

The Status and Legitimacy of Popular Uprisings in the AU Norms on Democracy and Constitutional Governance

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Abstract

During the first decade of the African Charter on Democracy, Elections and Governance, one significant political development in Africa has been the resort to popular protests or uprisings against tyrannical rule. These uprisings have been remarkable for their scale and extraordinary political ramifications, and succeeded in unseating longstanding authoritarian rulers. They presented serious challenges to the African Union's democratic and constitutional governance norms, in particular regarding the status of uprisings in relation to the ban on unconstitutional changes of government and the determination of whether and when resultant changes of government are constitutional. In addressing these issues, this article contends that, although popular uprisings (also called "democratic revolutions") are not a priori deemed constitutional, the AU's application of its norm banning unconstitutional changes of government to the popular uprisings in North Africa and Burkina Faso has opened a legal avenue that offers constitutional legitimacy for popular uprisings overthrowing authoritarian regimes.

Keywords

African Union, unconstitutional change of government, popular uprising, legal positivism, effectiveness theory, natural law, purposive constitutionalism, African Charter on Democracy, Elections and Governance

INTRODUCTION

On 17 December 2010, Mohamed Bouazizi, a young fruit and vegetable street vendor, set himself on fire in a public square in the Tunisian provincial town of Sidi Bouzid to protest against the harassment he had suffered at the hands of police and local officials. The 28 days of nationwide protest, also called the Jasmine Revolution, that Bouazizi's self-immolation sparked forced Tunisia's apparently enduring authoritarian leader, President Zine al-Abidine Ben Ali,

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to surrender power and flee the country for exile in Saudi Arabia. The spontaneity of the uprising, its speed and scale, facilitated by young Tunisians using social media such as Facebook and Twitter, not only caught observers by surprise but also overwhelmed Ben Ali's police state.

With Tunisians overcoming their fears even in the face of lethal police repression and taking power into their own hands to reclaim their agency, the reverberations of the uprising were not confined to the borders of Tunisia. It also produced domino effects in neighbouring countries, as people in Egypt and Libya took to the streets in an attempt to force their authoritarian governments out of power.

Although North Africa was the epicentre of the popular protests, the rest of Africa did not escape the phenomenon of protests. Indeed, the protests that spread like wildfire in North Africa spilled over to other parts of the continent as well. Protests of various magnitudes erupted in more than a dozen African countries during 2011, 2012 and the following years. In Senegal there were large and persistent popular protests beginning in June 2011 against the presidential re-election campaign of Abdoulaye Wade. The 80-year-old had secured a Supreme Court judgment allowing him to run for a third term, but the people, exercising their sovereign right, voted him out at the ballot box. Other countries that witnessed the phenomenon include Benin, Burkina Faso, Burundi, Cameroon, Congo, Democratic Republic of Congo, Djibouti, Ethiopia, Kenya, Sudan and Uganda. Admittedly, the scale and impact of these protests have not been to the level of those witnessed in North Africa, except in Burkina Faso where the protests ousted long-time dictator Blaise Compaoré in October 2014.

So far as Africa was concerned, beyond and above their domino effect and the message they carry, the North African popular uprisings, the so called "Arab Spring", also raised difficult questions for the African Union (AU). Like others, the AU did not anticipate this and hence was caught by surprise. The most immediate challenge for the AU was how to respond to the popular uprisings and the resultant changes of government in a principled and consistent way. In particular, there was the issue of whether popular uprisings or revolutions were consistent with the AU doctrine banning unconstitutional changes of government (UCG). Yet, the standard or framework by which the legitimacy of popular uprisings and hence their conformity with existing AU norms could be assessed was unclear. This was not surprising. After all, the AU norm banning UCG aims to address the historical challenge of coups d'état and similar forms of change of government through illegal means, rather than popular uprisings or revolutions.¹ Effecting a change of

1 See generally SA Dersso "Defending constitutional rule as a peacemaking enterprise: The case of the AU's ban of unconstitutional changes of government" (2017) 24/4 *International Peacekeeping* 639; I Souaré "The African Union as a norm entrepreneur on military coups d'état in Africa (1952–2012): An empirical assessment" (2014) 52 *The*

government through street protests rather than the barrel of the gun was not imagined to be in the realm of the probable.

This article addresses the question of whether and when popular uprisings would be compatible with the democratic governance norms of the AU, particularly its ban on UCG. The article further examines the issue of the standards or framework from which it can be determined whether popular uprisings conform with the UCG norm. These issues became particularly poignant when Egypt, after ending the long rule of Hosni Mubarak through street protests, experienced another round of protests in June 2013 that led to the ouster of the first democratically elected government of Mohamed Morsi. If even democratically elected governments are removed through mobilizing street protests, largely because they lack or lose popularity, there is certainly a need to address the serious questions of the reach and limits of popular uprisings as a vehicle for effecting change of government vis-à-vis the AU's UCG norm.

In addressing these issues, this article contends that, although popular uprisings, also called "democratic revolutions", cannot a priori be deemed to be constitutionally legitimate, the AU's application of its UCG norm to the North African popular uprisings and in Burkina Faso has opened new legal avenues that offer constitutional justification and legitimacy for popular uprisings overthrowing authoritarian regimes. However, the author begs to differ from the view advanced by some that "no tension exists between revolutions and the AU normative frameworks" and that there are no lacunae in the extant AU norms so far as popular uprisings are concerned.² Instead, this article asserts that there are instances when popular uprisings may not be compatible with the ban on UCG. As they stand, AU norms lack the criteria for determining conformity with UCG. In pursuing this analysis, the article relies on the distinction between legal positivism and what is sometimes called the natural law theory of law.³ Unlike international legal positivists who reject

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Journal of Modern African Studies 69; OE Yemisi "A club of incumbents? The African Union and coups d'état" (2012) 44 *Vanderbilt Journal of International Law* 123.

- 2 See MT Maru "The North African uprisings under the AU's normative framework" (paper presented at the Inter-African Group Conference on the Implications of North African Uprisings for Sub-Saharan Africa, Nairobi, 2 April 2012) at 169.
- 3 This distinction relates to the nature of law and its relationship to justice. For legal positivism, law refers to the rules that those with authority enact in accordance with duly established procedures applicable in society. Any set of rules meeting such criteria constitutes law, irrespective of its justness. By contrast, the natural law theory posits that what determines the legality of a rule or a political act is its consistency with its inherent purpose or with principles of justice, rather than how the rule is made or whether the act is clearly stipulated in an identifiable source of law. Thus, unlike the positivist school for which whether or not something is constitutional can only be determined by reference to what the constitution says, for the natural law theory constitutionality depends on the act's consistency with the essential purpose of the constitution or principles of justice.

popular uprisings or revolutions as a legal or constitutional matter, the view held in this article is that the compatibility of such events can be legally determined by reference to clearly established criteria that draw on the essential purpose of constitutional law.⁴

Following this introduction, the article offers an analytical framework that discusses popular uprisings within the context of the AU norm banning UCG. This includes a review of the issue of whether there can be a legal qualification or standard of legitimacy of popular uprisings, also called “democratic revolutions”. Discussion of the standard for assessing the constitutional legitimacy of change of government also forms part of this section. The next section offers an analysis of the AU’s responses to the events in Tunisia and Egypt. This is followed by a discussion outlining the lacuna or missing element in the AU’s existing constitutional governance norms, particularly its ban on UCG. The article then explores how this lacuna in the AU’s norm on UCG can be filled. This involves examining an approach for assessing the legitimacy of popular uprisings. This section also discusses the practical application of the framework developed to evaluate the conformity of popular uprisings with the AU norm on UCG, using the case of Egypt. The article concludes by highlighting patterns of application of this approach in the AU. It argues that the approach proposed in this article should be complemented with reinforcing the AU’s constitutional governance norm, focusing particularly on proactively addressing major democratic and constitutional governance deficits.

POPULAR UPRISINGS

With governments in Tunisia, Egypt and Yemen melting down in the face of the fury of the people and with others witnessing mass demonstrations, the first decade of the African Charter on Democracy, Elections and Governance (ACDEG) became an era of the rise of the people against the prevailing unjust political systems they had endured for long periods. Capturing this sentiment of the era, *Time* magazine chose as “person of the year” for 2011 the phenomenon of the rise of the people. Highlighting the significance of popular protests, *Time* explained its choice thus: “[n]o one could have known that when a Tunisian fruit vendor set himself on fire in a public square in a town barely on a map, he would spark protests that would bring down dictators in Tunisia,

4 The contrary view among positivist legal scholars has been that popular uprisings or revolutions are exclusively political issues that do not lend themselves to legal analysis. T Frank thus argued that “to debate whether revolution is unconstitutional is pointless sophistry”: A Khan “A legal theory of revolutions” (1987) 5 *Boston University International Law Journal* 1 at 2. For a recent work relying on the effectiveness theory, see K Obse “The Arab Spring and the question of legality of democratic revolution in theory and practice: A perspective based on the AU normative framework” (2014) 27/4 *Leiden Journal of International Law* 817.

Egypt and Libya, and rattle regimes in Syria, Yemen and Bahrain”.⁵ *Time* went on to note that, with protests occurring in countries with populations reaching three billion people, “protest” has appeared in newspapers and on-line exponentially more this past year than at any other time in history.⁶

Understandably, these protests and the political tumult accompanying them are of particular significance for international law and, in the African context, more so for AU law. The protests and their ramifications raise issues of direct importance in respect of the AU law that embodies rules banning UCG. What are popular uprisings? When are they legally valid or compatible with the UCG norm? How is their legal validity determined in relation to UCG? What can be learnt from the AU’s response to the popular uprisings in North Africa and Burkina Faso?

The North African popular uprisings consisted of mass demonstrations seeking major political changes that may entail a fundamental reordering of the structure of power relations, hence constituting revolution or less fundamental changes, such as change of government. Popular uprisings involve street protests or demonstrations and other acts of widespread expression of opposition, such as occupying public spaces and boycotting business activities including staying away from work. They are ordinarily widespread and attract broad-based popular participation.

By their very nature, they are extra-constitutional events manifesting the failure of established constitutional or legal processes to address the needs of the public, including most notably changing the government. In other words, a popular uprising is an extraordinary expression of the will of the people. Yet, despite embodying the will of the people, it is distinct from the forms of expression of popular will (such as elections) that are ordinarily prescribed in law and used in normal circumstances. If anything, popular uprisings are a result of the utter failure of these legally established processes of change of government, which are what Khan called rules of succession.⁷

For international legal positivists, popular uprisings or revolutions are legally validated by the strength of their success. This view is based on the traditional international law theory of effectiveness. In *Pure Theory of Law*, Hans Kelsen posited that a revolution becomes validated by the sheer reality of its success and effectiveness, hence changing the basic norm (Grundnorm) of the legal order.⁸ Accordingly, from the perspective of legal positivism, popular uprisings are not and should not be matters whose legitimacy should and can be legally determined.

5 R Stengle “Person of the Year introduction” (14 December 2011) *Time* (New York), available at: <http://content.time.com/time/specials/packages/article/0,28804,2101745_2102139_2102380,00.html> (last accessed 4 December 2018).

6 Ibid.

7 Khan “A legal theory”, above at note 4 at 2.

8 H Kelsen *Pure Theory of Law*, as quoted in Obse “The Arab Spring”, above at note 4 at 820.

The effectiveness theory on the legal validity of popular uprisings gives rise to a number of challenges. First, the fact that popular uprisings are not prescribed in law as a manifestation of the will of the people is taken to suggest that they have no legal basis of any kind and are outside the purview of law. As an extraordinary act, popular uprisings are understandably not in the menu of options that are constitutionally prescribed, and only those options that are ordinarily used in democratic systems, such as elections, procedures for recall or impeachment and referendum, are constitutionally laid down. It is however erroneous to infer that popular uprisings or democratic revolution have no basis in law. Such a position confuses the role of law as evidence, rather than the source, of citizens' rights. Secondly, the effectiveness theory, which draws on legal positivism, advances a very narrow conception of law, hence treating it as inherently incapable of dealing with popular uprisings. Unfortunately, such a conception of law completely divorces legality from public legitimacy.⁹ Certainly, this position is untenable on the basis of the evolving contemporary view of the law as an expression of the sovereign will of the people, as reflected for example in the Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration).¹⁰ Thirdly and importantly, the position of legal positivism pays no attention to the quality of the popular uprising, including the method or means used to effect change of government. Thus, by the standard of the effectiveness theory, even uprisings orchestrated by and relied on by the army or an act of violence would, if successful, pass the test of legal validity.¹¹

There was a time when the effectiveness theory was the mainstay of the legal order of the continental organization, the Organisation of African Unity (OAU), predecessor to the AU. The dogmatic application of the principles of state sovereignty and non-intervention was a characteristic feature of much of the OAU era. This resulted in an institutional posture and diplomatic culture of utter indifference to how government power was acquired and exercised within the confines of the territories of an OAU member state. As a result, during the Cold War period of the OAU, military coups and related illicit methods of change of government were the most common forms of assuming power. Following the effectiveness doctrine of international law, the OAU accepted regimes coming to power through military coups or other illegal means as legitimate, irrespective of their popular legitimacy.¹² The issue of the process for accessing power was accordingly considered to

9 Khan "A legal theory", above at note 4, calls this "social acceptability".

10 Declaration on the Framework for an OAU Response to Unconstitutional Change of Government, OAU doc AHG/Decl.5 (XXXVI) adopted in Lomé, Togo at the 36th ordinary session of the OAU, July 2000.

11 Khan "A legal theory", above at note 4, noted (at 18) that such a position confuses "a legal order with a mere presence of coercive force".

12 See for details KO Kufuor "The OAU and the recognition of governments in Africa: Analyzing its practice and proposal for the future" (2002) 17/2 *American University*

be a matter outside of the purview of the OAU and as such the regional body remained indifferent to the question of how an existing government came to an end and another took over.

From the perspective of the AU's democratic and constitutional governance norms, the effectiveness theory is no longer the criterion for determining recognition of anyone claiming power. Indeed, under the AU norms the concern of the law has shifted. The success (or effectiveness) of the process for changing the incumbent government and ascending to power became insufficient on its own for legal validity. Following a novel trend that started in the late 1990s, the promotion of ascension to power following constitutionally established processes of transfer of power has become part of the AU constitutional craft.¹³ The AU has come to concern itself not only with protecting democratically elected governments from the threat of being overthrown through unconstitutional means, but also with promoting democracy in its member states.¹⁴ Unlike the OAU's indifferent past, it is thus no longer legally possible for the AU to be indifferent to how a change of government in its member states came about.

As noted above, the beginning of the process towards what Thomas Tiekou called a democratic promotion role of the regional body¹⁵ can be traced back to the late 1990s. This concern with the democratic character of the process and method of change of government acquired clear and binding legal expression in the context of the transition to, and since the establishment of, the AU in 2000. In this process, member states of the regional body established rules that give their union the authority to intervene in domestic successions to executive power where the basis for such succession related to any one of the prohibited grounds.¹⁶

As first encapsulated in the Lomé Declaration, the ban on UCG was intended to affirm constitutional means as the only accepted method of changing governments. As set out in the declaration, the intention was to safeguard "respect of the rule of law based on peoples will expressed through the ballot".¹⁷ The Lomé Declaration accomplished at least two major tasks in the

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International Law Review 369, noting (at 375) that the OAU had accepted the "principle of effective control as one of the conditions for recognition of governments".

13 See generally Dersso "Defending constitutional rule", above at note 1.

14 S Dersso "The adequacy of the African Peace and Security Architecture to deal with serious democratic deficits" (2012) 21/3 *African Security Review* 4. See also TK Tiekou "Multilateralization of democracy promotion and defense in Africa" (2009) 56/2 *Africa Today* 75.

15 Tiekou, *ibid.*

16 For details of these, see SA Dersso "Unconstitutional changes of government and unconstitutional practices in Africa" (paper no 2 presented at Tufts University, Fletcher School of Law and Diplomacy, World Peace Foundation African Peace Missions, Massachusetts, June 2016), available at: <<https://sites.tufts.edu/wpf/files/2017/07/2.-UCG-Dersso-f.pdf>> (last accessed 4 December 2018).

17 Lomé Declaration, preamble, para 4.

ban on UCG: defining the circumstances that constitute UCG and elaborating the measures to be taken when UCG has occurred in a member state. Under the Lomé Declaration, UCG was defined as: “a military coup d’état against a democratically elected government; intervention by mercenaries to replace a democratically elected government; replacement of a democratically elected government by armed dissident groups and rebel movements; or the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections”.¹⁸ In the light of the focus of this article, it is unsurprising that the declaration makes no reference to popular uprisings.

When the AU adopted its Constitutive Act in 2000 (the AU Constitutive Act), the UCG norm received legally binding force. Accordingly, article 4(p) of the AU Constitutive Act established the prohibition of UCG as one of the AU’s founding principles. In underscoring the particular importance attached to this norm, the prohibition of UCG is the only commitment under the AU Constitutive Act for which a sanction is specifically prescribed in the event of a breach. Accordingly, article 30 of the AU Constitutive Act provides: “[g]overnments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union”. This was again enunciated in the Protocol Establishing the AU’s Peace and Security Council (PSC) under its article 7(g).

With the adoption of the ACDEG in 2007 (also known as the Addis Ababa Charter), the various elements of the AU norm as contained in the Lomé Declaration and the AU Constitutive Act were consolidated and further refined. Subsequent efforts focused mainly on strengthening the sanctions regime of the UCG norm and on making the additional sanctions elaborated in the ACDEG applicable to AU members not party to the charter. Accordingly, the Decision on the Prevention of UCG and Strengthening the Capacity of the African Union to Manage Such Situations¹⁹ reinforced the operation of the sanctions in the event of a breach. Apart from boosting the legal force of the measures envisaged in the Lomé Declaration, it reiterated the additional sanctions provided for under the ACDEG. Going further, it provided for “implementation by the Assembly of other sanctions, including punitive economic sanctions”.²⁰ The scope of UCG was further expanded to cover situations where the military seized power and handed it over to a civilian leader of its choice.

Clearly, unlike the previous period when the OAU followed the positivist theory of effectiveness in dealing with the question of change of government, in the context of the (O)AU elaboration of the UCG norm, the theory of effectiveness was abandoned. Success is thus not sufficient for a change of

18 Id, para 5.

19 AU doc Assembly/AU/4(XVI), adopted at the 14th ordinary session of the AU Assembly, 30 January 2010.

20 Ibid.

government to be legally acceptable. Under the AU's UCG norm, it is a prerequisite that the change of government conforms to the rules.

Notwithstanding their richness, the AU norms proved wanting in offering guidance for adopting a principled and effective response to the popular protests. Former AU commissioner for peace and security, Ambassador Lamamra, aptly summed up the seriousness and importance of this issue when he remarked that, "the uprisings in North Africa exposed a dangerous vacuum in the arsenal of AU instruments that needs to be urgently filled by putting in place appropriate response mechanisms that will enable the continental body to timely respond to such phenomena with the required robustness and effectiveness".²¹

From the perspective of the AU's UCG norm, perhaps the major lacunae relate to the standard for determining the constitutionality of such events. From the formulation and implementation history of the norms, it is not evident whether the test of constitutionality is a legalist / positivist approach or a purposive and legitimacy approach. From the perspective of the first approach, what is decisive is whether the change of government came about in accordance with the processes laid down in the constitution. The result is that any change that came about outside the constitutional provisions, irrespective of any regard to respect for constitutionalism, would be deemed unconstitutional. Key to the second approach is the role played by the people and whether the change embodies their general will, which is the source of a government's legitimacy.

THE POPULAR UPRISINGS IN TUNISIA AND EGYPT AND THE AU'S RESPONSE

It was the popular uprisings in North Africa, particularly the events in Tunisia and Egypt, that brought to the surface the question of the relationship between the AU's UCG norm and popular uprisings. This section accordingly uses and examines the developments in these two countries and pertinent AU responses in each case. It was in Tunisia that the North African popular uprisings started, following the self-immolation of Mohamed Bouazizi on 17 December 2010 in protest against his ill treatment by local authorities. The protests that his tragic death triggered in his hometown quickly spread to other parts of Tunisia and the capital, Tunis. The government's various efforts to contain the protests did not succeed. The crisis was magnified when the police and security forces responded heavy handedly to the protests by firing live ammunition at protestors. The resultant deaths of dozens of protesters and injuries to many more became the straw that broke the proverbial camel's back. The president's various efforts to diffuse the situation were however too

21 Ambassador R Lamamra (AU commissioner for peace and security) "Key note address to the open session of the 284th meeting of the Peace and Security Council of the AU" (Addis Ababa, Ethiopia, 11 July 2011) (copy on file with the author).

little and far too late. Unable to stop the widespread and persistent protests and with the military maintaining its neutrality and showing no support either for protecting the government or for its removal, on 14 January the president and his family left the country.

Immediately after Ben Ali's departure, the prime minister announced in a televised address that he had temporarily assumed the position of president, invoking article 56 of the constitution, which mandates that in case the president is unable to exercise his power, he will delegate power to the prime minister. On 15 January 2011, the Constitutional Council overturned this misapplication of the constitutional process and declared that the speaker of Parliament should, as per the requirements of the Constitution of Tunisia, temporarily assume the vacant position of president and organize elections within 60 days.²²

The most immediate question that the AU and its PSC faced was to determine whether the removal of the president conformed with the ban on UCG. There were two opposing views. The first was the legalistic view that any change of government that came about outside the processes set in the constitution (elections, recall, impeachment) was unconstitutional. According to this view, since Tunisia's Constitution did not stipulate the removal of the government through street protests, the change of government brought about by the protests was unconstitutional. The second was the purposive and legitimacy approach to constitutionalism that put a premium on popular will as the source of government authority. According to this view, what is key for determining the conformity of a change of government through popular street protest is whether the protest can be considered to embody the will of the people for whose expression the established constitutional mechanisms, such as elections, vote of no confidence, impeachment or referendum, are rendered politically unavailable.

Like others, the AU was unprepared for the popular uprising in Tunisia and its success in evicting Ben Ali from power. Its rules were silent on how to answer the stark question that the situation posed, on how to determine the conformity of the popular uprisings with the AU's UCG norm.

At its 257th meeting, when it considered the situation in Tunisia "in the light of the departure of President Ben Ali", the PSC appealed to political stakeholders and the Tunisian people "to work together, in unity, consensus and respect for legality, towards a peaceful and democratic transition, which will allow the Tunisian people to freely choose their leaders through free, open, democratic and transparent elections".²³ While the PSC also expressed "its

22 See "Tunisia swears in interim leader" (16 January 2011) *Al Jazeera*, available at: <<https://www.aljazeera.com/news/africa/2011/01/201111513513854222.html>> (last accessed 4 December 2018).

23 PSC Communiqué of the 257th Meeting on the Situation in Tunisia (15 January 2011), AU doc PSC/PR/COMM.2(CCLVII), para 3.

solidarity with the people of Tunisia”,²⁴ it did so without making it clear whether it deemed the ouster of Ben Ali legally acceptable and without commenting on the constitutional character of the transition. Instead, the PSC took what appears to be an evasive position (albeit consistent with the purposive and legitimacy approach to constitutionalism) that expressed support for the democratic aspiration of the people.

Despite the lack of a clear policy position and the cautious approach that the PSC adopted, it was however significant that it did not deem the situation to be a case of UCG. It was clear from this that the PSC did not follow the dogmatic position of the legalistic / positivist viewpoint for determining constitutionality. Indeed, during its 268th meeting on 23 March 2011, the PSC welcomed the political evolution in Tunisia.²⁵ In doing so, the PSC implicitly gave a nod to the purposive and legitimacy-based approach to determining the constitutionality of the removal of a government.

Inspired by events in Tunisia, similar protests started in the Egyptian capital, Cairo, on 25 January 2011. The immediate factors that triggered the protests in Egypt are similar to those in Tunisia. These included rising food prices and inflated costs of essential goods, discontent among the country’s fast-growing young population about unemployment and rampant corruption among the country’s ruling elites. The political dimension of the protesters’ demands was intended to achieve various substantive changes. The most immediate demand was for the resignation of President Mubarak, which was expected to pave the way for a transition to democracy under new leadership.

Although the youth took the lead in the demonstrations, the protests attracted people of different age groups, religious backgrounds and political orientation. Women, children and middle-class working men from various walks of life gathered at Cairo’s Tahrir (Liberation) Square day after day, with some of the protesters sleeping in the square. Despite their diversity in many ways and the lack of any centralized leadership, this disparate array of opposition protesters was united around the demand for the end of Mubarak’s 30 years of rule and the need for a democratic transformation of Egypt.

Contrary to expectations, the violence that the police and security forces used to disperse protesters and the resultant casualties strengthened the protests, which gained momentum and continued to attract even more Egyptians to the streets. Although Mubarak ordered the army onto the streets of major cities where protesters had been staging anti-government demonstrations, unlike the police and security forces, the Egyptian army maintained a “hands-off” approach, refusing to use force against protesters until Mubarak eventually bowed to the public pressure to stand down. When Mubarak finally stepped down from power on 11 February 2011, less than 24 hours after he

24 Id, para 2.

25 PSC Communiqué of the 268th Meeting on the Situation in Tunisia (23 March 2011), AU doc PSC/PR/BR.2(CCLXVIII), para 2.

had delivered yet another televised address in which he promised to hand over power while remaining president, the high military council not unexpectedly assumed control of power with the plan to hand over power after elections in six months' time and to revise the constitution.²⁶

In a communiqué adopted at its 260th meeting, the PSC expressed its position on the situation in Egypt. It noted "the deep aspirations of the Egyptian people, especially its youth, to change and the opening of the political space in order to be able to democratically designate institutions that are truly representative and respectful of freedoms and human rights".²⁷ Most significantly, the PSC deemed the demands of the Egyptian people, which they expressed through mass protests, to be "consistent with the relevant instruments of the AU and the continent's commitment to promote democratization, good governance and respect for human rights".²⁸

Unlike its response to the situation in Tunisia, regarding the legal or constitutional issues surrounding the president's resignation and the ensuing transition, the PSC, holding the situation to be exceptional, took note of the president's resignation and the surrender of authority for the exercise of state power to the Supreme Council of the Armed Forces (SCAF). At the same time, the PSC did not completely embrace SCAF's role. As Tarek Masoud wrote at the time, "whether or not Egypt can be said to have undergone a revolution depends on how sincere the SCAF is being when it promises to midwife a transition to democracy".²⁹ Indeed, the PSC's position on SCAF's role was similarly conditional. It thus made it clear that it reserved "the right, in the light of developments in the transition process and on the basis of the relevant AU instruments, to take any measure that the situation may warrant, with due respect for the legitimate aspirations of the Egyptian people for democracy".³⁰ On this the PSC's position was spot on. It is a message that put the army on notice that the PSC was ready to invoke the AU's UCG norm should the army abort the transition to democracy by abrogating power to itself.

A number of points are worth noting about the PSC's response in respect of both Tunisia and Egypt. First is the apparent distinction it made between the people and the government. Second and more remarkable in this context was the premium it placed on the democratic aspiration of the people and its expression of solidarity with the people. Such a position implies a policy stand that the concern with constitutionalism is principally about defending the rights of the people and the principles of democracy, rather than the

26 See "Egypt Protests: Key moments in unrest" (11 February 2011) *BBC News*, available at: <<https://www.bbc.com/news/world-middle-east-12425375>> (last accessed 4 December 2018).

27 PSC Communiqué of the 260th Meeting on the Situation in Egypt, AU doc PSC/PR/COMM.(CCLX), para 2.

28 Id, para 3.

29 T Masoud "The upheavals in Egypt and Tunisia: The road to (and from) Liberation Square" (July 2011) 22/3 *Journal of Democracy* 20 at 25.

30 PSC Communiqué of the 260th Meeting, above at note 27, para 8.

dogmatic positivist application of rules divorced from their essential purpose (safeguarding the freedom of the people) and / or consistency with principles of justice.

Since the events of 2011 and 2012, the AU has been seized with the issue of how to deal with popular uprisings. In 2013, it again became an issue in Egypt. Egypt held its first democratic elections in 2012. After two rounds of elections, Mohamed Morsi of the Freedom and Justice Party, the political wing of the Muslim Brotherhood, won the presidential ballot and became president on 30 June 2012. Despite the significance of this development as a major step in Egypt's democratization process, Egypt continued to face increasing political turbulence, worsening socio-economic challenges and rising insecurity including acts of terrorism in the Sinai region. Together with perceptions of rising "brotherhoodization" of the government, these political, socio-economic and security problems created the ground for mobilizing opposition against President Morsi's government. Various forces, including elements of Mubarak's regime such as the security establishment and businesses, and liberal and secular forces opposed to Muslim Brotherhood, coalesced to create a movement bent on removing Morsi's government.

With the Tamarood group serving as catalyst, these forces staged huge popular protests in Cairo and other cities against Morsi's government on 30 June 2013. After issuing a 48 hour ultimatum against President Morsi, citing the mass protest that continued into the following days, the army chief, General El Sisi, announced on 3 July 2013 the removal of President Morsi, the dissolution of Parliament, the suspension of Egypt's 2012 Constitution and the establishment of an interim government.³¹

In line with its norm on UCG and established practice, in an emergency meeting held on 5 July 2013, recalling the Lomé Declaration and the ACDEG, the PSC determined that "the overthrow of the democratically elected President does not conform to the relevant provisions of the Egyptian Constitution and, therefore, falls under the definition of an unconstitutional change of Government".³² Accordingly, the PSC decided "to suspend the participation of Egypt in the AU's activities until the restoration of constitutional order".³³

According to the AU, the main reason for treating this as an instance of UCG was the electoral credentials of Morsi's government. AU commissioner for

31 See N Ketchley "How Egypt's generals used street protests to stage a coup" (3 July 2017) *The Washington Post*, available at: <https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/03/how-egypts-generals-used-street-protests-to-stage-a-coup/?noredirect=on&utm_term=.6e82071aad96?> (last accessed 4 December 2018). See also "Egypt and the coup: Inside the 11 days that toppled Morsi" (3 July 2018) *Middle East Eye*, available at: <<https://www.middleeasteye.net/news/egypt-coup-inside-story-sisi-events-topple-morsi-july-2013-five-years-1727562284>> (last accessed 4 December 2018).

32 PSC Communiqué of the 384th Meeting on the Situation in Egypt, AU doc PSC/PR/COMM.(CCCLXXXIV), para 6.

33 Ibid.

peace and security, Ambassador Ramtane Lamamra, thus said, the “principal guide for the PSC was the fact that there is now an elected president who continues to claim that he is the legitimate leader and has supporters that agree with him”.³⁴

Another consideration for judging whether the overthrow met the AU’s standard of UCG could have been the role played by the military. While millions of Egyptians protested against Morsi’s government, the military’s intervention was the decisive factor in toppling that government. Like the European Union and the USA, which refused to call the overthrow of Morsi a coup, AU officials were also not willing to characterize it as a military coup, hence leaving their position very vague (despite calling it an unconstitutional change).

Two missing elements in the AU’s decision on Egypt

The first missing element was the lack of clarity in the AU’s position regarding the basis on which it made its decision concerning UCG. While the Lomé Declaration and ACDEG define five situations as constituting UCG, the PSC’s 5 July 2013 decision suspending Egypt made no reference to any of them. The PSC opted to adopt a rather convenient reasoning in determining the unconstitutionality of the change of government, arguing that the change of government did not comply with the procedures laid down in Egypt’s 2012 Constitution.

This was obviously a very problematic basis for determining the unconstitutionality of a change of government. Deciding the constitutionality of political events in an AU member state is not within the purview of the PSC. This is rather a matter left to the constitutional court of the country concerned. The PSC is expected to take a decision on whether a change of government is unconstitutional primarily on the basis of and by reference to the AU UCG norm. In other words, the PSC’s determination of the occurrence of UCG has to be made by applying the UCG norm to the facts regarding the change of government in the country. As a body operating on the basis of a legal arena independent from the legal order of AU member states, the PSC makes such a determination irrespective of the subjective pronouncement of the national authorities, including those charged with interpreting the national constitution. As such, the country’s constitutional process, while relevant, only has a secondary role.

There are previous cases where the constitution of affected countries was used as a first instance basis for determining the occurrence of UCG. This

34 SA Dersso “AU stance on Egypt a rare show of commitment” (Monday 15 July 2013) *Cape Argus* (Cape Town) at 15. See also E Jobson “Cairo unhappy about temporary suspension from the African Union” (8 July 2013) *Business Day* (Johannesburg), available at: <<https://www.businesslive.co.za/bd/world/africa/2013-07-08-cairo-unhappy-about-temporary-suspension-from-the-african-union/>> (last accessed 4 December 2018).

was the case for example with respect to Togo in 2005.³⁵ Yet, in a case such as Togo's, the issue concerned the succession of government power following the death or incapacity of the country's president. Since succession of power is a matter primarily regulated by the constitution of the affected country, the AU's UCG norm can only be invoked by reference to that constitution. In the case of Egypt, the main question did not concern compliance with rules of succession. It was rather the removal of Morsi's government and its replacement by another, and the propriety of such a change of government vis-à-vis the AU's UCG norm. That is why reference to the Egyptian Constitution as a basis for determining unconstitutionality can only be a convenient or politically expedient, rather than the legally appropriate, path, given that the question that arose in Egypt did not concern succession of power.

Part of the reason for this ambiguity in the AU's approach to its decision to suspend Egypt has to do with the lack of clarity in the AU's UCG norm on how to address cases of changes of government supported by popular uprisings. The AU's position with respect to the ground for considering the situation as constituting UCG has at best been ambivalent. Importantly, it evaded the argument that the change of government was a result of a popular uprising.

The other element missing from the AU's engagement on Egypt was the fact that no effort was made to warn the transitional authorities in Egypt about the rule that bans legitimizing UCG through elections. On three previous occasions, namely with respect to UCG in Guinea (2008), Madagascar (2009) and Niger (2010), the AU expressly stated that perpetrators of such changes of government cannot take part in elections held to restore constitutional order. In the case of Madagascar, the AU even warned that it would not recognize elections that were held with the participation of Andry Rajoelina, the leader of the interim authorities.

The question of the lacuna in the AU's UCG norm in relation to popular uprisings itself became a PSC agenda item. In a session dedicated to the subject of UCG and popular uprisings in Africa held on 29 April 2014, one of the issues raised was the definition of popular uprisings and the rules or guidelines for determining the compatibility of mass protests with the AU's UCG norm.³⁶ In the press statement issued after the meeting, the PSC called for "appropriate refinement of the definition of unconstitutional changes of government, in light of the evolving challenges facing the continent, notably those related to popular uprisings against oppressive systems, taking into account all relevant parameters".³⁷

35 PSC Communiqué of the 25th Meeting on the Situation in Togo (25 February 2005), AU doc PSC/PR/Comm (XXV), para 2.

36 See SA Dersso "Unconstitutional changes of government and popular uprisings: Mending the cracks in the AU norm and practice" (briefing paper delivered at the PSC's open session on 29 April 2014) (copy on file with the author).

37 PSC Press Statement regarding open session (29 April 2014), AU doc PSC/PR/BR. (CDXXXII).

TOWARDS CRITERIA FOR DETERMINING CONSTITUTIONALITY OF POPULAR UPRISINGS

It is clear from the foregoing that, while the AU norms envisage various response mechanisms, once violent conflicts or political upheavals are imminent or have already erupted, the norms provide very little guidance for political crises involving popular uprisings. More specifically, they offer no systematic and particular guidance for how to respond to popular democratic uprisings. At the heart of this lies the difficulty of distinguishing between legitimate uprisings and those that might amount to situations that AU norms and policy instruments proscribe as constituting UCG. This section outlines four tests or considerations for measuring the constitutionality of uprisings.

The AU norms on constitutional rule and democratic governance and the overall purpose of the AU norm banning UCG form the basis for these four considerations. These tests or considerations for assessing the constitutionality of uprisings precipitating change of government vis-à-vis UCG also draw some inspiration from theories of revolution. The criteria draw on the author's 2012 article, which was the first to propose and articulate such criteria.³⁸ Later, the AU High-Level Panel on Egypt, established following Egypt's suspension from the AU for UCG, adopted these guidelines in its final report as a framework for determining the compatibility of popular uprisings with the AU's UCG norms.³⁹

The first consideration relates to the existence of what the Common African Defense and Security Policy of 2004 refers to as "situations that prevent and undermine the promotion of democratic institutions and structures, including the absence of the rule of law, equitable social order, population participation and electoral processes".⁴⁰ Where circumstances are so terrible that they violate the very rationale for the existence of government, people living under such governments are, according to the 1948 Universal Declaration of Human Rights (UDHR), entitled to have recourse to rebellion against tyranny and oppression.⁴¹ As John Locke noted in his *Second Treatise of Government* and as was subsequently established in the American Declaration of Independence and the UDHR, "revolutions happen not upon every little mismanagement in public affairs".⁴² Any such interpretation "will unhinge and overturn all Polities, and instead of government and order leave nothing but anarchy and confusion".⁴³ According to the UDHR, it is as a last resort that man is

38 Dersso "The adequacy of the African Peace and Security Architecture", above at note 14.

39 AU High-Level Panel on Egypt *Final Report* (June 2014) PSC/AHG/4.(CDXVI).

40 Solemn Declaration on the Common African Defense and Security Policy (AU, 2004).

41 See UDHR, preamble.

42 J Locke *Second Treatise of Government* (2017, Jonathan Bennet) at 74, available at: <<https://earlymoderntexts.com/assets/pdfs/locke1689a.pdf>> (last accessed 4 December 2018); American Declaration of Independence, para 2; UDHR, preamble.

43 Locke, id at 194.

entitled and compelled to have recourse to rebellion against tyranny and oppression, which arise when human rights are not protected by the rule of law or are not respected and there is no mechanism of providing redress for their breach.⁴⁴ In the final report of the AU High-Level Panel on Egypt, this first criterion or consideration was split into two parts: “the descent of the government into total authoritarianism to the point of forfeiting its legitimacy”; and “the absence or total ineffectiveness of constitutional processes for effecting a change of government”.⁴⁵

The popular uprisings in North Africa evidently express the deep-seated anger and frustration of ordinary citizens against corrupt, tyrannical and undemocratic political orders. Circumstances have been such that citizens felt that they were left with no institutional mechanism for redressing their grievances and holding the government to account.⁴⁶ In other words, the uprisings are last resort measures of popular self-defence against major breaches of the social contract by the state.⁴⁷ In responding to events of this kind, the first issue for the AU to consider is whether effecting the change of government through an uprising was a last resort option.

The second consideration is the organization and nature of the mobilization of protestors as well as their popularity. As the AU High-Level Panel Report put it, this is the criterion of “popularity of the uprisings in the sense of attracting a significant portion of the population and involving people from all walks of life and ideological persuasions”.⁴⁸ One test here is the issue of whether the uprising involves an attempt on the part of a particular political grouping or section of society to impose its political agenda. If the protest amounts to an attempt on the part of a particular political grouping to bring about a change of government through street protests, it would not be popular and the PSC would deem it unconstitutional, as it did in the case of Madagascar in 2009. In terms of organization and mobilization, the popular uprisings in North Africa were not driven by and associated with prevailing political groupings and ideological divisions in the relevant countries. As Omar Ben Yedder wrote on Tunisia’s uprising, “[t]his was a spontaneous uprising by the people, not sparked by any particular political leader or movement”.⁴⁹ The uprisings did not thus involve partisan political agendas, nor did they seek to impose the political agenda of one political grouping or section of society over others. The protests rather espoused popular aspirations and

44 UDHR, preamble.

45 AU High-Level Panel on Egypt *Final Report*, above at note 39 at 31.

46 See, for example, F Ajami “Demise of the dictators” (14 February 2011) *News Week* (New York) at 18–27. See also Masoud “The upheavals in Egypt and Tunisia”, above at note 29 at 20–34; and F Zakaria “The revolution” (14 February 2011) *Time* at 18–19.

47 See Dersso “The adequacy of the African Peace and Security Architecture”, above at note 14 at 6–7.

48 AU High-Level Panel on Egypt *Final Report*, above at note 39 at 31.

49 OB Yedder “Tunisia: Lessons from the uprising” (February 2011) *New African* at 20.

expectations for a reformed political and socio-economic order.⁵⁰ They were mostly mobilized through social media, with young activists serving as catalysts and organizers.

In terms of the test on popularity of the uprisings, numerical strength, although important, is not the major decisive factor. So, the mere fact that an opposition political party is able to mobilize hundreds of thousands or a million people does not make it popular. A population of notable size supporting the old regime does not make an uprising less popular either. Those who have been benefiting from the old regime are surely bound to oppose calls for ending it. Accordingly, the main test to measure popularity is whether or not the uprising draws support from a significant number of people from diverse ideological, religious, ethno-cultural, regional and other sectoral backgrounds.

Seen from this perspective, it emerges that one of the features of the North African uprisings that gave them their democratic character was that they were popular. Involvement in the protests was not limited to a particular section of society or political group. While most of the people who were active in the uprisings were youth and people from middle- and lower-income backgrounds, the uprisings nevertheless attracted people from almost all walks of life and age groups, as well as people from different religious, cultural, ideological and political affiliations. In this regard, Ben Yedder was right when he stated that “[t]he show of solidarity throughout the country, its diaspora and across all social classes was unique, unexpected and intensely uplifting”.⁵¹

The third consideration is the peacefulness of the protestors, which the report of the AU High Level Panel on Egypt gave as its last criterion. The very foundation of the AU’s UCG norm is the outlawing of change of government by the use of force and the promotion of peaceful change.⁵² Various AU instruments, including in particular the African Charter on Human and Peoples’ Rights, guarantee the right of peaceful assembly.⁵³ Noting the difficulty of assessing the peacefulness of protests, Micha Wiebusch asked “[i]f a protest involves some riots or looting because of opportunism, could the general public action still be considered peaceful enough to count as an acceptable popular revolution?”⁵⁴ The requirement of peacefulness does not mean that the protest has to be free from any form of violence.⁵⁵ It is not the absence of any incident of violence but the overall character of the protest that is key for assessing its peacefulness. One of the most notable features of

50 See generally R Laremont (ed) *Revolution, Revolt and Reform in North Africa* (2014, Routledge).

51 Yedder “Tunisia”, above at note 49.

52 See Dersso “Defending constitutional rule”, above at note 1.

53 African Charter on Human and Peoples’ Rights, art 11.

54 M Wiebusch “The role of regional organizations in the protection of constitutionalism” (2016, International IDEA discussion paper 17) at 24.

55 See African Commission on Human and Peoples’ Rights “Guidelines on freedom of association and assembly in Africa” (2017), para 70(b).

the North African uprisings, with the notable exception of that in Libya, was that they were largely peaceful, except for the sporadic expressions of anger and defiance at efforts to counter the demonstrations or the opportunistic incidents of violence. The protestors displayed a great deal of discipline even in the face of attacks directed at them from the security forces and supporters of the old regime.

The fourth consideration is the involvement of the military. Given the AU's UCG rules, the legitimacy of the active involvement of the military in movements for toppling governments is a factor that may hugely detract from the democratic character of uprisings. Once again, it is interesting to note that the military in both Tunisia and Egypt maintained their neutrality. They were involved neither in instigating nor in actively assisting the removal of their presidents. Despite its standing in the history and politics of the country, even the Egyptian army maintained a "hands-off" approach until Mubarak eventually bowed to public pressure to stand down. As to its role in the transition, the PSC treated it as a gap filling measure for facilitating the handing of power to civilian authority and hence it left open the possibility of treating the transition as unconstitutional.

This role of the army is another feature that sets the Libyan case apart from others, as the situation there turned into a full-blown civil war following the defection of military personnel to the rebel side and their organization of an effective army. Despite the similarities that it shares with the uprisings in Tunisia and Egypt, the case of Libya should therefore be treated differently: as a civil war. The AU's roadmap for resolving the crisis in Libya did exactly that.⁵⁶

Having taken the experiences in North Africa, especially Egypt, into account, and reflecting the earlier analysis in this section, the AU High-Level Panel suggested the following parameters as a guideline: "(a) the descent of the government into total authoritarianism to the point of forfeiting its legitimacy; (b) the absence or total ineffectiveness of constitutional processes for effecting change of government; (c) popularity of the uprisings in the sense of attracting [sic] significant portion of the population and involving people from all walks of life and ideological persuasions; (d) the absence of involvement of the military in removing the government; (e) peacefulness of the popular protests".⁵⁷ This clearly espouses the approach proposed in this article and represents express affirmation. Unfortunately, the report did not set out these elements in any further detail. The next step is the proper articulation of these considerations as general criteria for determining the relationship between popular uprisings and the AU's UCG norm. This can be done based on the framework articulated in detail in this article.

56 See PSC Communiqué of the 265th Meeting on the Situation in Libya (10 March 2011), AU doc PSC/PR/COMM.2(CCLXV).

57 AU High-Level Panel on Egypt *Final Report*, above at note 39 at 31.

Applying the framework to the 2013 popular uprisings in Egypt

While it took 18 days of popular protest to force out Hosni Mubarak, the ouster of Mohamed Morsi on 3 July 2013 was achieved six times faster. As with the removal of Mubarak, Morsi's ejection involved a combination of nationwide street protests and the intervention of the Egyptian army.

Unlike the overthrow of Mubarak, the forced removal of Morsi divided opinions. Much of the reaction exhibited celebration or ambivalent acceptance of the coup. Others considered the ouster as a major setback for democracy and categorically condemned it. The dilemma faced by both international actors and commentators is best captured in Judith Levy's question "[s]hould we cheer the people or weep for democracy?"⁵⁸

Admittedly, this disagreement is in part ideological. Importantly, however, the disagreement also critically turns on the question of whether there is a standard that can help us make a legal assessment of the democratic legitimacy of Morsi's ouster. When asked in an interview with Al Jazeera whether the AU would call Morsi's overthrow a coup, El Ghassim Wane, then director of the AU Peace and Security Department, said, "[w]e are calling it an unconstitutional change of government because you have a situation that falls under the definition of an overthrowing of a democratically elected government, or the overthrowing of a government that happens in violation of the rules provided by the constitution".⁵⁹

First consideration

The first consideration, as outlined above, is whether effecting the change of government through an uprising is a last resort option. This is also about whether democratic institutions and processes have been eroded to the point of not being duly pursued by citizens to effect a change of government. Hence, as was evident in Tunisia and Egypt in 2011,⁶⁰ circumstances should be such that citizens are left with no institutional mechanism to redress their grievances and hold the government to account. In other words, people are left with no option but to mobilize uprisings as last-resort measures of popular self-defence against major breaches of the social contract by the authorities. In the particular case of the Morsi government in Egypt, the question was thus whether or not people had options for holding the government to account through a means short of a popular uprising.

58 J Levy "Egypt: Should we cheer the people or weep for democracy?" (5 July 2013) *Time*, available at: <<http://ideas.time.com/2013/07/05/egypt-should-we-cheer-the-people-or-weep-for-democracy/>> (last accessed 4 December 2018).

59 See: A Essa "Q&A: What does AU suspension mean for Egypt?" (6 July 2013) *Al Jazeera*, available at: <<http://www.aljazeera.com/news/africa/2013/07/20137518523285137.html>> (last accessed 4 December 2018).

60 See, for example, Ajami "Demise of the dictators", above at note 46. See also Masoud "The upheavals in Egypt and Tunisia", above at note 29; and Zakaria "The revolution", above at note 46.

The popular protest of 30 June 2013 revealed that Morsi's government had grown to become widely despised. Admittedly, its performance in almost all areas of governance left much to be desired. Indeed, in some areas such as the economy it proved to be an outright failure. Yet as various commentators pointed out, overt or covert efforts by the security establishment and opposition forces to frustrate Morsi's government also share the blame for the poor performance and the resultant surge in the government's unpopularity.⁶¹

While Morsi's government was not perfect and was ill equipped to deal effectively with Egypt's post-revolution political, security and economic challenges, it was premature to determine conclusively that it had lost all its legitimacy, making it necessary to effect its urgent removal through street actions. Its failures were not a product of outright despotism or the total negation of the constitutional process, although acts of arrogation of power were witnessed. Morsi's government's sin largely consisted of becoming increasingly unpopular, ineffective and less inclusive. This does not constitute a fundamental breach capable of stripping the government of its democratic legitimacy and hence is not enough to warrant a democratically justifiable popular uprising. The challenge to the legitimacy of Morsi's government was not of such nature that could not have been addressed through constitutionally established processes.

The popular protest from 30 June to 3 July 2013 also does not meet the test of last resort. Apart from its electoral credentials, a major factor that distinguishes Morsi's government from that of Mubarak is that it had not closed the legal options for its replacement. Ousting the government through street protests was thus not the last option.

As Abdullah Al-Arian rightly pointed out, people who opposed Morsi "could have mobilised their energies towards upcoming parliamentary elections, won the majority, and proceeded to amend the constitution and empower a prime minister to take on a greater share of policymaking than Morsi".⁶² The possibility of voting Morsi's government out of power was real, if not immediate, available only at the end of his term.

Second consideration

The second consideration is the popularity of the uprisings. Accordingly, the protests should reflect the true will of the people in all their diversities. It is essential that the uprising did not involve a partisan political agenda, nor seek to impose a political agenda of one political grouping over the rest of society. The main test in applying this consideration is whether or not participation in the uprisings attracted a significant portion of the population,

61 See Ketchley "How Egypt's generals", above at note 31.

62 See A Al-Arian "Egypt's democratic outlaws" (4 July 2013) *Al Jazeera*, available at: <<https://www.aljazeera.com/indepth/opinion/2013/07/201374115114452703.html>> (last accessed 4 December 2018).

transcending ideological, religious, ethno-cultural, regional, gender and class divisions.

Again, when measured against this consideration, the circumstances involving Morsi's ouster do not stand up well to scrutiny. The events of 30 June to 3 July 2013 do not exactly represent the case of a people against a regime but manifested a case of a large percentage of the people against a significant other. Indeed, the Muslim Brotherhood and their supporters, which constituted the support base of Morsi's government, represented a significant part of Egypt's population. As such, the protests against Morsi's government reflected the will of only part of the people of Egypt, although they were widespread and attracted millions of Egyptians. The demand for ousting Morsi was also in significant measure ideologically charged, as it was mostly driven by the desire to keep the Muslim Brotherhood out of government.

Third consideration

In terms of the third requirement of peacefulness, the mobilization of the people largely followed the pattern of the 2011 protests. Unlike the 2011 protests, however, the 2013 protests received the backing of the business and security establishments of Mubarak's regime. In terms of their character, they largely displayed a non-violent posture. On this score, the events of late June and early July 2013 met the requirement of peacefulness.

Fourth consideration

The fourth consideration is the part played by the military. Here the question regards the kind of involvement of the military, the context in which the military became involved and whether the military's involvement arose from a genuine interest and need to prevent the total breakdown of law and order or the eruption of major violence. Accordingly, for an ouster of a government in which the army played a decisive role to be democratically defensible, it is important to show that the descent of society into chaos and civil strife could not have been prevented without the ouster of the government through military intervention.

In the case of the 3 July 2013 overthrow of Morsi's government, it was not adequately established that the ouster of Morsi was the only way out of the standoff that emerged following the protests that started on 30 June 2013. While the demand for Morsi to leave office came from millions of Egyptians, the military's intervention was decisive in overturning Morsi's government.

As Marwan Bishara observed in an insightful article, the military's intervention prevented "any last minute efforts that would save face and pave the way for constructive change, such as holding a referendum over the presidency or the building of a national unity government, leading to early elections".⁶³ Contrary to its statement that it was fulfilling the will of the people, the

63 M Bishara "Three questions: Egypt's 'zero sum' politics" (6 July 2013) *Al Jazeera*, available at: <<https://www.aljazeera.com/indepth/opinion/2013/07/20137515562854215.html>> (last accessed 4 December 2018).

army used the protests to arrogate for itself the role of deciding for the people of Egypt.⁶⁴

CONCLUSION

The economic and social changes taking place in Africa (such as the swelling numbers of youth, urbanization and expanding literacy) are increasing popular expectations for a democratic and just political and socio-economic order. In the event, the North African popular uprisings and the 2014 protests that forced Burkina Faso's long-time president into exile clearly demonstrated that much more attention will need to be given to the implementation of commitments to democracy, good governance and human rights, as well as equitable socio-economic development. In the final analysis, together with the ability of governments to implement inclusive socio-economic development policies, such compliance with human rights and democratic norms is what will determine the occurrence of popular uprisings and where UCG will take place.

This article has demonstrated both that there is a need to determine the legality or constitutionality of popular uprisings, and that popular uprisings or revolutions are amenable to legal determination and that their constitutionality can accordingly be legally verified. Indeed, the article has highlighted the difference in the approaches of the OAU and the AU, demonstrating the shift from the legal positivist view anchored on the OAU's effectiveness theory to the natural law theory of constitutional law espoused under the AU, particularly within the framework of its UCG norms. The clearest expression of the AU's embracing of the natural law theory is found in the ACDEG. Thus article 23(5) deems any amendment or revision of the constitution or legal instruments that infringes the principles of democratic change of government to be an act amounting to UCG. This emphasis on democratic principles elaborated in detail in the ACDEG, hence reflecting the natural law theory, means that, unlike during the OAU era, the AU cannot leave the determination of the constitutionality of a change of government to brute force. In the same way, the AU could not leave the question of the compatibility of popular uprisings to its UCG norm to the success or effectiveness of such uprisings.

Through the analysis of the law and the relevant cases, this article has established the necessity and framework for determining the constitutionality of popular uprisings. Useful policy relevant materials have emerged from the AU's engagements in the cases of Egypt and Burkina Faso. Nevertheless, the AU's UCG norm has not yet been sufficiently systematically updated and revised in the light of these developments for the AU to have a predictable

64 KM Abou El Fadl "The perils of a 'people's coup'" (7 July 2013) *New York Times*, available at: <<https://www.nytimes.com/2013/07/08/opinion/the-perils-of-a-peoples-coup.html?src=recg>> (last accessed 4 December 2018).

and legally coherent approach for determining the compatibility of popular changes of government with its UCG norm.

There are clear indications of recognition within the AU that such updating and revision is required. The 28 April 2014 outcome of the PSC session calling for addressing the gap in the AU's UCG norm vis-à-vis popular uprisings is still to be more systematically addressed. However, a significant step was taken in this direction when the AU High Level Panel on Egypt enunciated guidelines for assessing the conformity of popular uprisings with the norm on UCG in its final report of June 2014, which the PSC adopted during its summit level meeting in Malabo, Equatorial Guinea. As previously observed, this drew in particular on and adapted the various considerations discussed above as constituting elements of the criteria for determining the compatibility of changes of government via popular uprisings with the AU's UCG norm.

These elements first and foremost affirm a people's right to protest against oppressive regimes. Thus, in the context of the protests that forced Burkina Faso's dictator Compaoré into exile, the PSC in its decision of 3 November 2014 made reference to "the recognition of the right of peoples to rise up peacefully against oppressive political systems".⁶⁵ Secondly, where popular uprisings, which meet the criteria in the guidelines, force a government down, the ensuing change of government does not amount to and should not be counted as UCG and as such does not and should not invite the application of the AU's UCG norm, where it speedily leads to a civilian transitional government and does not hamper the popular aspiration for democratic change or suspend the constitution. In such instances, and in the light of the explicit objective of the AU's UCG norm for safeguarding the will of the people, democratic principles as enunciated in the ACDEG take precedence over the positivist view of legalistic non-compliance with constitutionally prescribed rules in bringing about a change of government.

65 PSC Communiqué of the 465th Meeting (3 November 2014), AU doc PSC/PR/COMM. (CDLXV), para 2.