127), Guinea (art 80), Guinea-Bissau (art 95), Lesotho (sec 118), Madagascar (art 99), Malawi (arts 9, 103), Mali (art 81), Mozambique (art 217(1)), Namibia (art 78), Niger (art 98), Nigeria (sec 17(2)(e) of the Fundamental Objectives and Directive Principles of State Policy), Rwanda (arts 60, 140), São Tomé & Príncipe (art 104), Senegal (art 88), Seychelles (art 119), Sierra Leone (sec 8(2)(c) of the Fundamental Principles of State Policy and sec 120(3)), Somalia (art 55), South Africa (sec 165(2)), Sudan (arts 99, 101), Swaziland (sec 62 of the Directive Principles of State Policy and sec 141), Tanzania (sec 107A), Togo (art 113), Uganda (art 128), Zambia (art 91) and Zimbabwe (sec 79B). [↑](#footnote-ref-24)
25. Burundi (art 89), Democratic Republic of Congo (art 211), Eritrea (art 58), Ethiopia (art 102), The Gambia (sec 42), Ghana (art 43), Kenya (sec 41), Liberia (art 89), Malawi (sec 75), Mauritius (see 38), Nigeria (sees 153, 285), Rwanda (art 180), Seychelles (art 115 provides for an Electoral Commissioner), Sierra Leone (sec 32), Somalia (art 68), South Africa (sec 181), Sudan (sec 128), Swaziland (sec 90), Tanzania (sec 74), Uganda (art 60), Zambia (art 76) and Zimbabwe (sec 61). [↑](#footnote-ref-25)
26. Benin (arts 19, 66), Burkina Faso (art 167), Cameroon (preamble), Cape Verde (art 19), Chad (preamble), Congo (art 10), Democratic Republic of Congo (art 28), The Gambia (art 6), Ghana (art 3) Guinea (art 19), Mali (art 121), Mozambique (art 80), Niger (art 13), Rwanda (art 48), Togo (arts 21, 45, 150) and Uganda (art 3(5) & (6)). [↑](#footnote-ref-26)
27. Benin (art 25), Botswana (sec 13), Burkina Faso (art 21), Burundi (art 32), Cameroon (preamble), Cape Verde (art 28), Central African Republic (art 12), Chad (art 27), Comoros (preamble), Congo (art 21), Democratic Republic of Congo (art 37), Djibouti (art 15), Equatorial Guinea (art 13(k)), Eritrea (art 19(6)), Ethiopia (art 31), Gabon (art 1(13)), The Gambia (sec 25(1)(e)), Ghana (art 21(1)(e)), Guinea (art 10), Guinea-Bissau (art 44), Kenya (sec 80), Lesotho (sec 16), Liberia (art 17), Madagascar (art 10), Malawi (sec 32), Mali (art 5), Mauritius (sec 13), Mozambique (art 52), Namibia (art 21(1)(e)), Niger (art 24), Nigeria (sec 40), Rwanda (art 35), São Tome´ & Principe (art 34), Senegal (arts 8, 12), Seychelles (art 23), Sierra Leone (sec 26), Somalia (arts 14, 21, 22), South Africa (sec 18), Sudan (art 26), Swaziland (sec 25) Tanzania (sec 20), Togo (art 30), Uganda (sec 29(1)(e)), Zambia (art 21) and Zimbabwe (sec 21). [↑](#footnote-ref-27)
28. Angola, Benin, Botswana, Burkina Faso, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Congo, Côte d’Ivoire, Democratic Republic of Congo (art 38), Djibouti, Ethiopia, The Gambia, Ghana, Guinea-Bissau, Kenya, Liberia, Lesotho, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tome´ & Principe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Togo, Uganda, Zambia and Zimbabwe. [↑](#footnote-ref-28)
29. Angola (art 2) Benin (art 5), Burkina Faso (art 13), Burundi (art 76), Cameroon (art 3), Cape Verde (arts 56, 57), Central African Republic (art 19), Chad (art 4), Comoros (art 6), Congo (art 53), Côte d’Ivoire (art 13, 14), Democratic Republic of Congo (art 6), Djibouti (art 6), Equatorial Guinea (art 1), Eritrea (art 19(6)), Ethiopia (art 38), Gabon (art 1(13)), The Gambia (sec 25(1)(e)), Ghana (sec 21(3)), Guinea (art 3), Guinea-Bissau (art 4), Kenya (sec 1A), Liberia (arts 77, 79-80), Madagascar (art 14), Malawi (sec 40(1)), Mali (art 28), Mozambique (arts 74-77), Namibia (arts 17(1), 21(1)(e)), Niger (art 9), Nigeria (sec 40), Rwanda (art 52), São Tomé & Príncipe (art 62), Senegal (art 4), Seychelles (art 23(1)), Sierra Leone (sec 35), Somalia (arts 14, 21), South Africa (sec 19(1)), Sudan (art 26(2)), Tanzania (sec 3, 20), Togo (art 6-8) Uganda (art 71) and Zambia (art 21). [↑](#footnote-ref-29)
30. Angola (art 32), Benin (art 25), Botswana (art 13), Burundi (art 32), Cameroon (preamble), Cape Verde (art 52), Central African Republic (art 8), Chad (art 27), Comoros (preamble), Congo (art 21), Côte d’Ivoire (art 11), Democratic Republic of Congo (arts 25, 26), Equatorial Guinea (art 13(k)), Eritrea (art 19(5)), Ethiopia (art 30), The Gambia (sec 25(1)(d)), Ghana (art 21(1)(d)), Guinea (art 10), Guinea-Bissau (art 44), Kenya (sec 80), Lesotho (sec 15), Liberia (art 17), Madagascar (art 10), Malawi (sec 38), Mali (art 5), Mauritius (sec 13), Mozambique (art 51), Namibia (art 21(1)(d)), Niger (art 24), Nigeria (sec 40), Rwanda (art 36), São Tomé & Príncipe (art 33), Senegal (art 8), Seychelles (art 23), Sierra Leone (sec 26), Somalia (art 19), South Africa (sec 17), Swaziland (sec 25), Tanzania (sec 20), Togo (art 30), Uganda (art 29(1)(d)), Zambia (art 21) and Zimbabwe (sec 21). [↑](#footnote-ref-30)
31. Angola (art 28), Benin (art 6), Burkina Faso (art 12), Burundi (arts 8, 86), Cameroon (art 2), Cape Verde (art 54), Central African Republic (art 18), Chad (art 6), Comoros (art 4), Côte d'Ivoire (art 33), Democratic Republic of Congo (art 5), Djibouti (art 5), Eritrea (arts 20, 30), Ethiopia (art 38), Gabon (art 4), The Gambia (arts 26, 39), Ghana (art 42), Guinea (art 2), Guinea-Bissau (art 47), Lesotho (sec 20), Liberia (art 77(b)), Madagascar (art 15), Malawi (sec 40(3)), Mali (art 27), Mauritius (sec 44), Mozambique (art 73), Namibia (art 17(2)), Niger (art 7), Rwanda (art 8), São Tomé & Príncipe (art 57), Senegal (art 3), Seychelles (arts 24, 113), Sierra Leone (sec 31), South Africa (sec 19(3)), Swaziland (sec 85), Tanzania (sec 5), Togo (sec 5), and Uganda (art 59). [↑](#footnote-ref-31)
32. Benin, Burundi, Cameroon, Central African Republic, Chad, Comoros, Côte d'lvoire, Djibouti, Gabon, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritius, Niger, Rwanda, São Tomé & Príncipe, Senegal, Sierra Leone, Swaziland, Tanzania, Togo, and Uganda. [↑](#footnote-ref-32)
33. Benin, Burkina Faso, Cape Verde, Chad, Comoros, Côte d'lvoire, Democratic Republic of Congo, Djibouti, Gabon, Guinea, Guinea-Bissau, Mali, Mozambique, Niger, Senegal, and Togo. [↑](#footnote-ref-33)
34. For a full discussion, see Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, 2014, A/HRC/26/36. [↑](#footnote-ref-34)
35. It has happened before in Ukraine (2004), Maldives (2014) and Austria (2016). [↑](#footnote-ref-35)
36. See *Doctors for Life International v Speaker of the National Assembly & Others* 2006 (6) SA 416 (CC) and *Matatiele Municipality & Others v President of the Republic of South Africa & Others* 2007 BCLR 47 (CC). [↑](#footnote-ref-36)
37. *Doctors for life* at para 105. [↑](#footnote-ref-37)