GHANA @ 60: GOVERNANCE AND HUMAN RIGHTS IN TWENTY-FIRST CENTURY AFRICA

Edited by
Michael Addaney & Michael Gyan Nyarko
Ghana @ 60: Governance and human rights in twenty-first century Africa

Published by:
Pretoria University Law Press (PULP)
The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

For more information on PULP, see www.pulp.up.ac.za

Printed and bound by:
BusinessPrint, Pretoria

To order, contact:
PULP
Faculty of Law
University of Pretoria
South Africa
0002
Tel: +27 12 420 4948
Fax: +27 86 610 6668
pulp@up.ac.za
www.pulp.up.ac.za

Cover:
Yolanda Booyzen, Centre for Human Rights, University of Pretoria


© 2017
# TABLE OF CONTENTS

Acknowledgments v  
Foreword vi  
Abbreviations and acronyms viii  
Contributors xii  
List of laws xviii  
List of cases xxi

## PART I: INTRODUCTION

1 Governance and human rights in twenty-first century Africa: An introductory appraisal  
   Michael Addaney & Michael Gyan Nyarko 2

## PART II: GHANA AT 60 – HUMAN RIGHTS AND CONSOLIDATION OF GOOD GOVERNANCE IN A CHALLENGING ERA

2 By accountants and vigilantes: The role of individual actions in the Ghanaian Supreme Court  
   Kenneth NO Ghartey 16

3 Electoral justice under Ghana’s Fourth Republic  
   Lydia A Nkansah 32

4 Safeguarding online freedom of speech in Ghana in an election year: The role of government  
   Ebenezer Adjei Bediako 52

5 Civil society and the right to access to information in the Ghanaian oil industry  
   Nora Ho Tu Nam 66

6 Ghana’s poverty alleviation strategy: Promising start, but bleak future?  
   Bright Nkrumah 82

7 Women’s political participation in decision-making processes and organs in Ghana: Trends, practices and social realities  
   Bright J Sefah & Kennedy Kariseb 101

8 The pursuit of actual equality: Women’s matrimonial property rights in Ghana since independence  
   Kwaku Agyeman-Budu 121
PART THREE: COMPARATIVE PERSPECTIVES ON GOVERNANCE AND HUMAN RIGHTS IN AFRICA

9 Challenges to judicial enforcement of socio-economic rights in Africa: Comparative lessons from Ghana and South Africa
Christopher Y Nyinevi

10 A comparative analysis of multiparty politics in Ghana and Mauritius
Darsheenee Singh Ramnauth & Roopanand Mahadew

11 Deepening and sustaining electoral democracy in Kenya: Lessons from Ghana
Lucianna Thuo

12 Towards a human rights-based approach for countering economic crises: Ghana and Zambia’s experiences with the global financial crisis
Grace Mukulwamutiyo

13 Transnationals, social media and democratisation of Africa in the twenty-first century: Lessons from Zimbabwe
Cowen Dziva & Munatsi Shoko

PART FOUR: THE AFRICAN UNION AND THE REALISATION OF DEMOCRATIC GOVERNANCE AND HUMAN RIGHTS IN TWENTY-FIRST CENTURY AFRICA

14 Pan-Africanism and development in the twenty-first century: A critical analysis of the New Partnership for Africa’s Development (NEPAD)
Elsabé Boshoff & Owiso Owiso

15 Moving the debate forward: Securing the rights of refugees under the African human rights system
Michael Addaney

16 The ‘protection of’ and ‘assistance to’ internally displaced persons in Africa
Romola Adeola

17 Women’s human rights in twenty-first century Africa: Taking stock of the Maputo Protocol
Hlengiwe Dube

18 Transnational democracy in Africa and the African Union’s Agenda 2063: Beyond Nkrumah’s Pan-Africanist pushbacks
Chairman Okoloise

Bibliography
This book benefited immensely from the alumni network of the LLM/MPhil in Human Rights and Democratisation in Africa of the Centre for Human Rights, University of Pretoria, from which the majority of the authors were sourced. Selected chapters were also drawn from scholars and activists from across Africa. We are most grateful to all the authors for their hard work, determination and patience.

Our profound gratitude and sincere appreciation goes to all who assisted and supported this vision to fruition, especially to Professor Frans Viljoen, the Director of the Centre for Human Rights, and Professor Magnus Killander, the Head of Research and Academic Coordinator of the Masters programme in Human Rights and Democratisation in Africa at the Centre for Human Rights, Faculty of Law, University of Pretoria. Special thanks are also extended to our colleagues who supported us in peer reviewing some of the chapters: Dr Romola Adeola, Dr Cristiano d’Orsi, Dr Lydia A. Nkansah, Dr Sylvie Namwase, Dr Ashwanee Budoo, Dr Oluwatoyin Adejonwo-Osho, Darshenee Singh Raumnauth, Dr Bright Nkrumah, Edward Murimi, Lydia Mensah, Kenneth Gharkey and Dr Ernest Owusu-Dapaah; we appreciate the time you committed to support this project.

Special thanks to Lizette Hermann, Isabeau de Meyer and the other editorial team at the Pretoria University Law Press who worked with us right from the beginning of this project to the very end. They helped to shape the concept of the book and refined the final output. We wish to thank and appreciate Professor Frans Viljoen once again, Professor Killander and the entire team at the Centre for Human Rights at the University of Pretoria for their unflinching support, guidance and direction in making this dream a reality.

Special appreciation goes to His Excellency Nana Addo Dankwa Akuffo-Addo, the President of the Republic of Ghana for graciously agreeing to write the foreword for this book and Ambassador Kwesi Quartey, Deputy Chairperson of the African Union Commission for his kind words of endorsement. We acknowledge the assistance of Mr Michael Ofori Atta and Ms Clara Napaga Tia at Office of the Presidency of Ghana in following up with the President regarding the foreword and Mr Bright Sefah of the Department of Political Affairs, African Union Commission for following up with the Office of the Deputy Chairperson of the African Union Commission regarding his endorsement.

Any opinion expressed in this book is solely that of the authors and not necessarily that of the institutions they represent or are associated with.

Michael Addaney and Michael Gyan Nyarko
Centre for Human Rights, University of Pretoria
December 2017
FOREWORD

The history of Africa is a marvelous case study of the multitude of difficulties that most post-colonial states have faced and continue to face in the process of self-discovery. Arguably, the protracted internal armed conflicts in most African states have been fueled by the quest to create governance and legal regimes that can guarantee everyone equal participation in the economic, social and political activities of their respective nations. The emerging independent African states of the 1960s declared their unflinching dedication to democracy, good governance and respect for human rights. This would have been effortlessly plausible, because most of the independence constitutions of many African countries came with a flowery package of rights for their citizens. This however did not become a lived reality. Shortly after independence, the constitutions of most of the emerging African states were amended in ways that watered down the essence of human rights and democratic governance.

Ghana was the first country in sub-Saharan Africa to gain independence and played a critical role in the political transformation and regional integration in Africa. Over the years, Ghana has transformed from one-party state through military rule to multiparty democracy. Since independence, despite internal challenges, Ghana continues to play critical transformational role on the African continent. On 6 March 2017, Ghana celebrated her 60th anniversary of independence from colonial rule. Current circumstances in Ghana and across Africa reinforce the argument that democracy and the rule of law are maintained by vigilance and involvement of the people. Succeeding in this endeavour requires commitment and active participation at all levels of society and in all its institutions – from the grassroots to political process that is responsive to the needs of all members of society, to the organs of government that protect human rights and prods the political process to live up to its obligations. This must be followed by periodic audits to take stock of the progress made, the challenges that lie ahead and the most effective means of tackling the challenges.

In this regard, this edited volume audits some of the issues relating to the state of human rights standards and compliance, democratic consolidation and development in Ghana, as well as to bring forward how Ghana has contributed to the political, economic, cultural and ideological development in Africa. Through a human rights-based approach to governance and socio-economic development, the book examines the experiences of Ghana, selected experiences of other African countries and the African Union in advancing good governance and human rights over the years, on the journey to attain shared prosperity for all. The book takes stock of major developments in the areas of civil and political as well as economic, social and cultural rights in Africa, the changing nature of democratisation, regional integration and Pan-Africanism, and the ways in which the African Union policies may impact on governance and human rights on the continent.
This book is both apt and a timely addition to the discussion on good governance, democratic consolidation and respect for human rights in Africa. Practitioners, students and scholars of political science, law, human rights, gender studies, and African studies will find this book an important guide to the evolving governance and human rights issues in twenty-first century Africa.

Nana Addo Dankwa Akufo-Addo
President of the Republic of Ghana
December 2017
### ABBREVIATIONS AND ACRONYMMS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACDEG</td>
<td>African Charter on Democracy, Elections and Governance</td>
</tr>
<tr>
<td>ACHPR</td>
<td>African Charter on Human and Peoples’ Rights</td>
</tr>
<tr>
<td>ADB</td>
<td>African Development Bank</td>
</tr>
<tr>
<td>AEC</td>
<td>African Economic Community</td>
</tr>
<tr>
<td>AEDR</td>
<td>alternate electoral dispute resolution</td>
</tr>
<tr>
<td>AGA</td>
<td>African Governance Architecture</td>
</tr>
<tr>
<td>AHRLR</td>
<td>African Human Rights Law Report</td>
</tr>
<tr>
<td>AIDA</td>
<td>accelerated industrial development for Africa</td>
</tr>
<tr>
<td>APC</td>
<td>All People’s Congress</td>
</tr>
<tr>
<td>APRM</td>
<td>African Peer Review Mechanism</td>
</tr>
<tr>
<td>APSA</td>
<td>African Peace and Security Architecture</td>
</tr>
<tr>
<td>ASI</td>
<td>All Share Index</td>
</tr>
<tr>
<td>AUC</td>
<td>African Union Commission</td>
</tr>
<tr>
<td>AUEC</td>
<td>African Union Executive Council</td>
</tr>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>BPfA</td>
<td>Beijing Declaration and Platform for Action</td>
</tr>
<tr>
<td>CAADP</td>
<td>Comprehensive Africa Agriculture Development Programme</td>
</tr>
<tr>
<td>CC</td>
<td>Constitutional Court (of South Africa)</td>
</tr>
<tr>
<td>CDF</td>
<td>Constituency Development Fund</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of all forms of Discrimination against Women</td>
</tr>
<tr>
<td>CEEC</td>
<td>Citizens Economic Empowerment Commission</td>
</tr>
<tr>
<td>CESA</td>
<td>Continental Education Strategy for Africa</td>
</tr>
<tr>
<td>CFTA</td>
<td>Continental Free Trade Area</td>
</tr>
<tr>
<td>CG</td>
<td>capitation grant</td>
</tr>
<tr>
<td>CHRAJ</td>
<td>Commission on Human Rights and Administrative Justice</td>
</tr>
<tr>
<td>CIBA</td>
<td>Council for Indigenous Business Associations</td>
</tr>
<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa</td>
</tr>
<tr>
<td>CPP</td>
<td>Convention People's Party</td>
</tr>
<tr>
<td>CRC</td>
<td>Constitutional Review Commission</td>
</tr>
<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
</tr>
<tr>
<td>CRIC</td>
<td>Constitution Review and Implementation Committee</td>
</tr>
<tr>
<td>CRPD</td>
<td>Convention on the Rights of Persons with Disabilities</td>
</tr>
<tr>
<td>CSPOG</td>
<td>Civil Society Platform on Oil and Gas</td>
</tr>
<tr>
<td>CSSDCA</td>
<td>Conference on Security, Stability, Development and Cooperation in Africa</td>
</tr>
<tr>
<td>DFID</td>
<td>Department for International Development</td>
</tr>
<tr>
<td>DFP</td>
<td>Democratic Freedom Party</td>
</tr>
<tr>
<td>DOVVSU</td>
<td>Domestic Violence and Victims Support Unit</td>
</tr>
<tr>
<td>DPP</td>
<td>Democratic People's Party</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of the Congo</td>
</tr>
<tr>
<td>DRRC</td>
<td>District Registration Review Committee</td>
</tr>
<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
</tr>
<tr>
<td>ECK</td>
<td>Electoral Commission of Kenya</td>
</tr>
<tr>
<td>ECOWAS</td>
<td>Economic Community of West African States</td>
</tr>
<tr>
<td>EGGLE</td>
<td>Every Ghanaian Living Everywhere</td>
</tr>
<tr>
<td>EMBs</td>
<td>Electoral Management Bodies</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
</tbody>
</table>
EU EOM  EU Election Observation Mission
FAQs  foreign aid and grants
FDI  foreign direct investment
FNDP  Fifth National Development Plan
FRA  Food Reserve Agency (Zambia)
FSDP  Financial Sector Development Programme
FSP  Food Security Pack
GAS  Ghana National Accounting Standards
GBC  Ghana Broadcasting Corporation
GCPP  Great Consolidated Popular Party
GDP  gross domestic product
GDRP  Ghana Democratic Republican Party
GFC  Global Financial Crisis
GFP  Ghana Freedom Party
GIMPA  Ghana Institute of Management and Public Administration
GLR  Ghana Law Reports
GNI  gross national income
GNP  Ghana National Party
GPAS  Ghana’s Poverty Alleviation Strategy
GPRS  Ghana Growth and Poverty Reduction Strategy
GRP  Ghana Redevelopment Party
GSFP  Ghana School Feeding Programme
GSGDA  Ghana Shared Growth and Development Agenda
HRSA  Human Rights Strategy for Africa
HRC  Human Rights Committee
HSIC  Heads of State and Government Implementation Committee
ICC  International Criminal Court
ICCPR  International Covenant on Civil and Political Rights
ICESCR  International Covenant on Economic, Social and Cultural Rights
IDEA  International Institute for Democracy and Electoral Assistance
IDPs  internally displaced persons
IEBC  Independent Electoral and Boundaries Commission
IIEC  Interim Independent Electoral Commission
IFRS  International Financial Reporting Standards
IGP  Inspector General of Police
ILO  International Labour Organisation
IIAG  Ibrahim Index of African Governance
IMF  International Monetary Fund
IPAC  Inter-Party Advisory Committee
IPP  Independent People's Party
IP  internet protocol
IPU  Inter-Parliamentary Union
IREC  Independent Review Commission
KNDR  Kenya National Dialogue and Reconciliation
LEAP  Livelihood Empowerment Against Poverty
LP  Labour Party
LUSE  Lusaka Stock Exchange
MAP  Millennium African Recovery Programme
MDGs  Millennium Development Goals
MMDAs  metropolitan, municipal and district assemblies
MMM  Mouvement Militant Mauricien
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>MPA</td>
<td>Marital Property Agreement</td>
</tr>
<tr>
<td>MSM</td>
<td>Mouvement Socialiste Mauricien</td>
</tr>
<tr>
<td>NCCE</td>
<td>National Commission on Civic Education</td>
</tr>
<tr>
<td>NCP</td>
<td>National Convention Party</td>
</tr>
<tr>
<td>NCWD</td>
<td>National Council on Women and Development</td>
</tr>
<tr>
<td>NDC</td>
<td>National Democratic Congress</td>
</tr>
<tr>
<td>NDP</td>
<td>National Democratic Party</td>
</tr>
<tr>
<td>NEPAD</td>
<td>New Partnership for Africa’s Development</td>
</tr>
<tr>
<td>NGO</td>
<td>non-governmental organisation</td>
</tr>
<tr>
<td>NHIS</td>
<td>National Health Insurance Scheme</td>
</tr>
<tr>
<td>NIP</td>
<td>National Independence Party</td>
</tr>
<tr>
<td>NLA</td>
<td>National Lottery Authority</td>
</tr>
<tr>
<td>NPP</td>
<td>New Patriotic Party</td>
</tr>
<tr>
<td>NPRA</td>
<td>National Pension Regulatory Authority</td>
</tr>
<tr>
<td>NRC</td>
<td>National Redemption Council</td>
</tr>
<tr>
<td>NRP</td>
<td>National Reform Party</td>
</tr>
<tr>
<td>NSPS</td>
<td>National Social Protection Strategy</td>
</tr>
<tr>
<td>NVP</td>
<td>New Vision Party</td>
</tr>
<tr>
<td>OAU</td>
<td>Organisation of African Unity</td>
</tr>
<tr>
<td>ODA</td>
<td>Official Development Assistance</td>
</tr>
<tr>
<td>ODI</td>
<td>Overseas Development Institute</td>
</tr>
<tr>
<td>OHCHR</td>
<td>Office of the United Nations High Commissioner for Human Rights</td>
</tr>
<tr>
<td>OIF</td>
<td>Commonwealth of Nations as well Organisation de la Francophonie</td>
</tr>
<tr>
<td>OSCE</td>
<td>Organisation for Security and Co-operation in Europe</td>
</tr>
<tr>
<td>PAP</td>
<td>Pan-African Parliament</td>
</tr>
<tr>
<td>PAS</td>
<td>Poverty Alleviation Strategy</td>
</tr>
<tr>
<td>PCA</td>
<td>Petroleum Commission Act</td>
</tr>
<tr>
<td>PCP</td>
<td>People's Convention Party</td>
</tr>
<tr>
<td>PEPA</td>
<td>Petroleum Exploration and Production Act</td>
</tr>
<tr>
<td>PIAC</td>
<td>Public Interest and Accountability Committee</td>
</tr>
<tr>
<td>PIDA</td>
<td>Programme Infrastructure Development for Africa</td>
</tr>
<tr>
<td>PMR-NAC</td>
<td>pre-marital relationships not amounting to cohabitation</td>
</tr>
<tr>
<td>PMSD</td>
<td>Parti Mauricien Social Democrat</td>
</tr>
<tr>
<td>PNC</td>
<td>People's National Convention</td>
</tr>
<tr>
<td>PNDC</td>
<td>Peoples National Defense Council</td>
</tr>
<tr>
<td>PNDCL</td>
<td>Provisional National Defence Council Law</td>
</tr>
<tr>
<td>POTRAZ</td>
<td>Post and Telecommunications Regulatory Authority of Zimbabwe</td>
</tr>
<tr>
<td>PPLC</td>
<td>Political Parties Liaison Committee</td>
</tr>
<tr>
<td>PPP</td>
<td>Progressive People's Party</td>
</tr>
<tr>
<td>PRC</td>
<td>Permanent Representative Committee</td>
</tr>
<tr>
<td>PRMA</td>
<td>Petroleum Revenue Management Act</td>
</tr>
<tr>
<td>PSC</td>
<td>Peace and Security Council</td>
</tr>
<tr>
<td>PSD</td>
<td>Private Sector Development</td>
</tr>
<tr>
<td>PSM</td>
<td>Public Sector Management</td>
</tr>
<tr>
<td>PWAS</td>
<td>Public Welfare Assistance Scheme</td>
</tr>
<tr>
<td>PWD</td>
<td>persons with disabilities</td>
</tr>
<tr>
<td>RECs</td>
<td>Regional Economic Communities</td>
</tr>
<tr>
<td>RPD</td>
<td>Reformed Patriotic Democrats</td>
</tr>
<tr>
<td>RSF</td>
<td>Reporters without Borders</td>
</tr>
<tr>
<td>Acronym</td>
<td>Full Form</td>
</tr>
<tr>
<td>---------</td>
<td>-----------</td>
</tr>
<tr>
<td>RTI</td>
<td>right to information</td>
</tr>
<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
</tr>
<tr>
<td>SALR</td>
<td>South African Law Reports</td>
</tr>
<tr>
<td>SAP</td>
<td>Structural Adjustment Programme</td>
</tr>
<tr>
<td>SCGLR</td>
<td>Supreme Court of Ghana Law Reports</td>
</tr>
<tr>
<td>SCTS</td>
<td>Social Cash Transfer Scheme</td>
</tr>
<tr>
<td>SSA</td>
<td>sub-Saharan Africa</td>
</tr>
<tr>
<td>SSL</td>
<td>social security law</td>
</tr>
<tr>
<td>SSNIT</td>
<td>Social Security and National Insurance Trust</td>
</tr>
<tr>
<td>SSS</td>
<td>social security scheme</td>
</tr>
<tr>
<td>STC</td>
<td>Specialized Technical Committees</td>
</tr>
<tr>
<td>TJRC</td>
<td>Truth, Justice and Reconciliation Commission</td>
</tr>
<tr>
<td>UAS</td>
<td>Union of African States</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
</tr>
<tr>
<td>UDSP</td>
<td>United Development System Party</td>
</tr>
<tr>
<td>UFP</td>
<td>United Front Party</td>
</tr>
<tr>
<td>UGM</td>
<td>United Ghana Movement</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom</td>
</tr>
<tr>
<td>ULP</td>
<td>United Love Party</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNECA</td>
<td>United Nations Economic Commission for Africa</td>
</tr>
<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
</tr>
<tr>
<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
</tr>
<tr>
<td>UPP</td>
<td>United Progressive Party</td>
</tr>
<tr>
<td>URP</td>
<td>United Renaissance Party</td>
</tr>
<tr>
<td>USA</td>
<td>United States of America</td>
</tr>
<tr>
<td>USAID</td>
<td>United States Agency for International Development</td>
</tr>
<tr>
<td>WAJU</td>
<td>Women and Juvenile Units</td>
</tr>
<tr>
<td>YPP</td>
<td>Yes People’s Party</td>
</tr>
<tr>
<td>ZANU PF</td>
<td>Zimbabwe African National Union Patriotic Front</td>
</tr>
</tbody>
</table>
CONTRIBUTORS

Bright Nkrumah recently completed his DPhil Degree at the Centre for Human Rights, Faculty of Law, University of Pretoria. He previously served as a researcher at the South African Human Rights Commission. His research interests cover the African human rights system, constitutionalism, South Africa’s domestic and international socio-economic rights obligations, peace and security, good governance and democratisation in South Africa. His chapter was written while he was DPhil candidate at the Centre for Human Rights, University of Pretoria.

Bright J Sefah is a governance analyst at the African Union Commission (AUC) in Addis Ababa-Ethiopia. He works with the Governance Cluster within the African Governance Architecture (AGA) Platform of the Department of Political Affairs (DPA), African Union Commission. Bright holds an MPhil in Human Rights and Democratisation in Africa from the Centre for Human Rights, University of Pretoria, and a BA in Sociology and Social Work from the Kwame Nkrumah University of Science and Technology, Kumasi-Ghana. Bright is also a human rights activist who has a long-standing history of fighting for the promotion and protection of the rights of the marginalized, the aged, children, and prisoners, persons with disabilities (PWDs), women and minority groups. His research interests include international human rights law, rights of prisoners, peace and security in Africa, elections and governance. Bright was an LLM Student at the Centre for Human Rights, University of Pretoria when his contribution to this volume was written.

Chairman Okoloise is a Doctor of Laws (LLD) candidate and academic tutor at the Centre for Human Rights, University of Pretoria. He obtained a Master of Laws (LLM) degree in Human Rights and Democratisation in Africa cum laude at the University of Pretoria in 2015. He is an alumnus of the Human Rights and Democratisation in Africa (HRDA) programme and the Global Campus Alumni based at the European Inter-University Centre for Human Rights and Democratisation (EIUC), Lido Venice, Italy. Before his postgraduate studies, he obtained his Bachelor of Laws (LLB) degree in 2010 at the Ambrose Alli University in Nigeria and attended the Nigerian Law School in Lagos before his admission to the Nigerian Bar in 2012. Chairman is a two-time DAAD Scholar – an award he currently holds and a former postgraduate intern at the Department of Political Affairs of the African Union Commission Headquarters in Addis Ababa, Ethiopia. His specialties are human rights and democratic governance in Africa. He is currently working on the role of regional organisations in the regulation of abusive corporate businesses in Africa.

Christopher Y Nyinevi holds a full-time lectureship at the Faculty of Law, Kwame Nkrumah University of Science & Technology in Kumasi, Ghana, where he teaches Public International Law and Legal Writing. He graduated from the same University with an LLB in 2010 after which he attended Fordham University School of Law, New York, where he graduated in 2011 with an LLM in International Law & Justice. Mr Nyinevi was a beneficiary of the Vivian Leitner Global South LLM
Scholars Program, a fellowship administered by the Leitner Center for International Law & Justice at the Fordham Law School. He has since October 2014 been a member of the Ghana Bar. His areas of academic research interest are comparative constitutional law, public international law and human rights law.

**Cowen Dziva** is a doctoral student in the Department of Development Studies, University of South Africa, and obtained an MA in Development Studies from Midlands State University, Zimbabwe. Cowen is a professional development practitioner, who once worked for the Zimbabwe Human Rights Commission. He is also a lecturer in the Nehanda Centre for Gender and Culture Studies, Great Zimbabwe University, Zimbabwe. He has teaching and research experience in democracy and development, gender and development, and human rights of disadvantaged groups in society.

**Darsheenee Singh Raumnauth** is a Constitutionalism and Rule of Law Analyst at the Department of Political Affairs, African Union Commission. She is currently registered as a DPhil candidate at the Faculty of Law at the University of Pretoria, where she also completed her MPhil in Human Rights and Democratisation at the Centre for Human Rights in 2014. She also holds a Master’s Degree in Psychology with specialisation in Social Psychology from the University of Delhi (2013). She previously worked with the UN Special Rapporteur on Eritrea and the Refugee Law Project at Makerere University, Uganda. Prior to joining the Centre for Human Rights, she worked as Research Assistant at the Mauritius Institute of Education.

**Ebenenzer Adjei Bediako** is a Principal Research Assistant at the Faculty of Law, Kwame Nkrumah University of Science and Technology, and holds an LLM in Information Technology Law from the University of South Africa (UNISA). Ebenezer is a lawyer by profession having been called to the Ghana Bar in October 2010 and is a member of the Ghana Bar Association. His research areas include information communication technology law, corporate law and practice and clinical legal education. In the past, Ebenezer has researched on civil procedure and practice and media practice and freedom in Ghana.

**Elsabé Boshoff** is currently a professional legal assistant at the Secretariat of the African Commission on Human and Peoples’ Rights in Banjul, The Gambia. She holds a BA (Law) and LLB from the University of Stellenbosch, and LLM in Human Rights and Democratisation in Africa from the Centre for Human Rights, University of Pretoria. Elsabé’s research interests include international human rights law; environmental and climate change law; and business and human rights. She is passionate about African development, Pan-Africanism and sustainable development. Elsabe was an LLM Student at the Centre for Human Rights, University of Pretoria when her contribution to this volume was written.

**Grace Mukulwamutuyi** is a Zambian legal practitioner and human rights expert of close to eight years. In addition to a Master of Laws in Human Rights and Democratisation in Africa (LLM HRDA), obtained from the Centre for Human Rights, Faculty of Law, University of Pretoria, she
Hlengiwe Dube holds an MPhil in Human Rights and Democratization in Africa from the University of Pretoria. She also has an Honours Degree in Development Studies from the University of the Witwatersrand and a Bachelor of Arts Degree from the University of Zimbabwe. She is currently a consultant at the Women’s Rights Unit, Centre for Human Rights (University of Pretoria) on a state reporting project on state compliance with the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) focusing on Zambia, Lesotho and Sierra Leone. Her previous appointments include Legal Assistant with the African Commission on Human and Peoples’ Rights in The Gambia and Researcher with the Media Monitoring Project Zimbabwe. She has co-authored an article on the underutilisation of the African Committee of Experts on the Rights and Welfare of the Child. Her research interests encompass issues on the African human rights system, African Peer Review Mechanism (APRM), women and children’s rights and she is currently reading for doctoral studies in human rights.

Kennedy Kariseb is schooled in law, having completed both his Bachelor of Jurisprudence (BJuris) and Bachelor of Laws (LLB) degrees at the University of Namibia. He also holds a post-graduate certificate in Human Rights Implementation from the Luzern Academy for Human Rights at the University of Luzern, Switzerland. His latest qualification includes a LLM in Human Rights and Democratisation in Africa (obtained with distinction), from the Centre for Human Rights, University of Pretoria. He has professional experience ranging in legal advice, legal drafting, policy formulation and research, having previously worked in these areas at the African Governance Architecture Secretariat of the African Union Commission (AUC) and the Communications Regulatory Authority of Namibia (CRAN). His areas of academic interest are broadly blended between international human rights law (with a stern focus on special procedure mechanisms), African customary law, and gender studies. He is an author of several academic publications in these and other areas of law. Kariseb is currently an LLD candidate at the Centre for Human Rights, University of Pretoria.

Kenneth NO Ghartey is a Lecturer-in-Law and LLB Programme Coordinator at Lancaster University Ghana. He has a Master of Laws degree from the London School of Economics and Political Science in the United Kingdom. He is also an alumnus of the Kwame Nkrumah University of Science and Technology, the University of Ghana and the
Kenneth’s main research interests lie in the fields of corporate and commercial law with particular emphasis on the intersection between law and finance. Kenneth makes an occasional foray into interesting questions of jurisprudence and constitutional law and history for which he has always a fond interest.

Kwaku Agyeman-Budu is a Lawyer by profession and a legal academic. Since January 2013, he has been a Law Lecturer at the Ghana Institute of Management & Public Administration (GIMPA) in Ghana where he teaches constitutional law and intellectual property law. In September 2013, Kwaku also established The Justice Foundation, an apolitical not-for-profit non-religious human rights organization, with the sole purpose of increasing access to justice in Ghana. Kwaku holds a Master of Laws Degree (LLM) from Fordham University School of Law in the United States, where he graduated *cum laude* in 2012. Presently, he is a Doctor of Juridical Sciences (SJD) candidate at Fordham University School of Law where he assists in the teaching of international law and is also responsible for supervising several law and development clinical projects. Kwaku is also the Deputy Director of the African Centre of International Criminal Justice (ACICJ) at GIMPA, Ghana.

Lucianna Thuo is an Advocate of the High Court of Kenya as well as a law lecturer and the Associate Dean of the School of Law at Kabarak University, Nakuru, Kenya. She holds an LLM in Human Rights and Democratisation in Africa from the Centre for Human Rights, University of Pretoria, South Africa and Diploma in Realising Human Rights through Criminal Law from Åbo Akademi University, Turku, Finland. She has served as the Research Coordinator for the Judiciary Committee on Elections in Kenya and the Political Parties Disputes Tribunal (PPDT). Her research interests include election law, disability rights, public international law, international humanitarian law and international human rights law. She has previously written on, among others, the political participation rights of persons with disabilities, the place of amnesties in international human rights law and the impact of disjointed inclusion efforts on the participation rights of marginalised groups in Kenya.

Lydia A Nkansah is the Dean of the Faculty of Law, Kwame Nkrumah University of Science and Technology, Ghana. Lydia has experience in human rights enforcement in both peacetimes and post-conflict situations. She was a senior legal officer at the Commission on Human Rights and Administrative Justice of Ghana (CHRAJ). She served as the head of the Research Unit of the Truth and Reconciliation Commission for Sierra Leone and leader of evidence for the commission's hearings. She was also the international expert advisor to the Transitional Legislative Assembly of Liberia on its Truth and Reconciliation Bill. She has served on national boards including Ghana National Commission on Children and Ghana Institute of Languages. Her current research looks at transitional democracies from a legal perspective; juridical models that administers restorative and retributive justice, as well as democratic transitions. She has published in the areas of constitutional law, transitional justice, and democratization processes in Africa, and international criminal justice in Africa among others.
Michael Addaney is a doctoral researcher at the Research Institute of Environmental Law at the Faculty of Law, Wuhan University, Wuhan, China, and obtained an MPhil in Human Rights and Democratisation in Africa from the Centre for Human Rights, University of Pretoria. Michael is a professional development planner and a member of the Ghana Institute of Planners (GIP). He is also a staff of the University of Energy and Natural Resources, Sunyani, Ghana. His areas of research interest are: international human rights law, international environmental law and the intersectionality between climate change, urbanisation and environmental conservation in Africa. In the past, Michael has researched on refugee law, educational policy as well as urban management and governance in selected African countries.

Michael Gyan Nyarko is a doctoral candidate and academic tutor at the Centre for Human Rights, University of Pretoria, where he is also the editor of the Centre’s blog, AfricLaw and Coordinator of the Litigation Unit. He holds an LLM in Human Rights and Democratisation in African (with distinction) from the University of Pretoria and Bachelor of Laws degree from the Kwame Nkrumah University of Science and Technology, Kumasi – Ghana. Michael was called to the Ghana bar in 2011 and was part of a flourishing Pan-African commercial law practice headquartered in Accra, Ghana before joining the Centre for Human Rights as a master’s student in 2014. His research interests include law of international organisations, international human rights law, African human rights system, socio-economic rights, business and human rights, women’s rights, children’s rights, implementation of international human rights law in national systems, and democratic governance.

Munatsi Shoko is a doctoral student at the School of Development Studies, University of KwaZulu-Natal, Durban, South Africa, where he previously completed his MA in Population Studies. Munatsi is a lecturer in the Nehanda Centre for Gender and Culture Studies at Great Zimbabwe University in Masvingo, Zimbabwe. He is interested in research on Migration studies which includes the relationship between mobility and entrepreneurship and also the interrogation of transnational belongingness. Munatsi has published articles on mobility and entrepreneurship that resulted from Zimbabwe’s Land Resettlement programme as well as transnationals’ adaptation in destination countries.

Nora Ho Tu Nam is a post-doctoral fellow to the SARChI Chair in Multilevel Government, Law and Policy at the Dullah Omar Institute, University of the Western Cape. She holds the degrees LLD (University of Pretoria), LLM Human Rights and Democratisation in Africa (University of Pretoria), LLB, University of Mauritius. Her areas of interests are multilevel government, civil society and human rights in foreign policy. Nora was a doctoral candidate at the Centre for Human Rights, University of Pretoria when her contribution to this volume was written.

Owiso Owiso is currently pursuing a Master of Advanced Studies in Transitional Justice, Human Rights and the Rule of Law at the Geneva Academy of International Humanitarian Law and Human Rights. He holds a LLB (Hon) degree from The University of Nairobi, a Postgraduate Diploma from the Kenya School of Law and a LLM in Human Rights and
Democratisation in Africa from the Centre for Human Rights, University of Pretoria. Owiso is an Advocate of the High Court of Kenya and practises law in Nairobi. Owiso’s research interests are international human rights law; international criminal justice; international humanitarian law; democracy and governance; and contemporary African thought. Owiso was an LLM Student at the Centre for Human Rights, University of Pretoria when his contribution to this volume was written.

Romola Adeola is a post-doctoral fellow at the Centre for Human Rights, Faculty of Law, University of Pretoria, where she also completed her Master of Laws in Human Rights and Democratisation in Africa and doctoral studies. Her areas of expertise include the law and policy aspects of migration, refugee protection, development induced displacement and international development law. She was previously a Steinberg Fellow in International Migration Law and Policy at the Faculty of Law, McGill University in Montreal, Canada.

Roopanand Mahadew holds an LLB Honours from the University of Mauritius and an LLM from the Centre for Human Rights at the University of Pretoria. He is currently reading for his LLD at the University of Western Cape, writing on the issue of land grabbing in African states and its human rights implications. He is a full time academic at the Department of Law at the University of Mauritius. He was a legal intern at the African Committee of Experts on the Rights and Welfare of the Child prior to joining the University. His research interest is in human rights, public international law and environmental law.
LIST OF LAWS

United Nation instruments
1945 Charter of the United Nations
1948 Universal Declaration of Human Rights
1951 Convention relating to the Status of Refugees
1951 Convention on Consent of Marriage
1952 Convention on the Political Rights of Women
1957 Convention on the Nationality of Married Women
1966 International Covenant on Civil and Political Rights
1966 International Covenant on Economic, Social and Cultural Rights
1969 Optional Protocol relating to the Status of Refugees
1981 Beijing Declaration and Platform for Action
1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
1998 Rome Statute of the International Criminal Court
1998 UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Regional instruments
1953 European Convention on Human Rights
1963 Charter of the Organisation of African Unity
1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa
1976 Cultural Charter for Africa
1977 Convention for the Elimination of Mercenarism in Africa
1980 Final Act of Lagos
1981 African Charter on Human and Peoples’ Rights
1990 African Charter for Popular Participation in Development and Transformation
1991 Treaty Establishing the African Economic Community
2000 Constitutive Act of the African Union
2000 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights; Declaration on Unconstitutional Changes of Government
2001 Economic Community of West African States Protocol on Democracy and Good Governance
2002 Protocol relating to the Establishment of the Peace and Security Council of the African Union
2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa
2003 Protocol on Amendments to the Constitutive Act of the African Union
2006 African Youth Charter
2006 African Charter for African Cultural Renaissance
2009 Statute of the African Union Commission on International Law  
2009 AU Convention for the Protection and Assistance of Internally Displaced Persons  
2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa  
2014 Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights

**National laws**

**Ghana**

Constitution of Ghana, 1957  
Constitution of the Republic of Ghana, 1960  
Constitution of the Republic of Ghana, 1979  
Constitution of the Republic of Ghana, 1992  
Labour Act, No 651 of 2003  
Legal Aid Scheme Act, 542 of 1997  
Disability Act, 715 of 2006  
National Peace Council Act, 818 of 2011  
Petroleum Commission Act, 821 of 2011  
Petroleum Exploration and Production, Act No 919 of 2016  
Petroleum Revenue Management, Act No 815 of 2011  
National Pensions Act, 766 of 2008  
Social Security Act, 279 of 1965  
National Health Insurance Scheme Act, 650 of 2003  
Criminal Offences Act, 29 of 1960 (As amended)  
Electronic Transactions Act, 772 of 2008  
Police Service Act, 350 of 1970  
Police Service Regulation of Ghana, Constitutional Instrument 76 of 2012  
National Lottery of Ghana Act, 722 of 2006  
Citizenship Act, 591 of 2000  
Customs and Excise (Duties and other taxes) (Amendment) Act, 739 of 2007  
Interpretation Act, 792 of 2009  
Deportation Act, 14 of 1957  
Constitution Order-in-Council, 1957 of Ghana  
Intestate Succession Act, PNDCL 111 of 1985  
Legal Aid Scheme Act, 542 of 1997  
Marriages Act, Cap 127 of 1884-1985  
Matrimonial Causes Act, Act 367 of 1971  
Preventive Detention Act, 1958  
Public Elections (Registration of Voters) Regulations, CI 91 of 2016  
Public Elections Regulations, CI 94 of 2016  
Registration of Voter’s Public Elections (Registration Regulations) CI 12 of 1995

**Kenya**

Independent Electoral and Boundaries Commission Act, No 9 of 2011  
Political Parties Act, 11 of 2011  
Information and Communication (Amendment) Act, 41A of 2013  
Media Council Act, 46 of 2013
Mauritius
Constitution of the Republic of Mauritius, 1968

Namibia
Combating of Domestic Violence Act, No 4 of 2003

Nigeria
Cybercrimes (Prohibition, Prevention, Etc.) Act of 2015

South Africa
Choice of Termination of Pregnancy Act, No 92 of 1996
South Africa Refugee Act, No 130 of 1998

Tanzania
Tanzania Refugee Act of 1998

Uganda
Ugandan Refugee Act of 2006

United States of America
Constitution of the United States of America 1787

Zambia
Constitution of the Republic of Zambia, 1996
Citizens Economic Empowerment Act, No 9 of 2006

Zimbabwe
Constitution of Zimbabwe (Amendment) Act 20 of 2013
LIST OF CASES

International cases

African Commission on Human and Peoples’ Rights

Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya Communication 276/2003, 27th Activity Report


Social and Economic Rights Action Centre (SERAC) and Another v Nigeria (2001) AHRLR 60 (ACHPR 2001)

Domestic cases

Ghana

Abebrese v Kaah [1976] 2 GLR 46
Abu Ramadan & Another v Electoral Commission & Attorney General Writ No J1/14/2016 unreported
Adjer-Ampofo v Accra Metropolitan Assembly & Another (No. 1) [2007-2008] SCGLR 611
Agyei Twum v Attorney-General & Another [2005-2006] SCGLR 732
Amidu v President Kufuor & Others [2001-2002] 2 GLR 510
Amidu v President Kuffour [2001-2002] SCGLR 86
Attorney-General v Faroe Atlantic Co. Ltd [2005-2006] SCGLR 271
Bentsi-Enchill v Bentsi-Enchill [1976] 2 GLR 303
Bilson v Rawlings & Another [1993-94] 2 GLR 41
Boafo v Boafo [2005-2006] SCGLR 705
Clerk v Clerk [1981] GLR 583
Federation of Youth Associations of Ghana v Public Universities of Ghana (No. 2)[2011] 2 SCGLR 1081
Gladys Mensah v Stephen Mensah [2012] 1 SCGLR 391
JH Mensah v Attorney-General [1997-98] 1 GLR 227
Kwesi Nyame-Tsease Eshun v Electoral Commission Suit No J1/24/2016 unreported
Kuenyehia and Others v Archer & Others [1993-94] 2 GLR 525
L Sagoe-Moses & 6 others v The Honourable Minister & The Attorney-General, 13 April 2016, SUIT No HR/0027/2015 High Court of Justice (Human Rights Division 2)
Republic v Mrs Charlotte Osei & The Electoral Commission; Ex parte Dr Papa Kwasi Nduom Suit No. GT/1401/2016 unreported
The Republic v High Court (Commercial Division) (Exparte Electoral Commission – Papa Kwesi Nduom-Interested Party, 2016 Civil Motion No J5/7/2017

xxi
In Re The owner of the Station –Montie FM, Salifu Maase, Alistair Nelson and Godwin Ako Gunn & Others, Civil Motion No J8/108/2016

In Re Akoto and Seven Others [1961] GLR 523


Mensah v Mensah [1998-99] SCGLR 350

Nartey v Gati [2010] SCGLR 745


New Patriotic Party v Rawlings & Another [1993-94] 2 GLR 193


Professor Stephen Kwaku Asare v Attorney-General, Suit No: J1/15/2015, 14 October 2015

Professor Stephen Kwaku Asare v Attorney-General, Writ No J1/6/2011, 22 May 2012, 34

Progressive People’s Party v Electoral Commission Suit No GT/1401/2016


Re Akoto and Seven Others [1961] GLR 523

Quartey v Armah [1971] 2 GLR 231

Quartey v Martey [1959] GLR 377

Quartson v Quartson [2012] 2 SCGLR 1078

Yeboah v Yeboah [1974] 2 GLR 38

Kenya

Raila Odinga & Others v IEC & Others Supreme Court Election Petition 5 of 2013

South Africa


City of Johannesburg v Rand Properties (Pty) Ltd and Others [2006] 2 SA 240

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)

In Re Certification of the Constitution of the Republic of South Africa 1996, 1996 (4) SA 744 (CC)

Jeziile v S and Others (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC)

Mapingure v Min of Home Affairs & Others S-22-14

Mazibuko and Others v City of Johannesburg 2010 (4) SA (CC)

Minister of Health v Treatment Action Campaign 2002 (5) SA 721 (CC)

Occupiers of 51 Olivia Road v City of Johannesburg 2008 (3) SA 208 (CC)


Soobramoney v Minister of Health, KwaZulu-Natal (Soobramoney) 1998 (1) SA 765 (CC)

United States of America

Marbury v Madison 1 Cranch 137 (1803)

People v Harris, 36 Misc 3d 613 [Crim Ct, NY County 2012]

United Kingdom of Great Britain and Northern Ireland

Blackburn v Attorney-General [1971] 1 WLR 1037

Brown v Attorney-General & Others, Suit No J1/1/2009, 3 February 2009

R v Commissioner of Police of the Metropolis, ex parte Blackburn [1968] 2 QB 118
Zambia

Sara Longwe v Intercontinental Hotels HP/765/1992
PART I: INTRODUCTION
1 Introduction

Ghana was the first country in sub-Saharan Africa to gain independence and played a critical role in the political and economic transformation in Africa. Over the years, just like Ghana, many countries south of the Sahara have transformed from one-party state through military rule to multiparty democracy. Since independence, despite internal challenges, Ghana continues to play critical transformational role on the African continent. This influence has been reinvigorated since the emergence of the concept of African Renaissance and adoption of the ‘African solutions for African problems’ mantra in the early 2000s. On 6 March 2017, Ghana celebrated its 60th anniversary of independence from colonial rule. Despite the notable progress on various fronts, Africa’s development has stalled over the years due to numerous and multifaceted challenges. This moment serves as an opportune time to take stock of the state of governance, human rights and socio-economic development in Ghana as well as on the African continent.

The struggle for democratic governance and human rights are not new phenomena in post-colonial Africa. Indeed, democratic governance and human rights were some of the most significant reasons for the anti-colonial struggle in Africa and provided ‘a powerful mobilizing rhetoric for Africa’s post World War II anti-colonial movement’. Consequently, ‘the departing colonisers who sought a “dignified retreat from the empire”’ negotiated with the African nationalist movements and adopted


independence constitutions which provided ‘protection for opposition parties, individual rights, independent courts and some measure of regional or local autonomy’. These guarantees were supposed to lay the foundation for democracy, constitutionalism and the respect for fundamental human rights in postcolonial Africa as by the adoption of these constitutions, ‘the emerging independent African states of 1960s [had] proclaimed their commitment to democracy, good governance and respect for human rights’. These guarantees were however, soon watered down after independence either through the adoption of new constitutions (as in the case of Ghana’s first republican constitution of 1960) or amendments (as in the case of other newly independent African countries). Kwame Nkrumah, the chief protagonist of Ghana’s independence and first President of Ghana is reported to have disparaged the independence constitutions of African states ‘as neocolonial devices designed to ensure “the preservation of imperial interests in the newly emergent state”’.6

The promise of democratic governance and respect for human rights was therefore short-lived, as Africa’s new leaders perceived multi-party democracy and respect for human rights as divisive and an impediment to development. ‘[T]he end of the 1960s was [thus] characterised by the negation of the pledged democracy and gross human rights violations with impunity across the continent’. This period was followed by a series of military coup d’états across the continent purportedly to clean the mess left by the civilian regimes. These military regimes were initially enthusiastically received by the masses but soon fell into the same errors of the civilian regimes they overthrew, and in some instances came with devastating consequences. By the early 1980s most of sub-Saharan Africa was under one party regimes or military governments. Growing domestic political pressure as a result of economic hardships in addition to conditionalities of the Bretton Woods institutions forced these regimes to commit to embrace ‘good governance’ which would encompass accountability, transparency and citizen’s participation in decision-making. Consequently, by the mid-1990s, most African states had

3 Prempeh (n 2 above);
4 Prempeh (n 2 above); see also MK Mbondenyi & T Ojienda ‘Introduction to and overview of constitutionalism and democratic governance in Africa’ in MK Mbondenyi & T Ojienda (eds) Constitutionalism and democratic governance in Africa: Contemporary perspectives from sub-saharan Africa (2013) 34.
5 Prempeh (as 2 above); Mbondenyi & Ojienda (n 4 above).
6 Prempeh (as 2 above).
7 Prempeh (n 2 above) 476-484; Mbondenyi & Ojienda (n 4 above); see also U Umozurike The African Charter on Human and Peoples Rights (1997).
8 Mbondenyi & Ojienda (n 4 above).
9 As above.
10 As above. For instance, military coup d’état by Flight Lt. Jerry Rawlings and his Armed Forces Revolutionary Council in 1979 resulted in the execution of two former heads of state and several top military officers in Ghana.
11 Prempeh (n 2 above) 484.
adopted constitutions that guaranteed multi-party democracy and respect for human rights.

Arguably, the protracted armed conflicts and internal wars in most African countries are fuelled by the quest since the colonial period to create governance, human rights and legal regimes that can guarantee everyone equal participation in economic, social and political activities.\footnote{M Mutua \textit{Human rights: A political & cultural critique} (2002) 74-82.}

In this climate, the coming into force of the African Charter on Human and Peoples’ rights in 1986 was no certain matter as there was strong opposition from certain governments which almost sank the project.\footnote{MK Mbondenyi \textit{International human rights and their enforcement in Africa} (2010) 89-90.} The adoption and ratification of the African Charter on Democracy, Elections and Governance almost thirty years later proved only marginally easier. This, despite the numerous human rights related instruments which had been adopted in the intervening period, including the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (the Maputo Protocol), the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of a Court on Human and Peoples’ Rights and the African Charter on the Rights and Welfare of the Child. Also entering into force during this period was the Constitutive Act of the African Union in 2001, which since the re-entry of Morocco in January 2017, is now applicable to all 55 African states, and which explicitly provides for the protection and promotion of good governance, human rights, shared and inclusive economic growth and sustainable development.

Despite this comprehensive regional governance architecture and human rights system, a quick glance at events in twenty-first century Africa shows that the continent still faces issues of poor governance, retarded and unbalanced development as well as disregard for human rights. This has caused several commentators to contend that the real contemporary problem is the implementation of these guarantees in the context of continuing historic challenges such as suppression of opposition parties, corruption, divisions along ethnic lines, and new emerging challenges of cross-cutting concern such as climate change and terrorism.\footnote{Mbondenyi (as above); M Mutua \textit{Human rights: A political & cultural critique} (2002) 74-82; CA Odinkalu ‘Back to the future: The imperative of prioritising for the protection of human rights in Africa’ (2003) \textit{Journal of African Law} 12; Oloka-Onyango ‘Human rights and sustainable development in contemporary Africa: A new dawn or retreating horizons?’ (2000) \textit{Human Development Report 2000 Background Paper} 4, http://www.undp.org/hdro/Oloka-Onyango2000.html (accessed 24 June 2017).} The prevailing situation in Africa is a lucid demonstration of how the undermining of human rights has produced the antithesis of democracy and good governance and vice versa. Finding sustainable solutions to the several challenges besetting Africa’s development requires embracing good
governance, respect for human rights and entrenching rule of law. 15 Towards providing a sustainable solution, the African Union, in 2013, adopted a comprehensive plan to drive structural transformation in economic, governance, cultural and development spheres – Agenda 2063. This Agenda comprises of eight priority areas including African identity and renaissance, continuation of the struggle against neo-colonialism and for the right to self-determination, African integration for socio-economic development, peace and security, democratic governance as well as establishing Africa’s identity at the international pedestal.16

As a development plan, Agenda 2063 trails the establishment of economic development policies and strategies beginning with the Lagos Plan of Action for the Economic Development of Africa 1980-2000 that culminated into the 2001 New Partnership for Africa’s Development (NEPAD). NEPAD fashioned new political, economic and corporate governance structures consequential to an overly multifaceted relationship between states, regional bodies, and international institutions. By mid-2000s, this vast array of executive, advisory, financial and decentralised institutions and bodies were tasked with redefining African economic self-sufficiency in a globalised world.17 Knowing that the success of shared economic growth and sustainable development required local ownership and participation, Agenda 2063 enunciates an inclusive vision of endogenous contribution in long-term sustainable development goals grounded in good governance, human rights, inclusive growth and the rule of law.18 Agenda 2063 is an ambitious and people-centred continental vision with a carefully crafted action plan that aims to position Africa for growth over the next 50 years.19 It incorporates lessons and experiences from Africa’s past with a core objective to secure unity, prosperity and peace for all its citizens. In simple terms, Agenda 2063 is targeted at ensuring that Africa does things differently in a people-centred manner, by scaling and scoping up to ensure it is bigger as well as better in terms of governance, performance outcomes, and impact on citizens.20

This book therefore assembles timely, rigorous and insightful essays which would inform decision-making in governance and human rights sensitive areas such as good governance, social justice, rule of law, democracy, judicial activism, shared socio-economic growth and

---

18 As above
19 Addaney (n 1 above)
sustainable development as well as peace and security in Africa. The book aims to provide an exploratory space for creative thinking and to encourage a wider, deeper and more nuanced debate from a broader knowledge base. Through this, the book aims for a different assessment of what transformative governance and rights-based approach to sustainable development might mean in Africa, and adopts a multidisciplinary approach to the issues. It provides a unique podium for the presentation of new evidence and theory from a variety of well-informed voices and perspectives to cross-pollinate ideas in the spheres of good governance, respect for human rights, social justice and rule of law from the Ghanaian and African perspectives. It is the strategic objective of the editors to align innovative thinking, research and policy making in this complex and dynamic fields. This is to contribute to an increased understanding of the role of governance and respect for human rights in advancing equitable economic growth and sustainable development in Ghana and Africa in general, as well as to position Africa on the global governance and human rights landscape.

2 Securing good governance and the respect for human rights in twenty-first century Africa

There is an ongoing contemporary and evolutionary debate on transformative governance for and rights-based approach to sustainable and equitable development, as well as stability in Africa. Over the last two decades, there have been signs of a move away from conventional approaches to governance reform and human rights system fashioned through the analytical lens of Western influences toward a new convention that uses African localities and daily norms as the starting point for political, economic and socio-cultural transformation. This is because, African governments having focused for decades on market approaches that failed, international and domestic actors are now engrossed with a more development-oriented approach to governance and human rights regime that stimulates a greater role for African states. The notion is to move away from policies that restrict and imprison state activity to those which support and enable capability for good governance, respect for human rights, shared growth and sustainable development. Despite the fact that interlopers occupy themselves discerning of new and not so new techniques of inducing good governance and a unique human rights regime in Africa, the reality is dawning among Africans and development partners that nobody can envision a transformative model of inclusive

21 African Union Commission (n 16 above)
governance and rights-based development which are significantly different from the past. This reality put forward a distinctive occasion to scrutinise alternate methods including African thoughts and locally sourced solutions to the seemingly intractable puzzle of what good governance, human rights and rule of law as tools for engendering sustainable development mean in Africa.

In recent years, it may be observed that not all news from Africa has been gloomy. There have been many advances especially among the emerging countries that are profiting from technological revolution, sturdier economic management as well as the expiration of the debt crisis. There has been a significant reduction in the under-five and maternal mortality rate, increased access and attendance of basic school, key improvements in the control of AIDS, as well as decrease in the number of deaths from malaria and other preventable diseases. These developments are to be celebrated, yet pale when compared to the enormous challenges still facing the continent’s governments and populations in the quest for both sustainable, inclusive and equitable development as well as peaceful and stable societies. Poverty, poor leadership, underemployment, climate change, conflict and wars, low capacity and low productivity, all machinate to hold most of the continent back. The rise of extremism and radicalism in ungovernable and governed spaces (north east Nigeria and east Africa) is of great concern for the future stability and security of these regions. Also as Central African Republic descends into chaos in the absence of a functioning state while the youngest country, South Sudan, fractures and disintegrates so soon after its bespoke construction, what lessons must be learned from the way the continent is governed? This disappointing outcome is in direct contrast to the high levels of economic growth being experienced across SSA. Kjær therefore elucidates the necessity to examine alternate paths to ‘growth-enhancing’ governance that are not dependent on predefined good governance institutions that fail but more dependent on good inquiry into the right political incentives for change.

With few exceptions, there have been setbacks for the consolidation of democracy; coups d’état in Mali and Guinea-Bissau, the constriction of press and political freedoms in Burundi, Rwanda and Uganda, the thwarting of elections in Democratic Republic of Congo, Ethiopia, Guinea, Mauritania, Togo, Uganda and Zimbabwe, and recent oppressive anti-human rights legislation in Ethiopia, Nigeria, Uganda and The Gambia, are examples of democratisation stalling and retreating. It has

26 Cubitt (n 22 above).
been observed that there has been general deterioration of political freedoms since 2000, rising sharply from 2010 to reach an all-time high in 2013.\(^ {27}\) Cubitt posits that despite the promotion of democracy as a condition of bilateral aid, only 20 per cent of states are politically ‘free’. More than half of all African countries experience persistent electoral violence where electorates are subjected to physical violence and/or coercive intimidation.\(^ {28}\) Despite this, and the fact that competitive elections are yet to be proven as a mechanism for guaranteeing the political accountability of leaders, African populations continue to believe they are the best method for choosing leaders.\(^ {29}\)

There is a convincing body of evidence indicating that governance and rule of law are not working for the majority of African populations who encounter the everyday realities and consequences of ineffective government in their states. These include a democracy where citizens observe but do not receive the benefits of economic growth; the prevalence of violence, or threat of violence, ineffective justice system and the paucity of law and order in every corner of the continent; the protraction of deep poverty as well as the tenacious marginalisation and disempowerment of large sections of the population. Bad governance is understood to be associated with the continent-wide ills. To find durable solutions to these challenges in order to cure Africa of its malaise, governance must be improved by some means. This means that some equally desirable outcomes such as human security, equality, justice or jobs should not be sidelined or de-prioritised in this over-ambitious, complex and capacity draining quest.\(^ {30}\) Even though the focus is grounded in the promotion of democracy, it does not embrace the larger debate on what good governance means to local populations.\(^ {31}\) Chang argues that this is due to constructing the wrong institutions.\(^ {32}\) Rather than addressing this policy malaise, however, various stakeholders have proceeded to increase the institutional demands on African governments by introducing additional requirements in the political and social spheres using the same prescriptive sculpting despite the limited capacity to deliver.\(^ {33}\)

Khan develops the argument that good governance and respect for human rights cannot take root on a continent mostly devoid of the

\(^{27}\) AFDB, OECD & UNDP *African economic outlook 2014: Global value chains and Africa’s industrialisation.*


\(^{30}\) B Rothstein *The quality of government: Corruption, social trust, and inequality in international perspective* (2011) 5.


\(^{32}\) HJ Chang *Institutional change and economic development* (2007).

necessary components to make it a success.\textsuperscript{34} Such as the rule of law, stable property rights, the control of corruption, capacity to implement reforms and so forth. Scholars have identified some alternative governance solutions that might help transform African economies and complex societies in a way most desirable for the populations involved.\textsuperscript{35} Finding sustainable solutions to the prevailing circumstance calls for embracing local norms in enacting laws and crafting policies to fit regional and individual contexts.\textsuperscript{36} Context now matters in policy circles and promoting ‘bottom up’ thinking may influence top-down conventions. Some of these solutions promote a focus on collective action, or the transformative potential of pre-existing and traditional institutions that must not be swept aside in the hurry to ‘innovate’.\textsuperscript{37} But ideas for local ownership are not new and have never brought about structural revolutions in the past, and there remains resistance to such change in policy circles. In essence, what is now being discussed, is the old but previously disparaged ideas of African scholars and policy makers who first asked the question of how the relationship between African states and their societies, between institutions and their citizens can be fundamentally and permanently transformed to promote good governance, respect for human rights and the rule of law as well as to facilitate shared growth and sustainable development. This is the question at the heart of this book.

3 Perspectives on good governance and human rights in twenty-first century Africa: Overview of the book

The authors of this book draw from their diverse backgrounds in law, policy, and activism to present original case studies from Ghana, Kenya, Mauritius, South Africa, Zambia, and Zimbabwe. The essays do not claim to cover the breadth of governance and human rights issues that have been taken up by African states and communities since independence. It rather provides a critical overview of some of the achievements, challenges and prospects of realising good governance and human rights in Ghana after 60 years of independence as well as comparative examples from other African countries and contemporary issues at the African Union level. The book is consequently, structured in three main sections, each relating to one of these themes in addition to an introductory section.

\textsuperscript{36} S Unsworth ‘What’s politics got to do with it? Why donors find it so hard to come to terms with politics, and why this matters’ (2009) 21 Journal of International Development 883-894; A Poole Political economy assessments at sector and project levels (2011); Booth & Cammack (n 24 above).
\textsuperscript{37} Booth & Cammack (n 24 above).
3.1 Introduction

This part of the book provides a brief overview of the struggle for good governance and human rights in Africa since independence as well as contemporary governance and human rights issues on the continent. Michael Gyan Nyarko and Michael Addaney, briefly introduce the historical context of governance and human rights in Africa.

3.2 Ghana at 60 – human rights and consolidation of good governance in a challenging era

This part of the book reviews some of the pertinent human rights and governance issues facing Ghana. In chapter 2, Kenneth N.O. Gharthey explores how individual action is crucial to entrenching democratic principles, upholding the rule of law and promoting good governance in Ghana. He elucidates how individual actions in the Supreme Court of Ghana, especially by two prime crusaders, have helped to consolidate Ghana’s democracy and to maintain the rule of law through four critical lenses: constitutional amendments, presidential immunity from suit, the rights of dual citizens and parliamentary approval of international agreements.

Lydia Nkansah argues in chapter 3 that one of the institutional core of democracy is periodic elections which subjects the principal apparatus of government to change and reconstitution. She observes that election may be contentious and disputes may arise at any stage of an electoral process and therefore, the effective resolution of disputes is critical to electoral integrity, hence electoral justice. She therefore examines Ghana’s electoral justice architecture which consists of court adjudication, and other alternate electoral dispute resolution mechanisms. She contends that the practice of electoral justice under Ghana’s Fourth Republic has made room for aggrieved persons in the electoral process to seek redress as opposed to resorting to violence as a means to resolving conflicts. Lydia concludes that this has facilitated seamless succession in Ghana’s democratisation process and that electoral justice may be strengthened if alternative election dispute resolution structures are also utilised to complement the courts.

Ebenezer Adjei Bediako advocates in chapter 4 for the right for people to freely express themselves on issues during election periods without unjustified state censorship. Taking issues with social media, he contends that ‘the use of social media is one of the phenomenal means of exercising the right to freedom of speech in Ghana and most parts of the world’. Bediako argues that having been granted the right to freedom of expression and to freely participate in political activities, citizens and indeed everybody in Ghana have the right to comment and express an opinion on any topical election issue either through the traditional media, electronic
media or social media. He concludes that any abuse of the use of social media can be prevented or remedied through several technological or legal means rather the seemingly convenient and easy means of blocking access to social media.

Following the discovery of large fields of oil in Ghana in 1997 with high hopes in Ghana in the face of fears of the ‘Dutch disease’, Nora Ho Tu Nam advances in chapter 5 that civil society can push for an improved management of the oil resources but only if the right to access information is respected. She sets out the content of the right to access information and how it can improve civil society’s contribution to greater accountability and transparency in the oil sector in Ghana. Nora examines the legislative framework regarding civil society involvement in the oil sector in Ghana with constant emphasis on the history behind the laws and practice.

In chapter 6, Bright Nkrumah takes on poverty, a key challenge to democratisation, good governance and the realisation of basic rights and freedoms. With Ghana and most Sub-Saharan African countries battling with poverty, Nkrumah observes that the construction of Ghana’s poverty alleviation architecture is a clear demonstration of the country’s commitment to address food insecurity and large-scale poverty. Nonetheless, Nkrumah argues that, to adopt a poverty alleviation strategy is one thing, but to implement it is another. He argues that the various social protection initiatives have been confronted with substantial operational setbacks and allegations of ‘resource-leakages’. He concludes that Ghana’s poverty alleviation architecture can be efficiently operationalised to address the drivers of hunger and poverty in Ghana.

In a bid to understand the essential role women should play in the realisation of good governance and human rights in Africa, Kennedy Kariseb and Bright Sefah scrutinise the causes of poor gender representation in political spheres in Ghana. They posit that since the attainment of sovereignty in 1957, numerous laws and policies, deriving a substantive basis from the Constitution have to date been passed to advance the course of women in Ghana. Kennedy and Bright contend in chapter 7 that, notwithstanding the constitutional protection, laws, policies and institutional frameworks, women in Ghana remain privy to continued forms of discrimination and abuse. They argue that the realities of ‘gender differences’ in Ghana are a manifestation of the inefficiency of laws as a remedy to socially constructed problems. They conclude by advocating for legal reforms such as gender quotas to ensure gender equality in Ghana.

Kwaku Agyeman-Budu takes the argument by Kennedy and Bright further in chapter 8 by narrowing it down to women’s right to property in Ghana. He presents an overview of the current state of affairs regarding the implementation of women’s rights in Ghana, sixty years after independence and 30 years since the ratification of CEDAW, with
particular emphasis on women's property rights. He traces the development of women's property rights by critically examining the jurisprudence of the courts in Ghana since independence. He suggests that in order to speed up the process towards actual equality for women in Ghana in terms of their property rights, Parliament must immediately enact the Property Rights of Spouses Bill without further delay. This he contends will ensure that the legal regime regarding spousal property rights is well regulated especially for the courts to skilfully guide the development of the law to cater for the needs of an ever changing and dynamic society.

3.3 Comparative perspectives on governance and human rights in Africa

With emphasis on Ghana and South Africa, Christopher Y. Nyinevi explores in chapter 9 the quest for the realisation of socio-economic rights in Africa. He argues that the idea of enforcing socio-economic rights through the judicial process is misconceived as courts are ill-suited for the task. He strongly contends that judicial enforcement should at best be a complementary approach to be employed under the most compelling circumstances to aid a political mechanism of enforcement.

Through a comparative approach, Darsheenee Singh Raumnauth and Roopanand Mahadew focus on the evolution of multi-party politics from the advent of independence in Ghana and Mauritius in chapter 10. They highlight how multi-party politics has contributed in shaping and strengthening the concept of democracy in these two countries as well as influenced civil and political rights from an international, regional and national perspective. Raumnauth and Mahadew also analyse the interdependence of the state institutions with multi-party politics in the field of human rights and rule of law broadly and interrogates how this relationship has consolidated the democratic fabric in both countries.

In chapter 11, Lucianna Thuo analyses how democracy in Kenya can be deepened utilising lessons from Ghana. She critically examines the practice of electoral democracy in Ghana and Kenya and explains why ethnicity and a two-party political tradition are prominent features of electoral politics in both countries. She further reviews the role of Ghana’s electoral commission, informal institutions such as the Inter-Party Advisory Committee, the Constitutional provisions on ethnic balance, the role of electoral assistance and the peace narrative in Ghana to draw lessons for Kenya.

Grace Mukulwamutio in chapter 12 analyses the inception of the Global Financial Crisis in 2008 and how it impacted and still impacts, through a decline in economic growth and constantly low growth projections on Ghana and Zambia. She proffers the human rights-based approach as desirable in order to mitigate, if not fully counter, the
ramsifications of the Global Financial Crisis. She contends that the human rights-based approach mainly resides in the protection of basic socio-economic rights, because this category of rights require protection in any given situation, including periods of financial crises, in which their safeguard is typically undermined.

Cowen Dziva and Munasti Shoko examine the timely and thorny issue of social media and human rights in Zimbabwe in chapter 13 and look into the usage of social media platforms (Whatsapp, Twitter, and Facebook) by African transnationals. They make reference to Zimbabweans living outside their country who are educating and mobilising nationals into democratic action, to freely advocate for the rule of law, political accountability and respect of human rights.

3.4 The African Union and the realisation of democratic governance and human rights in Africa.

This part of the book discusses the roles of the African Union and its institutions in the realisation of democratic governance and human rights in Africa.

Elsabe Boshoff and Owiso Owiso take up the subject of the NEPAD framework as a uniquely African concept in chapter 14. They explore the Pan-African influence on the design and implementation of the NEPAD platform and its various thematic components, and highlight the place of Pan-Africanism in twenty-first century regional cooperation and development in Africa.

With the ongoing refugee crises at the global and regional levels, Michael Addaney discusses refugee protection under the African human rights system in chapter 15. He examines the advances in legal protection that would benefit refugees on the continent focusing on the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 Convention) and the activities of the African Commission on Human and Peoples’ Rights (African Commission). Addaney observes that African states should strive to comply with the letter and spirit of the 1951 Convention and the 1969 Convention and persist on upholding their conventional generosity and liberal refugee protection systems in order to offer effective protection to refugees in Africa.

Romola Adeola contributes further to the discussion on migration by analysing how internally displaced persons (IDPs) in Africa can be protected and assisted in chapter 16. She observes that, unlike refugees, the plight of IDPs is heightened by the fact that IDPs remain within the borders of states and do not cross international borders. She interrogates international and regional instruments and argues that at the heart of the
narrative on safeguarding the interest of the IDPs are two elements, namely, ‘protection’ and ‘assistance’. Though contained in the title and utilised several times in the Kampala Convention, the content of these elements with respect to the different categories of displaced persons, which she explores, is not explicit in the Kampala Convention.

Hlengiwe Dube in chapter 17 takes stock of the impact of the Maputo Protocol in Africa. She observes that through the process of transforming women’s lives and making Africa free of violence against women and girls, measures geared towards gender equality and women empowerment have been adopted at the regional and domestic levels. She contends that, although there have been tremendous human rights gains on the continent over the years, most societies in Africa are still grappling with the concept of ‘rights’ and as a result, Africa continues to face challenges regarding the realisation of women’s rights thirteen years after the adoption of the Maputo Protocol. She makes a clarion call on the AU and African governments to make the provisions of the Maputo Protocol a reality.

The book concludes in chapter 18 where Macaulay Chairman Okoloise chronicles the struggle for the ‘total liberation of the African continent’ and the formation of the OUA and the AU. After examining the motivation for the adoption of the Agenda 2063, Okoloise analyses the viability of a transnational democratic state in Africa by 2063 and how to avoid the same pushbacks that befell Nkrumah’s Pan-African agenda. He conceptualises transnational democracy in Africa within the context of Agenda 2063, African instruments on democracy, elections, governance, human rights, peace and security, and the contemporary challenges confronting African statehood. Okoloise concludes by articulating a practicable marshalling and more realistic paradigm for attaining the AU’s lofty aspirations of a transnational democracy by 2063.
PART II: GHANA AT 60 – HUMAN RIGHTS AND CONSOLIDATION OF GOOD GOVERNANCE IN A CHALLENGING ERA
Abstract

It cannot now be denied that individual action is crucial to entrenching democratic principles, upholding the rule of law and promoting good governance. Towards these ideals, the citizens of Ghana agreed to adopt through the 1992 Constitution of the Republic of Ghana, a framework for government that will secure for themselves and posterity, liberty, equality of opportunity and prosperity and the protection of fundamental human rights and freedoms. To kindle popular involvement in the democratic process, article 2 of the 1992 Constitution gives a right to any person to challenge the constitutionality of an act or omission of any person, an enactment and things done under the power of an enactment. In the period following January 1993, many citizens have taken advantage of this duty to protect Ghana’s young democracy. These individual actions have often had wider implications for the country’s constitutional jurisprudence including (1) the role of Parliament and the Executive in Constitutional amendments, (2) the scope of the presidential immunity from suit and the personality of the Attorney-General, (3) The Connections between human dignity and exclusion from political office and (4) the scheme for the Parliamentary approval of international business and economic transactions. Using these lenses, this chapter argues that the conferment of a direct enforcement right on persons, natural and legal, has been fundamental to the success of the Fourth Republican Constitution of Ghana. It concludes that without this express power in the ordinary citizen; Ghana’s entire constitutional architecture could not have stood the test of the last two odd decades.

1 Introduction

One of the yearning hopes of Ghanaians after the coming into force of the Constitution of the Republic of Ghana, 1992 (‘the 1992 Constitution’) was that the so-called ‘culture of silence’1 entrenched by Ghana’s long and chequered history with military dictatorships and revolutions, will be broken by empowering citizens to use legitimate judicial means to help create a country of laws.

1 Coined by the then pro-opposition press as a description for the years of military rule immediately preceding 1993 which were characterised by a stifling of individual and press freedom of speech.
Towards this end, the Constituent Assembly repeated a long-standing feature of previous Constitutions\(^2\) in article 2(1) of the 1992 Constitution. Within it, a person who alleges that ‘an enactment or anything contained in or done, under the authority of that or any other enactment’ or ‘any act or omission of any person’ ‘is inconsistent with, or is in contravention of a provision of [the] Constitution’ may bring an action in the Supreme Court for a declaration to that effect.’

The relative position of this constitutional provision points clearly to the importance that the framers attached to this personal right of natural and legal persons to protect the Constitution and to give effect to our national collective commitment to ‘[t]he Rule of Law’ and to ‘[t]he Principle that all powers of Government spring from the Sovereign Will of the People.’\(^3\) It comes only after article 1 which declares the supremacy of the Constitution. It is the exercise of this right that we shall call ‘individual actions’ throughout this chapter.

The contention in this chapter, by exploring these four lenses, is that the conferment of a direct enforcement right on persons, natural and legal, has been fundamental to the success of Fourth Republican Constitution. Indeed, one may go as far as to legitimately assert that without this express power in the ordinary citizen, our entire constitutional architecture could not have stood the test of the last two decades. Particularly, the focus of this chapter will be on two prime crusaders, Professor Stephen Kwaku Asare, a US-based Ghanaian Professor of Accounting who is also an attorney and Mr Martin Alamisi Burns Kaiser Amidu, at various times, Deputy Attorney-General and Minister of Justice, Vice-Presidential Candidate of the National Democratic Congress, Attorney-General of the Republic and more recently anti-corruption crusader who has acquired the moniker ‘Citizen Vigilante’, presumably on his willingness to take on the structures of power. Their activities reveal that a portion of the citizenry, though very small indeed, has taken this constitutional watchdog role, very seriously.\(^4\)

These individual actions have contributed to our constitutional jurisprudence in at least four areas, namely (1) the role of Parliament and the Executive in Constitutional amendments; (2) the scope of the presidential immunity from suit and the personality of the Attorney-General; (3) the connections between human dignity and exclusion from

\(^4\) This phenomenon is not limited to Ghana. There are examples in England include Mr Raymond Blackburn who lends his name to the famous line of ‘Blackburn cases’ e.g. Blackburn v Attorney-General [1971] 1 WLR 1037 and R v Commissioner of Police of the Metropolis, ex parte Blackburn [1968] 2 QB 118 and Mr Ross McWhirter who was murdered for his support for the rule of law. See Lord Denning’s The Discipline of Law (1979).
political office; and (4) the scheme for the Parliamentary approval of international business and economic transactions. This chapter therefore considers aspects of a few cases decided by the Supreme Court and highlights what changes to the constitutional viewpoint have been occasioned by the decisions in these areas of focus.

2 The role of parliament and the executive in constitutional amendments

After more than a decade and half of the Fourth Republic, questions about the continued integrity and reliability of some of the Constitution's provisions in the light of the developments since 1993 became more and more prevalent. In the 2008 election cycle, then Candidate John Mills (later elected President) put forward a holistic review of the 1992 Constitution as one of his campaign promises. In 2010, President Mills in accordance with article 289 of the 1992 Constitution, set up a ten member Constitution Review Commission (CRC) with a mandate to collate views of the general public on the strength and weaknesses of the Constitution and to make recommendations to Government for amendments.

Following the completion of the CRC's work, the government, in June 2012, issued a white paper largely accepting the commission's recommendations. In October 2012, the Government set up yet another body, a five member Constitution Review and Implementation Committee (CRIC) to implement the recommendations in strict compliance with chapter 25 of the Constitution. The CRIC in accordance with this mandate set out to draft amendments bills for the consideration of Parliament.

Professor Stephen Kwaku Asare, questioning the constitutionality of the Executive's actions and arguing that Parliament and not the President has the sole constitutional authority to consider, recommend and take all actions relating to constitutional amendments brought an action before the Supreme Court for, among other declarations, a declaration that Parliament's power to amend the Constitution as stipulated in article 289(1) is plenary and exclusive and that this power cannot be delegated to or usurped by the President.

By a five to two majority, the Supreme Court held that the President had power under the Constitution to appoint a commission of inquiry into any matter which was in the public interest. In line with that, constitutional amendments are within the scope of what may be considered to be in the public interest especially since the proper functioning of the Constitution, which the President was mandated by the Constitution to maintain and protect, was a matter of grave public interest. The Court concluded that the

---

5 Professor Stephen Kwaku Asare v Attorney-General, Suit No J1/15/2015, 14 October 2015.
Role of individual actions in the Ghanaian Supreme Court

President's appointment of the CRC was not unconstitutional and that the attempt to solicit citizen input towards the amendment process went to rather strengthen the democratic process.

Of prime relevance is the plaintiff’s main argument that the President’s sole role in the ‘carefully designed amendment architecture’ provided for under chapter 25 of the Constitution was his ministerial power of assent at the very end of the process. The argument being that beyond the mandatory obligation to assent to a bill passed by Parliament to amend the Constitution the President has no further constitutional role in the process. The plaintiff strenuously sought to distinguish between the process of consultation and review (termed ‘front-end’ legislative processes), the actual exercise of legislative authority in the passing of the amendment bill into law and the purely ministerial process of assent (termed ‘back-end’ process by the plaintiff). Arguing therefore, that Parliament’s power to amend the Constitution was plenary and exclusive, the plaintiff contended that it was unconstitutional for the President to use the power to appoint commissions of enquiry to engage in the ‘front end’ legislative processes that eventually culminated in the amendment bills that were submitted to Parliament.

According to the plaintiff since the framers of the 1992 Constitution vested sole legislative authority in Parliament, it must be also be implied that all the relevant powers necessary to give effect to Parliament’s legislative authority was also thereby solely vested in Parliament. This was particularly more so in the context of issues of grave importance such as constitutional amendments. Related to this contention, is the predicate-act canon of interpretation which asserts that where a general power is conferred, all related power necessary for the exercise of that power is also thus conferred. It was therefore to be understood that all steps both necessary and incidental to the constitution amendment process (particularly the ‘front end’ processes) were all thus exclusively vested in Parliament.

When encountered for the first time, the plaintiff’s contentions appear to be a simple affirmation of the concept of separation of powers until the general powers of the President in both the ordinary legislative process and the constitutional amendment architecture is considered as a whole under the 1992 Constitution. The Court by its decision showed that whilst there was good evidence of separation of the powers of the branches under the Constitution, there were also several instances in which the constitutional architecture requires collaboration between the branches for effective governance. The President as head of the Executive plays an important role in the initiation and recommendation of legislation to Parliament.

6 Asare (n 5 above) 9.
Indeed, legislation that imposes a charge on public funds or a tax can only be introduced in Parliament by or on behalf of the President. The Court could not therefore, accept Plaintiff’s literalist contentions that the ‘front end’ activities set in motion by the President under the auspices of the CRC and subsequently, the CRIC amounted to usurpation of the Parliament’s legislative authority.

This Supreme Court, in the continued tradition of earlier ones before it, has not been particularly fond of a strict or literalist interpretation of the constitutional text. The Court in the period following the 1992 Constitution has advocated a ‘purposively broad, liberal and benevolent interpretation of the Constitution as a whole’. In the context of this case, the strict interpretation advocated by the Plaintiffs would exclude all other individuals and bodies from engaging in any ‘front end’ or pre-legislative activities. The Court refused to accept the assertion that this challenges Parliament’s legislative authority under the Constitution. This is because it is only Parliament’s eventual acceptance of the preparatory work by CRC/CRIC and its subsequent deployment of its legislative powers that ‘marks the real beginning of its crucial exclusive legislative role in the actual amendment process.’

The current political atmosphere and the provisions of the 1992 Ghanaian Constitution as a whole justifies this position. Post-1992, the Executive has generally allowed Parliament a free hand in the exercise of its legislative authority although the Government and its agencies are often heavily involved in the ‘front-end’ legislative processes. In spite of that reality, it is an equally serious question if the President’s power to appoint commissions of inquiry will literally extend to all matters which in the President’s opinion are in the public interest. Following, the Supreme Court’s purposive approach, it stands to reason that there must certainly be situations where the President’s power to appoint commissions of inquiry may well cross the boundaries of the province particularly allocated to the other branches of government by the Constitution. The particular instances in which these boundaries may be crossed are however, hard to readily formulate. In those circumstances, the Supreme Court should feel bound to intervene. The conclusion therefore is that

---

10 Chief Justice Wood in Asare (n 5 above) 23.
11 As above, 37.
12 More recently reinforced by the Memorandum to the Interpretation Act, 2009 (Act 792).
while the appropriateness of the President’s use of a commission of inquiry in the collation of citizen’s views on the Constitution towards amendment could be questioned politically, the process is not unconstitutional.

Respect for the separate powers of each branch of government should have led the Executive to have handed over the preparatory work of the CRC to Parliament for Parliament to have decided what to do with it. The further step taken in the appointment of the CRIC, the formulation of the amendment bills and the subsequent submissions of those bills to Parliament may have gone a step too far in meddling in what is properly the legislative province.13

3 Presidential immunity from suit and the personality of the Attorney-General

Shortly after Mr John Agyekum Kufuor assumed office as President of Ghana on 7 January, 2001, the media carried reports that three persons had been appointed Chief of Staff, Presidential Affairs Adviser on Public Affairs and National Security Adviser. Mr Martin Amidu, the plaintiff, claiming that the appointments were unconstitutional brought an action14 before the Supreme Court under article 2 of the 1992 Constitution, against President Kufuor as first defendant, the Attorney-General as second defendant and the three persons as third, fourth and fifth defendants on the grounds that under articles 58(1) and (2) and 295(8) of the Constitution and sections 2 to 4 of the Presidential Office Act, 1993 (Act 463), those three persons could not have been properly appointed as staff of the Office of the President without consultation with the Council of State as required by article 91(1) of the Constitution. At the time the suit was brought, the position of Attorney-General was vacant.

When the matter came to be heard, the newly appointed Attorney-General raised a preliminary objection to the propriety of the suit against the President personally on the ground that under article 57(4) the President had immunity from legal proceedings while in office. Secondly, that since those three persons had thereafter been nominated by the President as Ministers of State and had been approved by Parliament; the plaintiff’s action had become moot.

For our immediate purposes, the following questions from the hearing on the preliminary objection are most relevant:

13 Except e.g. where the proposed amendments will have financial implications in terms of art 108 for which some sort of collaboration between the Executive and Parliament in formulating the text of the amendment bills will be recommended.
(1) What is the precise scope of the President’s immunity from suit during the currency of his term and shortly thereafter?

(2) Is the office of Attorney-General personal to the holder of the time being of that office so that there could be no civil suit against the Executive if the position was vacant?

The attempt by Mr Amidu to sue a sitting President personally is not novel. The question on whether or not the President may be personally sued in the exercise of his or her executive functions under the Constitution is also not new. This was firmly decided in the very early days of the Constitution in 1993 in personal actions brought against then President Rawlings.\(^\text{15}\) The Supreme Court there held that President could not be sued in a personal capacity especially since article 88(5) specifies that ‘… all civil proceedings against the State shall be instituted against the Attorney-General as defendant’. Beyond shielding the President from undue distraction in the exercise of his or her executive actions, the grant of the immunity was also to protect the dignity of that high office. The framers of the 1992 Constitution therefore, continued in the tradition of the 1969 and 1979 Constitutions to grant the President immunity from suit to cover both civil and criminal action during the pendency of the President’s term and thereafter for three years after the end of the term.\(^\text{16}\)

There is an obvious tension between making one person seemingly above the law in the discharge of that person’s functions and the basic principle that all citizens be subject to the law in a modern democratic society. It has however, been determined that the President’s immunity to suit granted under article 57(4) is not absolute since it is subject to article 2 and the prerogative writs.\(^\text{17}\) The Attorney-General is however, at all times the proper person to sue with respect to the contested executive actions of the President. This statement presents an interesting twist to the question whether or not the position of Attorney-General is personal to the holder, for the time being, of that office. In other words, is it important in the defence of government in a suit who is or whether there is an Attorney-General at any point in time?

In arguments before the Court in support of the preliminary objection to the plaintiff’s suit, the then newly appointed Attorney-General, Nana Akufo-Addo had argued that at the time when plaintiff filed his suit, there was no substantive holder of the office of Attorney-General and therefore there was no proper party to answer the suit against the government. This argument was both ingenious and mischievous. Nana Akufo-Addo had himself in 1997\(^\text{18}\) challenged the legality of a similar contention made by


\(^\text{17}\) Amidu (n 14 above) 530.

the government legal team in a suit he brought on behalf of Mr JH Mensah, a notable national politician. The plaintiff in the case being considered, Martin Amidu, by a strange twist of fate had been Deputy Attorney-General on the side of the government at that time. In January 2001 however, these two personalities were on different sides of the argument. A part of the court, led by the Acting Chief Justice, seemed to favour the worrying position that since there was no substantive Attorney-General the plaintiff’s action had been against a ‘non-existing personality’.

It is true that the wording article 88(1) will seem to favour the view that the office of Attorney-General is personal to any holder of the office, for the time being. Article 88(1) provides that the Attorney-General ‘shall be a Minister of State and principal legal adviser to the government’. Under article 88(5), ‘... all civil proceedings against the State shall be instituted against the Attorney-General as defendant’. Are actions against the State to be received by the Attorney-General in a personal capacity or as holder of a public office? We should be very weary to accept the position that the Attorney-General acts for all purposes in a personal capacity as some members of the Court did. This position creates a dangerous opportunity for the Executive to effectively truncate all proceedings against the State by merely removing the substantive Attorney-General from office or leaving the office vacant for as long as possible.

A consideration of article 88(1) alone without more reveals only a skewed view of the nature of the Attorney-General’s office. The responsibilities of the Attorney-General under the Constitution itself suggest that the Attorney-General’s functions cannot, in all circumstances, be personal. If a President refuses to appoint an Attorney-General can he be compelled by court action to appoint one? And if as was suggested by some Justices of the Supreme Court there can be no suit against the State without a substantive Attorney-General who then is to receive the court processes on behalf of the State? The Legal Service created under the Constitution oversees the great majority of criminal and civil proceedings instituted by or brought against the State. The evidence of practice shows that an Attorney-General typically takes a personal interest in only the cases of the highest consequence. There is no real trouble created by the acceptance of and answer to a suit against the State by the members of the Legal Service whether or not there is a substantive Attorney-General. Indeed, in the conduct of government cases, there is no formal substitution of Attorney-General when the previous office holder leaves office as is the case in other civil suits. The ‘haste with which the plaintiff issued out his writ’ when he ‘knew well that there was no Attorney-General at post’ should have been wholly irrelevant to outcome of the preliminary objection.

19 Edward Wriedu Ag CJ in Amidu (n 14 above) 519.
20 As above.
Since the Court was prepared to take judicial notice of the social realities surrounding the appointments, it should have been prepared to hold that the Attorney-General was only often a nominal defendant except in the most important cases and therefore, there is often no need for a substantive Attorney-General for the State to be adequately defended. It is noteworthy that the Solicitor-General whose office is not in the nature of a political appointee had first answered the processes in the main suit before the Attorney-General assumed office on 9 February 2001. In any case, were the President anxious to only allow an Attorney-General and no one else to defend the government, he had power to immediately submit his nominee for Attorney-General to Parliament for approval as was actually done in this case. On the whole, the Supreme Court did not give much importance to the question of the nature of the Attorney-General’s office in deciding on the preliminary objection. A more definitive pronouncement on the question would have put to rest the seasonal gimmicks of suits against the President soon after a swearing in.

It is respectfully submitted in that regard that the individual personality of the office holder of Attorney-General should not be paramount in considering whether or not there is someone to defend actions against the State. The individual personality of the Attorney-General is probably only relevant in the Attorney-General’s ministerial duties defined under particular legislation together with the role of the principal adviser to government.

4 The connections between human dignity and exclusion from political office

In December 1996, The Constitution of the Republic of Ghana (Amendment) Act, 1996 (Act 527) was passed to amend the 1992 Constitution by repealing and replacing the whole of article 8; the provision on dual citizenship. The original provision had prohibited dual citizenship except to a very limited degree. The new article 8 inserted by Act 527 however, declared that a Ghanaian citizen may hold the ‘citizenship of any other country in addition to the citizenship of Ghana’. An additional clause in the new article 8 however, prohibited dual citizens from being appointed holders of six specified offices including Ambassador or Inspector-General of Police. In addition, the amendment permitted further additions to the list of excluded public offices to be made by an Act of Parliament.

Pursuant to the amended article 8, Parliament enacted the Citizenship Act, 2000 (Act 591). This Act extended the list of offices prohibited to dual citizens from six to twelve to include the positions of Chief Justice and Chief of Defence Staff among others. The Minister was also given power to add to this list by Statutory Instrument. Professor Stephen Kwaku Asare
filed a writ against the Attorney-General alleging that the prohibitions were discriminatory and violated the dignity of dual citizens and the principle of equal citizenship under the Constitution.

The declaratory reliefs sought by the plaintiff were unanimously dismissed by the Supreme Court. The Court was of the opinion that in matters of constitutional amendment, it is the expressed popular will that is determinative. If the right amendment procedure is followed, the courts' sole task is to interpret the amendments such as to minimize their impact on other fundamental principles of the Constitution. However, the Court re-emphasised that it had jurisdiction to declare a constitutional amendment a nullity although all the procedural requirements have been fulfilled. This is more so when such an amendment conflicted with an entrenched provision of the Constitution. In coming to its conclusion, it took the position that the original article 8 which totally barred, with minor exceptions, dual citizenship was a worse inequality than the impugned amended article 8(2). It was the court’s view that the new article increased rather than diminished the rights of the Ghanaian who had voluntarily acquired the citizenship of another country. Significantly, the Court held that unequal treatment of dual citizens was constitutionally justifiable since the State has power to adopt measures to secure the loyalty of its citizens.

This case explored interesting legal questions beyond the constitutionality of the exclusion of dual citizens from certain public offices. These include a consideration of whether or not the exclusion from public office can be considered as eroding the constitutional right to equality and dignity and whether or not the right to political participation in government guaranteed under article 21(3) of the 1992 Constitution is absolute. Particularly compelling was the plaintiff’s assertion that constitutional amendments cannot operate to diminish or water down previously conferred rights and that the only aim and purpose, whether direct or indirect, of latter amendments should be to strengthen or widen already guaranteed rights. Finally, there seems to be, although not openly declared, a second rate status granted to constitutional amendments effected through Acts of Parliament in Ghana.

The case presented the Court an opportunity to analyse the scope of the right to human dignity under article 15 of the 1992 Constitution. It was the plaintiff’s case that a dual citizen’s exclusion from certain types of

---

24 Constitution of Ghana 1992, art 15: ‘(1)The dignity of all persons shall be inviolable. (2) No person shall, whether or not he is arrested, restricted or retained, be subjected to – (a) torture or other cruel, inhuman or degrading treatment or punishment; (b) any other condition that detracts or is likely to detract from his dignity and worth as a human being ...’
public office operated to erode that dual citizen’s dignity under the Constitution. The Supreme Court in its judgment was prepared to concede that issues of human dignity are often intertwined with prescriptions of equality under the law. The Court however, seemed to doubt whether a limited denial of participation in government is a question properly considered within the ambit of human dignity. Drawing inspiration from article 5 of the African Charter on Human and Peoples’ Rights, the Court was of the opinion that actions which would qualify as an infringement of the right to dignity all lay at ‘severe end of the continuum of degrading treatment’\textsuperscript{25} such as slavery, slave trade, torture, and cruelty. Article 15 could not therefore, be expansively interpreted to regard the limiting of the right to political participation of dual citizens as infringing their right to human dignity. It is submitted that his reasoning accords with text of article 15. That provision speaks of being subjected to ‘torture or other cruel, inhuman or degrading treatment or punishment’ none of which are properly related to exercise of political rights or the assumption of public office. Very importantly, this interpretation also accords with the African Charter on Human and Peoples’ Rights (ACHPR) since article 5 thereof also admits of this limited view of the concept of human dignity.\textsuperscript{26}

The plaintiff also asserted that the unequal treatment of dual citizens violated article 17; the equality clause of the Constitution. Relying on its judgment in a previous matter, the Court held that the ‘concept of equality embodied in article 17 is by no means self-evident’\textsuperscript{27} and that a differentiation of rights can be justifiable. This is ably demonstrated by article 17(4) of the Constitution which allows different treatment of Ghanaian citizens to address, for example, social and economic imbalances in the society.

One wonders if the Supreme Court’s views on the extension of the constitutional rights to dignity and of equality to the holding of public office could have been swayed if the Court’s attention had been drawn to article 13\textsuperscript{28} of the ACHPR, clause 2 of which provides that ‘[e]very citizen shall have the right of equal access to the public service of the country.’ It is not however clear whether a ‘right of equal access to public service’ is

\textsuperscript{25} Asare (n 21 above) 56.

\textsuperscript{26} African Charter on Human and Peoples’ Rights, art 5: ‘Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.’

\textsuperscript{27} Nartey v Gati [2010] SCGLR 745,754: ‘To our mind, it is clear what article 17 does not mean. It certainly does not mean that every person within the Ghanaian jurisdiction has, or must have, exactly the same rights as all other persons in the jurisdiction. Such a position is simply not practicable.’

\textsuperscript{28} Art 13, ACHPR: ‘1. 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 the country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.’
absolute and necessarily negatives a constitutional differentiation in access to public service on grounds of say, loyalty or national security.

One of the real points of interest was the plaintiff’s case that standards of constitutionalism and human rights in modern constitutions are such that they cannot be easily or effectively diluted. It was asserted that a grant of fundamental rights was almost irreversible; that subsequent changes could only validly increase and not diminish the previously enjoyed rights. This radical argument was not accepted by the Court since it was the Court’s view that this conflicted with another principle of democracy that the will of the people should prevail.

The rejection was however, done with caution because there is judicial recognition that Constitutions deserve a hallowed status and swift changes to it that remove the rights of citizens whether or not facilitated by the representatives of the people should be warily considered. In that state of affairs, it is suggested the courts should use their interpretative role to retain many of the original rights as far as the text would allow. Towards that end, it should be possible in certain narrow circumstances to declare unconstitutional an attempt to water down human rights in a manner at odds with the basic structure of the Constitution taken as a whole. The bench must however, be slow to usurp the popular will expressed through Parliament or via a referendum.

It was easier for the Supreme Court to reject this claim by the plaintiff because in this case, the amendment the plaintiff sought to impugn was in reality granting dual citizenship to persons who previously had no such right. The only true complaint was therefore that they were then subsequently excluded from certain public offices. It was the court’s view that a State should have power to use fair means to ensure the loyalty of its citizens. In the context of today’s international affairs and security, this is both reasonable and prudent. Owing allegiance to two states with the power to be appointed to sensitive positions in both countries could create situations of conflict when citizen’s duties in one state could amount to an illegality or treason in another.

Once an amendment is incorporated it becomes for all purposes a part of the Constitution. Some members of the Supreme Court therefore, expressed an initial ‘difficulty with the notion that one part of the Constitution could be declared unconstitutional because it was inconsistent with another part of the Constitution.’ The Court was however, more open to arguments challenging the constitutionality of an amendment law which contained provisions considered inconsistent with existing provisions of the Constitution. The plaintiff was allowed to file a Supplementary Statement of Case to address this legal issue. It was the

29 Asare (n 21 above) 34.
plaintiff's position that a provision that is lawfully inserted into the Constitution cannot be said to be unconstitutional. He contended however, that if the amendment were procured by unlawful means or even one that was at odds with the 'basic structure of the Constitution' then it ought to be declared a nullity.

This is not however, a situation of one part of the Constitution being unconstitutional for being at variance with another part of it. It is respectfully submitted that Dr Date-Bah JSC framed the issue properly when he asked the following question: 'Was the constitutional amendment valid at the point of enactment?' 'If it was invalid at the point of enactment, then it never became a part of the Constitution' in the first place and did not therefore present the legal quagmire of declaring one part of the Constitution, unconstitutional.

Whilst this seems like a practical way to dispense with this matter, it presents a peculiar jurisprudential problem of its own i.e. the question of the real status of constitutional amendments effected through Acts of Parliament. In the exercise of the Supreme Courts' constitutional interpretative function under article 2(1), it has always maintained a position of considering the Constitution as a 'living document' and to consider all of its provisions 'as a whole'. There has not been a situation in the past where the constitutionality of any part of the original constitution as promulgated in 1992 has been challenged for the reason that it conflicts with another part of the constitution. Where there have been difficulties in reconciling seeming differences between two original provisions, the Supreme Court has strived to consider the purpose of the framers in formulating the said provisions and then to reconcile them by considering their utility in context on a case by case basis.

However, it is clear that an Act of Parliament passed to amend the Constitution can still be declared unconstitutional at a later point for being inconsistent with another original provision. This somewhat creates a separate status for new provisions that are introduced into the Constitution via the amendment process. They become second rate because they remain valid additions to the Constitution for as long as they are not declared unconstitutional. The original provisions do not suffer a similar uncertainty. For the amended parts of the Constitution, no real effort needs to be made to always forcefully reconcile the new provisions with the structure of the older text. It is inconceivable that an original action can be legitimately brought before the Supreme Court to strike down any part of the original text for itself being unconstitutional. What will the yardstick be for measuring the constitutionality of an original provision beyond the

30 Dr Date-Bah JSC in Asare (n 21 above) 34.
fact of its incorporation in the original text? Importantly, if an original provision is declared unconstitutional, can Parliament be compelled to re-enact a new provision which is in consonance with the ‘basic structure’ of the Constitution as it exists? To avoid the obviously absurd outcome of declaring an original provision unconstitutional with nothing to fall back on, the Supreme Court should altogether decline an invitation to consider such request in whatever form it is disguised.

5 The scheme for the parliamentary approval of international business and economic transactions

A better understanding for the constitutional scheme for the parliamentary approval of international business and economic transactions was occasioned by a case brought before the Supreme Court by Mr Amidu against the Attorney-General and Isofoton SA, Madrid, Spain and a third defendant.32

In August, 2005, the Republic of Ghana and the Kingdom of Spain concluded a loan agreement for an amount of Sixty-Five million Euros (€65,000,000) – the main Financial Protocol for the implementation of various projects in Ghana. This loan agreement was approved by Parliament. Subsequently, Isofoton SA, a foreign registered company entered into contracts with two Ghanaian ministries to undertake solar electrification projects. These contracts were ostensibly breached by the government and a suit was brought on behalf of Isofoton SA by the third defendant who had been granted a power of attorney to do so. In the course of hearing Isofoton’s suit against the Attorney-General, proposals for negotiation were offered and a consent judgment based on those negotiations was sanctioned by the High Court. A judgment debt of over a million dollars was agreed and part of it was thereafter paid. Mr Amidu brought an action before the Supreme Court essentially to reverse the judgment debt payments. The case however, provided a further elaboration on the meaning of an ‘international business or economic transaction’ under article 181(5) of the Constitution.

Mr Amidu asserted that the agreements between Isofoton, a foreign registered company and the Ministries of Food and Agriculture and Energy were international business or economic transactions within the meaning of article 181(5) of the Constitution33 and never became operative since those agreements were not approved by Parliament. The plaintiff’s claim was mainly that the approval of the main Financial Protocol by Parliament did not negate a need for the two specific agreements to be

33 Original provisions contained in the 1969 and 1979 Constitutions, art 144 and expanded under the Constitution.
subject to particular parliamentary approval. In contrast, the second defendant asserted that the two contracts were ‘merely project implementation contracts’ which did not require separate Parliamentary approval.\footnote{Relying on the authority of Attorney-General v Faroe Atlantic Co Ltd [2005-2006] SCCLR 271 and Attorney-General v Balkan Energy Ghana Ltd & 2 Others, Writ No J6/1/2012, 16 May 2012.} It was the second defendant’s case ‘that only major and autonomous international agreements which financially commit the State are required are to be submitted to Parliament for approval’ and that an expansive interpretation will ‘impose a needlessly burdensome duty of sheer formality on Parliament that is clearly bound to increase and extend Parliamentary business to gargantuan proportions.’\footnote{Amidu (n 33 above) 11.}

The above represents the conflicting interpretations that formed the basis of the legal question of interest in this case. The Supreme Court speaking through Dr Date-Bah refused to agree with the second defendant’s ‘needless burdensome duty’ argument. It was the Court’s view that the considerations that Parliament needs to take in respect of the Financial Protocol or ‘mother’ loan agreement will often be different from those that are relevant in examining the implementation projects. Parliament must therefore also approve the so-called ‘project implementation contracts’ under the ‘mother’ loan or financial protocol. This provides a new analysis that expands the existing judicial recognition of the fundamental importance of the Parliamentary scrutiny of international business or economic transactions confirmed in \textit{Attorney General v Faroe Atlantic Co Ltd} \footnote{Faroe Atlantic (n 35 above).} and \textit{Attorney-General v Balkan Energy & 2 Others.}\footnote{Balkan Energy (n 35 above).} The constitutional significance of this interpretation of article 181(5) is that it places a greater responsibility on Parliament. This is not at odds with the expectations connected to modern governance. Issues surrounding Ghana’s growing public debt and the so-called judgement debt scandals of recent years make it even more relevant that beyond the stand-alone international transactions, specific implementation contracts should be separately approved by Parliament.

A note of caution must however be sounded. It is no secret that any legislature, in the complexities of modern governance, often has more to consider than it can properly do. Where the ‘implementation contracts’ are so closely representative of the main foundation international business or economic transaction, it is recommended that the courts should be prepared to hold that the ‘implementation contracts’ will not require additional or separate Parliamentary approval. It is suggested that a proper yardstick for determining if a contract is ‘merely an implementation contract’ is whether its purpose is essentially coterminous with that of the
'mother' transaction. There must be in a very real sense, a unity of purposes between the main and the ancillary agreements. A helpful indicator should often, but not always, be whether or not the sums approved under the 'mother' transaction is close to the total sum under the implementation contract. Government agencies may also save scarce Parliamentary time by incorporating 'implementation' details into the broader 'mother' agreements. The one value, if there is nothing else, to be taken away from Mr Amidu's action is that it reinforces the oft-neglected constitutional role of Parliament to safeguard the nation's purse.

6 Conclusion

Dr Date-Bah JSC in concluding the lead opinion in the Isofoton case had this to say: '... it is sweet and honourable to die for one's country. Whilst we are not suggesting that the plaintiff has died in his efforts to safeguard the public purse, there is no doubt that he has sacrificed to achieve that objective. It is only right that we should once again put on record ... this Court's appreciation of his public-spiritedness which has led to the examination of the important legal and policy issues that have been settled in this case. He has served the public interest well by securing the clarification of the law embodied in this judgment as well as the orders made'.

This is a validation of this chapter’s assertions that individual actions have been fundamental to the protection of human rights, the rule of law and good governance. Similar praise goes to Professor Stephen Asare and many other well-meaning Ghanaians who will continue to contribute to strengthening our young democracy. If our constitutional order will secure for us and posterity, the blessings of liberty, equality of opportunity and prosperity and the protection of fundamental human rights and freedoms, it is evident that this will be a shared responsibility of all Ghanaian citizens.

38 Amidu (n 33 above) 19-20.
39 Of noteworthy mention is the public interest action by Nana Adjei Ampofo in Adjei-Ampofo (No1) v Accra Metropolitan Assembly & Another (No 1) [2007-2008] SCGLR611 on the enforcement of the human dignity provisions of the Constitution for which the Supreme Court through Sophia Akuffo JSC (as she then was) felt compelled to congratulate the plaintiff.
Abstract

Election may be contentious and disputes may arise at any stage of an electoral process. The African Charter on Democracy, Elections and Governance requires State Parties to establish and strengthen national mechanisms that redress election-related disputes in a timely manner. The practice of electoral justice under Ghana’s Fourth Republic has made room for aggrieved persons in the electoral process to seek redress as opposed to resorting to violence as a means to resolving conflicts. Electoral justice under Ghana’s Fourth Republic has mainly been by court adjudication. The courts have exercised activism in electoral judicial review to bring finality to pre-electoral disputes to safeguard the electoral process. They have thus ‘facilitated ... the continual process’ of succession in Ghana’s democratisation process. However, the incessant spate of court litigation in the ninth hour of elections particularly as occurred during the 2016 elections created tensions and uneasiness, stalling the electoral process. This chapter argues that electoral justice could be strengthened if Alternate Electoral Dispute Resolution (AEDR) structures are also utilised to complement the courts adjudication especially that of pre-election disputes. It advances that the effectiveness of AEDR to a large extent depends on the political actors and also the Electoral Commission’s stance towards an amicable peaceful resolution of electoral disputes.

1 Introduction

One of the basic features of democratic governance is holding periodic elections, which subject the principal apparatus of government to change and reconstitution. Election may be contentious, and disputes may arise at any stage of an electoral process. The effective resolution of disputes is critical to the integrity of elections, hence electoral justice. An electoral justice system requires that each action, procedure and decision related to the electoral process should be in line with the law, it should protect or restore electoral rights when breached and should give aggrieved persons a hearing and redress. 1 Since the inception of the Fourth Republic, Ghana
has conducted seven general elections to choose presidents and members of parliament to form government. The seventh election was conducted on 7 December 2016 to form the current government. Under the Fourth Republic, the six elected governments with the exception of President John Atta Mills have completed their terms of office for the first time as a Republic due to incessant coup d’après. President Atta Mills died in office and President John Dramani Mahama the then Vice President completed the unexpired term of Mills’ government.2

Ghana has also succeeded in changing government through the ballot box in 2001 since its independence in 1957 when the New Patriotic Party (NPP) emerged as the winner in the 2000 general elections and took the political baton from the National Democratic Congress (NDC). The wheels of power turned again when the NDC won the 2008 elections and took the political baton from the NPP in January 2009.5 Ghana has passed Huntington’s two-turnover test for democratic consolidation. Huntington maintained that democracy is consolidated when the government that has won power in the initial election loses power to another party in the second election and the winner of the second election also loses power in subsequent elections.4 Ghana’s democratic credentials notwithstanding, elections under Ghana’s Fourth Republic are characterised with incessant pre and post-election disputes.5 The 2016 general elections was particularly characterised with pre-election disputes. There have also been sharp contentions on the state of the voters register among the major actors of the electoral process. There has been a spate of litigation at the eleventh hour of the 2016 elections.6 The electoral laws under Ghana’s Fourth Republic anticipate disputes at different stages of the electoral process and make room for their resolution.7

3 LA Nkansah (n.2 above).
7 See for example arts 48 and 64, of the 1992 Constitution; The Public Elections (Registration of Voters) Regulations, 2016, C.I. 91 and Public Elections Regulations, 2016 (CI 94).
Chapter 3

Against this background the paper examines Ghana’s electoral justice architecture, which consists of courts adjudication, and other Alternate Electoral Dispute Resolution Mechanisms (AEDR), for pre and post-election disputes. The paper maintains that electoral justice under Ghana’s Fourth Republic has mainly been by court adjudication, where the courts have exercised activism in electoral judicial review to bring finality to the issues being contested. The judiciary has thus ‘facilitated in the continual process’ of succession in Ghana’s democratisation process. However, the incessant spate of court litigation in the eleventh hour of elections created tensions and uneasiness, stalling the electoral process at some points.

The AEDR or out of court electoral justice structures are hardly utilised. The paper also examines the viability of utilising alternate dispute resolution or out-of-court resolution for election disputes. It maintains that the sharp contentions which characterise elections in Ghana could be minimised if both formal and informal AEDR mechanisms in place are utilised or, where non-existent, are put in place to complement courts adjudication. However, the AEDR as an effective electoral justice tool to a large extent will depend on the EC’s posture towards an amicable peaceful resolution of electoral disputes. This is because the EC in recent times has become a major disputant in electoral disputes and has taken a stance in preference of litigation as a means of resolving electoral disputes.

Concepts of electoral dispute resolution have emerged, one of which is electoral justice, which forms the conceptual basis of this study. The International Institute for Democracy and Electoral Assistance (IDEA)\(^8\) conceived electoral justice as the means, measures, and mechanisms that have been wedged into an electoral system to prevent the occurrence of irregularities and for that matter electoral disputes or to mitigate them or to resolve them and punish perpetrators when they do occur.

An electoral justice system involves the means and mechanisms for ensuring that, (1) ‘each action, procedure and decision related to the electoral process is in line with the law (the constitution, statute law, international instruments, and all other provisions)’, (2) ‘and also for protecting or restoring the enjoyment of electoral rights,’ and (3) ‘giving people who believe their electoral rights have been violated the ability to make a complaint, get a hearing and receive adjudication’\(^9\) The ACE Encyclopaedia referred to electoral dispute resolution system as ‘a system of appeals through which every electoral action or procedure can be legally challenged ... Such a system aims at ensuring regular and completely legal elections. Legal elections depend on legal corrections of any mistake or unlawful electoral action.’\(^{10}\)

---

8 International IDEA (n 1 above).
9 International IDEA (2010a) (n 1 above).
10 ACE Electoral Knowledge Network (n 1 above) 113.
An electoral justice system aims to ‘prevent and identify irregularities in elections and to provide the means and mechanisms to correct those irregularities and to punish the perpetrator’.\textsuperscript{11} It is at a cornerstone of democracy, in that it safeguards both ‘the fundamental role in the continual process of democratisation and catalyses the transition from the use of violence as a means for resolving political conflicts to the use of lawful means to arrive at a fair solution’.\textsuperscript{12} Even though an electoral justice system is informed and shaped by the history, politics, law and cultures of a given country, electoral justice system needs to conform or adhere to certain principles in order to be efficient and effective. These principles are integrity, participation, lawfulness (rule of law), impartiality, professionalism, independence, transparency, timeliness, non-violence and acceptance.\textsuperscript{13} The electoral justice principles are meant to lead to procedurally-correct elections and compliance with citizen’s electoral rights. Electoral justice mechanisms may be categorised into formal systems whose decisions are corrective of irregularities, or those that are punitive and whose decisions lead to the punishment of offenders, or also alternate dispute resolution mechanisms that parties to an electoral dispute may resort to for amicable settlement of disputes.\textsuperscript{14}

In Ghana, the law provides for electoral rights; the right to vote and be voted for. The laws on the electoral process make room for dispute resolution of issues that emanate from the process; pre and post-election disputes. This spans from issues relating to the demarcation of constituencies, challenging the registration processes as well as challenging the election results. There are also provisions on the qualification of candidates, voter registration, the voter register, appointment of registration officers, voting and election results among others.\textsuperscript{15} These issues may be dealt with through court adjudication and some through administrative or out of court settlement. The following sections look at the spate of pre-election disputes and electoral litigation through the lens of 2016 electoral process.

2 The spate of litigation and the judiciary in the 2016 electoral process

2.1 Electoral judicial review

The role of the judiciary in election adjudication is hinged on its traditional role of ensuring adherence to the constitutional limits placed on them

\begin{itemize}
\item \textsuperscript{11} International IDEA (2010b)5.
\item \textsuperscript{12} IDEA (2010a) (n 1 above).
\item \textsuperscript{13} IDEA (2010 a (n 1 above).
\item \textsuperscript{14} IDEA (2010a) (n 1 above).
\item \textsuperscript{15} The Judicial Service of Ghana (n 4 above).
\end{itemize}
through judicial review. Judicial review ensures conformity with constitutional limits placed on public officials and adherence to all constitutional provisions. Also, it allows for the compliance of validity, legality, rationality and reasonableness of governmental actions. In the contexts of electoral adjudication, the judiciary exercises 'electoral judicial review'.

First, the judiciary resolves disputes over electoral rules to ensure that the rules create 'a level playing field – they are rule-evaluating'. They make sure that the rules governing the conduct of elections are in consonance with the higher norms and principles of the constitution. There were cases on the procedural appropriateness of the Public Elections Regulations, 2016 (CI 94); such as whether political parties should be given copies of collated sheets or not. In – Kwesi Nyame – Tease Eshun v Electoral Commission, the Supreme Court ordered the EC to give copies of the collation sheets of the presidential election results to the agents of political parties. Under CI 94, the EC was not obliged to make the collation sheets available to political parties; neither did it make room for the signing of the collation sheet by returning officers and agents of political parties. The Supreme Court ordered the EC to confer with the lawyers for the plaintiff to amend CI 94 to make collation sheets available to political parties. The amended CI 94 was then adopted by the Court for the conduct of the 2016 general elections.

Also in Tufour and Others v The Electoral Commission and Attorney-General the Supreme Court affirmed Regulation 23 of CI 94 as being consistent with Article 49 of the Constitution. The main issue in that case was whether special voting should be counted at the close of the special polls or be sealed and counted alongside the general polls as provided for by Regulation 23(11) of CI 94. The plaintiff maintained that the said Regulation 23(11) is inconsistent with Article 49 of the 1992 Constitution which provides that for any public polls, counting of the polls shall be done immediately after the polls. The Supreme Court held that the close of polls means the close of polls in a given constituency. In this case, counting of the special polls at the close of the general polls in a given constituency and for that matter Regulation 23 of CI 94 is consistent with article 49 of the 1992 Constitution. To uphold the plaintiff’s application would mean a fractional declaration result not reasonably contemplated by the Constitution. That ‘the fractional declaration of results is not an effective

---

18 The Supreme Court ordered the EC to give copies of the collation forms to political parties.
19 Suit No J1/24/2016.
20 Writ no JI/1/2017, 14 November 2016.
way of conducting elections, which to be effective must be *inter alia*, as smooth, easy to track, coherent, complete and expeditious as possible.\(^{21}\)

The second function of the courts is for ‘... securing fair plays-they are rule-enforcing’.\(^{22}\) In this sense, they act as referees of the election competition and decide complaints of violence to redress irregularities and even cancel where they deem it necessary to do so. On 10 October, 2016, barely two months to the 2016 presidential general elections, the Electoral Commission disqualified 13 presidential aspirants on the basis of errors and irregularities on their nomination forms, some of which amounted to criminality, as the attached Table 1 depicts.\(^{23}\) This led to a spate of litigation as some of the disqualified candidates rushed to court to challenge their disqualification.\(^{24}\)

One of such cases is *The Republic v Charlotte Osei and The Electoral Commission Ex Parte Dr Papa Kwesi Nduom*.\(^{25}\) In this case Dr Nduom, the flag bearer of the Progressive People’s Party (PPP) had been disqualified by the EC because he did not have the required number of subscribers on his nomination form mandated by Regulation 7(2)(b) of CI 94. Nduom challenged his disqualification in the Accra High Court arguing among other things that he was not given the opportunity to be heard by the EC before the decision was taken to disqualify him. He maintained that he should have been given the opportunity to correct the errors on his form. He argued that the EC had set the nominations period to close on 30 September 2016 and also set 29 and 30 September 2016 as the dates to receive nomination forms from aspirants. He submitted his nomination form on 30 September 2016. EC did not leave room to make it possible for him to be heard before his disqualification was announced. He asked for the reliefs of *certiorari* to quash the EC’s decision and prohibition to prevent the EC from conducting balloting for positions in the presidential elections. Nduom further requested the Court to give directives to the EC to allow him to correct the error and resubmit his form, and the EC to take the form upon submission. Regulation 9 of CI 94 mandates the EC to point out errors on nomination forms to applications and also gives them the opportunity to correct them during the nomination period.

The EC on its part conceded that it had set 29 and 30 September 2016 as the dates to receive nominations. Thus, if Dr Nduom wanted to take advantage to have errors on his forms pointed out to him for correction

---

22 Gloppen (n 16 above) 3.
23 See Statement by the EC on reasons for disqualifying candidates for 2016 elections.
24 See *The Republic v High Court, (Commercial Division (Exparte Electoral Commission — Papa Kwesi Nduom – Interested Party, 2016 Civil Motion No J5/7/2017; The Republic v Mrs Charlotte Osei and Another (Exparte Dr Papa Kwesi Nduom, Suit No GT/ 1401/2016; Nana Konadu Agyemang Rawlings *v* Electoral Commission; Hassan Ayarega *v* Electoral Commission; People’s National Convention (PNC) *v* the Electoral Commission.*
before the end of nominations he should have submitted his forms earlier and ignored the dates set by the EC in order to take advantage of that before the close of nominations in accordance with the rules. Since Nduom ‘purported to have relied on the notice issued regarding the two specific dates of 29th and 30th September, 2016 for the submission of his forms, then the Applicant [Nduom] voluntarily assumed the risk associated with the late submission of forms’. The High Court ruled in favour of Nduom, by quashing his disqualification and also ordered the EC to allow him to correct the form and accept same from him. The Court further held that the timelines for nominations are within the discretion of the EC. The EC however had not set the nomination period required by Regulation 9(2) of CI 94; hence the EC could not complain that the nomination period had elapsed.

The EC appealed to the Supreme Court against the decision of the High Court in The Republic v High Court (Commercial Division); Ex parte Electoral Commission27 where the Supreme Court ordered the EC to (1) extend the nomination period from 7 November 2016 to the close of 8 November 2016; (2) give Nduom the opportunity to correct the errors and accept his nomination upon submission; (3) invite the other disqualified applicants who had submitted their nomination by 30 September 2016 and give them a hearing within the extended period and (4) give candidates the opportunity to make correction in accordance with Regulation 9(2) of C.I. 94. The Supreme Court further gave an order to stay all proceedings pending in the High Court.

Also in Abu Ramadan and Another v Electoral Commission and Attorney-General,28 the Supreme Court ordered the Electoral Commission on 5 July 2016 to ‘immediately’ delete from the register names of the 56,739 persons it said registered with National Health Insurance cards. The court also ordered the Commission to delete persons whose names were not submitted to the Supreme Court but who registered with the NHIS cards. The Court had already ruled in 2014 that it was illegal for the EC to register persons with NHIS cards.

In Progressive People’s Party v Electoral Commission the plaintiff challenged the presidential filing fee of GHS 50,000.00 and parliamentary filing fee of GHS 10,000.00 fixed by the EC for being ‘arbitrary, capricious and unreasonable’. The plaintiff also sought for an interlocutory injunction to restrain the EC from accepting filing forms as scheduled. The suit was dismissed by the High Court.

26 As above, 3 & 4.
28 Writ No J1/14/2016.
2.2 Analysis and implications of the spate of litigation

Litigation allowed the court to review and clarify the rules for the actors and the citizenry on specific aspects of the electoral process. Thus *Ex parte Papa Kwesi Nduom*²⁹ made it clear that the disqualified aspirants were entitled to an opportunity to correct errors on their forms and be heard before being disqualified. *Tufour and Others v The Electoral Commission and Attorney-General*³⁰ for example clarified that special voting should be counted with the general polls together in respective constituencies at the close of the polls in those constituencies. The spate of litigation which engulfed the 2016 pre-election process created a lot of tension, uneasiness and uncertainty about the elections and stalled some of the electoral processes. This is because the issues involved had to be resolved before the EC could continue with some scheduled activities. For example, the plan of the EC to have balloting by aspirants for their positions on the balloting paper could not be done as planned, as the EC had to wait for the outcome of the cases on the disqualification in order to know the number of presidential aspirants. Likewise, it could not receive filling fees as planned until the case challenging the fees fixed by the EC had been dealt with by the court.

It is observed that the cases under consideration were all brought against the EC rather than the usual disputes that occur among the political parties and allied organisations concerning the elections. Some of the cases could have been resolved out of court only if the EC was amenable to hear the complainant out or to comply with its own regulations put in place for the elections. This seems to suggest that the EC had become part of the contest instead of being an impartial referee in the process. The litigation allowed for a review of the work of the EC and held the EC accountable. Thus, in *Ex parte Electoral Commission*³¹ the Supreme Court clarified Regulations 6 and 7 of CI 94 that presidential aspirants were entitled to the opportunity to correct errors on their form. Had the Electoral Commission adhered to the Court’s order in 2014 against registering voters with NHIS cards, the subsequent case of *Abu Ramadan* in 2016 would not have arisen. They revealed lapses in the EC’s work and also made it accountable. Since the EC’s work has come under the scrutiny of the court it is likely to improve upon its performance in the future and possible law reform.

Likewise, litigation revealed the defects/gaps and ambiguity of an electoral law and addressed it. *Kwesi Nyame – Tease Eshun v Electoral Commission*³² is the case in point. It ended in judicial law-making as the Supreme Court got the CI 94 amended to make it mandatory for the EC to make collation sheet (pink sheet) available to political parties. This is very

²⁹ *Ex Parte Dr Papa Kwesi Nduom* (n 24 above).
³⁰ Writ No JI/1/2017.
³¹ *Ex parte Electoral Commission* (n 27 above).
³² (n 19 above).
crucial to the integrity of the process in ensuring transparency because the pink sheet has the collated results of given constituencies. It is fair that the key actors in the process are furnished with copies of the laws. Electoral laws should inherently conform to the substantive and procedural requirements of rule of law in order to produce fairness, clarity and certainty in the electoral process.\(^{33}\)

Litigation served as a safety valve for the contestants to cool off their frustration, anger and loss because of the possibility of succeeding in court. In the cases considered above which dealt with pre-electoral disputes, there were sharp contentions by those involved and their supporters. The situation did not escalate because of the safety valve provided by the court. The judiciary came under fierce criticism and attack for its decisions leading to contempt and a clash between the Judiciary and the Executive. In In Re The owner of the Station – Montie FM, Salifu Maase, Alistair Nelson and Godwin Ako Gunn & Others,\(^{34}\) the 2nd, 3rd, and 4th contemnors, were radio host and panellist respectively. The 3rd and 4th contemnors with the support of the 2nd contemnor hurled insults at the Supreme Court judges with threats of death should the decision in Abu Ramadan’s case go against the EC. The Supreme Court was hearing the case on validity of voters registered with NHIS. The contemnors also incited the public to reject the Supreme Court’s decision on the validity of the voters register. The Supreme Court charged them with contempt for, (a) scandalising the court, (b) defying the authority of the court, and (c) bringing the authority of the court into disrepute. On 18 July 2016, the court found them guilty on their own plea and sentenced them to a term of four months imprisonment and a fine of GHS10 000 each. The directors were also fined GHS30000. The President John Mahama invoked Article 72 of the Constitution to grant the contemnors pardon when top members of the ruling NDC party submitted a petition to the President.

The response to the spate of litigations was judicial activism. The judiciary played an active role in getting the issues resolved in an expeditious manner to enhance electoral integrity. For example, in Ex parte Electoral Commission\(^{35}\) the Supreme Court was proactive in making a general order to cover all the other disqualified candidates so that they did not have to individually pursue their case. By this, the judiciary saved costs and time. The decision also allowed all electoral processes, such as the balloting for the positions of the presidential candidates on the ballot paper to continue. The judiciary has also showed its preparedness to handle election cases expeditiously by setting up 17 specialised courts across Ghana for such purposes.

---

34 Civil Motion No J8/108/2016.
35 Ex parte Electoral Commission (n 26 above).
Although the judicial activism within this period is laudable, we risk inundating the courts with litigations in future elections. This calls for consideration of alternative electoral dispute resolutions.

3 Viability of alternate electoral dispute resolution

The idea of alternative dispute resolution is well established in legal systems as a means of addressing myriad forms of disputes. These could be formal and informal. In the contexts of election disputes, alternate electoral dispute resolution mechanisms (AEDR) include compromise, mediation, conciliation, negotiation, dialoguing, etc. However, debates surround the suitability of out-of-court resolution of election disputes.

Proponents of AEDR maintained that AEDR could enhance electoral justice because it provides for; ‘easier, faster and more cost effective access to justice; a less threatening environment for the disputants; the possibility of win-win outcomes for all disputants; and the opportunity to circumvent the problems of discredited EDR mechanisms’.36 Green, a proponent of AEDR, adds that it has an advantage of legitimising democracy when it provides timely resolution as opposed to protracted adjudication and that disputants are able to work out their interest fairly and quickly.37

Critics of AEDR on the other hand argued that election is a zero-sum game – you win or you lose. A dispute resolution should therefore follow suit to determine who wins or who loses. There is no middle way and there is no room to share or split the pie so any AEDR mechanism that is intended to slice the pie is unsuitable. It has been asserted, ‘Democracy demands a winner and a loser. There is nothing in election Beyond Winning’.38 AEDR may not lead to the closure of the dispute and the dispute may eventually end up in court as it is the case with ADR practice, whereas litigation when determined brings a closure to an electoral dispute. Lawyers in particular prefer litigation in court to mediation in post-election contexts since that is a familiar constituent that had been tried and tested. There is also the issue of neutrality of mediators or arbitrators.

In the contexts of EDR systems in Africa, both formal and informal AEDR exist but these deal mainly with pre-election disputes. Thus several African countries have out-of-court resolution platform for handling pre-election disputes both at the formal and informal levels. For example South Africa and Lesotho have institutionalised interparty liaison

36 International IDEA (n 1 above) 188.
38 As above, 325.
committees that serve as a platform to engage the EMB and political parties for consultation and cooperation on election matters.39

However, post-election disputes are mostly mandated by the law to be resolved through the court. In view of the potential of resolving some election disputes through AEDR, they should be nurtured to complement adjudication. This is possible because within the African contexts settling dispute out of court is the norm rather than the rule. African indigenous dispute resolution mechanisms have informed Western theories and practice of ADR and are being reshaped and reconstituted at the macro and micro levels both in Africa and elsewhere. It would therefore not be out of place to consider AEDR and have it institutionalised within the electoral justice architecture of respective countries. In fact ad hoc international mechanisms were instituted outside the constitutional framework of Kenya and Zimbabwe to address post-election disputes. In the case of Kenya the African Union through Kofi Annan, the former UN Secretary-General, mediated the Kenyan post-election violence of 2007 that led to the establishment of a coalition government.40 Similarly, the Southern African Development Committee (SADC) appointed Thabo Mbeki, former South African President, to mediate in the post-election violence that followed the 2008 election in Zimbabwe. This culminated into power-sharing agreement and the formation of the government of national unity.41

It should be pointed out that not every electoral dispute would be amenable for AEDR. The International Foundation for Election Systems (IFES) examined the possibility of ADR being utilised to address election disputes. IFES identified certain election disputes cases that are not amenable for ADR. These included (1) cases relating to fundamental rights, (2) cases in which binding precedents are desirable, and (3) cases in which the court system can provide a timely, credible decision.42 Each electoral system should disaggregate electoral disputes in terms of those amenable for AEDR and those that are not. This is in no way suggesting that AEDR should replace adjudication by the court, because when AEDR does not work the matter may end up in Court; but that parties in a post-election dispute should be allowed to resort to AEDR when they deem it fit. In this way, the burden on the court could be lessened and parties may succeed in working out a position that caters for their interest and that of their supporters. With AEDR, election may not always be a zero-sum game in all cases.

39 International IDEA, 2010 a. (n 1 above).
40 As above.
42 Green (n 37 above).
4 Out of court electoral justice

The constitutional instruments put in place for the respective election periods for the conduct of elections under the Fourth Republic have wedged in them out of court settlement of disputes. One particular area where out of court settlement mechanism has been provided for can be found in all Constitutional Instruments under the Fourth Republic regulating registration of voters. The Public Elections (Registration of Voters) Regulations, 2016, CI91 will be examined as a framework of analysis. It will be helpful to acquaint the reader with the Voters Register under the Fourth Republic before examining the mechanisms for resolving complaints on registration and the register.

4.1 The voters register under the Fourth Republic

The EC by article 45 of the Constitution has the responsibility to prepare the voters register by registering qualified Ghanaians. The EC inherited the voters register used for the 1992 elections from the National Commission for Democracy. This register had been prepared in 1987 and had been used for the 1992 referendum on the adoption of the Constitution. The register was over bloated because the mode of registration was by house to house and market-to-market so there was multiple and double entries. The EC tried to clean the register but in the words of Annoh, ‘it was not totally reliable and verifiable’. The NPP rejected the results of the presidential election which was conducted on 3 November 1992 with the register and boycotted the parliamentary election scheduled for December 1992. The NPP came out with a book: ‘The stolen verdict: Ghana, November 1992 presidential election: report of the New Patriotic Party’ (1993) to register its protest.

The EC discarded the register and prepared a new one in 1995 which was reviewed in June 1996 and used for the 1996 presidential election. Coloured photo ID cards were partially introduced. Thus photo ID cards were issued to voters in the ten urban centres and ten rural communities within the urban capital. This was to forestall impersonation. In the villages, it was felt that people could be identified easily than the urban capitals. This was an improvement on the previous situation where thumb printed ID card was used. Some voters crossed over to register in other

43 Graphic Online on 18 October 2016 reported a breakdown of the 17 specialised courts as follows: Greater Accra, six; Ashanti and Western, two each, while Eastern, Central, Upper West, Upper East, Northern, Volta and Brong Ahafo have been assigned a judge each. http://www.graphic.com.gh/news/general-news/cj-designates-17-courts-to-handle-electoral-disputes.html.


45 As above.
electoral areas because they wanted to have photo ID cards. It was also considered discriminatory by some political parties.46

In 2000 there was a review of the voters register and voters were issued with black and white photo ID cards throughout the country. Political parties insisted on having photos included in the register to check impersonation. This register was used for 2004 and 2008 although incremental registration was undertaken in the process. It was visual registration whereby the face and fingerprint were taken to allow officers to identify a voter facially. The registration system where one officer undertook the registration was reviewed to make room for ‘four officials; registration official, shader, laminator and a cameraman in a photo taking area’.47 For the 2012 general election, a biometric registration was introduced to allow for biometric identification, a system that allows for biometric identification i.e. fingerprints, ears, full face to be verified as opposed to visual identification used in the past. The idea of biometric registration was to eliminate the incidence of impersonation.

For the 2016 elections all sides to the political divide held the view that the register is over bloated. This is a fact the EC acknowledged. In the words of Dr Afari Djan, former EC Chairman:

If our population is indeed 22million, then perhaps 13 million people on our register would be statistically unacceptable by the world standards. If that is the case, then it may mean that there is something wrong with our register … All of us as Ghanaians, if we think that the figure is not realistic, have a collective responsibility to try to clean the register.48

There have been sharp contentions on how to address the problem of the register. The New Patriotic Party called for a new voters register, whereas the National Democratic Congress and its allies called for the retention of the existing register which can be cleaned. The saga on the voters register for the 2016 elections resulted in a demonstration orchestrated by political pressure groups comprising the Alliance for Accountable Governance, Let My Vote Count Alliance and the New Patriotic Party which led to police clash and brutality.49 The EC’s response to the saga was to set up a Five-Man Voters’ Register Panel for two days public hearings which took place.

46 As above.
47 As above, 8
on 29 and 30 October, 2015. The Panel reported that the voters’ register should be validated and not be discarded.

4.2 Voters registration and alternate dispute resolution

Under CI 91 the EC appoints registration supervisors and officers to carry out specific tasks during the election. A political party or an interested person could request for the names of persons the EC proposes to appoint as officers and supervisors not later than two weeks before they are appointed. A ‘registered political party or a person qualified to be a registered voter’ that has an objection to the appointment of any of the proposed person could submit it in writing to the EC. The EC should communicate its decision to the parties involved within seven days of the receipt of the objection.

First, it should be observed that by this arrangement, the interested party will have to request for the list of those who are about to be appointed to serve in the capacity as registration officers and the request should be made fourteen days before the appointment of the officers. This poses a problem - how are people to know that within fourteen days the EC will appoint the officers in order for them to request for the list and thereafter raise any necessary objection? This smacks of Kwaku Ananse’s law. The better option to tackle this problem is to adopt the provision under the repealed Registration of Voter’s Public Elections (Registration Regulations 1995, CI 12) that provided for the publication of the list in each registration centre and allowed interested parties to object to the appointed officers within seven days of publication.

Secondly, Regulation 8 of CI 91 is not exhaustive and leaves a lot of open ends. For example, it does not establish a procedure for resolving complaints. It only provides that the EC makes a decision on the objection and communicates it to the objector. Is it then the end of that process? There is the need for an exhaustive process to be put in place to make it viable for disputes to be thoroughly resolved. This is an administrative dispute resolution platform which can be effective if the concerns raised are addressed.

A person who is qualified to be a registered voter may submit a complaint on any matter concerning the registration process to a registration office or supervisor, or assistant. The officer shall resolve it or

50 Members of the panel were; His Lordship Professor VCRAC Crabbe, Most Reverend Professor Emmanuel Asante, Dr Grace Bediako, Dr Nii Narku Quaynor, and Maulvi Bin Salih
51 See Crabbe (n 48 above).
52 Regulation 8 of CI 91.
53 Kwaku Ananse in the Akan folklore of Ghana is a cunning character who personifies cheating and unfairness.
refer it to a higher officer for ‘further action’.\textsuperscript{54} What happens next? This is an administrative process through which the EC can have the opportunity to resolve myriads of complaints on the registration process and minimise misunderstanding and disagreements in the process. This can be effective if concerns raised are solved. The application for registration by a person seeking to register as voter can be challenged by a registration officer, a supervisor of registration, a registered political party, or a person qualified to be a registered voter. The ground for challenge is on the basis of qualification of the applicant.\textsuperscript{55} The challenge shall be determined by the District Registration Review Committee (DRRC). The DRRC is composed of:

(a) one representative of each registered political party active in the district;
(b) the district officer of the Commission, who is the secretary to the Committee;
(c) The police commander in the district or the representative of the police commander;
(d) The District Director of Education or the representative of the District Director;
(e) One representative of the traditional authorities in the district.\textsuperscript{56}

The Committee appoints its own chairperson.\textsuperscript{57} The Committee in conducting its proceedings ‘shall be fair to the parties to the dispute’.\textsuperscript{58} The DRRC examines the ground for the challenge within seven days of the receipt of the challenge and decides within seven days as to whether or not the applicant qualifies to be registered or not and communicate its decision to the EC within forty-eight hours of the determination of the matter.\textsuperscript{59} Unless the decision of the DRRC is appealed against, the EC shall give effect to it after fourteen days of the DRRC’s communication of its findings to the parties to the dispute.\textsuperscript{60} A party to the dispute who is not satisfied with the decision of the DRRC may appeal against the findings to the Chief Registration Review Officer (CRRO) who is the High Court Judge. The CRRO determines the procedure for hearing of the appeals. The CRRO in writing communicates his decision on the appeal to the EC and the parties and the EC shall comply with the decision.\textsuperscript{61}

The DRRC is a body with exhaustive mandate and procedures in place to comprehensively address the issues on the qualification and disqualification of applicants who seek to be registered. The process starts

\textsuperscript{54} Regulation 17 of CI 91.
\textsuperscript{55} Regulation 18 of CI 91.
\textsuperscript{56} Regulation 19(1) & (2) of CI 91.
\textsuperscript{57} Regulation 19(3) of CI 91.
\textsuperscript{58} Regulation 19(5) of CI 91.
\textsuperscript{59} Regulation 20(1)(c) of CI 91.
\textsuperscript{60} Regulation 20(4) of CI 91.
\textsuperscript{61} Regulation 21 of CI 91.
from the registration centres and this creates a viable system to flush out unqualified voters from the register or to prevent unqualified people from registering to begin with. This process must be nurtured as it is effective in ensuring that the voters register is cleaned at the micro level rather than waiting to have it infested before attempting cleaning at the macro level through the EC or the Supreme Court.

The inclusion of a political party on the basis of being active in a particular district is difficult to determine. The meaning of ‘active’ has not been clearly provided for and so may make the composition of the DRRC in this regard problematic.

Again, in a situation where there are so many political parties being active the numbers will swell up. In any case it is not prudent to have political parties represented on the DRRC because this may generate conflict among the political parties. Determining who should be the Chairperson can also create a stalemate. This should have been determined by the Regulation.

After the initial/provisional voters register is exhibited, by exhibition officers’ claims (to have names included) on the register or objections (to have names omitted) from the register could be made by filling of relevant form. The claims and objections are pasted at the registration centre. Copies are transmitted to the district officer of the EC and to the Regional officer of the EC and as well as to the District Registration Review Officer.62 The claims and objections raised on the register are settled by the District Registration Review Officer (DRRO), who is the District Court Magistrate. In the absence of a District Court, the Judge of the High Court appointed as Chief Registration Review Officer (CRRO) of the region will appoint a lawyer of not less than three years standing, preferably residing in the district, to serve as the DRRO.63

The DRRO adopts the procedure for dealing with claims and objections and shall hear the persons or their representatives. The Commission shall give effect to the decision of the DRRO unless it receives a notification of appeal on the decision.64 A person aggrieved by the decision of the DRRO shall appeal to the High Court.65 As soon as practicable, the High Court shall inform the EC and the parties to the dispute of its decision.66 The EC shall comply with the decision of the High Court. The EC certifies the register after the objections on it are settled and publishes it. It replaces every existing register.67

62 Regulation 25 of CI 91.
63 Regulation 26 of CI 91.
64 Regulation 26(5) of CI 91.
65 Regulation 26(6) of CI 91.
66 Regulation 26(7) of CI 91.
67 Regulation 26(7) of CI 91.
4.3 Other AEDR mechanisms for consideration

The Alternate Dispute Resolution Act of Ghana, 2010 (Act 798) provides for various mechanisms for out of court dispute resolution. Among these are arbitration, mediation and other out of court dispute resolution mechanisms. The other out of court mechanisms may include mechanisms which may not be expressly provided for under the ADR Act of Ghana yet are consistent with general ADR practice. One of such mechanisms is the Early Neutral Evaluation mechanism which may be suitable for use within the context of electoral dispute. Under the Early Neutral Evaluation, an independent person or body of persons critically evaluates the respective cases of the parties in accordance with the applicable law devoid of the procedural bureaucracies that inundate the normal court adjudication. The parties are therefore aware of how meritorious their cases are and advice themselves accordingly without going through the excessive delay and expense that is associated with the court adjudication in electoral disputes.

For instance, the case of Republic v Charlotte Osei and The Electoral Commission Ex Parte Dr Papa Kwesi Nduom went all the way to the Supreme Court only to be decided on the basis of, inter alia, a breach of the rules of natural justice, particularly the principle of audi alteram partem. The electoral process was nonetheless halted during the pendency of the suits as the EC awaited the decision of the Court before it could proceed any further with the electoral process. And this contributed to the added tension and doubts as to whether or not the Electoral Commission could even conduct the elections on 7 December 2016 as scheduled. An Early Neutral Evaluation of this matter of disqualification would have averted all the tension and spared all parties the expense of time and resources while at the same time ensuring an amicable settlement of the dispute. It is therefore being recommended that just as the Chief Justice has appointed 17 specialised courts for the adjudication of electoral disputes, the Chief Justice could appoint judges to operate as Early Neutral Evaluators to speedily and efficiently resolve all electoral disputes that may arise.

Other bodies or organisations can facilitate in resolving out of court settlement of pre-election disputes except those which have specifically been mandated to be settled through petition in court. These include Inter-Party Advisory Committee (IPAC) and the National Peace Council. IPAC can be a forum to resolve pre-election disputes. IPAC was formed in March 1993 by the EC following the criticisms of the 1992 elections. Currently, it is instituted at the regional, district and constituency levels.

---

68 For further reading on early neutral evaluation see MVB Partidge *Alternative dispute resolution: An essential competency for lawyers* (2009).
69 Civil Suit No GT/1401/2016 delivered by Justice Eric Kyei Baffour in the High Court, Accra on the 28th of October 2016
70 *Ex parte Electoral Commission* (n 27 above).
The IPAC brings representatives of political parties to a forum with the EC on election matters. The IPAC forum has resulted in critical electoral reforms in Ghana and addressed issues of contention at various stages of the electoral cycle.\textsuperscript{71}

The National Peace Council can also be an avenue for resolving electoral disputes by virtue of their mandate as a body to ‘harmonise and co-ordinate conflict prevention, management, resolution and build sustainable peace through networking and co-ordination.’\textsuperscript{72} The National Peace Council has already been involved in past elections to try and forge peace among political parties. Given its institutional representation, it can be a formidable body provided they remain objective to the cause of peace.

5 The Electoral Commission and dispute resolution

The effectiveness of any Electoral Management Body (EMB) like the EC in carrying out any of their functions including dispute management depends by and large on the independence of the body. This is irrespective of their composition and mode of appointment. The factors that go to make them independent are identified by Open Society Initiative for West Africa (OSIWA) as ‘strength of character of members, ... security of tenure, ... the stability of administrative personnel, ... The security of funding, ...’ as well as ‘... the degree to which the EMB has effective control over all the task that must be completed in the electoral process’.\textsuperscript{73}

In addition, the mandate of the EMB to relate with the political parties and the quality of collaboration between EMB and other institutions and stakeholders in the electoral process is critical.

OSIWA established in their study that one of the common challenges of the EMBs in West Africa is ‘the low level of involvement of EMBs in the management of electoral dispute’.\textsuperscript{74} In Ghana, however the EC has been specifically given dispute resolution functions; administrative or otherwise as already discussed. Ordinarily dispute management including prevention and resolution is an integral part of any electoral system. The effective management of electoral dispute by the EC and its posture towards AEDR is critical to the success of any AEDR platform; administrative or otherwise.

The EC should make it possible to resolve issues and disagreement with stakeholders like political parties through negotiations, dialoguing,

\begin{itemize}
\item Annoh (n 40 above).
\item Sec 3(a) of the National Peace Council Act, 2011 (ACT 818).
\item IM Fall & M Hounkpe ‘Overview: The contribution of electoral management bodies to credible elections in West Africa’ in IM Fall, M Hounkpe, A Jinadu & P Kambele (eds) Election management bodies in Africa: A comparative study of the contribution of electoral commissions to the strengthening of democracy (2011) 1 5-8.
\item As above 8.
\end{itemize}
compromise, and mediations instead of the practice of asking them to go to court. The spate of litigation which engulfed the 2016 election would have been minimised if the EC had had an amenable disposition to resolving differences. A case in point is *Ex parte Nduom*, where Nduom had already sought an audience with the EC Chair for the opportunity to correct the errors but the EC Chair still resisted and did not cooperate so Nduom had no option than to go to court. The inability of the EC to carry out its inherent function of resolving disputes is a pointer to a weakness of the system. Admittedly, some issues must necessarily be adjudicated in court or by a formal adjudicatory body but as the UN (Economic Commission for Africa) has pointed out:

The more efficient and effective an electoral system is, the fewer the electoral disputes requiring adjudication by the courts or other bodies. Still few elections are so perfect that they do not generate disputes. They can occur between parliamentary candidates, competing parties and rival presidential candidates.75

In the case of Ghana, the EC has been the major disputant in almost all the cases as opposed to the actual contestants. This trend should not continue as it will be weakening the electoral system. The EC should organise the elections in such a way as to minimise disputes for public confidence.

6 Conclusion

There have been sharp contentions in the electoral process under Ghana’s Fourth Republic. The practice of electoral justice under Ghana’s Fourth Republic has made room for aggrieved persons in the electoral process to seek redress as opposed to resorting to violence as a means to resolving conflicts. Ghana’s electoral justice consists of court’s adjudication, and other alternate electoral dispute resolution mechanisms (AEDR). Electoral justice has mainly been by court adjudication. There has been a spate of litigation at the eleventh hour especially during the 2016 elections. The judiciary handled the cases expeditiously and exercised activism in the handling of the issues to safeguard the 2016 elections. Although courts adjudication to a large extent brought finality to the issues being contested, they created tensions and uneasiness, stalling the electoral process at some points. Electoral justice may be strengthened if AEDR structures in place are also utilised to complement the courts. This could mitigate the incidence of litigation and tensions associated with it due to the adversarial nature of litigation. To strengthen electoral justice in future the following should be taken into consideration; the laws for the conduct of elections should comply with the dictates of the substantive and procedural requirement of the rule of law so as to produce fairness, certainty, and

clarity in the electoral process. Parliament should scrutinise proposed constitutional instruments for the conduct of elections placed before it for approval. Citizens should also provide review of such proposed instruments for Parliament in the form of memoranda. Also, voter education should be intensified to create an understanding of the electoral laws to avoid incessant rush to court. The EC should respect and comply with its own rules it has formulated for the conduct of elections and avoid the incidence of impunity. The EC should be seen as an impartial referee of the game of election rather than descending into the arena of the contest to ensure public confidence in the electoral process.
Abstract

The 1992 Constitution of Ghana guarantees all persons in Ghana the right to freely express themselves on any issue including political issues. This right is however subject to such qualifications and laws as are necessary in a free and democratic society and are consistent with the Constitution. Social media and other online platforms are some of the means by which the people of Ghana exercise their right to freedom of expression and speech. Against this background, this chapter discusses whether any person, entity or organisation has the right to block or ban the use of social media in an election period or any other time. The chapter argues that having been granted the right to freedom of expression which includes the right to participate in political activities, everybody in Ghana can express an opinion on any issue either through the traditional or electronic media. The chapter further proposes that working within the law, any abuse of the use of social media can be prevented or remedied. Besides, there are technological measures that the security agencies in Ghana can deploy to avert any online abuses. Therefore, banning or preventing access to social media for whatever reason without recourse to legal processes is unconstitutional. The chapter finally proffers recommendations on how online activities can be legally sanitised.

1 Introduction

The 1992 Constitution of Ghana guarantees all persons in Ghana the right to freedom of speech and expression subject to such qualification and laws as are necessary in a free and democratic society and are consistent with the Constitution. This right is exercised, among others, through the traditional media as well as electronic media with its attendant social media platforms. The twenty-first century has been touted as ‘information age’\(^1\) and with the help of information communication technology devices, internet usage is on the rise across the globe. Ghana is alive and active in this information communication technology era. For instance, in

---

\(^1\) Information age is the ‘era in which the retrieval, management, and transmission of information, especially by using computer technology, is a principal (commercial) activity’ [http://www.oxforddictionaries.com/definition/english/information-age](http://www.oxforddictionaries.com/definition/english/information-age) (accessed 30 May 2016).
November 2015, 2,900,000 people out of a population 26,327,649 had subscribed to Facebook accounts. The use of the internet and social media has revolutionised communication in recent times. The internet and other electronic communication devices are said to have substantially changed communication practices around the world, as a result of which a lot of people do not rely on the traditional mass media intermediaries for communication. This shows that electronic platforms are becoming preferable means of communication in this technological era.

Twitter, an online social networking site which was invented in 2006, enables its users to send and read text-based messages of up to two hundred and eighty characters, known as ‘tweets’. As of 2012, it reportedly had over five hundred million active users. Twitter users include presidents, prime ministers and the Pope. Also, political campaigns, commercial advertisements, and friendly chats take place through the use of social media. Social media, like other technological developments, is a recent invention. It post-dates major international, regional and national laws and legal instruments that guarantee freedom of speech and expression both online and offline. Examples of these laws and legal instruments are discussed in the subsequent paragraphs.

1.1 Universality of the right to freedom of speech and expression

The Constitution of the United States of America, since the 18th century, barred the Congress from making laws ‘... abridging the freedom of speech, or of the press ...’ In 1948 when the United Nations General Assembly adopted the Universal Declaration of Human Rights (UDHR) of which Ghana is a signatory, it guaranteed the right to freedom of expression through any media and regardless of frontiers. In relation to article 19 of the UDHR, the Human Rights Council of the United Nations passed a non-binding resolution in June 2016 that aims at the promotion,
protection and enjoyment of human rights on the Internet. This resolution was passed because, inter alia, more people around the world use the internet as an essential means of communication and that there exists human right violations and abuses on the internet. The Council, by the same resolution, admonished member states to take steps to prevent the disruption of access to the internet as well as other human rights violations over the internet. Consequently, member states were required to ensure that ‘... the same rights that people have offline must also be protected online, in particular freedom of expression, ... regardless of frontiers and through any media of one’s choice ...’ and in terms of article 19 of the UDHR.

The European Convention on Human Rights (ECHR) also guarantees freedom of speech and expression regardless of frontier. It prohibits interference of the right to freedom of speech by public authorities. The Foreign Affairs Council of the European Union has also adopted the European Union Human Rights Guidelines on Freedom of Expression Online and Offline. The Council recognised that the use of the internet and other digital technologies has broadened the means by which individuals exercise their right to freedom of speech. Consequently, European Union member states are required to respect and protect freedom of speech online as well as offline. The Council, in the Guidelines, condemned any restriction on freedom of expression and censorship, both online and offline, in violation of international human rights law.

The above instruments establish that the jurisprudence of international and regional human rights organisations is that online freedom of speech and expression should not be different from similar rights that are enjoyed offline. Within the African context, the African Charter on Human and Peoples’ Rights (ACHPR) provides that ‘[e]very individual shall have the right to receive information’ and that ‘[e]very individual shall have the

---

8 Human Rights Council ‘The promotion, protection and enjoyment of human rights on the Internet’, A/HRC/32/L.20, 27 June 2016 https://www.article19.org/data/files/Internet_Statement_Adopted.pdf (accessed 15 November 2016). The Council noted: ‘that the exercise of human rights, in particular the right to freedom of expression, on the Internet is an issue of increasing interest and importance as the rapid pace of technological development enables individuals all over the world to use new information and communication technologies’; and upon becoming concerned about ‘all human rights violations and abuses committed against persons for exercising their human rights and fundamental freedoms on the Internet, and by the impunity for these violations and abuses.’

9 As above.

10 As above.

11 European Convention on Human Rights 1953, art 10(1).


13 Human Rights Council (n 8 above).

14 African Charter on Human and Peoples’ Rights (ACHPR) 2005 (also known as the Banjul Charter), art 9(1).
right to express and disseminate his opinions within the law.'15 Expanding the scope of the right to freedom of expression and access to information in the ACHPR to online activities, the African Commission on Human and Peoples' Rights (ACHPR)16 in 2002 adopted the African Declaration on Internet Rights and Freedoms. This Declaration became imperative because of the intermittent denial of access to and use of the internet which was considered a violation of the right to freedom of speech.17 The Commission stated that a ban or denial of access to online platforms is a breach of the responsibility of States to respect, protect and fulfil human rights of all people.18 In line with its international obligations under the UNHDR and the ACHPR, Ghana has enacted provisions on freedom of expression in its Constitution. These are discussed in the subsequent paragraphs.

1.2 Freedom of speech and expression in Ghana

The 1992 Constitution of Ghana guarantees that all persons shall have the right to freedom of speech and expression.19 This right includes freedom of the press and other media.20 These rights are only ‘subject to such qualifications and laws as are necessary in a democratic society.'21 Additionally, every person in Ghana has the right to form or join any political party and also to participate in political activities.22 Consequently, everybody in Ghana is free to comment and express an opinion on political or apolitical issue through any media platform. A restriction on these rights will be valid if it is done in accordance with the relevant laws of the democratic state of Ghana.

2 Abuse of the right to freedom of speech and expression online

Online freedom of expression though very fundamental in the lives of individuals, it has its own excesses. Although ‘freedom of speech should

15 ACHPR, art 9(2).
18 As above.
21 Constitution of Ghana 1992, art 21(1)(a) and (f).
22 African Declaration on Internet Rights and Freedoms (n 18 above), art 21(3).
never mean freedom to abuse,' some individuals abuse their right to freedom of speech online as though they were within a law-free zone in Cyberspace. Social media played a significant part in the Arab Spring that led to the spread of democratic revolutions in the Arab World. Social media messaging was also used to organise the riots and disturbances that took place in London and other cities in August 2011. The then Home Secretary of Britain told the Home Affairs Committee of the United Kingdom House of Commons that investigated the riots that social media networking sites were used to 'coordinate criminality and stay one step ahead of the police.'

The nature and speed of growth of the internet and social media have not made the law keep up with regulation. Consequently, some countries adopt measures that prevent their citizens from accessing certain online contents at certain times. Some of these measures include preventing access to specific websites, Internet Protocol (IP) addresses, domain name extensions, the taking down of websites from the web server or using filtering technologies to exclude pages containing some keywords or other specific content from appearing on internet pages. These measures are adopted if the authorities in those countries are of the view that the online contents are not in the best interest of their political agenda. Some African countries that have gained notoriety in either banning or interfering with social media or the internet generally include Uganda, Congo Brazzaville and Chad.

2.1 Expression of intent to block or banning social media in Ghana on Election Day

In the run up to the 2016 presidential and parliamentary elections in Ghana, the then Inspector General (IGP) of the Ghana Police Service Mr John Kudalor in an interview with a broadcasting house in Ghana on May 26, 2016 said:

At one stage I was even saying that if it becomes critical, on the eve and on the election day we shall block all social media as other countries have done.

24 McGoldrick (n 5 above) 130.
25 McGoldrick (n 5 above) 130.
27 As above.
28 McGoldrick (n 5 above)
29 McGoldrick (n 5 above) 1.
… If people are churning out the type of information which are quite false then why not? The security of this nation is paramount.31

As the former IGP said, other countries, including some African countries ban or block access to the internet or social media on Election Day. For instance, Uganda shut down social media on its election day on 19 February 2016. On that day, voters woke up to realise that access to their social media platforms had been cut; President Yoweri Museveni defended the ban as a security aimed at averting the spread of lies that can incite violence and illegal declaration of election results.32

Fortunately in Ghana, there was no ban on access to the internet or social media prior to, during and after the 2016 parliamentary and presidential elections because social media ban is alien to Ghana. As beacon of democracy and rule of law in Africa, fundamental human rights and freedoms form the bedrock of Ghana. In the face of these rights and freedoms this chapter submits that without recourse to the relevant laws of Ghana no person, authority or organisation has the power to ban access to and use of social media in Ghana for any purpose.

2.2 Whether or not any person, authority or the Inspector General of Police has the power to block or ban access to and use of social media

Freedom of expression and speech, just like any other right, are not inherently absolute. As indicated earlier, the constitutionally guaranteed rights and freedoms in Ghana are subject to the prevailing laws of Ghana. This means that access to and use of social media can be banned or blocked only when the person or authority that intends to implement the ban establishes that the ban is in accordance with the laws of Ghana. It must also be established that the ban is in line with the fundamental principles of Ghana as a democratic state and its international obligations.

This chapter submits further that within the context of the prevailing laws of Ghana, online freedom of speech and expression can be blocked or banned only by an order of a court of competent jurisdiction. No person or authority can *suo motu* do that. This is because the Constitution of Ghana requires the three arms of government, all other governmental agencies and all persons to respect the fundamental human rights and freedoms enshrined in the Constitution. 33 These rights and freedoms are enforceable

---

33 1992 Constitution of Ghana (n 19 above), art 12(1).
by the Supreme Court or the High Court. Consequently, it is one of these courts that have the power to take away the rights and freedoms from the people of Ghana. If any person or entity attempts to exercise this exclusive judicial power, he or she will be undermining the Constitution because judicial power of Ghana is vested in the Judiciary.

It is instructive to point out that the 1992 Constitution, the Police Service Act, the Police Service Regulations and the Electronic Communications Act do not authorise an IGP, the Ghana Police Service or any other person or entity to block or ban access to and use of social media. If there were any such provision in any of these enactments, apart from the Constitution, that provision would be unconstitutional. Guided by the above principles, well-meaning Ghanaians, civil society groups and other international organisations that believe in the principles of rule of law and fundamental human rights openly opposed the IGP’s expression of intent to block or ban social media. Some of their views are highlighted below.

2.3 Aversion for the blocking or banning of social media

Dr Ibn Chambers, the Special Representative of the United Nations Secretary General for West Africa and the Sahel, acknowledged that social media is for both good and bad. He however warned that a total ban would obviously not be something that the United Nations would encourage as that will amount to restricting the democratic space and it will restrict freedom of expression. Dr Chambers’ view resonate the international obligation on Ghana under the UDHR. To this end, the UN cannot sanction a manifest breach of the right to freedom of speech and expression.

Kofi Annan, a former Secretary General of the United Nations advised that banning or blocking access to social media is an exercise in futility because irrespective of the nature of the ban, people are able to circumvent the ban and access the internet and social media through other means. As subsequent discussions in this paper will show, technology has made it possible for internet users to circumvent online blockades. Therefore,

34 Constitution of Ghana (as above), art 130(1).
35 Constitution of Ghana (as above), art 140(1).
38 Police Service Regulation of Ghana, Constitutional Instrument 76 of 2012.
40 D Adogla-Bessa ‘UN against social media ban on election day’ http://citifmonline.com/2016/06/18/un-against-social-media-ban-on-election-day-ibn-chambas/#sthash.PHKXZcce.dpuf (accessed 16 August 2016).
Safeguarding online freedom of speech in Ghana in an election year

blocking online access is not always wholly effective; it does not worth the effort.

Likimani, a media and democracy activist, called on the government of Ghana and the police to be circumspect in their desire to streamline what happens on social media. Likimani recounted the democratic credentials of Ghana and further advised that the ban on social media will be an affront to the democratic principles of Ghana beyond trampling on the fundamental rights and freedoms of the people of Ghana. Likimani admonished Ghana not to subscribe to heavy-handed repressive tactics otherwise it will not be a democratic country. What Ghana needs is education of the citizens. She added that heavy-handed repressive tactics are not a democratic best practice and it does not suit the [democratic] path of [Ghana]. The opinions of Likimani are in tandem with the substratum of this paper. As a democratic country, Ghana has to adopt democratic best practices worthy of emulation internationally; online blockade is not a best practice.

The Police, other security agencies and Ghanaians owe a civic and legal duty to ensure peace and stability in the country. This duty is irrespective of whether or not there are elections. However, blocking or banning access to the internet or social media without recourse to laid down legal procedures is a short-sighted and overly simplified way of addressing a matrix of techno-legal, politico-legal and socio-legal challenges. This is because websites are stored on servers that have internet protocol addresses. The government can compel internet service providers and telecommunication companies to block access to a specific Internet Protocol address. Smartphone apps, like WhatsApp, will try to connect to its own server and they will not be able to if the internet service provider blocks connections. So it is fairly easy to pinpoint a specific site or app and block access. This rather easy step can have awful constitutional and legal consequences.

43 Ansah (as above).
44 A set of interconnected webpages, usually including a homepage, generally located on the same server, and prepared and maintained as a collection of information by a person, group, or organisation http://www.thefreedictionary.com/website (accessed 17 August 2016).
45 An Internet Protocol address (IP address) means ‘the number identifying the point of connection of a computer or other device to the internet.’ Sec 144 of the Electronic Transactions Act (n 25 above).
46 BBC News (n 30 above)
3 Consequences of banning online freedom of speech

Banning or blocking access to the internet or social media will amount to a breach of the inviolable right to freedom of speech that has been constitutionally guaranteed. The 1992 Constitution of Ghana embodies the soul, spirit and life of Ghana and it vests insurmountable power and authority in the people of Ghana. Article 1 of the Constitution provides: ‘The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised in the manner and within the limits laid down in this Constitution.’\(^{47}\) This is the bedrock of constitutionalism, democracy and rule of law in Ghana. No person in Ghana wields an isolated power that is superior, or even equal, to the collective sovereign will of the people of Ghana.

It follows therefore that no person or authority has a right to torpedo the fundamental right of the people of Ghana to express themselves either online or offline. The reality of today’s world is that social media is a way by which people communicate.\(^{48}\) Therefore, any attempt to block or ban access to and use of social media will be an unconstitutional denial of the right to freedom of speech and expression. The Constitutional Court of Turkey declared the blocking of social media as ‘illegal, arbitrary and a serious restriction on the right to obtain information.’\(^{49}\) If Ghana believes in constitutional supremacy, constitutionalism, rule of law and the protection of fundamental human rights, then it stands to reason that the Supreme Court of Ghana will not endorse an arbitrary ban on access to and use of the internet or social media.

The second consequence of online ban is that it will destroy the central pillars of the 1992 Constitution. The people of Ghana adopted, enacted and gave the 1992 Constitution to themselves based on some inviolable principles that are outlined in the preamble to the 1992 Constitution. Among others, the people of Ghana adopted the Constitution based on:

The Principle that all powers of Government spring from the Sovereign Will of the People; The Principle of Universal Adult Suffrage; Rule of Law; The protection and preservation of Fundamental Human Rights and Freedoms, Unity and Stability for our Nation.\(^{50}\)

\(^{49}\) C Yeginsu ‘Turkey lifts twitter ban after court calls it illegal’ https://www.nytimes.com/2014/04/04/world/middleeast/turkey-lifts-ban-on-twitter.html?_r=0 (accessed 9 June 2017).
\(^{50}\) Preamble to the 1992 Constitution of Ghana.
Judging from these foundational principles and the constitutional provisions discussed above, it will be an obvious unconstitutionality if without recourse to law, online freedom of speech and expression is blocked.

Thirdly, banning access to social media or the internet will be tantamount to trampling upon press freedom. The 1992 Constitution of Ghana guarantees media freedom and independence and also forbids media censorship. The internet and social media have become indispensable tools of journalism in the twenty-first century. Commenting on the IGP’s threat to ban social media, Dave Agbanu, the General Secretary of the Ghana Journalists Association pointed out that because social media has become a tool for journalism, shutting it down could lead to blackout on news and information flow. According to the Amnesty International, shutting down communication networks is a clear and unjustified attack on media freedom. As has been discussed earlier, media freedom and independence are pivotal within the democratic structure of Ghana. Therefore, the merely likelihood of causing media blackout and also violating media freedom should be enough disincentives to banning access to online communication.

Fourthly, a ban on social media will cast an indelible slur on the hard-won reputation of Ghana as the bastion of democracy, good governance and rule of law. There is no available information that a country in West Africa has sanctioned social media blackout on an election day. Ghana cannot afford to ignite such an unconstitutional flame. Ghana should emulate countries like Nigeria, United States of America, Great Britain and Canada. in its democratic development. Ghana should not follow the infamous examples of governments that block ‘social media during elections – most recently in Congo-Brazzaville, Chad and Uganda.’ Rather, Ghana should develop stronger institutions and leaders who can stand up to modern technological challenges and solve them in accordance with law.

Additionally, online blackout will lead to contractual breaches and economic losses. This is because; series of commercial activities take place over the internet. For instance, internet service providers and other online service providers pay huge fees before they are licensed to operate in Ghana. They pay these fees with the hope that barring any force majeure people will use their services at a fee and they will make profit. Also, businesses pay money to online content providers in order to advertise

---

51 Constitution of Ghana (n 19 above), art 162(1).
52 As above, art 162(2).
53 Adogla-Bessa (n 33 above).
55 BBC News (n 30 above).
their goods and services on social media and other online platforms. This implies that banning social media even for a minute will cause financial loss to many online businesses. So if there is a ban on the use of, and access to, social media and the ban is declared as unconstitutional, Ghana will most likely be saddled with huge judgment debts. This makes the whole idea of social media ban unprofitable.

Finally, a ban on online communications may result in clashes and fight backs. Despite the good intentions of the IGP about banning social media, it is instructive to point out that the reactions of people whose basic rights to freedom of speech and communication have been taken away have not always been pleasant. For instance, when Congo-Brazzaville banned social media in October 2015, it led to civil unrests that resulted in the death of five people and several others got injured.\(^56\) It will therefore serve no useful purpose if law enforcement agencies undertake actions that have the potential of jeopardising the security and safety of the country.

In order to avert the ills associated with the banning of social media that the following recommendations on how to sanitise online activities in Ghana are being made.

## 4 Social media and elections in a free and democratic Ghana: The way forward

The internet and social media are recent creations but they have come to stay. To make the internet and social media more useful in Ghana, the government should educate the citizenry on how to be responsible online. Information and communication technology is a course that is taught at the first, second and third cycle schools in Ghana. Through teaching and learning, the dangers of abusive use of the internet and social media can be curtailed. Modules on ethical use of the computer and internet should be incorporated into this course. This will equip the youth with the relevant knowledge on the need to be responsible both online and offline. Security agencies can use social media to their advantage because most governmental institutions have social media accounts. These platforms can be used to enlighten people on positive uses of the internet. Taking advantage of online platform, the Electoral Commission of Ghana for instance, developed a mobile app that gave real-time elections results during the 2016 presidential and parliamentary elections.\(^57\) Likewise, security agencies can develop apps and other software to give information on the proper and efficient use of the internet.


Social media has been demonstrated to be an important interface between the police and the public and a significant crime-fighting tool. It affords the police and other security agencies a lower cost and reasonably convenient means of disseminating information to the public during crisis or major events and presents a great opportunity for the police to engage the public in investigations and build relationships with the community. For instance, The Home Affairs Committee of the House of Commons of Great Britain (hereinafter referred to as the Committee) that investigated the August 2011 rioting in London and its environs commended the police officers who used social media during the disturbances to spread messages to inform and reassure the public. The Committee also recommended that police personnel should make use of social media in their day-to-day activities. The Committee further observed that social media platforms cost and time effective ways for the police to connect to the public so the police forces should actively encourage people to sign up to their Twitter and Facebook accounts to receive the latest information.

With regard to banning social media, the Committee said that it would have been ‘net negative to turn it [social media] off’ and that ‘it would be actively unhelpful to switch off social media during times of widespread and serious disorder and we strongly recommend that this does not happen.’ If in the midst of rioting social media was an effective crime-fighting platform, it stands to reason that it will even be more relevant in times of peace. The government of Ghana should therefore invest resources to equip the police and other security services with modern state-of-the-art technological equipment so that they can effectively monitor what happens on social media. Banning online activities with the view to stopping abuses cannot be flawless because people can use other means to disseminate information whether electronically or otherwise. For instance, people may use virtual private networks (VPNs) to hide the location of their computer’s connection to the internet. They can send text messages to over 100 people simultaneously or place conference call to about five or more people at the same time. If people intend to spread falsehood, they will no matter what. If technological means are rather used to monitor posts on social media and those posts are found to be in breach of the law that can be used as evidence for prosecution. This is because electronic evidence, under the Electronic Transactions Act (ETA) of Ghana, is admissible in a court of law.

59 France 24 (n 56 above).
60 House of Commons Home Affairs Committee (n 24 above) 27.
61 As above, 30.
62 VPN gives extremely secure connections between private networks linked through the Internet. It allows remote computers to act as though they were on the same secure, local network. See https://kb.netgear.com/1128/What-is-VPN-Virtual-Private-Networking (accessed 11 June 2017).
63 Electronic Transactions Act (n 32 above), sec. 7.
There is currently no statistics to prove the number of people in Ghana who commit online abuses. It will be unfair for the majority of Ghanaians to be deprived of their rights to online freedom of expression, information and communication because of the few Ghanaians who commit online abuses. The police and other security agencies should use the powers at their disposal to effectively maintain law and order online. One of the powers is the take-down notification measure under the ETA. The ETA provides that any ‘person who claims that an electronically published matter is illegal or unlawful shall notify the publisher’\textsuperscript{64} to take down such publication. Upon service of the take down notice in the prescribed form under the Act, a publisher will be obliged to remove that illegal or unlawful material. Failure to do so makes the publisher liable for that publication. With active presence on the internet and social media, the police and other security agencies can readily truncate the spreading of abusive or unlawful online contents. Further, the police are authorised to act as ‘Cyber Inspectors’ under the ETA. This gives them much power to oversee online activities including what happens on social media.

The police should prosecute noncompliant users of social media and those who break the law on other online platforms. Admittedly, under the Criminal Offences Act\textsuperscript{65} of Ghana, it is an offence for a person to publish or reproduce a statement, rumour or report that is likely to cause fear and alarm to the public or to disturb the public peace when he or she knew or had reason to believe that the statement, rumour or report was false.\textsuperscript{66} Publication within the context of this provision includes posting online materials. If such publishers of falsehoods or disturbing materials are prosecuted and punished, it will deter others from committing similar offences. The police and other security services in Ghana can sanitise online activities without infringing the rights and freedoms of innocent internet users if they implemented these and other equally effective measures.

5 Conclusion

This chapter has established that freedoms of speech as well as expression and freedom of the media are some of the inalienable rights that the 1992 Constitution of Ghana guarantees. The Constitution also requires the government and all persons in Ghana to respect and protect these rights. These rights are not peculiar to the Constitution of Ghana. Many international and regional legal instruments reinforce the need for countries to guarantee these rights. This chapter has highlighted the need for Ghana to protect these rights whether it is in an election year or not. Social media is one of the oft-used means of communication in Ghana and

\textsuperscript{64} n 32 above, sec 94(1).
\textsuperscript{65} Criminal Offences Act of Ghana Act, 1960 (Act 29) as amended.
\textsuperscript{66} As above, sec 208.
other parts of the world due to its usefulness. The chapter has argued that the blocking or banning social media before, during or after elections or any other period without recourse to law will be constitutional. To curb the potential illegality of online blackout, this chapter has offered recommendations about how the police and other security services in Ghana can sanitise online activities.
CHAPTER 5

CIVIL SOCIETY AND THE RIGHT TO ACCESS TO INFORMATION IN THE GHANAIAN OIL INDUSTRY

Nora Ho Tu Nam

Abstract

Following the discovery of large fields of oil in Ghana in 1997, hopes ran high in Ghana. With a potential annual income from oil production of $1 billion a year for the next 20 years, the potential to improve the living conditions of all Ghanaians is immense. At the same time, can Ghana avoid the dreaded ‘oil curse’? The chapter argues that an improved management of the oil resources is only possible if civil society is fully involved and the right to access information is respected. The chapter thus assesses the extent to which civil society has access to information pertaining to the oil sector. While the constitution of Ghana protects the right to information, there is no enabling legislation. In turn, the laws regulating the oil sector in Ghana become all the most important, representing the legal gateway to information for civil society. An analysis of those laws reveals that the notions of transparency and accountability are known to the government of Ghana. They are clearly mentioned in the laws. However, the sections in the laws surrounding the petroleum industry do not clarify the manner in which civil society may request information. Currently civil society is limited to the information which government releases in reports. The right to information however requires the right not only to receive but also to seek information.

1 Introduction

Following the discovery of large fields of oil in Ghana in 1997, hopes ran high in Ghana.\(^1\) With a potential annual income from oil production of USD1 billion a year for the next 20 years, many hoped for increased state expenditure on development and infrastructure projects which in turn would improve the living conditions of all Ghanaians.\(^2\) George Aboagye, CEO of the Ghana Investment Promotion Centre talked of a new future with Ghana entering a different category of economy.\(^3\) Former President

\(^2\) Annan & Edu-Afful (n 1 above) 6.
John Agyekum Kufuor held that ‘[e]ven without oil, we are doing so well, already. (…) Now, with oil as a shot in the arm, we’re going to fly’.4 At the same time, discussions were rife as to the ability of Ghana to avoid the dreaded resource curse. Many resource-rich countries have been unable to use the increased wealth derived from natural resources to the benefit of their people and to uplift the living standards. In fact, in research undertaken by Sachs and Warner in the late 1990s, evidence was presented that show ‘an inverse association across countries between natural resource abundance and economic growth over the period 1970–1990’.5 This outcome has been named the resource curse.6 In this regard, African countries are often cited as examples of states rich in natural resources but where natural resource exploitation has become a curse. Poverty levels in Nigeria were higher in 2010 than in the 1970s prior to the discovery of oil.7 In Angola, diamonds played a determining role in sustaining the conflict.8 The ability of Ghana to avoid the resource curse and to use its newfound wealth to the benefit of its population is therefore on everyone’s mind.

One way put forward to avoid the resource curse is to create the conditions necessary for accountability and transparency.9 The public interest must remain of paramount importance in any decision taken with regards to the oil in Ghana. However, this requires that the laws and institutions be built upon the premises of transparency and accountability.10 As far back as the pre-20th century, theories have abounded on the good society doctrine of frankness, openness and candour in state affairs.11 The information asymmetry between the citizens-the rightful owners of the natural resources- and the government who is entrusted with the management in good faith of those resources affords government greater opportunities to divert revenue and to act for personal gain.12 The publicity of information acts as a deterrent against corruption and poor governance by the executive by allowing for citizen oversight.13 The Ghanaian public must be able to review the accounts and actions of the oil companies, to hold their leaders accountable and to sanction them if need be. This power of oversight is however dependent on access to information: without accurate, reliable and time-relevant information, no scrutiny is possible.14

---

4 Annan & Edu-Afful (n 1 above) 7.
5 The research was referred to in P Stevens & E Dietsche ‘Resource curse: An analysis of causes, experiences and possible ways forward’ (2008) 36 Energy Policy 56.
6 Stevens & Dietsche (n 5 above) 57.
9 Debrah & Graham (n 7 above) 28.
11 Ofori & Lujala (n 8 above) 1188.
12 Ofori & Lujala (n 8 above) 1189.
13 Ofori & Lujala (n 8 above) 1188-1189.
14 Cavnar (n 10 above) 2.
This chapter focuses on access to information by civil society as a mean to improve transparency and accountability in the oil sector. The focus is placed on civil society and not on the general population. While public participation through individual citizen is a must, civil society has a representative character serving as ‘the organizational manifestation of diverse societal interests’. In addition, one must recognise the fact that meaningful participation in the oil sector is sometimes dependent on knowledge of the sector. Individual citizens may possess neither the knowledge nor the will to pour over pages and pages of financial and legal documentation and will often rely on civil society to shed light on those matters and any governmental transgression.

This chapter assesses the extent to which civil society may have access to information pertaining to the oil sector. The focus is placed on the legal framework as opposed to anecdotal evidence: law imposes an obligation to comply by the government as opposed to voluntary endeavours which rely on goodwill and thereby place civil society at the mercy of government. This chapter analyses both the international and domestic framework surrounding access to information. Subsequently, the place afforded to the right to access information in the legal framework of the oil sector is focused on. The Petroleum Revenue Management Act, the Petroleum Exploration and Production Act and the Petroleum Commission Act are the three legislations focused on. The chapter concludes with recommendations.

2 Framework surrounding access to information

2.1 International framework

The right to access information is one of the manifestations of the right to freedom of thought and expression and entails the right by the public to seek and receive information. Correlatively, governments have the duty to implement the necessary legislative and procedural measures that will allow the public with effective and equal access to information. The main principles should be of maximum disclosure and of presumption of publicity. Without the right to access information, civil society is unable to carry out its monitoring and advocacy role. In the 1999 Principles on Freedom of Information Legislation endorsed by the then UN Special

15 Brinkerhoff et al quoted in Cavnar (n 10 above) 2.
16 Cavnar (n 10 above) 2.
Rapporteur on Freedom of Opinion and Expression, Mr Abid Hussain as well as Mr Santiago Canton, the then Special Rapporteur on Freedom of Expression for the Organization of American States, the need to tackle the culture of official secrecy through legislation was recognised.\textsuperscript{20} Legislation on internal security such as treason and sedition laws should not be unduly used to deny access to public records.\textsuperscript{21} Access to information restrictions are only acceptable where the public authorities are able to prove that there is a risk of substantial harm and that the alleged harm exceeds the overall public interest in gaining access to that information.\textsuperscript{22} In this regard, one often mentioned exemption relates to national security. As per the Inter-American Commission, a restriction based on national security must be genuinely and demonstrably for the protection of the state or its territorial integrity against the use or threat of force, whether a military threat or a \textit{coup d'état}. As such, the suppression of industrial unrest, the concealment of information from public bodies and the protection of government from embarrassment are not legitimate purposes under national security.\textsuperscript{23}

The African Commission places a strong emphasis on the right to access information, which is guaranteed at article 9(1) of the African Charter. Article 4(1) of the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission in October 2002, further provides that

Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

In 2013, the African Commission following a two-year consultation process adopted a Model Law on Access to Information.\textsuperscript{24} This focus on access to information might in part be explained by the level of corruption in Africa, which is helped by the high secrecy surrounding public affairs.\textsuperscript{25} High levels of corruption aggravate the problem of poverty in Africa, worsening access to basic services and amenities.\textsuperscript{26}

\textsuperscript{20} The public's right to know: principles on freedom of information legislation (1999) principle 3.
\textsuperscript{23} Inter-American Commission on Human Rights (n 17 above) para 200.
\textsuperscript{25} Art 9 of the 2003 African Union Convention on Preventing and Combating Corruption states: ‘Each State Party shall adopt such legislative and other measures to give effect to the right of access to any information that is required to assist in the fight against corruption and related offences’.
\textsuperscript{26} Africacheck (n 24 above).
In the context of natural resources, access to information has been recognised in various international instruments though mostly in the context of the protection of the environment. The 1992 Rio Declaration on Environment and Development at principle 10 states in the context of public participation that:

> each individual shall have appropriate access to information concerning the environment that is held by public authorities, (...) States shall facilitate and encourage public awareness and participation by making information widely available.

The 1998 Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters as its title indicates also strongly highlights access to information. Though a regional instrument adopted under the auspices of the United Nations Economic Commission for Europe, the Convention has the potential to become a global regime. The legally binding Convention is open in principle to all state members of the United Nations. In the African context, the revised 2003 African Convention on the Conservation of Nature and Natural Resources at article 16 demands that states adopt legislative and regulatory measures to ensure access to environmental information by the public. The Convention was ratified by Ghana in 2007, but only recently came into force following the required number of ratification.

2.2 Ghana’s domestic framework

The right to access information is guaranteed under the 1992 Constitution of Ghana at article 21(1)(f) which grants to all persons the right to ‘information, subject to such qualifications and laws as are necessary in a democratic society’. According to the panel of constitutional drafting experts charged with the drafting of the 1992 constitution:

> A political system in which the public surrenders these rights to a political party or government cannot hope to remain democratic. The public must, therefore, be guaranteed the right to know, the right to access information, as a basic human and constitutional right.

---


29 Client Earth ‘The right to access information in the forest sector’ (2013) 5.
While the right to access information has been granted constitutional recognition for more than two decades, an enabling legislation has yet to be passed. The first Right to Information (RTI) Bill was drafted in 1999, then subsequently reviewed in 2003, 2005 and 2007. In none of those occasions was the bill presented to parliament. The first real attempt to enact the bill into law through its presentation to parliament occurred on 5 February 2010.\(^\text{30}\) In the same year, a series of public consultations took place where the public as well as the Ghana Right to Information Coalition, a coalition of non-governmental organisations (NGOs) from the ten regions of the country, were able to bring forward concerns and aspirations on the RTI Bill.\(^\text{31}\) Perhaps it is no surprise that this push to action for the enactment of the RTI Bill occurred the same year as the Constitutional Review Commission (CRC) was set up. The CRC was set up to effect public consultations on the operationalisation and reforms, if any, to the Constitution.\(^\text{32}\) The Commission recommended the passing of a RTI bill with minimal claw back clauses.\(^\text{33}\) Referring to international commitments in that regard, the Commission also discussed the right of citizens to information about governmental activities and the use of public assets.\(^\text{34}\) Not only should information be disclosed, but also resource decisions must be transparent.\(^\text{35}\) Still, parliament did not vote the RTI bill into law.

In February 2015, a breakthrough occurred with the RTI bill being formally advanced by a committee for the first time. The Select Committee on Constitutional, Legal and Parliamentary Affairs advanced the bill for its consideration by full parliament.\(^\text{36}\) In June 2015, the Attorney General moved the bill for a second reading.\(^\text{37}\) By then, Ghanaian parliamentarians were faced with the examination of over 1000 amendments in a 50-page document as identified by the Select Committee.\(^\text{38}\) Perhaps is it not surprising that in July 2016, George Loh, a member of the Select Committee on Constitutional, Legal and Parliamentary Affairs stated that


\(^{32}\) Client Earth (n 29 above) 6.


\(^{34}\) Constitution Review Commission (as above) para 142.

\(^{35}\) Constitution Review Commission (as above) para 142.


only 20 per cent of the 116 clauses of the bill had been tackled. More worryingly, Mr Loh pointed out to the apprehensions of his fellow parliamentarians on passing the bill. Fearing being exposed to persecution and ridicule, parliamentarians were deliberately dragging their feet over passing this bill.\(^39\)

The passing of the RTI bill by Ghana is also an international commitment. Ghana is a signatory of the Open Government Partnership Initiative since 2011, an international platform where states and civil society work together to achieve a more transparent and accountable government. As a signatory, Ghana has committed itself to passing the Right to Information Bill by the end of 2013 under the first Action Plan 2013-2014. Under the second Action Plan, the aim is now to pass the Bill by December 2016.\(^40\) This was however not the case and the Vice President of Ghana Dr Mahamudu Bawumia has now promised that the bill will be passed in 2017.\(^41\)

Undeterred by the lack of an enabling legislation, the Human Rights Division of the High Court of Ghana pronounced itself in April 2016 on the right to access information in Ghana. The bus branding case was brought forward by seven applicants against the Minister of Transport and the Attorney-General to obtain full disclosure on the contracts regarding the branding of 116 buses, access to copies of the contract and all related documents.\(^42\) The branding of the buses had been the cause of significant controversy in Ghana due, among others, to the amount of money spent.\(^43\) Ruling in favour of the applicants, the Court held that the ‘[e]very person in Ghana has the inalienable right to information, including official information.’\(^44\) The right to information, being both a constitutional right and a human right, is independent of the enactment of a law.\(^45\) In addition, the state may not benefit from its own failure to enact the RTI legislation and use the non-existence of the law as an excuse for non-disclosure.\(^46\) Still, access through the courts cannot replace the enactment of an enabling legislation. Litigation is a long and arduous process which requires high


\(^{41}\) J Nyabor ‘We’ll pass RTI Bill this year-Bawumia’ citi 97.3fm 2 February 2017 http://citifmonline.com/2017/02/02/well-pass-rti-bill-this-year-bawumia/ (accessed 21 June 2017).

\(^{42}\) L Sagoe-Moses & 6 others v The Honourable Minister & The Attorney-General, 13 April 2016, SUIT No. HR/0027/2015 High Court of Justice (Human Rights Division 2) 2.


\(^{44}\) L Sagoe-Moses (n 42 above) 6.

\(^{45}\) As above, 6.

\(^{46}\) As above, 7.
financial investment and which may therefore not be readily available to civil society organisations and citizens. In this regard, it is to be hoped that the Right to Information Bill is soon voted into law.

3 Access to information in the oil sector

The right of the public to access information held by public bodies is increasingly recognised as an important right, necessary to allow for a more responsive, free and accountable government. Nowhere is it truer than in the domain of the management of non-renewable natural resources as evidenced by the experience of countries affected by the ‘resource curse’. As stated above, there is currently no enabling legislation on the right to information in Ghana. Since the court’s pronouncement in April 2016, it is now clear that civil society organisations can approach the court for release of information. In practice however, NGOs cannot rely on the court every time they require access to information held by public bodies. This section analyses the extent to which the laws in Ghana in the oil sector allow for civil society to access information. Civil society desirous to work on oil in Ghana operates within the following laws representing both the upstream and the downstream: the Petroleum Revenue Management Act 815 of 2011; the Petroleum Exploration and Production Act 919 of 2016 and the Petroleum Commission Act 821 of 2011.47

If one desires to talk of civil society involvement in the oil sector in Ghana, one must refer to the Civil Society Platform on Oil and Gas (CSPOG). Created at a time where few Ghanaians NGOs had the necessary expertise to work on oil and gas, the CSPOG regroups approximately 120 organisations, individuals and professional bodies working on oil and gas issues in Ghana. Members of the GSPOG will take the lead on issues in line with their expertise such as the environment, human rights and revenue tracking. The Platform also works as one where the issue so requires such as on issues of national advocacy and the development of policy briefs.48 By working together, members of the Platform hope to have a greater impact on government policies and actions.

3.1 Petroleum Revenue Management Act

The Petroleum Revenue Management Act (PRMA) is a great example of the successful involvement of Ghanaian civil society on the formulation of

47 Annan & Edu-Afful (n 1 above) 13.
laws related to the oil sector. The CSPOG submitted 15 proposals to Parliament on the Bill, of which only one was rejected.\(^49\)

Enacted to regulate the collection and management of government revenue derived from upstream and midstream petroleum operations, the PRMA aims at providing a transparent and accountable framework for revenue management.\(^50\) In the management of petroleum resources, the highest international standards of transparency and good governance must be abided to.\(^51\) Through this, the Act sets out transparency and accountability as statutory obligations in the management of resources as opposed to a voluntary choice.\(^52\) Among the relevant provisions ensuring civil society’s access to information is the publication of the records of petroleum receipts within a specified time-frame by the Minister of Finance in two state-owned dailies and in the Gazette simultaneously.\(^53\) The records shall also be made available online on the website of the Ministry of Finance.\(^54\) The Minister of Finance must also report on the reconciled petroleum receipts and the annual budget funding Amount. The report is presented to Parliament and published both in the Gazette and in two-state owned daily newspapers by latest 30 April of each year.\(^55\)

Reporting forms part of the right to information. It is not only about the public seeking information, but states must proactively disclose information.\(^56\) Reporting also puts the information in the public domain as opposed to merely the hands of the person requesting the information. Reporting requirements also extends to quarterly reports by the Bank of Ghana on the performance and activities of the Ghana Stabilisation Fund and the Ghana Heritage Fund within a specified time-frame.\(^57\) These are accompanied by two semi-annual reports on the Funds by the Bank of Ghana which shall be presented to Parliament and published in two state-owned newspapers and the website of the Bank. These reports must be published by latest 15 February and 15 August of each year.\(^58\) The Minister of Finance shall also furnish an annual report on the Petroleum Funds. Importantly, the law sets out the necessity for the report to be ‘prepared in a manner that makes it accessible to the public’ and lists the minimum information which the report must contain.\(^60\) This is in line with international best practices on disclosure by public bodies which point to

\(^{49}\) Debrah & Graham (n 7 above) 29.
\(^{50}\) Sec 1 of the PRMA.
\(^{51}\) Sec 49(1) of the PRMA.
\(^{52}\) Oforn (n 8 above) 1190.
\(^{53}\) Sec 8(1) of the PRMA.
\(^{54}\) Sec 8(2) of the PRMA.
\(^{55}\) Sec 15(3) of the PRMA.
\(^{57}\) Both Funds are financed by revenue collected from oil exploration.
\(^{58}\) Sec 28(1) of the PRMA.
\(^{59}\) Sec 28(2) of the PRMA.
\(^{60}\) Sec 48(1) of the PRMA.
mandatory minimum baselines whereby public bodies may exceed the strictures of the law, but must keep the dissemination bar at a certain minimum level.\textsuperscript{61} For example, the African Commission model law on access to information not only lists the information to be made available by the public body, but also the time-frame for doing so.\textsuperscript{62} Additionally, the obligation to prepare the report ‘in a manner that makes it accessible to the public’ touches on the important notion of effective transparency. Information must not only be available, it must be available in a format that the public may understand and respond to.\textsuperscript{63} It is however unclear why a similar requirement as to a public-friendly report was not made with regard to the reports issued by the Bank of Ghana.

Created under the PRMA, the Public Interest and Accountability Committee (PIAC) has the potential to greatly improve access to information by civil society. The PIAC’s objectives are to monitor, evaluate and assess the management and investment of oil revenue.\textsuperscript{64} It follows calls both by civil society and the general public for an independent transparency and accountability mechanism to complement and overview the work of governmental institutions as well as to ensure the optimal use of petroleum resources.\textsuperscript{65} The Committee is made up of 13 members, all of which hail from civil society organisations, think-tanks, professional and religious bodies.\textsuperscript{66} These members are formally appointed by the Minister of Finance, though the influence of the latter is nominal and mostly confined to ensuring the eligibility requirements of the Act are met. Many of the members of the CSPOG are part of the PIAC, allowing for the inclusion of the CSPOG into the administrative structures of the petroleum industry.\textsuperscript{67} Still, there is room for political intervention. Where a member from a think-tank was needed as appointee to the Committee, the Minister unilaterally contacted some more ‘governmental friendly’ think-tanks excluding the ones deemed more problematic.\textsuperscript{68}

The PIAC must publicise its work through a widely-disseminated semi-annual report and an annual report. The reports must be made available in at least two state-owned national dailies by the 15 of September and 15 of March of each year, on the website of the Committee and to the President and Parliament.\textsuperscript{69} The PIAC must also hold two

\begin{thebibliography}{99}
\bibitem{sec71} Sec 7(1) of the Model Law on Access to Information for Africa.
\bibitem{ofori2014} Ofori & Lujala (n 8 above) 1189.
\bibitem{sect52} Sect 52 of the PRMA.
\bibitem{sect54} Sec 54(1) of the PRMA.
\bibitem{oppong2016b} Oppong (n 65 above) 331-332.
\bibitem{oppong2016c} Oppong (n 65 above) 331.
\bibitem{sect56} Sec 56(a) & (b) of the PRMA.
\end{thebibliography}
public meetings per year to report on its mandate. Unfortunately, there is no statutory enforcement mechanism for these reports, making them dependent upon the goodwill of Parliament.

The PIAC has been lauded as an example of a robust, home-grown practice which will enhance citizen voices in the oil industry. Its potential force to effect governmental oversight and to influence decision-making explains why the CSPOG pushed the government towards creating the Committee. 

Until now, the Committee has been bold and assertive in highlighting lacunae in the management of oil revenues, thereby reinforcing the public perception of a body unfettered by political interference. The composition of the PIAC allows civil society a place of choice, enabling access to information which might otherwise have been difficult to obtain. However, while the PIAC is undeniably a great tool towards improved transparency, there are still some weaknesses in the operationalisation of the PIAC. Currently, the PIAC has more of a non-binding advisory position to the government and the executive as opposed to being a link among the government, petroleum fund managers and the public. The voice of the PIAC is further reduced by the fact that Parliament has not set up a Committee to consider the PIAC reports nor have all the reports been debated by Parliament. This shows a low level of involvement and interest by local politicians in the work of the PIAC. This could have been prevented if clear reporting lines had been set up in the Act. Another issue faced by the PRMA is funding, which is both discretionary and lacking. The PRMA only talks of allowances to be paid to members of the PIAC, but keeps quiet on the manner in which the PIAC is to be funded. This is in a context where the PIAC has the extensive mandate of overseeing executive activities while keeping the public informed. As early as 2011, the PIAC has highlighted its difficulties to operate in the context of an insufficient budget. As an example, in November 2014, the PIAC was evicted from its leased premises following failure to renew the lease agreement due to budgetary constraints. This occurred despite the assertions by the Minister of Finance that funds had

70 Sec 56(c) of the PRMA.
71 Oppong (n 65 above) 313.
72 Debrah & Graham (n 7 above) 31.
73 Oppong (n 65 above) 335.
75 Oppong (n 65 above) 314.
been provided. This chronic underfunding had led some political commentators to opine that it is a retaliatory measure by government against PIAC’s criticism. In fact, this is but a continuation from the position adopted by Parliament regarding the PIAC during debates leading to the adoption of the PRMA. Parliamentarians were highly suspicious of the PIAC, questioning its purpose with the Auditor-General and Parliament being already available as constitutionally appointed oversight bodies. This finally culminated in the PIAC being subservient to Parliament and in funding to the PIAC being a matter of discretion by Parliament.

The failure to publish any information provided for under the Act is an offense punishable by a fine. Where however, the Act requires information to be publicised but the disclosure of it is seen as one ‘which could in particular prejudice significantly the performance of the Ghana Petroleum Funds’, the Minister may declare it as confidential subject to Parliament’s approval. Such a declaration must be supported by a clear explanation, keeping in mind principles of transparency and the right of the public to information. Parliament and the PIAC however retain access to the information. Under international practices, states have the right to limit access to official information. However, the limitations must be set out clearly in the law, must be necessary in a democratic society and proportionate in their aims. One important aspect here is the need for the harm to be actual, serious and real. One way in which to ensure confidentiality is in fact needed is to allow for an efficient and independent judicial review of the decision. Here Parliament cannot be deemed to be replacing the court as an independent arbiter.

78 Brakopowers (n 76 above).
79 Oppong (n 65 above) 324.
80 Oppong (n 65 above) 326. The general public in Ghana seems to have a different view, in the context of state-led consultations, it was reported that about 83% of survey respondents desired a ‘separate oversight mechanism, independent of Parliament, with full access to all information regarding the use and management of oil revenues in Ghana’. Oppong (n 65 above) 319.
81 Sec 50 of the PRMA.
82 Sec 49(3) of the PRMA.
83 Sec 49(4) of the PRMA.
84 Sec 49(5) of the PRMA.
86 As above, para 54.


3.2 Petroleum Exploration and Production Act

Passed in August 2016 after lengthy consultations, the Petroleum Exploration and Production Act (PEPA) replaced the similarly named law of 1986. While sharing similar concerns regarding the exploration and production of petroleum in a sustainable, safe, efficient and population-centric manner, the 2016 Act elaborates more extensively on those matters. Quite positively, the PEPA sets out the obligation for the government as of its section four to manage the petroleum resources of Ghana ‘in accordance with the principles of good governance, including transparency and accountability’.

Prior to and after declaring an area open to exploration, the Minister must publish an evaluation report in the Gazette and at least two-state owned dailies. The Minister may also publicise the report through any other medium of public communication. The publication of the report will allow civil society to hold government accountable by granting information on the impact evaluation undertaken by the government and the mitigating measures envisaged. Prior to the decision of opening an area to exploration, an interested party may present its views to the Minister. As the Act has recently been voted, it will be interesting to see who might be deemed an interested party: will a broad and purposive approach be taken with civil society allowed to speak or will only the specific persons affected be deemed interested parties?

With regards to the bidding process under the PEMA, more can be done with regards to transparency and accountability. While the act speaks of ‘an open, transparent and competitive public tender process’, the act does not elaborate on a public access to the relevant bidding information such as the list of bidding companies, the criteria used to select the companies and the reasons behind choosing the winning bidder. Best practices encourage states to disclose information to the public to prevent corruption. The Norway (Oil for Development) Checklist advises states to publicise the awarding criteria beforehand and to publicly justify the winning bidder in line with these criteria. Without access to reliable and timely information, it becomes difficult for civil society to act as a watchdog. In a similar vein, the reasoning by the Minister behind entering

---

88 Sect 2 of the PEPA.
89 n 87 above.
90 Sec 7(4) & (8) of PEPA.
91 Sec 7(6) of the PEPA.
92 Sec 10(3) of the PEPA.
93 Chatham House ‘Guidelines for Good Governance in Emerging Oil and Gas Producers’ (2013) 31.
94 Priority issue 30 of the Norway (Oil for Development) Checklist.
into direct negotiations for a petroleum agreement without a public tender should be made public so as to allow room for judicial challenge. The act speaks of direct negotiation where it represents ‘the most efficient manner to achieve optimal exploration, development and production of petroleum resources in a defined area’ but fails to either define ‘efficiency’ or to provide the guidelines to support the efficiency argument. The potential for the government to use this loophole to its financial advantage is thus immense.

The PEMA allows the Minister responsible for Petroleum or the Petroleum Commission to request information from those conducting petroleum activities within a specified time. The principles regulating access to information would require such information to be then available to the public. A public register of petroleum agreements, licences, permits and authorisations shall also be maintained by the Commission. While rendering the register public is laudable, it does not ensure that the full content of the agreements are made public. With several of Ghana’s petroleum agreements already public, the government should confidently take the next step of making full disclosure a statutory obligation. The publication of contracts and their subsequent online availability as stated under precept 2 of the Natural Resource Charter are an important tool to combat corruption and allow for greater transparency and accountability.

3.3 Petroleum Commission Act

The Petroleum Commission Act (PCA) sets up the Petroleum Commission, whose role is to manage and regulate petroleum exploitation and the corresponding revenues in Ghana. The Petroleum Commission has an important role to play in the petroleum sector: not only is it a regulator, the Commission also provides advice to the Minister, coordinates policies and acts as a link between the industry and the government. Previously, the role of regulator was undertaken by the Ghana National Petroleum Corporation, together with the role of economic participant. The PCA abolished this state of affairs with the Ghana National Petroleum Corporation nowadays solely focused on economic and commercial interests.

95 Sec 10(9) of the PEPA.
97 Sec (1) & (2) of the PEPA.
98 Sec 56(1) & (2) of the PEPA.
99 The Africa Centre for Energy Policy (ACEP) (n 96 above).
100 Sec 3 of the PCA.
101 Sec 3 of the PCA.
102 Sec 24(2) of the PCA.
The Commission publishes a public annual report on petroleum resources and activities.\textsuperscript{103} The Schedule to the Act lists out clearly the minimum base for information to be included in the report. These include information on active or relinquished production permits as well as on health and safety.\textsuperscript{104}

## 4 Conclusion

This chapter has analysed access to information by civil society as a means to improve transparency and accountability in the oil sector in Ghana. Access to information has been lauded as a means to improve accountability, transparency and good governance in general. The financial rewards involved in oil exploitation are such that the threats of corruption and funds mismanagement cannot be dismissed. Resource curse has affected numerous countries and has left populations disappointed and bitter, and at times worse off.

While the constitution of Ghana protects the right to information, there is no enabling legislation. A recent court case has however shown that the courts may be used in that regard by civil society. However, as highlighted before, this cannot be deemed a sustainable solution. Courts cannot be used as the first port of call for accessing public information, rather the role of courts is to review any decision taken by the executive. One cannot expect an individual or an entity to go to court to retrieve every single piece of information in the hands of the government. It is in this context that the laws regulating the oil sector in Ghana become all the most important, representing the legal gateway to information for civil society.

An analysis of those laws has shown that the notions of transparency and accountability are known to the government of Ghana. They are clearly mentioned in the laws such as in the PEPA, becoming the overriding principles behind the law. The requirement for reports by the public bodies are also clearly set out, although minimum requirements could have been laid out such as for the reports issued by the Bank of Ghana under the PRMA. However, the question remains as to whether those concepts have been clearly understood. Among the most problematic areas are the bidding and the disclosure of the agreements and licences. The awarding of contracts whether through bidding or direct negotiations is a particularly sensitive time for corruption and public disclosure is here most important. To surround that area with secrecy is to purposely forget when and where transparency is most needed. There should be a statutory obligation to disclose information related to the bidding process and to fully disclose the agreements. Other areas of concern are the underfunding of the PIAC, the lack of clear reporting lines

\textsuperscript{103} Sec 3(k) of the PCA.
\textsuperscript{104} Schedule to the PCA.
and the delay in considering its reports by the Parliament. All point to an unwillingness to allow civil society and thereby the public full access to the transactions in the petroleum industry.

The biggest issue with regards to the right to information however remains that currently civil society is limited to the information which government releases in those reports. The right to information requires the right not only to receive but also to seek information. Currently, neither an enabling law nor sections in the laws surrounding the petroleum industry clarify the manner in which civil society may request information. While reports are undoubtedly useful, there are situations that require information immediately and where a delay would defeat the purpose. The lack of a clear mechanism has also led most NGOs to obtain information ‘through the back corridor rather than the official door’.\(^{105}\) Access to information is a constitutional right that cannot depend on the goodwill of the government and the persuasiveness of the person or entity effecting the request. It is therefore pertinent that Ghana passes the RTI Bill to allow civil society to effectively monitor the government and oil companies.

\(^{105}\) Debrah & Graham (n 7 above) 35.
Abstract

The construction of Ghana’s poverty alleviation architecture (GPAA) is a clear demonstration of the country’s commitment to address food insecurity and large-scale poverty. Central to the GPAA is the introduction of substantial socio-economic policy reforms targeted at the (largely rural) poor, which includes the flagship Livelihood Empowerment Against Poverty (LEAP) cash transfer scheme, ‘capitation grants’ to expand free primary education and a school feeding programme. In addition, the state reformed the contributory pensions system from a (colonial-era unfunded) single statutory defined-benefit scheme to a new system with additional mandatory (and voluntary privately-administered) ‘tiers’ supplement the statutory scheme. Nonetheless, to adopt a poverty alleviation strategy is one thing, but to implement it is another. As the large scale poverty in rural and urban centres have shown, aside from political manipulation of resource allocations (for intra-party factional and electoral purposes), all of these initiatives have been confronted with substantial operational setbacks and allegations of ‘resource-leakages’. In many respects, the impact of these interventions have been disappointing: the LEAP and school feeding programmes benefits only a handful of the food poor and the ‘third tier’ of the new pension system has failed to attract a large section of the informal sector. This chapter discusses how the GPAA can be efficiently operationalised to address the drivers of hunger and poverty in Ghana.

1 Introduction

Poverty alleviation strategy (PAS) is a form of intervention by a government to alleviate its population from severe socio-economic deprivation.\(^1\) In most cases, the funds for PAS are often derived from public contributions and/or taxes. Consequently, PAS is often riddled with financial setbacks especially in regimes where majority of the population is living under poverty. Yet, irrespective of this setback, the launch of PAS in any regime (democratic or autocratic) is a necessary safety net to safeguard individuals from negative impacts of price surges in

---

basic necessities such as food, water, health care, housing and electricity. It is against this backdrop that Ghana launched an overarching PAS reforms from the early 2000s.\(^2\) Among the range of interventions is the National Social Protection Strategy (NSPS) which (as its name implies) aims at building a safety net to protect citizens from the adverse effect of poverty. It is important to indicate that virtually all Ghana’s poverty alleviation strategies were launched in the course of the country’s democratic regime after decades of political and economic mayhem.\(^3\)

In 1966, a joint military-police \textit{coup d'état} led by Col EK Kotoka and Major AA Afrifa overthrew the leftist independence leader Kwame Nkrumah’s regime which had declared a one-party state in 1964. Between 1967 and 1981, the country was plagued with a series of further coups and brief intermittent return to democracy. As touted by Boafo-Arthur, within this period, the country recorded one ‘palace coup’ with four successful military coups which were subsequently stabilised in 1981 under JJ Rawling’s People’s National Defence Council (PNDC).\(^4\)

In 1992, the country was ushered into the so-called ‘Fourth Republic’ with parliamentary and presidential elections, with the incumbent (PNDC military regime now transformed into a political party termed) National Democratic Congress (NDC) retaining the presidential seat. Ironically, although the Rawling’s regime had administered World Bank/International Monetary Fund (IMF) sponsored ‘structural adjustment’ macroeconomic policies from 1983, it won the elections on its populist and ‘socialist’ rhetoric. The opposition pro-market New Patriotic Party (NPP) in 2000 won exactly half of the seats in parliament with its leading candidate, JA Kufuor winning the presidential election.\(^5\)

Akin to other (West) African states, political debates prior to elections in Ghana are often fierce, thereby culminating into competitive polls.\(^6\) It was in this light that Gyima-Boadi and Prempeh mooted that while allegations of vote rigging as well as pre-and post-ballot vote violence are occasionally recorded in some constituencies, electoral processes in Ghana


\(^5\) It must be noted that the NPP traces its roots to the main opposition leader to Nkrumah’s regime, JB Danquah in the 1950s and early 1960s, as well as the short-lived 1969-1972 civilian regime of Dr Busia’s Progress Party, within which JA Kufour was a junior minister.

\(^6\) The power given to the Ghanaian people to elect their leaders translates to the power to have a voice in the decision-making of the nation.
have (by and large) have significantly contributed to democratic consolidation.\textsuperscript{7}

After the NDC's John Mahama failed to secure a second term of office like all his predecessors, the NPP in 2016 regained the reins of power by winning majority seats in parliament as well as their presidential candidate Nana Akuffo-Addo winning the presidential election. It could be said that Ghana remains one of the few states in Africa to have passed the democratic test of 'two peaceful transitions of power'.\textsuperscript{8}

In terms of poverty eradication, both the NDC and NPP have attempted to build on initiatives inherited from the colonial and post-colonial administration. For instance, in 1992, the Rawling's regime undertook some reforms to improve the contributory pensions system launched in the colonial era and inherited by the Nkrumah administration. Between the years 2000 and 2008, the NPP embarked on large-scale poverty alleviation strategy with the introduction of the first substantial direct cash transfer scheme (otherwise termed the Livelihood Empowerment Against Poverty (LEAP)), the school feeding programme, the National Health Insurance Scheme (NHIS) for premium-paying workers (and eventually premium exemption for 'indigents', children and pregnant women) as well as a reform of the contributory pensions system.\textsuperscript{9}

The expansion and operationalisation of most of these interventions (including the LEAP and pension reforms) occurred after President Mills of the NDC took over the reins of power in 2009.

The objective of this paper is to set out the various poverty eradication interventions in Ghana, their constraints and how they could be effectively operationalised to address the various socio-economic needs of citizens. The paper begins by providing brief historical account of poverty alleviation strategy in the (post)colonial era and then contextualises PAS within the structure of the economic inequalities between the Southern and Northern parts of Ghana. The paper then turns to assess some of the substantial PAS launched by the state which includes the LEAP, the Ghana School Feeding Programme (GSFP), NHIS and Social Security and National Insurance Trust (SSNIT). Given that this paper seeks to map out the constraints and prospects of PAS in Ghana, an overview of these interventions are in order to provide a platform for the assessment in the second part of this paper. The last part of the paper will consider the challenges confronting the operationalisation of these interventions and recommend possible ways in which to improve their effectiveness.

\textsuperscript{7} E Gyimah-Boadi & HK Prempeh ‘Oil, politics, and Ghana’s democracy’ (2012) 23(3) Journal of Democracy 98.
\textsuperscript{8} Gyimah-Boadi& Prempeh (n 7 above) 101.
2 History of Ghana’s poverty alleviation strategy

During the colonial era, Gold Coast (akin to other British colonies in the rest of Africa) witnessed the operationalisation of very few formal pro-poor initiatives, given that the domestic policy of the British was centred on the development of agriculture for export purposes. With the socio-economic welfare and protection of the individual not seen as the responsibility of the colonisers, it became the obligation of the community and kin to provide the material needs of individuals.

2.1 Post-colonial poverty alleviation interventions

In the early post-colonial era, the extended family continued to serve as the safety net by providing the financial and material needs to deprived members of the family. Relatives were responsible for (rural and extended) family care (in other words, the sustenance of the old and vulnerable members of the family). It was the obligation of adults to provide funds or the material needs of the children and elderly members of their clan or extended family. The norm thus, was that while the elderly provided the material needs of the children, it is expected that the latter will reciprocate this gesture when their elders retire.

Nonetheless, the extended family system got weakened in the late 1970s, particularly in view of the rise of modern society and urbanisation. With the migration of younger families into the urban centres, old and unemployed members of the family were cut off the support of the informal and traditional social protection system. Consequently, in the 1970s, Ghana launched different forms of pro-poor interventions which sought to provide universal access to basic amenities, including healthcare, education and pension funds. As argued by Luiz, in contrast to most African states, Ghana was one of the few to launch a universal unemployment benefits and expand the coverage of social insurance for the aged. For instance, in contrast to some other African countries like Zambia, the number of individuals receiving unemployment benefits in the

14 In view of this gap, a new form of poverty alleviation strategy emerged, particularly from religious networks and secular welfare organisations such as international non-governmental organisations (NGOs), missionaries and churches.
1970s was approximately 6 percent much higher in Ghana, than its ‘settler’ African counterparts like Zambia. Although these interventions had noble objectives, most deprived Ghanaians were still excluded. A typical example was the exclusion of unemployed women and youth from the benefits of the programme which simultaneous plunged many into lifelong poverty with all its negative impacts. The next section turns to assess key poverty alleviation strategy and their specific contributions to the socio-economic wellbeing of Ghanaians.

2.2 Pro-poor policies in pre-and post-democratisation

Following the overthrow of the Nkrumah regime in 1966, the various military rulers who experimented with statist policies till 1980, failed to develop sustained economic policies or efficient taxation of export commodities (timber, cocoa and gold) to support pro-poor programmes. By the time of Rawlins coup in 1981, the country was in a dire economic situation, on the brink of a sovereign debt default, had an overvalued currency, high inflation with export earnings, import volumes and real Gross Domestic Product (GDP) per capita having plummeted. The following year, the Rawlings’ administration turned to the Bretton Woods institutions for assistance; given that the country’s economic conditions had further worsened.

In April 1983, Ghana initiated an IMF-designed recovery plan, also termed as Structural Adjustment Programme (SAP) which included among others cutting spending on poverty alleviation strategies, retrenching public servants and reducing expenditure on social services. Although the SAP has been highly criticised in several quarters as being the primary cause of poverty, spatial disparities and inequalities in several less developed and developing countries, as in the case of Ghana, it triggered immense economic growth between 1984-9, particularly in the manufacturing, trade and agricultural sectors. From the late 1980s to the 2000s, real annual GDP witnessed a 5.7 percentage surge from its initial 1.4 per cent in the 1970s. With the GDP surging, so did the quality of life of most Ghanaians also improved, given that the economic prosperity

16 Luiz (n 15 above).
18 Luiz (n 15 above) 121.
22 Kraus (n 20 above) 28.
provided adequate financial space for the state to reform and expand social welfare.  

Yet, financial contraction in the course of the SAP did impose considerable painful impacts on the living standards of many Ghanaians, which led to low primary school enrolment (mainly due to the introduction of user fees in primary education, as well as dismissal of large numbers of public sector workers). According to Kraus, the rising ranks of dismissed and unemployed workers in the public sector due to the SAP triggered severe opposition from a great many Ghanaians including trade unionists, students, workers, civil servants and intellectuals. Arguably, this opposition played a key role in unleashing the social forces that forced the Rawlings' military regime to usher in the country’s Fourth Republic.


The main objective of this section is to set out government’s programmes tailored to build up sufficient and efficient safety nets for the poor. Among the most dominant of these programmes are the SSNIT, the Ghana Growth and Poverty Reduction Strategy (GPRS), the school feeding programme and the LEAP social grant scheme. This section will dedicate few paragraphs to briefly explain the nature and features of each of these interventions.

3.1 Social Security and National Insurance Trust (SSNIT)

After the adoption of the Social Security Act in 1965, a nationwide Social Security Scheme (SSS) was established to provide payments for death-survivor’s, invalidity and old age benefits. In 1991, the SSS was renamed the Social Security and National Insurance Trust (SSNIT) through the operationalisation of the Social Security Law (SSL) Akinto the SSS, the SSL provided (i) death-survivors payment (ii) invalidity pension and (iii) old age pension. The SSL stipulated that there should be 17.5 per cent total contributions of the monthly worker’s salaries, with 12.5 per cent by the employer and 5 per cent paid by the employee. The self-employed, on the
one hand, is expected to make the whole 17.5 per cent total contributions by themselves.29

In 2010, the National Pensions Act (Act 766) which provides for the establishment of a National Pension Regulatory Authority (NPRA) was launched.30 The Act established a three-tier scheme based on the following: (i) defined benefit scheme: a mandatory basic national social security system; (ii) defined contribution scheme: a mandatory privately managed and fully funded occupational pension scheme; (iii) defined contribution scheme: a voluntary personal pension scheme, privately managed and fully funded provident fund. Unlike the first and second-tier, the third tier was newly established in 2010.31 The latter arm of the scheme is specifically designed for employers in the informal sector, given that they are neither covered in the first nor the second tiers. Nonetheless, employees already covered in the mandatory first and second-tiers may voluntarily join the third-tier. The introduction of the third-tier is significant for the country’s poverty eradication effort since about 80 per cent of employees in Ghana work in the informal sector.32 The informal workers have two different accounts: (i) the retirement account and (ii) the personal savings account (which allows employees to receive benefits prior to their retirement).33

The 2010 Act simultaneously increased the SSNIT contributions to 18.5 per cent from its previous 17.5 per cent of the monthly worker’s salary. From the 18.5 per cent contribution, 13.5 per cent goes to the mandatory first-tier, while 5 per cent is allocated to the second-tier (privately mandatory contribution). Subsequently, 11 per cent of the worker’s 13.5 per cent contribution goes to the contributor’s pension and the extra 2.5 per cent to the NHIS Levy for purposes of health care.34

After January 2016, pensioners already on the SSNIT receive a minimum monthly pension benefit of GHS334.81 while new pensioners from 2017 will receive minimum monthly benefit of GHS276.35 On the whole, there has been an 18 per cent increment in 2017 compared to 20 per cent increment in 2016.36 According to SSNIT’s Evangeline Amagashie, ‘[t]here is a fixed rate of 15% which everybody is going to collect of

31 According to the National Pension Regulatory Authority, the maximum age to join the SSNIT is 45 years while the minimum age is 15 years.
32 Grebe (n 29 above) 10.
34 Presently, there are over 90,000 contributors from the informal sector.
35 Grebe (n 29 above) 11.
whatever salary [they] are earning plus GHS 17.41.'37 It must be indicated that under the present economic conditions, these amounts can hardly sustain an individual in the course of a month.38

3.2 Ghana Growth and Poverty Reduction Strategy and National Social Protection Strategy

In order to counteract extreme poverty and exclusion, the government in 2007 launched two overarching PAS, namely, the Ghana Growth and Poverty Reduction Strategy (GPRS) (which essentially is built up of GPRS I and II) and the National Social Protection Strategy (NSPS). The GPRS I, operational between 2002-2005 was aimed at achieving the UN Millennium Development Goals (MDGs) through the establishment of special programmes for the excluded and vulnerable individuals, such as persons with disability, orphans and the aged.39 When the GPRS I failed to achieve these objectives, the GPRS II (2006-2009) was launched with a focus on Ghana becoming a middle income country, and with economic growth that could generate sufficient jobs by 2015. Yet, as indicated by the Gareth Jones and Sylvia Chant, the second GPRS equally failed to realise its aspiration.40

The NSPS on the other hand was launched in 2007/2008 with three cardinal strategies to achieve the first goal of the MDGs, specifically tackling extreme poverty. The three objectives of the NSPS are (i) improving the NHIS; (ii) establishing the LEAP; and (iii) improving existing pro-poor programmes. The next section takes a closer look at these two strategies.

3.3 National Health Insurance Scheme

Based on the National Health Insurance Scheme Act (Act 650), the government in 2003 launched the NHIS to ‘provide basic healthcare services to persons’.41 Besides seeking to provide timely treatment, the NHIS was established to replace the previous cash and carry system which required individuals to make financial payment before they could receive

37 Cited in Citifmonline.com (n 36 above).
39 Grebe (n 29 above) 8.
The scheme enables members to benefit from ‘general outpatient services, inpatient services, oral health, eye care, emergencies and maternity care, including prenatal care, normal delivery, and some complicated deliveries’. 43

The NHIS is financed from both state and individual contributions. To be exact, it draws on (i) funds from the state allocated by parliament, (ii) the premiums of subscribers, (iii) returns from investments, (iv) 2.5 per cent SSNIT deductions from the formal sector; and (v) 2.5 per cent NHIS Levy on goods and services.44

The NHIS provides three different types of health insurance schemes, namely the (i) private commercial health insurance scheme for a specific group of people who have built their own mutual health insurance schemes; (ii) private mutual health insurance scheme which provides voluntary and private health scheme for every person; and (iii) the district-wide mutual health insurance scheme which is restricted to residents or members in a particular district. To ensure that all the poor persons across the country are given equal opportunity to benefit from the third scheme, the districts in the country have been partitioned into health insurance communities where each beneficiary is given a card thereby enabling them to access health care without direct payments.

In about three months after registration (and full payment of contributions), the beneficiaries are presented with health facility attendance cards, and most importantly health insurance identification to

enable them access health care. The three months waiting period is however worrying, especially considering that an individual may get sick during the waiting period and still cannot access healthcare based on the health insurance scheme.

Besides the waiting period, there is also a problem of access. The NHIS is district-based, and upon registration in a particular district, one could only receive treatment within that district and not anywhere else.48 The NHIS could thus be concluded as not well-thought-out since a beneficiary cannot benefit from the scheme if an individual is outside the boundaries of the district of registration.49

After the rendering of a service to a NHIS patient, the clinic or hospital sends the bill to the beneficiary’s scheme provider which will then make the payment to the service provider. This practice is applicable in both the private mutual health insurance scheme and the private commercial health insurance scheme.50 However, The National Health Insurance Authority (NHIA) (responsible for the payments of NHIS to health providers) has been criticised by several District Mutual Health Schemes (DMHS) for late disbursement of funds.51 Given that hospitals and other health care facilities depend on the financial support from the NHIA to hire health personnel, buy medical supplies and technologies, the late payment of funds to the DMHS adversely affects the quality of healthcare and in some cases, might result in the refusal of medical treatments to NHIS patients.52

Figure 1: Annual NHIS contribution per individuals based on social status

<table>
<thead>
<tr>
<th>Person</th>
<th>Annual Contribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Very Rich/Rich</td>
<td>GHS 480</td>
</tr>
<tr>
<td>Middle income</td>
<td>GHS 180</td>
</tr>
<tr>
<td>Very poor/Poor</td>
<td>GHS 72</td>
</tr>
<tr>
<td>Core poor</td>
<td>Free</td>
</tr>
</tbody>
</table>

The specific definitions of the classification are set out under the NHIS.53

3.4 Child-centred programmes

3.4.1 The capitation grant

The introduction of the new ‘Capitation Grant’ (CP) in 2004 was another ground-breaking initiative of the state which amounted to the total abolition of primarily school fees. This was targeted at attaining the goal of ‘universal access to basic education’ as set out in the MDGs and the GPRS II.\(^{54}\) To enable the abolition of school registration fees by public primary schools (initially in poor districts), the programme extends grants to basic schools in lieu of school fee income.\(^{55}\) According to Ampratwum and Armah-Attoh, although the state in partnership with the World Bank’s Primary Social Development Project in 1995 launched a policy of free compulsory basic education, the initiative was a failure considering that 50 per cent of primarily school aged children still remained out of school.\(^{56}\)

In the 2005/06 academic year, the CP was expanded to all registered public primary schools with a fixed amount transferred to these schools from the Ministry of Finance based on their enrolment figures.\(^{57}\)

Akin to previous PAS, the CP was equally riddled with operational setbacks, especially in terms of funding ‘leakages’.\(^{58}\) In their sampled survey of schools, Ampratwum and Armah-Attoh found that while the CP has increased the rates of children in primary school, there has been a decline in the quality of education with the grant on each child not substantially increased.\(^{59}\)

3.4.2 The school feeding programme

In an attempt to contribute to poverty reduction and food security, the government in partnership with donors (specifically the Government of the Netherlands) in 2005 launched the Ghana School Feeding Programme (GSFP). The initiative was introduced as part of the state’s measures to meet the MDGs targets on universal primary education, poverty and

---

53 Baidoo (n 52 above).
56 Ampratwum & Armah-Attoh (n 54 above) 2.
57 Ampratwum & Armah-Attoh (n 54 above) 47.
58 Funding ‘leakages’ may be defined as differences between resources transferred at a higher level (including between funds transferred to District Education Offices and those transferred to beneficiary schools).
59 Ampratwum & Armah-Attoh (n 54 above) 47-48.
hunger. The initiative which begun with ten pilot schools in each of the ten regions, now covers about 1698 public schools nationwide. The programme provides one hot and nutritious meal per day to around 700,000 children in the country.

The cardinal objectives of the programme are plethora, but most importantly to (i) reduce chronic hunger and malnutrition, (ii) increase local food production, and (iii) increase school enrolment, attendance and retention. In order to achieve these objectives holistically, pupils in deprived kindergarten and basic schools across the country are provided with meals prepared from locally produced crops. Although the programme was scheduled to end in 2010, subsequent regimes have retained it till now.

The school feeding programme and the CP can therefore be perceived as a two-pronged approach to combat food and nutrition insecurity among children aged between 6 to 11 and concurrently increase primarily school enrolment (with the expectation of some spin-off gains to local economies and communities depending on food production).

According to Abdulai, although these two child-centred interventions hold some potentials to address poverty and hunger, their politicisation by the two main political parties, specifically in terms of spending allocations have countered their effectiveness. Inconsistent with poverty and stated developmental targeting goals, both the NPP regime which launched the intervention and the successive NDC government seem to favour some districts and regions in per capital spending allocations. For instance, whiles the NPP demonstrates a disproportionate government expenditure on education in the Ashanti region, the NDC replicated this practice in the Volta region. This ‘patrimonialist’ or ‘clientelistic’ dimension to allocation of resources has negatively impacted on the effectiveness of these programmes.

61 Abdulai (n 60 above).
62 Grebe (n 29 above) 12.
64 Abdulai (n 60 above).
Chapter 6

3.5 Livelihood Empowerment against Poverty (LEAP)

The first form of social grant scheme or direct cash transfer in Ghana is the LEAP. Although this income support scheme had one key limitation (regarding the relatively small number of recipients reached), it is historic given that it is the first domestically-initiated intervention to provide fiscal support to indigenes currently. LEAP was launched by the NPP administration not long before the 2008 (presidential and parliamentary) elections. The timing of this initiative, arguably suggests that electoral considerations may well have played a key role in policy-making.

A striking feature of the LEAP programme however, is that (although donors, most prominently the United Nations Children’s Fund (UNICEF) and the United Kingdom’s Department for International Development (DFID) were involved in its design) it is largely a domestic initiative. While donors (including a World Bank loan and DFID grant) came on board later, the programme was initially funded mainly from the fiscus or general government expenditure.

Yet, due to the 2008 global price spikes in food and fuel, donors (specifically the government of Brazil, International Labour Organisation, World Bank, and UNICEF) are collaborating with government to expand the reach of the programme to other poor households. Thus by 2012, 50 per cent of the yearly US$20m LEAP budget was borne by donors while the remaining 50 per cent was drawn from general government expenditure. By late 2014, the United States Agency for International Development (USAID) came on board as a major donor to support government’s effort at expanding the programme to provide benefits to pregnant women and infants.

Starting as a 5-year pilot programme from 2008 to 2012 (and now in its second phase from 2013-2017), LEAP is aimed at cutting down on poverty by providing financial support to people with disabilities, the aged (65 years and above) and orphans or vulnerable children. This programme is unique considering that it is the first of its kind in the country to provide direct cash transfer to these vulnerable groups. By 2016, approximately

70 By 2012, approximately USD10m yearly expenditure.
73 Grebe (n 72 above).
45,000 households in 120 of the Ghana’s 170 districts were beneficiaries of the programme. The criteria for the selection of a needy household are based on a combination of the presence of any one of the aforementioned three categories of vulnerable groups coupled with the poverty status of the household.\textsuperscript{74}

Benefits levels in the course of the first years of the initiative were very low. Depending on the number of needy people in the household, the project provides monthly cash transfer between GHS 8 (US$ 2) and GHS 15 (US$ 4) funded from government budget. These benefit levels were however tripled in 2012.\textsuperscript{75} While financial support to the aged and persons with disabilities are unconditional, support for orphans or vulnerable children are conditioned on (i) birth registration of all children, (ii) sending children to school, (iii) preventing child labour, and (iv) enrolment of family members in the NHIS. It is important to indicate that the last condition is not really a condition but an extra benefit, given that all LEAP beneficiaries have free access to the NHIS upon registration in their district office.

Besides the various interventions set out above, there are other relevant initiatives which also seek to address poverty and food insecurity.\textsuperscript{76} Yet, considering that these programmes are less significant for the next discussion as well as the conclusion of the paper, they will not be discussed here.

4 Pro-poor interventions in Ghana: Prospects and challenges

Although Ghana has adopted several interventions to address the wanton poverty and its accompanying chronic hunger, it is important to emphasise that most of these initiatives are riddled with several constraints. It is therefore imperative to dedicate the next section to assess some of the challenges and possibly some remedies on how to make the various programmes effective tools in addressing poverty and food insecurity.

\textsuperscript{74} Grebe (n 72 above).
\textsuperscript{75} Grebe (n 72 above) 29. A household implies a single person who lives alone or a group of persons living together and ‘cook and eat together’.
\textsuperscript{76} Microfinance Schemes, Supplementary Feeding Programme, Integrated Agricultural Support Programme, Capitation Grant, Emergency Management Schemes, Social Welfare Programmes and the National Youth Employment Programme.
4.1 Constraints confronting poverty alleviation strategies in Ghana

The trend of PAS in Ghana has two striking features. First, there seems to be a ‘national consensus’ on the necessity for a PAS, as well as the fairly high level of political commitment in the operationalisation of these interventions. Yet, in light of the occasional allegations that the PAS are abused by both parties for naked electoral purposes, especially against the backdrop of the fiscal crisis of the country, the broad cross-party consensus on the PAS raises serious questions worth interrogating. The second distinctive feature is that the Ghanaian welfare policy has a strong emphasis on social insurance. Besides the existing defined-benefit and partially funded social systems, the NPP regime in 2008 introduced two additional tiers of defined-contribution and privately-administered pension schemes. Moreover, the Kufour-NPP administration launched NHIS intended to be largely (financially) self-sustainable, with the objective of pursuing a universal access to healthcare. The NHIS is financed through both state-subsidised membership and premiums. Although it is a bit unusual for a country like Ghana where poverty alleviation is basically thought of as social assistance to the rural poor (increasingly through cash transfers, food aid, agricultural subsidies and inputs), it is not surprising for right-wing, pro-market political party like the NPP to adopt such premium paying insurance scheme to address the poverty situation of Ghanaians, especially in the northern part of Ghana.

Northern Ghana: Special case

The problem of deprivation is predominant in the three northern regions of Ghana, namely Northern, Upper East and Upper West regions. Huge disparity exist between the southern and northern parts of Ghana including poor level of school enrolment and infrastructure in northern Ghana. It is estimated that less than 60 percent of children in these regions currently attend school. Compared to the South, the infrastructure in the north is less advanced and therefore makes access to essential socio-economic services such as hospitals, schools and portable water very difficult to access.

Moreover, although Northern Ghana remains the poorest, the government’s PAS barely touches the region. Consequently, the traditional social protection system as discussed in section 2 is the

78 Aboderin (n 77 above) 11.
prevailing norm in this part. For instance, due to the poor infrastructure (lack of doctors and/or well-equipped hospitals/clinics) in this part residents are unavailable to access (in practice) the services of the NHIS although they have the opportunity to do so. In some cases, NHIS beneficiaries have to walk long distance or wait in long queues before receiving treatment. The paper now turns to examine some of the general impediments confronting the effective operationlisation of pro-poor initiatives in Ghana.

Lack of holistic benchmarks

One of the constraints which currently faces the implementation of LEAP is the question of how to appropriately target the vulnerable group to enable them benefit from the initiatives. For instance, there is no universal threshold to measure the neediness and poverty situation of a household. In addition to this, is the challenge of ensuring that the cash transfer is disbursed only to the needy household or individuals.80

The existing inefficient target approach confronting the implementation of LEAP has led to a large section of potential beneficiaries in the LEAP been cut off. In terms of the GSFP, although the existing geographical targeting is based on chronic hunger or poverty, as well as one’s lack of access to electricity, water and road as the benchmarks for selecting beneficiaries, there is a constant breach of the selection benchmark given that the operationlisation of the programme is often centred on pupils in urban cities rather than poor rural schools.

It must be noted that In order to ensure an efficient poverty alleviation intervention, the targeting of people must be based on fair and holistic pillars, especially in a country like Ghana where majority of the citizens are self-employed or work in the informal sector and thus, not visible to the government. The state therefore has to develop a mechanism which would enable informal sector workers to benefit from all forms of state interventions.

Delay in payment of feeding grants

Another serious setback is the late payment of grants to some schools. For instance, in early January 2017, The Conference of Heads of Assisted Secondary Schools (CHASS) served notice of postponing reopening of schools if the state fails to defray the accumulated cost of feeding students.81 The perennial problem of unpaid feeding grants subsequently

80 J Lazarus ‘Participation in poverty reduction strategy papers: reviewing the past, assessing the present and predicting the future’ (2008) 29 Third World Quarterly 1206.
81 Citifmonline.com ‘We’ve made part payment of feeding grants – GES’ 10 January 2017.
led to students accusing government of being ‘insensitive’ to their plight, especially when they were asked ‘to stay home indefinitely over the non-payment of the feeding grants.’

**Inadequate funds**

Another major impediment confronting the poverty alleviation strategies have been the lack of adequate funds for their operationisation. Consequently, the grants have not made any great impact on the conditions of the recipients given that the transfer amount is not very high and beneficiaries (especially women) do not get empowered through financial independence.

**Lack of coherence**

Considering that the various programmes are operationalised by different ministries and departments, they have been criticised as been fragmented and lacking alignment or coherence with each other. For instance, there is no alignment or link between the school feeding programme operationalised by the ministry of education and the LEAP which is administered by the Ministry of Gender, Children and Social Protection. The lack of cooperation between these institutions often weakens the prospects of effective targeting of beneficiaries, considering that cooperation among ministries could improve targeting and distribution of grants.

**(In)equitable use of cash transfers**

Besides setting out conditions (in the case of the vulnerable or orphaned children) for accessing LEAP cash transfer, the programme does not set out strict rules to ensure that disbursed grants are used more equitably. One critic has lashed out at the programme by averring that since it is perceived as a ‘free-hand-outs’ by the poor, they often waste it on frivolities. Some have suggested that rather than providing conditional cash transfer, the grant should be transferred into industry development which would provide employment opportunities to enable the poor earn money for themselves. Whereas employment to a larger extent can play a key role in addressing the plight of the impoverished, it would however, be important that the state combines employment creation with basic income,

---

82 Deputy Director of LEAP, Mr Lawrence Ofori-Addo, cited in Abebrese (n 8 above) 12.
84 Amuzu *et al* (n 83 above).
particularly for those who are unable to secure placement (due to old age, disability or lack of skills).

5 Looking forward

Ghana has launched several substantial interventions in the sectors of education, health and social welfare as an attempt to address poverty and chronic hunger confronting millions of Ghanaians. While some of the programmes are working out well (for instance the school feeding programme) others are still battling with several constraints ranging from inefficient targeting of beneficiaries, inequitable use of cash transfers, delay in payment of grants, and lack of funds at the ministerial level to sustain the programmes.\textsuperscript{85}

In many respects, the impact of these interventions has also been disappointing: besides reaching a small proportion of the extremely poor, the beneficiaries of the LEAP programme have seen only modest improvements in socio-economic outcomes. The coverage of the NHIS also remains low (covers about one-third of the Ghanaian population) and the ‘third tier’ of the new pension scheme has failed to attract a large segment of the informal sector.

Further, apart from education-based interventions designed primarily to enhance enrolment as well as more general interventions which targets households, it seems that Ghana’s poverty alleviation intervention is disproportionately targeting the working-age rather than the unemployed who receive scanty government assistance in this respect.

In order to overcome these setbacks, the government must adopt a range of measures including:

(i) Enhance the budget of the implementing departments
(ii) design a special intervention focused on northern Ghana
(iii) Improve the infrastructure in the northern part of Ghana to enable the people access basic socio-economic facilities such as hospitals and schools
(iv) Considering that the amount of SSNIT monthly money paid out to pensioners is relatively low compared to the contributions they make, it is imperative that the government increases the benefits to enable pensioners access basic social and economic necessities.
(v) In the case of the NHIS, the NHIA must promptly reimburse the health providers after rendering their services to insured patients. This practice will not only boost the trust of the hospitals to continue providing

efficient services to these patients, but also encourage the people to make
their contributions on time.

(vi) The NHIA should also intensify its effort to ensure that new members of
the NHIS receive their insurance card immediately after registration.
This will ensure that members receive their benefits from the scheme
promptly, given that a healthy body is a precursor to a successful
economic activity.

(vii) The NHIS should be broadened from the district to national level, to
enable people access health care in the course of schooling or
employment beyond their local district.

6 Conclusion

Given that most of the programmes commenced few years ago, and they
still have to provide evidence of their value for addressing chronic hunger
and poverty, it is hard at this time to give reliable prospects for the future.
Yet, it is imperative to indicate that though the government of Ghana has
made some noble strides in addressing poverty, there is still a lot of work
do to target more poor people and sustain the existing programmes. In
sum, whereas some of Ghana’s poverty alleviation strategies are not yet
successful, they still serve as a role model for other (West) African
countries seeking for best practice on how to address poverty and hunger.
The NHIS for instance, provides a good indication on how Ghana begun
on its own, a health insurance scheme without the financial assistance of
any donor.
Abstract

Since the attainment of sovereignty in 1957, numerous laws and policies, deriving a substantive basis from the Constitution have to date been passed to advance the course of women in Ghana. Notwithstanding the constitutional protection, laws, policies, institutional and structural frameworks, women in Ghana remain privy to continued forms of discrimination and abuse. This chapter discusses the realities of ‘gender differences’ in Ghana and contends that the gender differences are a manifestation of the inefficiency of laws as a remedy to socially constructed problems. It argues that the law is not what is, but rather what it ought to be. It further posits accordingly, that the struggle for women’s emancipation, especially as regards their protection from discrimination and vulnerability, will have to be rooted in plural artefacts, premised on both social and legal remedies. Structural reforms, construed in law, are therefore inevitable for the emancipation of women in all decision-making process of the country. The chapter concludes that mainstreaming of gender impact reviews into parliamentary committee work, gender analysis of proposed and envisioned laws, policies and regulation, the introduction of tools for gender-sensitive budgeting, support for cross-party women’s caucuses, and women’s mentoring programmes are notable reform considerations towards this end.

1 Introduction

Since World War II, discussions around women’s political participation, have gained momentum in international circles. Historically, these discussions drew much of its currency in normative developments at political platforms, starting in 1946 with the first major international action in favour of women’s rights protection; namely the setting up of the Commission on the Status of Women by the United Nations (UN). Subsequent developments such as the declaration of the year 1975 as the International Women’s Year, again by the UN, was a symbolic mobilisation towards women’s rights realisation globally, more specially in the political sphere. This was followed by a robust declaration of the UN Decade of Women from 1976 to 1986. In 1979, the International Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted, building on the pre-existing legal
initiatives relating to women.\textsuperscript{1} More perpetuations for women’s rights also arose with the adoption of the Beijing Declaration and Platform of Action of 1995. The Beijing conference was in many respects an unprecedented initiative, in that it stirred attention on the then subsiding political and legal will on dealing with women’s subordinate status, especially in political and decision-making processes. The Beijing Conference by and large marked the closure of notable international developments relating to women’s rights.

These international developments pave way for regional mobilisation. In the case of Africa, the African Charter on Human and Peoples’ Rights, the so-called Banjul Charter, which was adopted in 1986, catalysed the first regional framework relating to human rights protection and promotion on the continent. Despite its lack of specificity towards the plight of women in Africa, the charter triggered some room for women’s political rights within the African geography.\textsuperscript{2} The introduction, in 2003 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (The Maputo Protocol), gave much needed and awaited thrust to women’s agenda on the continent. Nationally, since the early 1990s more and more States slowly started giving attention to women’s rights, especially in decision-making processes and organs.

In Ghana, sub-Sahara Africa’s first independent State,\textsuperscript{3} the struggle for women’s political mobilisation has been cumbersome, affected mainly by the political developments and trends since the attainment of sovereignty in 1957. As is the case in most parts of Africa and beyond, women’s political mobilisation, in Ghana, has largely been narrated and predicated narrowly on their participation in the electoral processes of the country.\textsuperscript{4} Put differently, women’s political participation in Ghana is conceptualised within the narrow confines of exercising voting privileges and more recently, their participation in the electioneering process; either as candidates to be elected into offices of higher political authority or as members of campaign teams for election candidates. Since the formation of the Fourth Republic in 1992, women’s roles in political activities, mostly on executive level has been steadily growing, albeit at a marginal pace.\textsuperscript{5} Thus the growth, visibility and influence of female political figures in the

---

\textsuperscript{1} These pre-existing text include \textit{inter alia} the Convention on the Political Rights of Women (1952); the Convention on Consent of Marriage (1951) and the Convention on the Nationality of Married Women (1957).

\textsuperscript{2} The African Charter gave birth to the Maputo Protocol for the promotion and protection of women’s rights although the African Charter did not exclude women from enjoying their rights.

\textsuperscript{3} Ghana gained independence in 1957, making it the first African State to gain political sovereignty from colonial powers. For a historical exposition of Ghana see in general OY Asamoah \textit{The history of Ghana} (1950-2013): \textit{The experiences of a non-conformist} (2014); RS Gocking \textit{The history of Ghana} (2005); WEF Ward \textit{The history of Ghana} (1963).


socio-economic development of the country have been relatively modest. Several political, legal and social determinants account for this steady, yet weak political involvement of women in decision-making processes and organs of government, most notably patriarchy and poverty in the form of financial insecurities for women.

This chapter seeks to analyse the status of women in political decision-making processes and organs in Ghana. To this end, the paper uses three elements as a matrix to comprehend this analysis; namely the legal and institutional framework relating to women’s rights generally, and social developments and trends pertaining to women in Ghana, particularly on parliamentary level. Based on this analysis, the paper argues for structural systemic reforms, rooted in law. The phrase ‘political participation’ as used in this paper predominantly refers to parliamentary and political party participation; but does not fall short of a broad based meaning, inclusive of elements such as women’s participation in decision-making processes and organs in different spheres such as civic spaces, and political consciousness.

2 Legal and institutional frameworks

2.1 Legal framework

Since gaining its independence in 1957, Ghana has had series of constitutions replacing its predecessors down the years. This can be traced from the first constitution that came into force after independence which ushered the country into a new republic and came with it multi-party elections. Following a chain of four military coup d’états, Ghana returned to constitutional rule in 1993 through the introduction of the 1992 Constitution that instituted multi-party democracy. Most of the previous constitutions of the republic did not recognised the rights of women as the 1992 constitution does. This is because the 1992 Constitution was largely modelled after the African Charter on Human and Peoples Rights. The 1992 constitution expresses an instrumental supremacy over any other laws in the land, and tasks the Supreme Court, the apex court under the country’s judicial system, with the supreme power of interpretation as well as striking down inconsistencies in acts and other provisions of policies and regulations passed by other branches of government.

---

7 As above.
10 As above, art 2.
The whole of chapter five of the Constitution is explicitly dedicated to ‘fundamental human rights and freedoms’ that every citizen must enjoy,\textsuperscript{11} regardless of origin, colour and gender.\textsuperscript{12} Specifically, it provides for political, civil, social and economic rights, which includes \textit{inter alia}, protection from forced labour and slavery,\textsuperscript{13} provides for equality and the prevention of discrimination on the grounds of gender or race.\textsuperscript{14} Other protections include freedom of expression,\textsuperscript{15} and freedom of association.\textsuperscript{16} Furthermore, the Constitution provides for fairness with regards to administrative bodies and their officials.\textsuperscript{17} Article 21(3) specifically provides that everyone is entitled with the ‘right and freedom of forming or joining any political party and can freely participate in political activities subject to such qualifications and laws as are necessary in a free and democratic society’.\textsuperscript{18} Equality in economic rights with regards to working under satisfactory, safe and healthy conditions as well as equal work without distinction of any kind is also provided for.\textsuperscript{19}

The Constitution further calls for distinctive care for mothers during reasonable periods before and after child-birth with paid leave and special care for the children so that women can realise their full potential.\textsuperscript{20} Further, ‘women shall be guaranteed equal rights to training and promotion without any impediments from any person’.\textsuperscript{21} Chapter 6 of the Constitution is dedicated to the Directive Principles of State Policy which must guide all organs of government, cabinet and political parties in the realisation of human rights and further tasks presidents to annually report to parliament on the necessary steps taken to ‘ensure full realization of basic human rights’.\textsuperscript{22} Article 35(6)(b) read together with article 36(6) of the constitution places a positive obligation on the state to, \textit{inter alia}, take appropriate measures to achieve regional and gender balance in recruitment and appointment to public offices’ as well as ‘necessary steps so as to ensure the full integration of women into mainstream economic development of Ghana.\textsuperscript{23} It also calls for equal economic opportunities for citizens with full integration of women into mainstream economic development of the country.\textsuperscript{24} Article 42 also provides for equal right to vote.\textsuperscript{25} It further guarantees the right to join any political party for every

\begin{itemize}
  \item \textsuperscript{11} As above, chapter 5.
  \item \textsuperscript{12} As above, art 12.
  \item \textsuperscript{13} As above, art 16.
  \item \textsuperscript{14} As above, art 17 (2).
  \item \textsuperscript{15} As above, art 21 (1)(a).
  \item \textsuperscript{16} As above, art 21(l)(e).
  \item \textsuperscript{17} As above, art 23.
  \item \textsuperscript{18} As above, art 21(3).
  \item \textsuperscript{19} As above, art 24(1).
  \item \textsuperscript{20} As above, art 28.
  \item \textsuperscript{21} As above, art 27.
  \item \textsuperscript{22} As above, art 34(1) & (2).
  \item \textsuperscript{23} As above art 35(5) & (6)(b).
  \item \textsuperscript{24} As above, art 36(6).
  \item \textsuperscript{25} As above, art 42.
\end{itemize}
Ghanaian of voting age, and also provides for the right to political participation that seeks to influence composition and policies of government.

Given the above, the Constitution has been robust as far as the formal protection and promotion of women’s rights are concerned. One must also take into consideration that the rights the Constitution protects are not exhaustive and may include ‘others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man’, even in the context of women’s rights protection generally. In this regard, rights that are guaranteed in ‘treaties, conventions, international or regional accords, and norms’ may be applicable. This can also include ‘provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states’. These provisions are briefly discussed below.

Regarding international law, it is a general truism, that international law, more especially international human rights law embodies a longstanding commitment to equal rights for women. However, the place of international law in the Ghanaian legal system remains a subject of interpretation. In terms of article 11 of the Constitution, international law falls short as a recognised source of law. The Constitution is also silent on the relationship, if any, between international law and national law. That withstanding, rights provided for under the Ghanaian ‘Constitution are not exhaustive and may include ‘others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man’. These may include provisions of international instruments seeking to promote human rights. It is also provided for in the constitution that the state, in discharging of duties as obligated by article 37 shall be under the guidance of international human rights.

---

26 As above, art 55(2).
27 As above, art 55(2) & (10).
28 As above, art 33(5). See also provisions such as arts 17(2), 22, 26(2), and 39(2).
31 The United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Constitutive Act of the African Union and the International Covenant on Economic, Social, and Cultural Rights, all contain a guarantee of equal rights without regard to sex. The African Charter on Human and Peoples’ Rights and its ancillary Protocol on the Rights of Women in Africa and the Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”) impose more specific obligations on States to ensure women’s equality.
33 As above.
rights instruments recognising the applicability and promotion of specific fundamental human rights.\textsuperscript{34}

Despite the anomaly on the place and status of international law under the Ghanaian legal system, Ghana remains a party to a considerable number of international treaties, including soft law norms. Notable among these are: The Convention on the Elimination of all forms of discrimination against women (CEDAW) in 1986,\textsuperscript{35} The International Covenant on Civil and Political Rights (ICCPR) in 2000,\textsuperscript{36} International Covenant on Economic Social and Cultural Rights (ICESCR) in 2000,\textsuperscript{37} African Charter on Human and Peoples’ Rights (The African Charter) in 1989,\textsuperscript{38} Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (The Maputo Protocol) in 2007,\textsuperscript{39} as well as the Beijing Declaration and Platform for Action (BPfA) in 1995.\textsuperscript{40}

Signing and ratifying of international human rights instruments in the first place is a country’s clear intent of upholding every right and freedom enshrined in those instruments. It is however worth taking into consideration that signing and ratifying of human rights instrument is one step whereas implementation for reflection of these rights on the ground is another. The mere fact that a country has ratified an instrument does not guarantee the reflection and improvement of basic human rights in those countries. There are several cases of countries that have accordingly ratified instruments but have not really reflected on implementation. The United Nations Population Fund reports that the probability of a woman being an illiterate is twice as men, pursuant to harsh working conditions, a very high number of women are impoverished in developed, developing and underdeveloped counties’ with earnings less than men on similar works and ‘discriminatory laws on land, property, inheritance and marriage’ still exist in many countries despite their ratification of CEDAW.\textsuperscript{41}

\textsuperscript{34} Constitution of Ghana 1992, art 37(3).
\textsuperscript{36} UNHR Office of the High Commissioner (n 36 above).
\textsuperscript{37} UNHR Office of the High Commissioner (n 36 above).
The president is endowed with the authority to execute treaties on behalf of the nation. However, this power of the president is subject to ratification by an act of Parliament or a parliamentary resolution which is passed by more than half of the members of parliament. In this regard, parliament serves as an oversight mechanism on signing and ratifying treaties, which binds on the nation after parliamentary approval.

In terms of the legislative and policy protection, legislative protection relating to women has been rapidly growing for the past two decades. Although no legislation or policy has yet been explicit as article 14 of the Maputo Protocol on the municipal level in Ghana, several pieces of legislation have till date been promulgated that are central to the political plight of women. The Labour Act, passed in 2003 too, has been vigorous in its protection of women’s rights. The Act introduces a long overdue leverage of labour equity between both sexes. However, the whole of part VI of the Act is explicitly dedicated to the enjoyment of women’s rights in a bid to promote women’s participation in public offices through giving pregnant women and nursing mothers privileges so that their situation will not be a problem to their participation in public offices. Legislative protection for women blended on their political empowerment has also been achieved through a legislative quota system. For example, in terms of the Legal Aid Scheme Act of 1997, it is prescribed that at least one out of four representatives from the Department of Social Welfare unto the board must be a female. The Disability Act of 2006 in appointing its representatives calls for the inclusion of a representative from the then Ministry of Women and Children Affairs (now Ministry of Gender children and Social Protection) and two other representatives, to be female candidates.

The National Peace Council did not leave women out. In appointing members for its governing body, the president is obliged to appoint two persons, one of whom must be a woman. In furtherance, the Regional Coordinating Council of the Regional Peace Council must appoint two persons unto its board of which one must be a woman as well as the district peace council also nominating two persons unto its board, one of which must be a woman. There are other ongoing bills that will stand to improve women’s political participation which includes the Affirmative Action Bill that will guarantee women’s equality in political discourse and

---

42 Constitution of Ghana 1992, art 75(1); The president, also the head of the executive, has the power to sign and ratify any instrument he deems necessary or in the interest of the nation. This may be done personally by the president or through a designated person appointed by the president.
43 As above, art 75(2)(a) & (b).
44 Labour Act (651) of 2003, sec 55.
45 Legal Aid Scheme Act of 1997 (Act 542), sec 4(1)(b).
46 Disability Act of 2006 (Act 715), sec 43(9) & (10).
48 As above, art 9(b) & 12(b).
in public service.\(^{49}\) Currently, however, there are ongoing aspirant provisions from the 1998 policy statement on the affirmative bill from cabinet requesting the government to ensure 40 per cent representation of women at all levels of governance, such as public sector boards, commissions, councils and the executive.\(^{50}\) This aspiration has as yet not materialised. Alternatively, there has been an acceptance of a proposal from the Constitutional Review Committee on the amendment of the Constitution that will obligate all State institutions to be composed of at least 30 per cent women’s representation,\(^{51}\) in an attempt to promote women’s participation; with the object of increasing their visibility in public institutions which essentially remains male dominated. In fulfilling its ‘gender mandate of promulgating a national policy for addressing gender injustices’, the government approved the National Gender Policy in 2015. The National Gender Policy of 2015 is aimed at ‘mainstreaming gender equality concerns into the national development processes by improving the social, legal, civic, political, economic and socio-cultural conditions of the people of Ghana’.\(^{52}\)

\section*{2.2 Institutional measures}

\subsection*{2.2.1 The Ministry of Gender, Children and Social Protection}

From the formation of the National Council on Women and Development (NCWD),\(^{53}\) then Ghana’s main institution for advancing women’s rights under the Foreign Affairs Ministry in 1975, to the Ministry of Gender, Children and Social Protection, Ghana has evidently advanced in the fight for women’s rights. The Ministry of Gender, Children and Social Protection is the main ministry with a clear mandate of bridging the gender gap in the country. It has among its mandate the coordination to ensure gender equality and equity and also has objectives such as promoting gender mainstreaming as well as gender responsive budgeting in Metropolitan, Municipal and District Assembles (MMDAs), the

\begin{itemize}
\item \(^{53}\) Established in 1975, the NCWD was created to as an official national machinery to advise the government on women related issues. It coordinates activities of both national and international organisations on matters that relate to women in Ghana. Originally under the ministry of foreign affairs, it has commissioned many research projects, initiated and funded projects, thus raising awareness on gender related issues.
\end{itemize}
enhancement of evidence based decision-making with regards to gender equality and empowering women.54

It further deals with ‘formulating gender policies and guidelines’, proposing programmes that promote women’s activities as well as the development of institutions that encourage women empowerment’.55 For example, the current minister of the ministry has a cabinet status and this can help the ministry to influence governmental policies to be gender sensitive.56 Also notable among such programmes is the National Gender and Child policy of 2015 which has goals such as ‘redressing gender inequalities, strengthening women’s role in economic development and promoting ‘women’s equal access to and control of economically significant resources and benefits’.57 Another is the celebration of international women’s day in Accra in 2011, dubbed Empowering the Ghanaian Woman for National Development’, where the first ‘Ghana Women Excellence Award’ was given out.58

2.2.2 Parliament

The parliament of Ghana is operated under the unicameral system of legislature. It has 275 seats with single member representatives representing the 275 constituencies.59 As the legislative branch of government with the power of enacting laws in the country, parliament since the country’s independence has enacted laws for ruling the nation with some going a long way to improving women’s rights such as the Interstate succession law 1985 (PNDC 111) and the Domestic violence Act, 2007 Act 732. In as much as some of the enacted laws and acts have social interventionist provisions for women’s rights, parliament has failed to enact specific affirmative laws and acts for the improvement of women’s political participation.

55 As above.
56 The constitution provides in art 76(1) & (2) for a cabinet made up of the president his vice and not less than 10 but not more than 19 ministers of state and their duty shall include assisting the president determine general policy of government.
57 Nyarko (n 34 above) 101.
58 All Africa ‘First ever Ghana Women Excellence Awards 2011’ http://blogafrica.allafrica.com/view/entry/main/main/id/0CSi9Xkenn5vuR5.html (accessed 29 November 2016); held at the International Conference Centre, Accra in 2011, the awards ceremony was the ministry’s initiative to join the rest of the world in celebrating women and recognising women who have strived to achieve excellence in political participations and fighting for women’s rights. At the awards, 34 Ghanaian women were awarded for their tremendous work towards national development.
Article 78(1) of the constitution provides that majority of ministers of state shall be appointed by the president from the 275 members of parliament. This is a clear opportunity where women have mostly been selected as part of the expected majority of ministers coming from parliament although the number of women in parliament is always not encouraging. Currently, the nation ranks 150 out of 185 in the Inter-Parliamentary union ranking on women’s representation in parliaments around the world. Only 35 of the parliamentary seats out of the 275 are occupied by women, a marginal representation of 12.7 per cent, an improvement on the previous house with 30 of the 275 parliamentarians being women, representing 10.9 per cent. There is also in parliament the Parliamentary Select Committee on Gender which consists of at most 25 members with the main role of examining all agendas that relate to gender and children to ensure that issues concerned with gender are included in all appropriate legislations. It also puts under consideration proposals that are meant to enhance the pursuit of affirmative action and reports to the House. Further, the parliament of Ghana also serves as an overseer of the African Peer Review mechanism (APRM) which partly assesses the countries performance in attaining the New Partnership for African Development (NEPAD) goals, to ensure greater gender equity.

In as much as parliament has put up these measures to improve women’s rights and their political participation, the picture does not tell an encouraging story. There has only been one woman speaker of parliament since independence. Secondly, the Ministry of Gender Children and Social Protection has advocated for and forwarded the Affirmative Action Bill which seeks to rectify discrimination on the basis of gender and or sex but parliament has failed to pass the bill into law. The affirmative bill if passed into law will provide for 40 per cent participation and representation of women in public institutions, governance, decision-making bodies and positions of power.

60 Constitution of Ghana 1992, art 78.
64 As above.
66 Being appointed by then president the Late John Evan Atta Mills, Mrs Joyce Bamford Addo stands as the only woman to have graced Ghana’s Parliament as the speaker.
67 Nyarko (n 34 above) 104.
68 As above.
2.2.3 The Electoral Commission

Backed by the constitution, the Electoral Commission of Ghana (EC) is the main body mandated to conduct elections in the country. Its importance with regards to influencing the country's institutions cannot be overemphasised. Through their activities individuals are selected for parliamentary representation, choice of leadership in government and even referenda for key decisions. It is the machinery through which people are elected to power positions and is endowed with the power to formulate policies and electoral laws which can go a long way to influence the elections. In this regard, the Electoral Commission is positively and strategically placed for women to have the opportunity of finding themselves in power positions. This could be achieved through gender-equality friendly electoral reforms that will see women getting equal opportunities just as men.

The commission can also use political platforms such as the Inter-Party Advisory Committee (IPAC)\(^69\) to push through sensitive gender issues that will positively influence the gender equality course. The Electoral commission, because of the nature of its work, closely work with the National Commission for Civic Education (NCCE) do disseminate vital information on the election process, being it changes in electoral laws or the voting process. The Commission can chance upon such opportunity to use the NCCE to sensitisate electorates and the general public on the importance of bridging the gender gap and doing away with stereotyping and prejudices towards electing and appointing women.

However, there exists no policy or electoral laws formulated by the electoral commission of Ghana that explicitly expresses affirmative action and stands to bridge the gender gap. It is of utmost importance to note that although encouragingly five of the seven commissioners of the electoral commission are women,\(^70\) there do not exist explicit work that the commission has done in the bid to improve women's political participation since the creation of the commission.

---

\(^{69}\) The Inter-Party Advisory Committee (IPAC) is a body that serves as a platform for the electoral Commission and registered political parties in Ghana. On this platform, political party's views, challenges and expectations are brought forward to be addressed whereas the commission also uses the platform to educate the parties and bring forward significant changes that will affect the organisation of elections or the political parties. IPACs decisions, although not binding, goes a long way to educating parties and also influencing parties decisions.

\(^{70}\) Commissioners of the Electoral commission including the chairperson are appointed by the president. All 5 women commissioners are presidential appointments and so cannot be attributed to the work of the commission.
3 Trends, practices and social realities for women in decision-making processes and organs

The trends in women’s filling political spaces in Ghana have been quiet challenging but have had a steady progress. Notably, these trends started in 1989 when Mrs Mary Chinery-Hesse was appointed as the Deputy Director-General of the International Labour Organisation. It followed with Dr. Mrs Matilda Fiadzigbey, appointed as first administrator of Stool Lands (1996); Ms Esther Ofiori, appointed the first woman Chief Executive Officer of the Ghana Trade Fair Authority (2001); Ms Eva Lokko, appointed the first woman Director-General of the National and Premier Broadcasting station Ghana Broadcasting Corporation (GBC) and Ms Elizabeth Adjei, the first female to be appointed as Director of the Ghana Immigration Service (2002); Dr Regina Adutwum, the first Woman to be appointed the Director-General of the National Development Planning Commission (2005); Her Ladyship Justice Mrs Georgina Wood, first woman to be appointed Chief Justice (2007); Hon. Justice Joyce Adeline Bamford-Addo made history as the first woman to be elected to the position of Speaker of the Fifth Parliament of the Fourth Republic of Ghana (2009); Ms Christina Samia Yaba Nkrumah was elected as the first woman chairperson of the Convention People's Party and the first woman to ever head a political party in Ghana (2011); Mrs Charlotte Kesson-Smith Osei became the first women since the country’s independence in 1957 to hold the position of Chairperson of the Electoral Commission of Ghana (2015). Out of the seven commissioners of the Electoral Commission appointed by the president, five of them are women with the head commissioner being a woman.

Backed by the constitution, the Council of State, an advisory body to the president in the functioning of his duties which includes appointments, has some specific people to fill positions such as a former chief justice, a former chief of defence staff, president of the house of chiefs as well as an elected representative from all the ten regions of the country. In addition, the president appoints eleven (11) members to join which in all should be

---

75 As above, 11.
76 As above, 11.
77 As above, 12.
78 As above, 12.
79 As above, 12.
Women's political participation in decision-making in Ghana

26 in number.\(^80\) The current president is yet to assemble a new council of state, but the immediate past government had six of the 26 members being women, three of them being appointed by the former president whereas the other three were elected from the regions.\(^81\)

With regards to ministerial appointments, a critical look at the 1992 government where there was only one minister who was a woman,\(^82\), one can say there has been significant increase in ministerial appointments although not up to the expectation of bridging the gender gap. The immediate past government had some key appointment positions being held by women. These included the minister for Gender, children and social protection, the Attorney General and Minister for Justice, the Foreign Affairs minister, Minister for Education among others. In total, out of the 36 ministerial portfolios appointed by the president, only ten of them were women.\(^83\) The recently elected government has also named some women who are being vetted for some key ministerial positions such as the Foreign Affairs ministry, Attorney General and Minister for Justice, Minister for Local Government and Rural Development, Communications Minister, Minister for Gender, Children and Social Protection, among others. In total the government has named 8 women out of the forty-five ministerial appointments designated.\(^84\)

Although decision-making processes and organs warrant a variety of institutions, one major yardstick in measuring women’s political participation has been premised on their representation at the highest levels of decision-making in public spaces, especially in government. Since the early 1990s, growth in these spaces have however, been gradual yet unstable (see table 1 below). During the 1992 elections, only 17 women out of 200 candidates made it into parliament.\(^85\) The elections in 1996 and 2000, showed a steady growth of 19 women in Parliament, compared to 181 male representation.\(^86\) In the elections in 2004, the number grew by a mere 6 aggregation, tallying 25 female parliamentarians.\(^87\) In 2008 and 2012, female representation stood at 19 to 30 female representation, falling short since the elections in 1992 of meeting the threshold of 30 per cent female representation in parliaments set as part of the Millennium

\(^80\) Constitution of Ghana 1992, art 89.
\(^82\) National Commission on Culture (n 73 above).
\(^83\) One must note that the ten women appointed in the 36 ministerial positions include those who were reshuffled. This means some were actually appointed twice and in the end reducing the number from ten to eight. Helen Ntoso, for example, was named the Eastern Regional Minister and later reshuffled to Volta Regional Minister.
\(^86\) As above.
\(^87\) As above.
Development Goals.\textsuperscript{88} It should, however, not be denied that there has been a steady growth, albeit minimally, since the elections in 1992 (see table 2 below).

Table 2: Gender parliamentary representation in Ghana (1992-2012)

<table>
<thead>
<tr>
<th>Gender Parliamentary Seats allocations per Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Female</td>
</tr>
<tr>
<td>Male</td>
</tr>
<tr>
<td>Total seats</td>
</tr>
</tbody>
</table>

Source: Ghana Statistical Services (2014),\textsuperscript{89} Ghana Elections 2016\textsuperscript{90}

Table 3: Progress in women’s parliamentary participation in Ghana

<table>
<thead>
<tr>
<th>Global Ranking</th>
<th>Country</th>
<th>% of Women as at 1995</th>
<th>% of Women as at 2017</th>
<th>% Point change</th>
</tr>
</thead>
<tbody>
<tr>
<td>137 Ghana</td>
<td>8.0 %</td>
<td>12.7 %</td>
<td>4.2 %</td>
<td></td>
</tr>
</tbody>
</table>

Source: Inter-Parliamentary Report\textsuperscript{91}

Trends in parliamentary figures in Ghana thus reveal that the space and avenues for women have been relatively low, and that decision-making, especially on the national front remains male oriented. It also reveals that women’s inroads in political avenues are relatively still received with skepticism and pre-conceived perceptions of women’s place in the national geography. Accordingly, the developments since the beginning of the Fourth Republic in 1992/3 retain the status quo ante; that is Ghanaian public life has been and still remains dominated by men. There is till date a heavy absence of meaningful and effective women representation, contribution and impact in socio-economic and political developments in Ghana.

\textsuperscript{88} As above. The Inter-Parliamentary Union (IPU) ranks Ghana 137 out of 174 countries for female representation in government. See generally, Inter-Parliamentary Union (IPU) ‘Women in National Parliaments’ http://www.ipu.org/wmn-e/classif.htm (accessed 12 November 2016).

\textsuperscript{89} Ghana Statistical Agency (n 85 above).


The same dreary picture remains painted for Ghanaian women in other aspects of the civic sector. In a report released in early 2010, the Ministry of Gender, Children and Social Protection authoritatively reported that out of twenty-eight boards surveyed nationally across Ghana, only three have met the affirmative action requirement of 40 per cent board membership being women. The same report revealed that at the directorate level in the civil service, only 18 per cent of positions are held by women. 92 As far as the judiciary is concerned, four out of the thirteen positions in the Supreme Court are filled by women, with the highest office of Chief Justice held by a woman. 93 With regards to the Courts of Appeal, out of twenty-seven (27) positions available, only ten of the seats are filled by women since 2007. 94 At the High Courts too, out of 95 positions, only thirty-three (33) are filled by women. 95 It should however be noted that the above challenges are not unique to Ghana. 96 In fact, the commonwealth has been hard hit by the reality of gender inequality for at least the past few decades.

The question often asked, perhaps rightly so, is whether there is any value in strengthening women’s participation in political processes. Is such a proposition, not sanctioned on a premise of devaluing women, making them look more vulnerable and thus subjecting them to male subjectivity, contrary to the ideal of female political independence? Does the political emancipation of women, especially when their credibility is in question, generally not compromise on quality and substance? Often these questions arise, when talks around women’s political emancipation unfold, particularly in the area of affirmative action directed at women’s manumission. Although there may (or may not) be some value in these questions, possible responses to these questions have become self-stating over the years.

The importance of equal gender representation in developing countries, such as Ghana, cannot be overemphasised. As Viljoen has once

92 See generally, Ghana Statistical Agency (n 85 above) 171.
96 To be elaborate: Within the sub-regional level in Southern Africa, similar trends and practices are visible. Take for instance, Namibia and South Africa, both relatively nascent and stable constitutional democracies like Botswana. As at January 2015 women’s representation in the Namibian Parliament stood at 24% having reduced from 30% in the previous parliament. Of the 14 regional governors appointed in 2015, only five are female. Furthermore, according to the latest publicly available Public Service Report, women only have a 37% representation in decision-making bodies in the public sector. In the private sector, men account for 83% of positions of authority compared to women who only cover 17%. As far as the judiciary is concerned, out of the 14 judges of the High Court of Namibia, only two are women. No female judges serve on the Supreme Court bench on a permanent basis. In a similar trend, it is on record that as of November 2013 that in South Africa, men account for 70.1% in positions of senior management in the public sector, while women occupy 29.9%; marking the disempowerment of women in management and decision-making organs.
correctly averted, the effective integration of women in public mainstream requirements “female perspectives and presence.” For too long a time, women in Ghana, as in most parts of sub-Saharan Africa and beyond, had not had the opportunity to meaningfully engage political processes and positions of authority; subjecting them to political marginalisation and political vulnerability. In instances where they have made inroads in public domains, their roles remained relatively ancillary and at times their contributions are received with political hesitation and skepticism. Jemina Anita De Sosoo, a leading Ghanaian feminist and politician once attested to this reality during an international interview: “As women when you enter into politics you need to be courageous, because of insults like “you are a prostitute, you are this, you are that”, so first of all I have to build their [male counterparts] confidence to assure them [that] I am also part of the system, though they have been insulting my name …”. Although De Sosoo’s experience cannot necessarily be attributed to all women in Ghana, it is an immediate manifestation of the marginalisation and stigmatisation of women in political cosmoses of Ghanaian public spaces.

Besides the historical challenges women in Ghana had to and continue to endure, global realities necessitates that any democratic process today would need equal representation of men and women to succeed, given the developments and events the global economy has undergone since World War it has been argued, rightly so, that the participation of women in leadership structures and processes would make a qualitative difference to the governance of countries, and that women have special skills and unique experiences they would bring into these processes and structure. Actually, women in Ghana constitute 51.9 per cent of the total population, thus constituting a major portion of the national economy. It would therefore only be morally accurate and tenable that ‘power dynamics are equally shared by both sexes; due regard being given to both their interests and aptitudes’.

A case can further be made for the argument that due to their strong social integration compared to their male counterparts, women leaders tend to take decisions that are more conducive to improvement in the welfare of societies. These include voting and showing allegiance in favour of increased attention and allocation of national resources to life quality

100 Ghana Statistical Service *Labour force report: Six round of the Ghana Living Standards Survey (GLSS6)* (2014) 1. The data generated from the survey suggest that the estimated population for the entire country at the mid-survey period is 26.4 million, with the number of females (13.7 million) being slightly more than the males (12.7 million).
issues such as health, social welfare and education. Thus the exclusion of women from decision-making processes deprives a country of a valuable contribution to the progress and welfare of its people.

Several socio-economic, legal and political determinants account for the under representation of Ghanaian women in parliamentary and other public spaces. As in most parts of Africa and beyond, the Ghanaian society has been predominantly patriarchal ‘characterized by entrenched cultural norms, beliefs and practices that perpetuate gender inequalities’. Patriarchy has penetrated and permeated not only the household setting but has principally been visible in government structures and processes. This reality has often given rise to the low representation of women, since by virtue of socialisation women are regarded as less suitable for political office compared to male figures. Added to this phenomenon is the Ghanaian society’s conservativism blended in religious connotations.

Domestic affairs, such as the burden of caring for children, the elderly, the disabled, and generally the household has been, in accordance with tradition been largely left to women. This subsidiary role has to a considerable amount contributed to women overlooking the probabilities of them moving beyond the domestic affairs into other spheres such as political and decision-making organs. This is because the practice and theory of patriarchy has made male leadership more acceptable compared to female leadership. However, the question that arises is whether patriarchy more specially culture should be disregarded in advancing women’ discourse. This is a controversial question that requires deep analysis. Needless to hold, culture has a different connotation and meaning to different people and societies. Thus, one cannot eliminate long established and settled practices emanating from culture and tradition. The space for culture, in an ever globalising world, manifests the complexities between cultural relativism and modernity. In a legal context, one would speak of conflicts between customary law and practice viz-à-viz modern positive law. As Fombad rightly stated:

In every part of Africa, customary law co-exists with imported modern law. Conflicts between the two still persist and will not disappear soon. With the

102 For example developments in countries such as Namibia and South Africa affirm women parliamentarians’ sensitivity towards social issues. Both the Combating of Domestic Violence Act of 2003 (in the case of Namibia) and the Choice of Termination of Pregnancy Act of 1996 (in the case of South Africa) which are crucial pieces of legislation to the plight of women have been initiated and motivated by female political figures.


growing importance of customary law and customary courts, it is now imperative for more imaginative ways to be found to deal with the underlying conflict between the two systems of law. The easy option of suppressing a rule of customary law is certainly not the best way to address the matter.

One of the ‘imaginative ways’ in dealing with culture and its impugned practices is to place universal values at the centre. Thus, cultural practices can only be accepted to the extent they do not violate and detract from human dignity, equality and justice between persons.

Political participation generally requires adequate financial resource capacity; of which many women are not able to provide. \(^{106}\) Available data indicates that despite an impressive developmental record, there is persistent income inequality and poverty among women and men in Ghana. \(^{107}\) This phenomenon has the adverse effect of earnestly disadvantaging women when it comes to commanding economic power and thus limits their opportunities to participate in politics as a result of the lack of necessary (financial) resources. Causally linked to this is the actuality that running for political office, especially on political party level, is a process bound procedure, often dominated and administered by men and associated with financial costs and implications.

Another shortcoming that has been a trend in Ghanaian governance structures is the ‘restrictive exposure’ of female parliamentarians compared to their male counterparts. To elaborate: Women who make it to cabinet, since the 1992 elections are often placed in ‘redundant’ traditional positions preconceived for women. \(^{108}\) This trend cements entrenched perceptions and misconceptions about the political and overall leadership capabilities of women. This phenomenon may be understandable given the calibre and political immaturity and suitability of most available female candidates. Because of the low levels of Ghanaian women in public offices, such as parliament, most women do not have the specialised skills and knowledge, or, have not grasped the tactics and contours of making strides in political life, thus limiting their possible appointment to these strategic offices. The failure by the government in placing more women in strategically influential positions where their capabilities can be more highlighted and recognised, such as the ministries of defence, finance, foreign affairs and trade may also cement misconceptions about the political and leadership capabilities of women.

---

\(^{106}\) As above.


\(^{108}\) Notable of these positions include, the ministry of education, health, women and children affairs, communication, tourism etc.
4 Conclusion

As pointed out earlier many countries around the continent have and keep on striving to make room for women in the political discourse. Ghana, a nation ranked 53rd on the Democracy Index table\textsuperscript{109} cannot be excluded in this regard due to the freedoms and rights enjoyed by its citizens as well as the freedoms and rights the constitution promises. From the above discussions one can tell the country has put in many measures to improve women’s political participation. A look at constitutional provisions such as chapter 5 and 6, the government’s commitment to signing and ratifying international instruments such as the African Charter, the CEDAW, the Maputo Protocol and the BPfA are just examples and indications of the country’s willingness to advance women’s rights and their political participation. Further institutions like parliament and the Ministry of Gender, Children and Social Protection have gone a long way to advance this course in upholding women’s human rights, ensuring women’s participation in politics and public life, and developing affirmative action.

However, the country has left more to be desired with regards to this discourse. The legal framework in its present form has not been as comprehensive in securing a substantive right for women in the political realm. Thus, the realisation and advancement of women in political spaces in Ghana remains kilometric. Coupled with this shortcoming is the uncertain nature of the space and status of international law, particularly international human rights law, within the broader scope of the Constitution, which remains a threat to the comprehensive realisation of women’s rights, including their security in terms of political participation. Under current patterns and practices, thus, women’s rights protection and promotion generally, depends on the subjective efforts and generosity of the courts, civil society, the executive and the legislature.

Structural reforms, construed in law, are therefore inevitable. Surely, women’s rights mobilisation, especially in political processes and visibility in decision-making processes and organs will have to begin with women’s emancipation on political party levels. This will necessitate promoting women’s participation as active voters and credible candidates in electoral processes and institutions on political party levels. Subsequent, systematic measures such as women’s candidate training, awareness campaigns, as well building the capacities of female candidates for strategically and ‘predominantly’ male oriented leadership positions. Further measures include development of female candidates capacity to analyse issues from a gender perspective; the development of gender-sensitive election manifestos, and the adoption of policies and/or quotas to promote the

\textsuperscript{109} The Economist Intelligence Unit ‘Democracy in an age of anxiety’ (2015) 5.
ability of women to participate fully at all levels of decision-making within political parties.

Secondly, due consideration should be given to the enactment of the Affirmative Action Bill. Not only is the promulgation of the Bill overdue, viewed in light of similar legislation in comparative jurisdictions, notably commonwealth countries such as Australia and Canada the subsequent outcomes of such legislation, may be a compelling reason to place emphasis on the enactment of the Bill. In the absence of any evidence to the contrary, there should be no doubt that a similar approach, if adopted in Ghana, would yield the preconceived outcomes. Considerable sight should also be given to legislative gender quota measures, especially in those pieces of legislation establishing parastatals with boards. Thirdly, although women’s parliamentary representation is not a fallacy in its entirety, support for female parliamentarians has been extremely weak in the past. Thus, due consideration should be given on the development and strengthening of parliamentarians, particularly female parliamentarians on gender issues. Furthermore, the mainstreaming of gender impact reviews into parliamentary committee work, gender analysis of proposed and envisioned laws, policies and regulation, the introduction of tools for gender-sensitive budgets, support for cross-party women’s caucuses, and women’s mentoring programmes are notable reform considerations.
Abstract

Women's rights have been at the forefront of the development agenda of many nations since the establishment of the United Nations. Indeed, it has been the subject of much controversy and debate ever since the mid 1990's, following the Beijing Conference and its subsequent declaration and action plan. In Ghana for instance, there exists a legal and institutional framework within which Women's Rights are to be promoted and safeguarded. The 1992 Constitution of Ghana for instance, provides for the recognition and enforcement of Women's Rights. Coincidentally, 2016 marks exactly thirty years since Ghana ratified the Convention on the Elimination of All forms of Discrimination against Women (CEDAW). However, it seems as though, issues concerning Women's Rights in general have all but been neglected in Ghana, and essentially relegated to the peripheries of national development. In particular, the property rights of women has been considered a slippery slope for far too long, as culture derived chauvinistic tendencies steeped within an overly patriarchal socio-economic landscape, has impeded progress. This chapter therefore presents an overview of the current state of affairs regarding the implementation of Women's Rights in Ghana, sixty (60) years after Independence and thirty (30) years since the ratification of CEDAW, with particular emphasis on women's property rights. More specifically, the chapter traces the development of women's property rights, by critically examining the jurisprudence of the courts in Ghana from independence to date. The chapter offers a comprehensive review and critique of the Property Rights of Spouses Bill, which has been pending in Parliament for a while now, and proffer some suggestions and recommendations towards improving the promotion and protection regime, regarding women's property rights in Ghana.
1 Introduction

Human Rights in contemporary times have permeated almost all aspects of national development. Governments all over the world therefore strive to adhere to Human Rights standards and doctrines when developing national policies and legislation. Women’s rights in particular have been at the forefront of the development agenda of many nations since the establishment of the United Nations. It has indeed been the subject of much controversy and discussion ever since the mid 1990’s, following the Beijing Conference and its subsequent declaration and action plan. In Ghana for instance, there exists a legal and institutional framework within which women’s rights are to be promoted and safeguarded. Thus, the 1992 Constitution of Ghana, which many scholars believe ushered in a new era of robust human rights protection for all persons in Ghana, makes provision for women’s rights.

1 See generally, Medium-Term National Development Policy Framework: Ghana Shared Growth and Development Agenda (GSGDA) II, 2014-2017, December 2014. This policy document for example, encourages the adoption of ‘legal, legislative and operational measures to reinforce the principle of gender equality and equity in personal status and civil rights; and the integration of a gender perspective in the development of all national policies, programmes, processes and structures’.
2 As above.
3 The Preamble of the United Nations Charter provides in part for the reaffirmation of faith in fundamental human rights, in the dignity and worth of the human person, and in the equal rights of men and women. The Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) was thus adopted in 1979, and to date over 180 countries have ratified or acceded to this treaty, and are thus under an international obligation to adopt domestic policies and laws that conform to the standards of the CEDAW.
5 As captured in the Mission Statement of the Beijing Declaration and Platform for Action, it is ‘an agenda for women’s empowerment. It aims at accelerating the implementation of the Nairobi Forward-looking Strategies for the Advancement of Women and at removing all the obstacles to women’s active participation in all spheres of public and private life through a full and equal share in economic, social, cultural and political decision-making’.
6 The 1992 Constitution of Ghana makes provision for the promotion and protection of human rights. There are also several institutions that safeguard women’s rights in Ghana today, including: The Ministry of Gender, Children & Social Protection; The Commission on Human Rights & Administrative Justice (CHRAJ); the Human Rights Division of the High Court of Ghana, and the Gender Based Violence Courts within the Judiciary in Ghana.
7 Ghana has a chequered history in terms of enforcement of human rights since Independence, ranging from non-recognition of human rights provisions by the Courts in the 1960’s, to the period of military sanctioned violence, torture, enforced disappearances etc. in the 1980’s. Therefore, the new constitutional regime that the promulgation of the 1992 Constitution ushered in was a breath of fresh air to many; and has so far proved to be the longest period of democratic rule in the history of the country.
Coincidentally, 2016 marked exactly thirty years since Ghana ratified the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW).\(^9\) However, it seems issues concerning women’s rights in general have all but been neglected in Ghana, and essentially relegated to the peripheries of national development.\(^10\) In particular, the property rights of women has been considered a slippery slope for far too long, as culture derived chauvinistic tendencies steeped within an overly patriarchal socio-economic landscape, has impeded progress.\(^11\) The focus of this chapter therefore is to present an overview of the current state of affairs regarding the implementation of women’s rights in Ghana, with particular emphasis on women’s property rights since independence.

Part 2 of the chapter therefore generally sets out and briefly examines the legal and institutional framework for the promotion and protection of women’s rights in Ghana. Part 3 will then trace the development of women’s property rights in Ghana, by examining the jurisprudence of the courts and thereby discuss some seminal cases, some of which have inhibited and others that have expanded the frontiers of this aspect of women’s rights in Ghana since independence. Part 4 provides a review and critique of the Property Rights of Spouses Bill, which has been pending in Ghana’s Parliament for over a decade now. Finally, in Part 5, some suggestions and recommendations are made towards improving the promotion and protection regime, regarding women’s property rights in Ghana.

2 Legal framework

2.1 Legal framework

There exists today in Ghana, a myriad of domestic legislation and international treaties that provide for the promotion and protection of the rights of women. The most important of these for the purposes of this chapter are: the Constitution of Ghana; the Marriages Act; the Matrimonial Causes Act; the Intestate Succession Act; the Convention on

---

9 CEDAW was adopted in December 1979, and entered into force on 3 September 1981. Ghana however signed the treaty on 17 July 1980, and ratified it on 2 January 1986.

10 It must be noted here however that, a lot of progress has been made in the field of women’s rights in Ghana over the years. That notwithstanding, the *Medium-Term National Development Policy Framework: Ghana Shared Growth and Development Agenda (GSGDA) II, 2014-2017*, December 2014 points out on page 153 that, there is a ‘lack of national commitment to eliminate gender-based inequalities; low recognition of gender equity in public sector (public sphere); lack of gender responsive budgeting; inadequate representation of women and then participation in public life and governance; as well as insufficient procedures and tools to monitor progress.’

11 For example in 2014, during a discussion on the Intestate Succession Bill in Parliament, the Member of Parliament for Daboya Makarigu in the Northern Region of Ghana, Mr Nelson Abudu Baani, suggested that women deemed guilty of engaging in adultery ought to be stoned or hanged to death.
the Elimination of all forms of Discrimination Against Women (CEDAW); the African Charter on Human and Peoples’ Rights (Banjul Charter); and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (The Maputo Protocol).

2.1.1 The Constitution of Ghana

The first post-independence Constitution of Ghana did not contain any noteworthy human rights provisions. In fact, there was very little regard paid to fundamental rights and civil liberties in the post-independent era in Ghana. Thus, when Ghana was to attain Republican status in 1960, the framers of the draft 1960 Ghanaian Constitution attempted to incorporate some fundamental principles, upon which the Constitution was to be based i.e. freedom and justice. These fundamental principles made it into the 1960 Constitution as article 13, which provided as follows:

13. (1) Immediately after his assumption of office the President shall make the following solemn declaration before the people – On accepting the call of the people to the high office of President of Ghana I solemnly declare my adherence to the following fundamental principles – That the powers of Government spring from the will of the people and should be exercised in accordance therewith. That freedom and justice should be honoured and maintained. That the union of Africa should be striven for by every lawful means and, when attained, should be faithfully preserved. That the Independence of Ghana should not be surrendered or diminished on any grounds other than the furtherance of African unity. That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief. That Chieftaincy in Ghana should be guaranteed and preserved. That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country. That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of his freedom of religion or speech, of the right to move and assemble without hindrance or of the right of access to courts of law. That no person should be deprived of his property save where the public interest so requires and the law so provides. (2) The power to repeal this article, or to alter its provisions otherwise than by the addition of further paragraphs to the declaration, is reserved to the people.

Unfortunately, these fundamental principles (especially those on non-discrimination and the right of access to courts of law) were disregarded and infringed upon with impunity by the first President, whose duty it was

---

12 Reference to the Constitution of Ghana here encapsulates all formal post-Independence Constitutions that Ghana has had during specific periods of its constitutional evolution and development.
13 See, the Ghana (Constitution) order in Council, 1957.
14 The enactment of the Preventive Detention Act and the application of the Deportation Act served as fundamental stumbling blocks impeding the realisation of fundamental rights and freedoms in the immediate post-independence era.
15 See Constitution of Ghana1960, art 13(1).
to uphold them in the first place, and given the judicial stamp of approval by the Supreme Court of Ghana in the now infamous case of In Re Akoto and seven Others. The Court unanimously held in this case, per Korsah, CJ as follows:

It is contended that the Preventive Detention Act is invalid because it is repugnant to the Constitution of the Republic of Ghana, 1960, as article 13(1) requires the President upon assumption of office to declare his adherence to certain fundamental principles ... This contention, however, is based on a misconception of the intent, purpose and effect of article 13(1) the provisions of which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service. In the one case the President is required to make a solemn declaration, in the other the Queen is required to take a solemn oath. Neither the oath nor the declaration can be said to have a statutory effect of an enactment of Parliament. The suggestion that the declarations made by the President on assumption of office constitute a 'Bill of Rights' in the sense in which the expression is understood under the Constitution of the United States of America is therefore untenable ... In our view the declaration merely represents the goal which every President must pledge himself to attempt to achieve. It does not represent a legal requirement which can be enforced by the courts. On examination of the said declarations with a view to finding out how any could be enforced we are satisfied that the provisions of article 13(1) do not create legal obligations enforceable by a court of law. The declarations however impose on every President a moral obligation, and provide a political yardstick by which the conduct of the Head of State can be measured by the electorate. The people's remedy for any departure from the principles of the declaration is through the use of the ballot box, and not through the courts.

Since then, subsequent Ghanaian Constitutions have prioritised the entrenchment of fundamental rights and freedoms. For example, chapter 4 of the 1969 Constitution of Ghana is dedicated to the liberty of the individual i.e. fundamental human rights. Thus, it was no longer at the discretion of the President, whether or not to guarantee or adhere to these principles. Also, the Constitution provided that Parliament had no power to amend the provisions of chapter 4 of the Constitution 'in any way that may detract or derogate from any such provision or the principles embodied in any such provision'.

In terms of women's rights, the 1969 Constitution was the first of its kind in Ghana to introduce explicit provisions in this regard. Article 13, on the welfare of the family, mandated Parliament to pass legislation that will ensure:

17 As above 533-535.
18 All Constitutions of Ghana beginning with the 1969 Constitution, through the 1979 Constitution and the present 1992 Constitution have had extensive and entrenched human rights provisions.
19 This was a direct reaction to art 13(1) of the 1960 Constitution, and also the Supreme Court's decision in the Re Akoto case.
(a) the rights of women and children to such special care and assistance as are necessary for the maintenance of their health, safety, development and well-being.

Also, article 25 barred Parliament from enacting any law that contained any provision that was discriminatory in itself or effect. The word ‘discriminatory was defined to mean:

Affording different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, sex, occupation or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

In addition to maintaining a whole chapter on fundamental human rights, the 1979 Constitution of Ghana went a step further to make provision for equal rights of mothers, spouses and children. Article 32(2) for instance safeguarded women's property rights as it provided that:

No spouse may be deprived of a reasonable provision out of the estate of a spouse whether the estate is testate or intestate.

The 1992 Constitution of Ghana also follows this trend and contains a chapter dedicated to Fundamental Human Rights and Freedoms. Article 27 is captioned ‘Women’s Rights’, and provides as follows:

(1) Special care shall be accorded to mothers during a reasonable period before and after childbirth; and during those periods, working mothers shall be accorded paid leave. (2) Facilities shall be provided for the care of children below school-going age to enable women, who have the traditional care for children, realize their full potential. (3) Women shall be guaranteed equal rights to training and promotion without any impediments from any person.

This Constitutional provision, although captioned as ‘Women’s Rights’ generally, only seems to deal with one aspect out of the whole spectrum of ‘women’s rights’ i.e. labour rights of women. The provision therefore recognises women as potential mothers, and thus mandates all employers to accord paid leave to their female employees before and after childbirth. Also, it requires day care facilities to be provided in order to ease the total burden of child rearing off women so they are able to achieve their other life goals; but exactly whom the burden of providing these

---

20 This was arguable also a reaction to the 1960 Constitution.
25 The provisions of art 27 make this quite clear, as it fails to enumerate the various other aspects of women’s rights that are available.
facilities falls on, is not quite clear though.\textsuperscript{27} Finally, article 27 imposes an obligation on all employers, public and private, to ensure equality between men and women in terms of capacity building and career advancement, without any inhibitions especially based on gender.\textsuperscript{28}

In terms of women’s property rights, article 22 of the Constitution captioned, ‘Property Rights of Spouses’ provides for this. This article provides that:

(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will. (2) Parliament shall, as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses. (3) With a view to achieving the full realization of the rights referred to in clause (2) of this article – (a) spouses shall have equal access to property jointly acquired during marriage; (b) assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage.

This provision is important for a number of reasons. Firstly, it provides generally for the property rights of all spouses, including women – whether as a result of the death of the other spouse, or upon the dissolution of a marriage. Secondly, and most importantly, the legislature is obliged to pass legislation that will regulate the property rights of spouses. Finally, it seems quite clear from the wording of article 22(2) that the framers of the Constitution must have envisaged the prolonged delay that was to beset the enactment of the law regulating the property rights of spouses. This is evidenced from the use of the words ‘as soon as practicable’ in clause (2) of article 22.\textsuperscript{29} The failure of Parliament in enacting this legislation to date has created enormous problems for the effective implementation of women’s property rights in Ghana, a theme that is explored further in this chapter.\textsuperscript{30}

2.1.2 \textit{The Marriages Act}

The Marriages Act of Ghana, 1884-1985 (Cap 127), provides for the various types and incidents of marriage permissible in Ghana. There are therefore three of such marriages: Customary Marriages; Mohammedan Marriages;\textsuperscript{31} and Christian and Other Marriages. All these forms of marriages also have distinct means through which property is inherited either upon dissolution of the marriage or upon death of one of the

\textsuperscript{27} The reasonable assumption is that the burden is on both the State as well as the private sector, since chapter 5 itself of the Constitution is expressed to be applicable to all persons in Ghana, including legal entities.

\textsuperscript{28} See art 27(3) of the 1992 Constitution.

\textsuperscript{29} This is however not an excuse for Parliament’s failure to pass the Bill into Law.

\textsuperscript{30} Part 4 of this chapter reviews the draft Property Rights of Spouses Bill.

\textsuperscript{31} The word ‘Mohammedan’ is used in reference to Islam/the Islamic religion, and Muslim marriages or those contracted under Islam and Muslim Law generally.
spouses. For example, section 15 of Cap 127 provides for the application of the Intestate Succession Act, 1985 (P.N.D.C.L. 111) to customary marriages, whether registered or unregistered. On the other hand Section 28 of Cap 127 provides that: ‘On the death of a Mohammedan whose marriage has been duly registered under this Part the succession to the property of that Mohammedan shall be regulated by Mohammedan law’.32

2.1.3 The Matrimonial Causes Act

The Matrimonial Causes Act,33 is an Act meant ‘to provide for matrimonial causes and for other matters connected therewith’.34 In terms of the property rights of women upon a divorce or dissolution of marriage, sections 19 and 20 of Act 367 are relevant. Section 19 states that:

The Court may, whenever it thinks just and equitable, award maintenance pending suit or financial provision to either party to the marriage, but no order for maintenance pending suit or financial provision shall be made until the court has considered the standard of living of the parties and their circumstances.

Similarly, section 20 provides as follows:

(1) The Court may order either party to the marriage to pay to the other party such sum of money or convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the court thinks just and equitable. (2) Payments and conveyances under this section may be ordered to be made in gross or by instalments.

These provisions ensure that both women and men, especially women,35 are taken care of financially and property wise in the event of a dissolution of marriage. Thus, in matrimonial causes, the matrimonial court36 is mandated to award maintenance to either of the parties, pending the determination of the matter or make an order for financial provision for the benefit of one of the parties, once it is fair, just and equitable to do so. However, any such decision must take cognizance of the general standard

---

32 What this means is that, property distribution upon the death of a Muslim spouse is done strictly pursuant to the dictates of Islam, as contained in the Quran or other Islamic edicts.
33 1971 (Act 367).
34 As above, Long Title.
35 This is because it is a notorious fact that women for decades have generally been discriminated against especially customarily, upon the dissolution of marriage or death of their husbands. The law was therefore intended as a corrective measure for this unjust state of affairs.
36 This refers to the court that is vested with jurisdiction for matrimonial matters, be it the District, Circuit or High Courts.
of living of both parties. The court can also order one party to transfer on the other, movable or immovable property as settlement of property rights. These provisions leave no doubt that women’s property rights in Ghana are protected and safeguarded during and after divorce proceedings.

2.1.4 The Intestate Succession Law

The Intestate Succession Law, 1985 (PNDCL 111) regulates the devolution or distribution of the estate of any person who dies without leaving behind a will. PNDC Law 111 was enacted 30 years ago to protect inheritance rights concerning women and children, as customary law often provided women unequal access to their late husbands’ estate when there was no legal will in place. The Law provided a uniform intestate succession regulation in Ghana. In terms of the property rights of women whose husbands die intestate, sections 3, 4, 5 and 6 caters for this. For example, section 3 (captioned, ‘Devolution of Household Chattels’) provides that:

Where the intestate is survived by a spouse or child or both, the spouse or child or both of them, as the case may be, shall be entitled absolutely to the household chattels of the intestate.

Section 4 (Spouse or Child or both to be entitled to one House) on the other hand states:

Notwithstanding the provisions of this law:–

(a) where the estate includes only one house the surviving spouse or child or both of them, as the case may be, shall be entitled to that house and where it devolves to both spouse and child, they shall hold it as tenants-in-common;

(b) where the estate includes more than one house, the surviving spouse or child or both of them as the case may be, shall determine which of those houses shall devolve to such spouse or child or both of them and where it devolves to both spouse and child they shall hold such house as tenants-in-common: ‘Provided that where there is disagreement as to which of the houses shall devolve to the surviving spouse or child or to both of

37 This is important in order to avoid the court handing out decisions that are incapable of enforcement, as a result of the financial and other circumstances of the parties involved.
38 Thus, aside monetary settlement, the court can also order property (both movable and immovable) to be transferred to one party as part of financial settlement.
39 In theory and in practice, the legal regime ensured that women’s property rights are protected in cases of dissolution of marriage.
40 PNDC 111 was enacted to ensure equitable distribution of property upon the death intestate of an individual.
41 Therefore, even though an individual may die intestate, the law ensures that the estate of the deceased is distributed proportionally among his immediate and extended family.
them, as the case may be, the surviving spouse or child or both of them shall have the exclusive right to choose any one of those houses; except that if for any reason the surviving spouse or child or both of them are unwilling or unable to make such choice the High Court shall, upon application made to it by the administrator of the estate, determine which of those houses shall devolve to the surviving spouse or child or both of them’.

Section 5 (Intestate Survived by Spouse and Child) provides:

(1) Where the intestate is survived by a spouse and child the residue of the estate shall devolve in the following manner:
   (a) Three-sixteenth to the surviving spouse;
   (b) Nine-sixteenth to the surviving child;
   (c) One-eighth to the surviving parent;
   (d) One-eighth in accordance with customary law:

Provided that where there is a child who is a minor undergoing educational training, reasonable provision shall be made for the child before distribution.

(2) Where there is no surviving parent one-fourth of the residue of the estate shall devolve in accordance with customary law.

Section 6 (Intestate survived by Spouse only) of PNDCL 111 also provides:

Where the intestate is survived by a spouse and not a child the residue of the estate shall devolve in the following manner:

   (a) One-half to the surviving spouse;
   (b) One-fourth to the surviving parent;
   (c) One-fourth in accordance with customary law:

Provided that where there is no surviving parent one-half of the residue of the estate shall devolve in accordance with customary law.

Quite clearly, PNDCL 111 makes provision for women’s property and inheritance rights where their husbands die intestate. Although this law has been extremely helpful in advancing the property rights of women generally, proposals for reform of the law have over the years been mooted.42

2.1.5 International obligations of Ghana

Ghana has signed and ratified several international and regional treaties that impose legal obligations on the country. However, the legal effect and impact of some of these treaties are in doubt, as Ghana has consistently in the past failed to ‘domesticate’ such treaties, being a dualist state.43 That

42 There have been various proposals over the years for comprehensive reform of Ghana's intestate succession law.
notwithstanding, it is important that we briefly examine some of the relevant provisions of those treaties that bother on human rights, in particular women’s property rights.

**Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW)**

The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) was adopted in December 1979, but entered into force in September 1981. Ghana signed this treaty on 17 July 1980, but only ratified it on 2 January 1986. Article 16(1)(h) provides as follows:

(1) States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: …

(h) The same rights for both spouses in respect of the ownership, acquisition, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

**The African Charter on Human and Peoples’ Rights (Banjul Charter)**

The African Charter on Human and Peoples Rights, more popularly referred to as the Banjul Charter was adopted in 1981 and entered into force in 1986. Ghana ratified the Banjul Charter on 24 January 1989. Article 14 of the Charter, which is on the right to property provides that: ‘The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws’. Article 18(3) of the Charter makes provision for the elimination of discrimination against women and children: ‘The State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions’. However, it is important to note that Ghana has not explicitly domesticated most of the international and regional human rights instruments it has ratified including the African Charter and Maputo Protocol.

---

44 Over 180 States have signed and ratified this treaty.
45 Although Ghana has a history of signing and ratifying international treaties, implementation of the provisions however has more often than not been delayed due to a myriad of reasons, ranging from lack of political will to weak enforcement and monitoring institutions.
The Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol)

The Protocol to the African Charter on Human and Peoples’ Rights in the Rights of Women in Africa (the Maputo Protocol) was adopted on 11 July 2003, and entered into force on 25 November 2005. Ghana signed the Maputo Protocol on 31 October 2003, and subsequently ratified it on 13 June 2007.48 Article 7(d) of the Maputo Protocol, captioned ‘Separation, Divorce and Annulment of Marriage’ provides as follows:

States parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that: ... In case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.

Article 21 of the Protocol further provided for the right to inheritance. The provision is as follows:

(1) A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it. (2) Women and men shall have the right to inherit, in equitable shares, their parents’ properties.

3 The judiciary and development of women’s matrimonial property rights in Ghana

3.1 Property rights of women from independence: The ‘no-property rights’ era

The case of Quartey v Martey49 was arguably the starting point for the ‘oppression’ of women in terms of their property rights in post-independent Ghana. The case involved the plaintiff (wife of the deceased) who sued her deceased husband’s family, claiming inter alia a share of her deceased husband’s property especially as she had assisted her late husband financially during his lifetime and had given active assistance to him in all the jobs he did. The court, presided over by the late Justice Ollenu, however held as follows:

... by customary law it is a domestic responsibility of a man’s wife and children to assist him in the carrying out of the duties of his station in life, for instance, farming or business. The proceeds of this joint effort of a man and

his wife and/or children, and any property which the man acquires with such proceeds are by customary law the individual property of the man. It is not the joint property of the man and the wife and/or children. The right of the wife and the children is a right to maintenance and support from the husband and father … I must hold that, in the absence of strong evidence to the contrary, any property a man acquires with the assistance or joint effort of his wife, is the individual property of the husband and not joint property of the husband and the wife.

What this meant was that, women essentially were not entitled to inherit property from the estate of their deceased husbands, even if they assisted or contributed in the acquisition of same. As preposterous as this may sound, all that the law provided women during this era was ‘maintenance and support’. It has been argued for example that, it was the patriarchal nature and system of ownership prevalent in Ghana that led to this inevitable conclusion. Thus, this rule espoused by the court was for many years the standard that prevailed in terms of the property rights of women, especially those married under customary law.

However, in 1971, there was a glimmer of hope when the Matrimonial Causes Act (Act 367) was enacted. Section 20(1) of Act 367 is of paramount importance in terms of women’s property rights. It provides as follows:

The Court may order either party to the marriage to pay to the other party such sum of money or to convey to the other party such movable or immovable property as settlement of property rights or in lieu thereof or as part of financial provision as the court thinks just and equitable.

3.2 The era of substantial contribution

In the 1970’s however, the courts begun a movement towards the development of the principle of ‘substantial contribution’ as the primary determinant of the property rights of women upon the breakdown of a marriage, be it customary or otherwise. This development was due to the enactment of the Matrimonial Causes Act. Sections 19 and 20 referenced earlier are instructive as these provisions ensure that both women and men, especially women, are taken care of financially and property wise in the event of a dissolution of marriage. These provisions leave no doubt that women’s property rights in Ghana are protected and safeguarded during and after divorce proceedings.

Thus, the Ghana Law Reform Commission in its report entitled ‘The Law Regulating Property Rights between Spouses’ described the principle in the following terms:51

A spouse claiming a portion or all of the matrimonial property jointly acquired upon dissolution of the marriage must show either an agreement between the parties giving him/her a beneficial interest or evidence of contribution towards the acquisition of property, such as direct financial improvements, renovations, extensions, or, applying her income or time for the benefit of the family so as to enable the husband (or other spouse) to acquire the property in question.

In *Quartey v Armar*,52 the parties had been married from 1950 to 1960, when the marriage was dissolved. The plaintiff thus sued the defendant for a declaration that she was the owner of two houses, and for an order for the defendant to deliver to her the original deed of conveyance in respect of one of the houses which was in his possession. Both parties claimed that they had bought both houses themselves, although evidence on the record suggested that both were bought in the name of the plaintiff i.e. House number one in her maiden name, and house number two in her married name. It was held as follows:

Having regard to the plaintiff’s annual income and living circumstances, she was not of such financial means to be able to pay the lump sum of 4,000 Ghana pounds or the balance of 1,500 from her savings. It was more probable that the first house was actually paid for by the defendant ... If two or more persons purchased property and provided the money in unequal shares, the purchasers were presumed to take as tenants in common in shares proportional to the sums advanced. But where the persons involved in the purchase are man and wife, unless there is evidence to the contrary, it is presumed that they intended to own the property jointly. In this case the evidence showed that the plaintiff paid the initial deposit on the second house. The defendant must have paid the 800 but the balance of the purchase price was paid jointly by her and the defendant, although the defendant’s contributions were greater. Since there was no evidence of advancement or intention that the house was to be held by them in separate shares, they were to own it jointly.

Subsequently in the case of *Abebrese v Kaah*,53 Sarkodee J in distinguishing the present case from *Quartey v Martey* held that:

… the rule of customary law that property acquired by a husband with the assistance of his wife and children became the property of the husband alone took its root from the fundamental principle of customary law that the wife and children were dependent upon the husband. That was not the case here. Further, the size of the plaintiff’s contribution was far in excess of the

52 [1971] 2 GLR 231.
assistance contemplated by the customary law ... There is no doubt in my mind and I find that the plaintiff was a woman of considerable means.

Thus, it was held that the house in question was the joint property of the plaintiff and her husband.

However, in the cases of *Bentsi-Enchill v Bentsi-Enchill*,\(^\text{54}\) on their divorce, there was the question of whether the wife had any beneficial interest in a house purchased by the husband out of his earnings during the subsistence of the marriage. The courts held that the wife had not contributed substantially or materially towards the acquisition of the property acquired by the husband during the marriage, and as such had no share or interest in the property. Also, in *Clerk v Clerk*\(^\text{55}\) upon divorce, the wife applied to have the matrimonial home transferred to her. It was held that: ‘the man has property and the wife has nothing, her only assets are her children who, according to the evidence, are well placed in life. A woman cannot ask for more’.

Despite the mixed results that this ‘substantial contribution’ doctrine was producing, the courts were clearly seen to be moving away from the *Quartey v Martey* era, where women could not even have a share of matrimonial property. Consequently, in *Yeboah v Yeboah*\(^\text{56}\) the High Court essentially overruled the decision in *Quartey v Martey* by holding that no rule of customary law prevented joint ownership of property by spouses. The court thus took account of the wife’s indirect contributions in the form of time and effort (such as supervising the construction of the house) towards the acquisition of the house. The court held that, although it was difficult to quantify such contributions in monetary terms, her combined direct and indirect contribution entitled her to an equal share of the house with the husband.

### 3.3 The era of substantial equality

As has already been noted, article 22 of the Constitution provides for the property rights of spouses and requires parliament to enact the relevant legislation in this regard. Regrettably, even though the Constitution sets out the broad framework for property rights and envisages statutory expansion, to date the legislature has failed to do so. Thus, the Property Rights of Spouses Bill has been pending in Parliament for about a decade now, with no indication as to when it may be actually enacted into law. In the absence of this, the Courts have since the late 1990’s filled this vacuum, and expanded greatly on the ‘substantial contribution’ principle.

---

\(^{54}\) [1976] 2 GLR 303.


\(^{56}\) [1974] 2 GLR 38.
The first case worthy of note is *Mensah v Mensah*,\(^{57}\) where the applicant sought a share of the property on the basis that she had contributed equally in economic terms to the acquisition of property through her earnings at their stores. The Supreme Court in applying the ‘equality is equity’ principle, which seems to underpin article 22 of the Constitution, held as follows:

… the principle that property jointly acquired during marriage becomes joint property of the parties applies and such property should be shared equally on divorce; because the ordinary incidents of commerce has no application in marital relations between husband and wife who jointly acquired property during marriage.

The Court in *Mensah v Mensah* therefore clearly favoured the equal sharing of joint property in all circumstances, provided it could be established for a fact that both parties contributed one way or the other towards the acquisition of the property. As Yankah puts it,

if it was established that the parties jointly contributed (financially) to the acquisition of the property, then the property should be shared equally because the courts would not reduce the marital relationship to a commercial arrangement and reduce the sharing of joint marital property to mathematical calculations.\(^{58}\)

In the subsequent case of *Boafo v Boafo*\(^{59}\) the Supreme Court modified and clarified the position of the law. It held that:

… The spirit of … the judgment in *Mensah v Mensah* appears to be that the principle of the equitable sharing of joint property would ordinarily entail applying the equitable principle, unless one spouse can prove separate proprietorship or agreement or a different proportion of ownership … The question of what is ‘equitable’, in essence, what is just, reasonable and accords with common sense and fair play, is a pure question of fact, dependent purely on the particular circumstances of each case. The proportions are, therefore, fixed in accordance with the equities of any given case.

What can be deduced from this decision is that, although the case affirms the equality is equity principle as espoused in the *Mensah v Mensah* case, the Court further construed and gave meaning to provisions in the Matrimonial Causes Act, as well as article 22(3)(b). Consequently, the issue of proportions, interests and rights over matrimonial property was to be determined in accordance with the equities of each case i.e. on a case-by-case basis. So far, it is evident that the Supreme Court had begun its shift away from ‘substantial contribution’ to ‘substantial equality’.

---


\(^{58}\) n 50 above.

Then came the case of *Gladys Mensah v Stephen Mensah*. This case further broadened the scope of the ‘substantial equality’ principle, by re-interpreting the doctrine of ‘substantial contribution’ and outlining some of its constituent parts. The Court held thus:

… this Court is of the considered view that the Petitioner’s contribution even as a housewife, in maintaining the house and creating a congenial atmosphere for the respondent to create the economic empire he has built are enough to earn for her an equal share in the marital properties on offer for distribution upon the decree of divorce. From the evidence on the record, this court will not permit the respondent to use the petitioner as a donkey and after offering useful and valuable service dump her without any regard for her rights as a human being.

In sum, this case ensured that women’s property rights deriving from marriage were forever protected and enshrined in the law. The fact that the court boldly asserted that domestic chore, however menial or unquantifiable they may be, entitled women to an equitable share in marital property was a step in the right direction towards actual equality. Unfortunately, this victory was somewhat short lived, for the court subsequently produced another decision that some scholars have deemed as a step backwards for the protection of women’s property rights in Ghana.

In *Quartson v Quartson* it was held that the decision in *Gladys Mensah v Stephen Mensah* was not to be misconstrued. The Court therefore warned that their earlier decision was ‘not to be taken as a blanket ruling which afford spouses unwarranted access to property they were not entitled to’. Contrary to this, the court expected all cases to be decided on their merits thereof. However, it seems as though the court entangled itself and was caught in a catch 22 situation – for on the one hand the *Gladys Mensah* case had watered down the need for actual financial contribution in order to merit a share of matrimonial property, whereas on the other hand, the decision in the *Quartson* case failed to provide any legal basis for why the wife was not entitled to a share in the matrimonial home, the construction of which she had single-handedly supervised, albeit relying on funds sent from the husband who was outside the country at the time. Thus, non-monetary contributions as a determinant of interest in matrimonial property were in a state of flux following the *Quartson* case.

Fortunately, the Supreme Court in *Arthur v Arthur* ‘redeemed’ itself. The case involved a couple that had been married for about a decade. The petitioner alleged that during their stay in France, where the respondent was a professional footballer, she had been prevented by him from taking

60 [2012] 1 SCGLR 391.
61 n 48 above.
up gainful employment, as she was required to essentially drive him as well as their children everywhere. As a result of this arrangement, she alleged that they agreed that his earnings and any property that was acquired during the subsistence of the marriage were their joint property. The court re-affirmed its belief in the ‘equality is equity’ principle as espoused in the Gladys Mensah case. Thus, irrespective of any quantifiable ‘substantial contribution’ or not, the presumption in Ghanaian law now seems to be that all marital property acquired during the subsistence of marriage are prima facie deemed to be joint property, that ought to be shared equally upon dissolution of marriage.

4 The Property Rights of Spouses Bill

4.1 Overview of the draft Bill

As has been already noted, the Property Rights of Spouses Bill has long been on the agenda for Ghana’s Parliament. Unfortunately, it is still pending as there is no indication regarding when it may ultimately become law. This is so, notwithstanding the obligation in article 22 of the Constitution. The Memorandum to the draft Bill thus takes cognizance of this fact and suggests that ‘though the preparation of the Bill has been protracted, it is to fulfill the obligation of the supreme law that this Bill has been proposed in the best interest of spouses’. The Bill is divided into four (4) parts: relationships; marital property agreements and related matters; property rights; and miscellaneous matters. The first part on Relationships reiterates the provisions of article 22 of the Constitution, and goes on further to define what a spouse means, as well as certain types of non-marital arrangements like cohabitation. The second part on marital property agreements (MPA’s) is essentially the Ghanaian version of pre-nuptial agreements that exist elsewhere in the world. Under property rights, several concepts are explained, including

---

64 See the Memorandum to the Property Rights of Spouses Bill, Ghana.
65 As above.
66 For the avoidance of doubt, a spouse in Ghana is defined to mean a man married to a woman or vice versa.
'joint property', 'separate property', 'equal access' etc. Clause 10 defines joint property to include the matrimonial home if it is jointly acquired and other immovable property acquired by both spouses for the purpose of their marriage. Household property and other property acquired during the marriage also forms part of the joint property but separate property is excluded. The court is given power in this clause to restrain a spouse or third party from disposition of joint property.

Clause 11 excludes separate property from distribution and defines separate property. A spouse is given capacity to acquire and keep property during the subsistence of the marriage under the Bill. Separate property includes, among other things, property acquired before marriage or property acquired by bequest, devise, through inheritance or gift from a person other than the spouse. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship are separate property. The part of a settlement that represents those damages are also to be considered separate property. Property that the spouses have agreed is not to be included in the matrimonial property is obviously separate. Trust property is excluded except where it is a sham to deprive the vulnerable spouse of joint property. Per Clause 12, equal access includes the right to the use of, the benefit of and to enter the joint property and where there is agreement between spouses, to the disposal of the joint property. Finally, the Miscellaneous Matters part provides for maintenance orders, jurisdiction of courts, applicability of the Legal Aid Scheme Act, 1997 (Act 542), settlement by Alternative Dispute Resolution (ADR), Offences etc.

4.2 Critique of selected provisions

Section 3 on Cohabitation provides in sub-section 1 that: 'Cohabitation refers to a situation in which a man and a woman hold themselves out to the public to be man and wife'. Section 3(2) then states: 'Persons who have cohabited for a period of five years or more shall be deemed to be spouses and have rights of spouses for the purpose of this Act'. Section 3(3) finally provides that:

The rights conferred by this section on cohabitees are available only to persons who (a) have the capacity to be married to each other under a marriage recognised under this Act; (b) are eighteen years and above; and (c) have held themselves out as husband and wife for a period of not less than five years.

The rationale for this provision as evidenced in the Memorandum is that, persons who cohabit tend to make contributions towards the acquisition of joint property during the subsistence of such relationships; and as such it will be unfair to deny such persons their rights to the joint property simply because they are not legally married. We can however extend this reasoning to cover pre-marital relationships not amounting to cohabitation
(PMR-NAC). It is a notorious fact that there are no timelines by which couples are to abide by in terms of when they legally get married. It is also a fact that some couples may be in relationships for a few years before deciding to get married. What then becomes of such couples, who are not cohabiting but yet contribute to acquire joint property, with or without the intention of one day cohabiting or getting legally married? Should such couples also, in the words of the Memorandum 'lose their property rights merely because they have not completed or formalized their union?'

It is suggested that, since the first part of the draft Bill is on Relationships, a provision is introduced to cater for PMR-NAC’s, for example, since it is a form of relationship that is prevalent in contemporary times. Also, the requirement of cohabiting for five (5) years before being entitled to ‘spousal’ rights must be reviewed. This is because, in terms of acquisition of property, there is no hard and fast rule as to when it may be acquired. Thus, whereas some cohabitee couples may acquire joint property only after several years of cohabitation, it is perfectly foreseeable that others may acquire joint property right from the inception of their relationship. Therefore, to tie in spousal property rights with the length of time of cohabitation may rather be a hinder to the enjoyment of property rights generally for cohabitee couples, especially women. A much better way of going about this, in my opinion, is to only retain the requirement of holding yourselves out to the public as a couple, and allowing the courts to determine incidents of this on a case-by-case basis.

In terms of the Marital Property Agreement (MPA), the draft bill essentially reduces the contracting of marriage to commercial transactions if the parties so desire. The form of the MPA can however be Oral or Written. It is suggested that, the Written MPA be encouraged over the Oral MPA’s. This is because, unlike ordinary contracts, there has to be some ‘extra’ sanctity attached to MPA’s by virtue of the nature of the marriage institution to which it relates. Thus, even though illiteracy levels in Ghanaian society is still significant and thus, numerous illiterate as well as semi-literate couples desirous of getting married may wish to have MPA’s and by law should be entitled to it, it may be necessary to insist on the contents of the agreement being written down, for the avoidance of doubt. This point is further buttressed by section 6 of the draft Bill itself, which encourages potential couples, although not mandatory, to obtain independent legal advice before entering into an MPA. The fact that, the Bill includes such a provision in the first place, is indicative of the seriousness and thoughtfulness that must be attached to issues involving the MPA, and as such it is ideal that the agreement is evidenced in writing.

67 It must be noted that the Supreme Court in the Mensah v Mensah case held that: ‘… the ordinary incidents of commerce has no application in marital relations between husband and wife who jointly acquired property during marriage’.
Polygamous marriages

Clause 20 is reproduced verbatim below to illustrate the impact of the Bill on polygamous marriages:

(1) Where a husband has more than one wife in a polygamous marriage, the ownership of the property shall be determined as follows:
   (a) joint property acquired during the first marriage and before the second marriage was contracted is owned by the husband and the first wife; and
   (b) any joint property acquired after the second marriage is owned by the husband and the co-wives and the same principle is applicable to a subsequent marriage.

(2) Despite subsection (1)(b), where it is clear either by agreement or through the conduct of the parties of the polygamous marriage that each has separate matrimonial property, each wife owns that separate matrimonial property separately without the inclusion of the other wives.

(3) A husband in a polygamous marriage who takes a subsequent wife or wives shall together with the existing wife or wives make a declaration as prescribed of their respective interest in the joint property ...

Clause 3 addresses the question of cohabitation by stating that persons who have cohabited for a period of five years or more shall be deemed to be spouses and have the rights of spouses for the purpose of this Act so long as they have the capacity to be married to each other under a marriage recognised under this Act, are eighteen years and above, and have held themselves out as husband and wife for a period of not less than five years.

It is unfortunate that the Legal and Constitutional Committee of the Parliament of Ghana, per a member of the committee and MP for Offinso South, Ben Abdallah Banda, who disclosed this to Citi News, said the decision to expunge the provision of cohabitation from the bill is in the supreme interest of the country. ‘Within the context of the law, a spouse is someone who has been legally married so where do we place cohabitation ... at the end of the day, the consensus was that cohabitation should be expunged from the law and indeed cohabitation has in fact been expunged from the law’.68

5 Towards actual equality: Recommendations for action

It is suggested that, in order to speed up the process towards actual equality for women in Ghana in terms of their matrimonial property rights, Parliament must immediately enact the Property Rights of Spouses Bill,

without further delay taking into consideration the suggested revisions. This legislation will ensure that the legal regime regarding spousal property rights is well regulated. The courts will thus be in a better position to skilfully guide the development of the law to cater for the needs of an ever changing and dynamic society.

Serious thought should be given to establishing a Women’s Rights Commission, either through an Act of Parliament or by virtue of a Constitutional amendment. This Commission which will solely focus on women’s rights issues nationwide will play a critical role in first and foremost educating women across the country on their rights. The Commission also has the potential of spearheading the movement to ensuring effective implementation of all the laws regarding women’s rights in Ghana, as well as Ghana’s regional and international obligations in this regard. If established, the Commission can serve as a critical tool for national development, as it will harness the energies of women, and work towards equality and equal standards and treatment of women, as compared to men in terms of all aspects and facets of national development.

Also, Ghana should seriously consider the enactment of a Women’s Rights Act, or have women’s rights feature prominently in the Affirmative Action Act, that was proposed by the Constitution Review Commission. Although admittedly legislation on its own do not solve problems, it will nonetheless serve as a signal of intent, and be useful in ensuring that we comply with acceptable international standards and practices regarding the fulfilment and implementation of women’s rights in Ghana. The practical impact this Act will make will be to first and foremost domesticate Ghana’s international and regional legal obligations in relation to women’s property rights. This will then provide the platform for the actual enjoyment of property rights by Ghanaian women, devoid of any ambiguities that the current state of affairs seems to present.

A process of codification of customary law in Ghana generally, and customary matrimonial property rights in particular must be embarked upon. This will have the tendency of bringing clarity to the issue of property rights, as several different regimes exist throughout the country. Codification will therefore ensure certainty, albeit diverse and peculiar to the different ethnic groups and regions of Ghana. This process of codification can be periodically revised to accord with changing societal needs and the exigencies of the times. In any case, codification will be based on the actual customs that although seemingly permanent evolves significantly over a period of time.

All existing institutions (the special High Courts, DOVVSU, CHRAJ, etc.) that play a tangential role in the enforcement of women’s rights generally and women’s matrimonial property rights in particular, must be institutionally strengthened in order to effectively and efficiently carry out their onerous responsibilities. Also, the law must be enforced. One of the major problems in Ghana is the non-enforcement of laws. Thus, although there is a plethora of laws in existence, due to the lack of a culture of enforcement as well as inadequate and/or incompetent enforcement institutions and mechanisms, abuses are suffered. If these were to be done however in the field of women’s rights for example, it is my belief that the pursuit of actual equality for women in Ghana, in terms of their property rights may be attainable in the not too distant future. Finally, public education/awareness creation will also play a pivotal role in terms of raising awareness regarding women’s rights issues generally, and the property rights of Ghanaian women in particular.
PART III: COMPARATIVE PERSPECTIVES ON GOVERNANCE AND HUMAN RIGHTS IN AFRICA
Abstract

It has become increasingly fashionable for many countries especially those in the developing world to include extensive Bills of Rights in their constitutions. The inclusion of socio-economic rights in such Bills of Rights has also been on the increase. While the developing world, particularly emerging democracies in Africa, have been keen on paying special attention to socio-economic rights in their legal systems, the opposite is what generally pertains in the developed world, at least in the United States and under the Strasbourg human rights regime in Europe. The beautifully crafted rights promise economic prosperity and social wellbeing. Courts are granted wide mandates to enforce them. But after several years of constitutional democracy, the majority of the populations in countries with such Bills of Rights are still poor and disillusioned. Disenchanted and frustrated, the masses lash out at the Courts. But, are the Courts really to blame? This chapter examines the above question and argues that the idea of enforcing socio-economic rights through the judicial process is misconceived as courts are ill-suited for the task. That judicial enforcement should at best be a complementary approach to be employed under the most compelling circumstances to aid a political mechanism of enforcement. To illustrate and buttress this point, the chapter reviews the seminal cases on socio-economic rights from Ghana and South Africa. It concludes that a modified form of the monitoring system used at the international level in the implementation of human rights treaties should be adopted at the national level.

1 Introduction

It has become increasingly fashionable for many countries especially those in the developing world to include extensive bills of rights in their constitutions. The inclusion of socio-economic rights in such bills of rights has also been on the increase especially in constitutions of emerging African democracies. The beautifully crafted rights guarantee minimum standards of economic and social wellbeing for the people. Courts are

---

1 Government of Ghana Report of the Committee of Experts on Proposals for a Draft Constitution of Ghana 1992, para 139: "The Committee also elaborated the social and economic aspects of human rights – aspects which are of particular relevance to the
granted wide mandates to enforce them. But after several years of constitutional democracy, most people in countries with such bills of rights are still poor and disillusioned.

Some have blamed this state of affairs on the courts. They argue that the socio-economic right jurisprudence of the courts has been deferential to government policy and not made any difference in the lives of the many that ‘remain desperately poor’. But are the courts really to blame? I examine this question by exploring the seminal cases on socio-economic rights from Ghana and South Africa. In the process, I attempt an explanation for why socio-economic right litigation has generally produced disappointing outcomes in the two countries. I then look at what should be the pragmatic approach to effectively implement socio-economic rights and the realistic role the courts can play in that process.

The discussion is structured as follows: After this introduction, I explore the development of socio-economic rights in Ghana, followed by a critical examination of the Ghana Supreme Court’s jurisprudence on the subject. In the next two parts, I respectively discuss the origin of socio-economic rights in South Africa and the relevant socio-economic right cases of the South African Constitutional Court. I then examine the challenges to judicial enforcement of socio-economic rights generally and finally conclude with some suggestions for the way forward.

2 The development of socio-economic rights in Ghana

The British, whose protégé Ghana was, had a complicated human rights regime rooted in the common law. The common law recognised certain civil and political rights only. Australia’s Chief Justice, Robert French, observes that what might be called human rights that existed at common law included the right of access to the courts; immunity from deprivation of property without compensation; legal professional privilege; privilege against self-incrimination; immunity from interference with vested property rights; immunity from interference with equality of religion; the right to access legal counsel when accused of a serious crime; immunity against deprivation of liberty except by law; and the freedom of speech and

conditions of Africa and the developing world generally. Some of these rights are included in the proposed Directive Principles of State Policy, except that here they are more precisely elaborated as rights.

2 See e.g., Constitution of Ghana 1992, art 2(1); Constitution of Kenya 2010, art 258(1); Constitution of South Africa 1996, sec 38.

3 L Berat ‘The Constitutional Court of South Africa and jurisdictional questions: In the interest of justice?’(2005) 3 International Journal of Constitutional Law 39 64.
of movement. All these are civil and political rights that were scattered in centuries-old case law. Being common law based, they were vulnerable and ever in jeopardy of modification or abolition by a ‘sovereign Parliament’. Thus until 1998 when the Human Rights Act was passed to domesticate the European Convention on Fundamental Human Rights and Freedoms, the British could not boast of a codified bill of rights.

But ironically, the British handed to most of their former colonies constitutions that contained some declarations of rights at independence. This is particularly true for former British colonies in the Caribbean and others in Africa like Nigeria, Botswana, Kenya, Mauritius and the Seychelles Islands. Interestingly, Ghana’s Independence Constitution toed the British tradition by having no bill of rights except for the meagre provisions that prohibited racial or religious discrimination and expropriation without compensation.

Besides the absence of a bill of rights, another significant feature of the Independence Constitution was its retention of the British monarch as Ghana’s head of state. To abolish this system and to sever all colonial ties with the British, the 1960 First Republican Constitution was adopted. Though the idea was to move away from the British model of parliamentary democracy towards the American presidential system, in practice British constitutional doctrines were employed in implementing the 1960 Constitution. The case of Re Akoto and Seven Others illustrates the unfortunate situation where the Westminster doctrine of parliamentary sovereignty was used to stunt the development of a Republican Constitution that could have effectuated the rule of law and respect for


6 SKB Asante ‘Reflections on the constitution, law and development’ (J.B. Danquah Memorial Lecture Series 35, March 2002) 27 (‘Traditionally the British had no justiciable Bill of Rights. Although this was partly a reflection of the fact that it has no written constitution, British jurists were traditionally uncomfortable adjudicating on human rights issues on the ground that these inevitably involved the determination of sensitive political or social issues which were more appropriate for Parliament than the Judiciary.’) (Though the British doctrine of parliamentary sovereignty is extant, at least in theory, it is safe to say that the Human Rights Act 1998 should not be as vulnerable as the common law guarantees of human rights. Being the domestication of the European Human Rights Convention that is binding on the UK, Parliament would be slow to take actions that undermine the Act and by extension Convention, for fear of the political, diplomatic and legal repercussions the country would face on the international plane.).

7 See Go (n 5 above).

8 See Ghana (Constitution) Order in Council, 1957: secs 31(2)·(3) and sec 34(1).

human rights. Akoto and the other accused persons were detained under section 2 of the Preventive Detention Act 1958 which empowered the Government to detain a person for up to five years without trial if the person engaged in ‘acts prejudicial to the security of the state’. The High Court dismissed their application for habeas corpus. On appeal to the Supreme Court, it was contended inter alia that the Preventive Detention Act, under which the appellants were detained, was in excess of the powers conferred on Parliament because it contravened the Declaration of Fundamental Principles which the President had to subscribe to on assuming office. The relevant parts of the Declaration as contained in article 13(1) of the Constitution were as follows:

That freedom and justice should be honoured and maintained; That no person should suffer discrimination on grounds of sex, race, tribe, religion or political belief. That every citizen of Ghana should receive his fair share of the produce yielded by the development of the country. That subject to such restrictions as may be necessary for preserving public order, morality or health, no person should be deprived of freedom of religion, of speech, of the right to move and assemble without hindrance or of the right of access to courts of law.

The appellants’ arguments, in essence, were these: (a) that the Court should treat the Declaration on similar terms as the Bill of Rights in the United States Constitution; and (b) that applying by analogy the doctrine of judicial review established in Marbury v Madison11 the Court should declare the PDA inconsistent with the declaration and therefore void. The Court was not persuaded. It held that the appellants’ contention that the Declaration set out in article 13(1) should be considered as the a bill of rights was ‘based on a misconception of the intent, purpose and effect of article 13(1) the provisions of which are, in our view, similar to the Coronation Oath taken by the Queen of England during the Coronation Service’. Accordingly, to the court, ‘the suggestion that the [D]eclaration made by the President on assumption of office constitutes a “Bill of Rights” in the sense in which the expression is understood under the Constitution of the United States of America [was] therefore untenable.’13

Had the appellants’ approach to interpreting article 13(1) of the Constitution been accepted, it would have placed the Declaration on the pedestal of a bill of rights and this would have laid the foundation for the development of a human rights regime in Ghana. With such a result, the clause of the Declaration which said ‘that every citizen of Ghana should

10 Asante (n 6 above) 26 (‘Some commentators have, in denouncing the [Re Akoto] decision, suggested that the decision may have been induced by “judicial cowardice” or “judicial inertia”… I would submit that their decision is also explicable, at least in part, on the basis of strict adherence to… juristic doctrines and traditions, which would have shaped the perspectives of jurists steeped in British legal traditions:’) (emphasis added).
11 1 Cranch 137 (1803).
12 Re Akoto (n 9 above) 534.
13 Re Akoto (n 9 above) 534.
receive his fair share of the produce yielded by the development of the
country’ would probably have become the fountain of Ghana’s
constitutional jurisprudence on socio-economic rights through ingenious
interpretation. The failure of the Court to take the bold step in asserting its
role as the trustee of the Constitution and of the people’s freedoms was a
major setback to the development of a human rights culture within the
body politic.14 It undoubtedly contributed to the events that led to the
overthrow of the 1960 First Republican Constitution.

Having learnt from the failure of Court in the Re Akoto to assert its
authority in defence of the fundamental human rights of the people, the
1969 Second Republican Constitution left nothing to chance. The
Constitution explicitly provided for a justiciable Bill of Rights in chapter
Four. It vested the Supreme Court with the power of judicial review to
invalidate any act or omission of the Executive, Parliament or other
agency of government that contravened provisions of Constitution
including the Bill of Rights.15 Successive constitutions after the 1969
Constitution, namely the 1979 and 1992 Constitutions have all maintained
and reaffirmed these fundamental values which have come to stay in
Ghana’s democracy.16 The 1979 Constitution provided for the first time
not only an enforceable bill of civil and political rights, but also a chapter
on social and economic rights described as the ‘Directive Principles of
State Policy’.17

The current 1992 Constitution of Ghana ushered in the Fourth
Republic in January 1993. This was after four military interventions had
plunged the country into economic misery and derailed its forward march
on the path of democracy, the rule of law and human rights. The 1992
Constitution therefore promises democracy, the rule of law and respect for
fundamental human rights. It gives the people an assurance of economic
and social prosperity. Chapter five of the Constitution guarantees
fundamental human rights and directs that they be respected by the
‘Executive, Legislature and Judiciary and all other organs of government
and [their] agencies and, where applicable to them, by all natural and legal
persons in Ghana.’18

14 See Amidu v President Kufuor [2001-2002] SCGLR 86, 138 (Kpegah JSC: ‘Every student
of the Constitutional Law of Ghana might have felt, after reading the celebrated case
of In re Akoto, [1961] 2 GLR 523, SC that if the decision had gone the other way, the
political and constitutional development of Ghana would have been different. ‘Different’ in the
sense that respect for individual rights and the rule of law might well have been entrenched in our
land, and we who now occupy this court would have had a well-beaten path before us to
tread on in the discharge of our onerous responsibilities imposed upon us by the 1992
Constitution’).
16 Asante (n 6 above) 4.
rights including the right to education, the right to work and to earn fair wages, the right to form or join a trade union, the right to maternity leave with pay and the rights of the disabled. Chapter six of the Constitution, entitled ‘Directive Principles of State Policy’ (the Directive Principles), is however the main part of the Constitution devoted to economic and social rights. Article 36(2) for instance enjoins the state to 'take all necessary steps to establish a sound and healthy economy whose underlying principles shall include

(a) the guarantee of a fair and realistic remuneration for production and productivity in order to encourage continued production and higher productivity;

(b) affording ample opportunity for individual initiative and creativity in economic activities and fostering an enabling environment for a pronounced role of the private sector in the economy;

(c) undertaking even and balanced development of all regions and every part of each region of Ghana, and, in particular, improving the conditions of life in the rural areas, and generally, redressing any imbalance in development between the rural and the urban areas; [and]...

(e) the recognition that the most secure democracy is the one that assures the basic necessities of life for its people as a fundamental duty.

The mainly civil and political rights in chapter five are declared to be ‘enforceable by the Courts as provided for in [the] Constitution.’ But the Constitution is silent on the justiciability of the Directive Principles except a direction that it ‘shall guide all citizens, Parliament, the President, the Judiciary, the Council of State, the Cabinet, political parties and other bodies … in applying or interpreting [the] Constitution or any other law and in taking and implementing any policy decisions, for the establishment of a just and free society.’ Thus, for a long time, there had been conflicting viewpoints on the justiciability of the Directive Principles.

19 As above, art 25.
20 As above, art 24.
21 As above, art 27.
22 Art 29. (Art 33(5) of the Constitution indicates that rights contained in chapter five are not exhaustive. It therefore follows that socio-economic rights that are not mentioned in chapter five or any other part of the Constitution may nevertheless be enforceable in Ghana if ‘they are inherent in a democracy and intended to secure the freedom and dignity of man’. In the Lottery case (n 28 below) 1096, the Supreme Court held that ‘[e]vidence of such rights can be obtained from either the provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states.’).
24 As above, art 34(1).
Chapter 9

3 Socio-economic right jurisprudence of Ghana’s Supreme Court

In *New Patriotic Party v Attorney General* (31 December case)\(^{25}\) Justice Adade expressed the earliest view of the Supreme Court on the justiciability of the Directive Principles when he said:

> It has been maintained in certain quarters that these directive principles are not justiciable, and therefore cannot avail the plaintiff. I am aware that this idea of the alleged non-justiciability of the directive principles is peddled very widely, but I have not found it convincingly substantiated anywhere … I have not seen anything in Chapter 6 or in the Constitution, 1992 generally, which tells me that Chapter 6 is not justiciable.

Not long after, in 1997, another decision emanated from the Supreme Court which contradicted Justice Adade’s view. The *New Patriotic Party v The Attorney General* (CIBA case)\(^{26}\) held that the directive principles standing alone were not capable of judicial enforcement, unless they were read in conjunction with the fundamental human rights enshrined in chapter 5 of the constitution. In that case the point of controversy was the ‘rights of people to form their own associations free from state interference’ under article 37(2)(a) of Directive Principles. The question was whether that provision was by itself justiciable without the need to read it together with article 21(1)(e) which also guarantees the freedom of association in chapter five. The Court held that the Directive Principles of State Policy, standing alone, were not enforceable, unless they were read together with other provisions of the Constitution which are expressly designed to be justiciable. Thus to the Court, article 37(1)(a) was only enforceable if it was read with article 21(1)(e), its twin provision in chapter five. Speaking for the Court Justice Bamford-Addo stated:

> In general therefore it is correct to say that the directive principles are principles of state policy which taken together constitute a sort of barometer by which the people can measure the performance of their government. They provide goals for legislative programmes and a guide for judicial interpretation but are not of and by themselves legally enforceable by any court. However, there are exceptions to this general principle. Since the courts are mandated to apply them in their interpretative duty, when they are read together or in conjunction with other enforceable parts of the Constitution, 1992, they then in that sense, become enforceable.\(^{27}\)

The view of Justice Bamford-Addo became the longstanding position on the justiciability of the socio-economic rights under the Directive Principles of State Policy until it was overturned in *National Lotto Operators*

27 As above, 745.
**Association v National Lotto Authority (the Lottery case).** There, the court preferred Justice Adade’s view in the 31st December case to Justice Bamford-Addo’s in the CIBA case.

### 3.1 The Lottery case

In 2006, the National Lotto Act (Act 722) set up the National Lotto Authority (NLA), and made it the sole agency in the country to initiate and operate any form of lottery or game of chance. Private lottery was thus abolished and made an offence punishable by a fine, a three year term of imprisonment or both. Angered by this, the private lotto operators who had been thrown out of business by the National Lotto Act filed a writ in the High Court. Among others, they prayed the court to declare that the monopolisation of lottery in the NLA infringed the constitutional duty of the government to ensure a pronounced role of the private sector in the economy and the right of private lotto operators to free economic activity.

Because these issues bordered on the interpretation of the Constitution, particularly, the socio-economic rights in chapter six, the High Court referred them to the Supreme Court for determination. The Supreme Court, in its decision, overturned the CIBA case’s reasoning that the directive principles were not enforceable unless they were read with the fundamental civil rights. The Court held that ‘the starting point of analysis should be that all the provisions in the Constitution [including the directive principles] are justiciable, unless there are strong indications to the contrary in the text or context of the Constitution’. This by all standards is an innovative interpretation which makes the enforcement of economic and social rights which was, hitherto, in limbo unequivocal.

In spite of this, the Court reached a conclusion that is shocking and disappointing in a nation whose constitution promises ‘the blessings of liberty, equality of opportunity and prosperity’ to the population. The Court held that the National Lotto Act did not infringe the plaintiffs’ right to economic activity or their right to work. The plaintiffs had argued that by monopolising the lottery business in the NLA, Parliament had stifled private initiative and creativity in economic activities and thereby reduced the role of the private sector in the economy contrary to article 36(1) of the Constitution. The Court’s response was ‘that the plaintiffs [were] crying wolf’. In its opinion, the plaintiffs did not have an absolute right to engage in the ‘gambling business’ as their claim amounted to seeking ‘an untrammeled right to operate their private lotto business, free from any

---

29 National Lotto Act, sec 4.
30 See Constitution of Ghana, art 130(2).
31 Lottery case (n 28 above) 1099.
32 1992 Constitution (Preamble).
33 Lottery case (n 28 above) 1115.
licensing regime established by Parliament.\textsuperscript{34} That, ‘to afford the citizens and residents of Ghana an opportunity for individual initiative and creativity in economic activities \textit{does not imply the denial to the Ghanaian State of the normal regulatory authority} exercised by democratic states the world over.'\textsuperscript{35}

Nevertheless, I would submit that on the facts of the case, it is surprising that the Court upheld the state’s monopolisation of the lottery business. Unless one equates regulation to ‘prohibition’ or ‘abolition’ as the Court did, it is hard to imagine that the state loses the right to regulate the lottery business merely because private persons are allowed to run their own lotto enterprises.

### 3.2 The right to education cases

On the educational front, the same ‘deference-to policy-makers’ jurisprudence can be observed. The seminal case in this regard is \textit{Federation of Youth Associations of Ghana v Public Universities of Ghana} (No 2) (the Fedyag case),\textsuperscript{36} which concerned the fee paying policy of the public universities in Ghana. To ensure diversity in their student population, the Public Universities have adopted a policy whereby a percentage of their yearly admissions are reserved for international students at full cost. However, the admission spaces reserved for international students have never been fully filled. Instead of offering such vacant slots to ordinary Ghanaian applicants on merit, the universities rather sell them to Ghanaian ‘fee paying students’ who can afford tuition at the same full cost as international students regardless of whether they are less qualified than the ordinary applicants.

The plaintiffs alleged that the Public Universities had turned the admission process into a money making venture by reserving more spaces than could ever be occupied by international students. In sum their claim was that the Public Universities were discriminatorily providing access to university education on grounds of economic status since applicants who could have been admitted on merit were being shortchanged through the sale of the surplus international students’ quota to Ghanaian fee paying students. In defence, the Public Universities submitted that the fee-paying policy was not discriminatory because it did not in any way diminish the quota of admissions available to the applicants admitted on merit. And that in any case, since the government is unable to fully meet the financial requirements of the public universities, they had to supplement government efforts by resorting to the fee-paying policy.

\textsuperscript{34} As above, 1116.
\textsuperscript{35} As above, 1116.
\textsuperscript{36} [2011] 2 SCGLR 1081.
The court had to decide whether Ghanaian fee-paying policy of the Public Universities infringes article 25(1)(c) of the Constitution, which provides that ‘higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by progressive introduction of free education’. Interestingly, the court conceded that ‘the full fee-paying policy is to the disadvantage of persons with low economic status as they may not have the ability to opt for the fee paying policy’. Nonetheless, it went ahead to declare the policy as constitutionally valid because (i) ‘it does not affect the quota for ordinary applicants admitted on merit’; (ii) ‘it creates more opportunity for qualified students to get university education’; and (iii) ‘the government cannot provide bursaries for all qualified students to enter the university’. Indeed the court went as far as to say that ‘since education comes with cost in terms of infrastructure … well-resourced libraries and research centres, [and] teachers or lecturers, Ghana, like other African countries, cannot provide free education within the shortest possible time’.

An important question which the Court’s decision failed to address, however, is whether there is or will ever be an instance in which the Court may be prepared to order the government to commit resources to implement a particular socio-economic right like education or health. Note that one of the reasons why the Court upheld the fee paying policy was because of Public Universities’ assertion that even if they offered the vacant slots not taken by foreign students to ordinary Ghanaian applicants, the government would not be able to provide the bursaries needed for the training of those extra students. The Court seemed too ready to accept this defence without any scrutiny. But seeing as the government would always be quick to cite the lack of resources as the basis for its failure to implement a socio-economic right, one would have to wonder if or when the Court would be bold enough to question or reject such clichéd economic defences.

In Progressive Peoples’ Party v Attorney General (the fCUBE case) the plaintiff political party sought a declaration that the government had failed to implement articles 25(1)(a) and 38(2) of the Constitution which enjoin the government to provide ‘free compulsory universal basic education’ (fCUBE) within 10 years of the coming into force of the Constitution. The plaintiffs contended that the failure of the government to implement the fCUBE policy had resulted in thousands of children of school going age being drawn to child labour and other hazardous activities instead of the classroom. While not disputing the facts, the Court held that the action did not implicate its exclusive jurisdiction to interpret or enforce the Constitution because, among others, the provision in question had already

37 As above, 1102.
38 As above, 1102.
39 As above, 1096.
been interpreted by the court in the *Fedyag* case. The action was therefore dismissed.

The Court’s decision seems rather interesting. Although both the *Fedyag* and *fCUBE* cases sought to enforce the right to education guaranteed by the Constitution, the substance of each case was different. The crux of the plaintiff’s case in *Fedyag* was that the fee paying policy being implemented by the Public Universities of Ghana was discriminatory and inconsistent with the right to *tertiary education* under articles 25 and 38 of the 1992 Constitution. The substance of the *fCUBE* case was however to seek a declaration that the government had a specific obligation under the combined effect of articles 25(1)(a) and 38(2) to provide *free compulsory basic education* and had violated the Constitution by failing to do so. The Court’s failure to recognise these differences was a grave error resulting in the abdication of its constitutional duty to hold the government accountable. It robbed the people of the opportunity to know from their ‘constitutional court’ whether the government can take forever to implement a constitutional injunction when a specific timeframe has been indicated by the Constitution itself. In fact, it appears too tempting to not think that the dismissal of the case at the jurisdictional stage was a convenient means by which the Court timidly avoided a confrontation with the government over a policy matter. The decision, like earlier ones from the Court, reflects the hopelessness in using the judicial process to enforce socio-economic rights in Ghana.

4 The origin of socio-economic rights in South Africa

South Africa’s history of apartheid which was characterised by the evils of enforced racial inequality, segregation, socio-economic and political injustice, and the persecution of dissidents is a world record that speaks for itself. Respect for human rights and equality being a taboo topic in apartheid South Africa, it would be a mockery of the subject for one to situate a discussion of socio-economic rights within the apartheid era. There was no such thing as ‘human rights for all’, for one to even think of respect for social and economic rights. It is not surprising, therefore, that the Constitutional Court of South Africa in one of its earliest decisions after the abolition of apartheid said that ‘the [post-apartheid interim] Constitution introduces democracy and equality for the first time in South Africa. It acknowledges a past of intense suffering and injustice, and promises a future of reconciliation and reconstruction’.41

Human rights, in general, and socio-economic rights in particular, is therefore a post-apartheid subject matter as far as South Africa is

concerned. The long road to the institutionalisation of a human rights regime in South Africa was achieved through what has been described as a ‘cautious, piecemeal process’ of transition from apartheid to democracy. With the end of apartheid in 1990, the country through its political leadership, including the anti-apartheid leaders, set in motion the transition to democracy by adopting an Interim Constitution in November 1993. That Interim Constitution which was the product of extensive negotiations by the Government and the black liberation movements became the roadmap for the transition. Under this roadmap, there was elected a National Assembly which doubled as the Constitutional Assembly that drafted a 'Final Constitution' for the country. Although the white minority were prepared to relinquish power to the majority, they were determined to have a hand in drawing the framework for the future governance of the country obviously because of the fear and mistrust that built up between the two sides under apartheid. To allay these fears, the Interim Constitution provided for some constitutional principles which the Final Constitution had to conform to. Again as an insurance against either side shortchanging the other in the process, it was also provided that the Constitutional Court that had been created by the Interim Constitution should certify that the Final Constitution had complied with all the constitutional principles. Although the Interim Constitution had some socio-economic rights, they were not a broad range of socio-economic rights. Therefore when Constitutional Assembly finally settled down to work, it decided to add ‘the rights of access to housing, health care, food, water, social security, and basic education to the draft Final Constitution.’ This move precipitated mixed reactions, but the pro-socio-economic rights bloc had their way. The final product of this long and laborious process is the current 1996 Constitution of South Africa which was duly certified by the Constitutional Court on 6 September, 1996.

The Constitution has very generous provisions on civil and political rights as well as economic and social rights. It is by far one of the Constitutions in the world with the most detailed bill of rights. Having regard to the history of discrimination and marginalisation of black Africans in the country during the apartheid era, the adoption of such extensive bill of rights is not surprising. The economic and social rights enshrined in the Constitution include the rights to education, housing, work and trade, a healthy environment, health care, food, water and social

43 As above, 1569.
44 As above, 1570.
46 Ebadoahi (n 42 above) 1570.
47 See Certification Judgment (n 45 above).
security; language and culture and membership of a cultural, religious or linguistic community.\textsuperscript{48}

Sandra Liebenberg, a South African constitutional lawyer, is of the view that the socio-economic rights in the 1996 Constitution are of three categories, namely, (a) qualified positive socio-economic rights; (b) unqualified or basic socio-economic rights; and (c) negative socio-economic rights.\textsuperscript{49} The positive but qualified socio-economic rights are mainly, the rights of access to housing, health care, food, water, and social security. They ‘are positive in so far as they require the State to take some affirmative action, but qualified to the extent that the provisions only ask the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights, acknowledging limited resources.’\textsuperscript{50} The unqualified or basic socio-economic rights are those rights which the state considers as being among its topmost priorities and which despite resource constraints are subject to immediate, rather than progressive realisation. The classes of rights under this category ‘include children’s rights, the right to a basic education, and certain rights of detainees’.\textsuperscript{51} The last category of ‘negative socio-economic rights’ comprises those socio-economic rights that are considered as imposing limits on state action and the behaviour of private persons. Examples include ‘the right to be free from summary, unjustified evictions (a notorious apartheid-era practice) and the right not to be refused emergency medical treatment.’\textsuperscript{52}

5 The socio-economic right jurisprudence of the South African Constitutional Court

Unlike Ghana, the South African Constitution contains an explicit injunction that makes its socio-economic rights enforceable by judicial action.\textsuperscript{53} In spite of this, the Constitutional Court recognises the difficulty presented by the justiciability of socio-economic rights in a constitutional democracy underpinned by separation of powers. In \textit{Soobramoney v Minister of Health, KwaZulu-Natal (Soobramoney)},\textsuperscript{54} it observed that ‘a court will be

\begin{itemize}
\item \textsuperscript{48} Constitution of South Africa 1996, secs 22 to 31.
\item \textsuperscript{49} See Ebadolahi (n 42 above) 1571-72 (It should be noted that Liebenberg’s categorisation of the socio-economic rights in South Africa’s Constitution is not faultless. Prima facie, none of the categories for instance capture the right to form or join trade unions. Nor do they reflect the fact that some of the rights have both negative and positive aspects. Nevertheless, as observed by Ebadolahi, her categorisation provides ‘a useful starting point in understanding pertinent differences between various [socio-economic rights] included in the [South African] Constitution’).
\item \textsuperscript{50} Ebadolahi (n 42 above) 1572.
\item \textsuperscript{51} Ebadolahi (n 42 above) 1572-73.
\item \textsuperscript{52} Ebadolahi (n 42 above) 1572-73.
\item \textsuperscript{53} Constitution of South Africa 1996, secs 8 & 38.
\item \textsuperscript{54} 1998 (1) SA 765 (CC).
\end{itemize}
slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibilities it is to deal with such matters.\textsuperscript{55} In \textit{Soobramoney}, the appellant was suffering from kidney failure, ischemic heart disease and a cerebro-vascular disease that had induced stroke. He was terminally ill, but his life could be prolonged if he had regular renal dialysis. Because he could not afford private treatment, he turned to the state-run Addington Hospital in Durban. Due to inadequate dialysis machines and other medical resources, the hospital had formulated guidelines to manage demands for dialysis treatment.

By the guidelines, only patients who suffered acute, but treatable, renal failures were given automatic renal dialysis. Patients like the appellant who suffered terminal renal failure did not get automatic treatment. Such patients could get renal dialysis if they were ‘free of significant vascular or cardiac disease’ and therefore eligible for kidney transplant.\textsuperscript{56} Because the appellant had stroke and heart disease in addition to a renal failure, and was therefore not eligible for heart transplant, he was turned away. His application to the High Court to compel the hospital to provide him dialysis treatment was dismissed.

On appeal, the Constitutional Court held that contrary to his argument, the appellant’s case did not implicate the right to life and the right to emergency medical treatment. In the Court’s view, the right to emergency medical treatment enshrined in article 27(3) of the South African Constitution envisages a situation where a person ‘suffers a sudden catastrophe which calls for immediate medical attention’.\textsuperscript{57} Thus, to the Court, the purpose of the right to emergency medical treatment was to prevent ‘the particular sense of shock to our notions of human solidarity occasioned by the turning away from hospital of people battered and bleeding or of those who fall victim to sudden and unexpected collapse’.\textsuperscript{58} Since the appellant’s medical condition was not the type of emergency envisaged by section 27(3), the proper standard of assessment, according to the Court, was subsections (1) and (2) of section 27. Under those provisions the state must only ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation’ of the right to health care. The Constitutional Court therefore affirmed the High Court’s ruling and by extension the Aldington Hospital guidelines.

A similar conclusion was reached in \textit{Government of the Republic of South Africa v Grootboom (Grootboom case)}.\textsuperscript{59} Ms Grootboom and the other plaintiffs were living in shacks at Wallacedene, an informal settlement near

\begin{itemize}
  \item \textsuperscript{55} \textit{Soobramoney}, as above, para 29.
  \item \textsuperscript{56} As above, para 4.
  \item \textsuperscript{57} As above, para 20.
  \item \textsuperscript{58} As above, para 51.
  \item \textsuperscript{59} 2001(1) SA 46 (CC).
\end{itemize}
the municipality of Oostenberg. The settlement was in a sorry state. There was no potable water or sanitation system, and only 5 per cent of the population living in the waterlogged slum had access to electricity. Many of the dwellers who had applied for low cost housing from the municipal authorities had been on the waiting list for as long as seven years. In their bid to escape these deplorable conditions, Ms Grootboom and her family moved their shacks to an area on a private land which had been earmarked for the development of low cost housing. The private developer obtained a court order to evict them, but they continued to stay because they had nowhere else to go. At the onset of the cold, windy and rainy winter, the shelters of Ms Grootboom and the other litigants were pulled down with bulldozers resulting in their forced eviction. They filed an action in the High Court claiming that they had a right to temporary housing under sections 26 and 28 of the South African Constitution. They prayed the court for an order directing the government to provide ‘adequate basic temporary shelter or housing [for them] and their children pending their obtaining permanent accommodation’ or alternatively make available ‘basic nutrition, shelter, healthcare and social services’ to their children who in this case were more vulnerable. The High Court rejected the argument of the petitioners that they were entitled to immediate temporary housing pending the provision of permanent housing by the state. It however ruled that the children were entitled to such a right, in unqualified terms, under the section 28 of Constitution and that the provision of such shelters for the children should take account of their parents, since it was crucial to the best interest of children that their parents should be with them. The Court therefore ordered the Government to provide Ms Grootboom and the other petitioners with basic shelter such as tents, portable latrines and a regular supply of potable water.

On appeal, the Constitutional Court was of the opinion that even though the national housing policy the Government had developed was laudable, to the extent that it did not take account of sections of the population who were in crisis and desperately needed temporary housing, it failed the constitutional test of reasonableness. Despite this conclusion, the Constitutional Court overturned the ruling of the High Court. It held that ‘neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand.’ The Court reasoned that ‘section 28’s requirement that children have a right to shelter was one that rested primarily with parents and only secondarily with the state’. It therefore dismissed the idea that children’s right to shelter under the South African Constitution was absolute. By so holding, it also rejected the

60 Grootboom, as above, para 13.
61 As above, para 95.
62 See Berat (n 3 above).
argument that the state had a minimum core obligation\textsuperscript{63} to provide housing upon demand to persons who were in desperate need.

The next socio-economic rights case worthy of consideration is \textit{Minister of Health v Treatment Action Campaign (Treatment Action Campaign)}.\textsuperscript{64} As part of its broader strategy to combat the AIDs pandemic in South Africa, the Government launched a programme to stem mother to child transmission by supplying the drug Nevirapine to pregnant women. Despite receiving free supplies of the drug, the government decided to pilot the distribution at two sites within each province of the country citing concerns over its safety and efficacy. Public sector doctors outside the pilot sites were precluded from prescribing the drug for their patients. But in view of the scale of the HIV/AIDs pandemic in the South Africa at the time, the Treatment Action Campaign and the other applicants in the case thought the government’s pilot distribution of Nevirapine was unreasonable. They sued in the High Court of Pretoria arguing that by sections 27 and 28 of the Constitution, the government was obliged to implement an effective programme to prevent mother-to-child transmission of HIV throughout the country.\textsuperscript{65} The High Court agreed with them. It held that the government had a duty to supply Nevirapine to pregnant women with HIV outside the pilot sites and to also implement a comprehensive national programme to prevent mother-to-child transmission of HIV.\textsuperscript{66}

The government appealed to the Constitutional Court. The Constitutional Court was of the view that the most relevant question that the case raised was ‘whether the applicants had shown [that] the measures adopted by the government to provide access to health care services for HIV-positive mothers and their new born babies [fell] short of its obligations under the Constitution’.\textsuperscript{67} In addressing this issue, the Court, relying on its decisions in the \textit{Soobramoney} and \textit{Grootboom} cases held that the rights guaranteed under both sections 26 and 27 do not place an obligation on the state ‘to go beyond available resources or to realise these rights immediately’.\textsuperscript{68} Rather, they only require the government to take reasonable measures within its available resources to progressively implement a particular socio-economic right. However, in the instant case, the Court agreed with the applicants that since the government’s policy prevented a substantial number of pregnant women with HIV outside of

\textsuperscript{63} The Committee on Economic, Social & Cultural Rights introduced the concept of minimum core obligation in its General Comment 3 of 1993. Essentially, it is the obligation of a state party ‘to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [in the ESCR Covenant] … It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation.’ \textit{Grootboom} (n 59 above) para 31.

\textsuperscript{64} 2002 (5) SA 721 (CC).

\textsuperscript{65} \textit{Treatment Action Campaign}, as above, para 5.

\textsuperscript{66} As above, para 8.

\textsuperscript{67} As above, para 25.

\textsuperscript{68} As above, para 32.
the pilot centres from having access to Nevirapine, it failed the constitutional test of reasonableness. It therefore affirmed the High Court’s order that the government should supply Nevirapine to all public hospitals outside the pilot sites.

Nevertheless, in examining the outcome of the case, we cannot discount the Court’s consideration of the government’s concession that no additional or significant cost would be incurred by supplying Nevirapine to ‘those public hospitals and clinics outside the research sites where facilities [already existed] for testing and counseling’.

Had the situation been otherwise, the outcome would probably have been different given the Court’s decision that the state has no obligation to go beyond available resources to realise a socio-economic right immediately.

The last case we consider is Mazibuko and Others v City of Johannesburg (Mazibuko case). The case concerned a new water distribution policy that the City of Johannesburg piloted in a part of Soweto to address the recurring loss of 75 per cent of the water supplied to Soweto and its attendant revenue shortfalls. The policy involved (i) the free supply of six kiloliters of water per month to every household (‘basic water supply’) and (ii) the option for a household to get a pre-paid meter if it required water beyond the basic supply. The question was whether the policy was consistent with section 27(1)(b) of the Constitution which guarantees the right of every person to ‘sufficient food and water’.

Reversing the decision of the Supreme Court of Appeal, the Constitutional Court held that since the constitutional entrenchment of socio-economic rights did not imply an obligation ‘to furnish citizens immediately with all the basic necessities of life,’ the state’s obligation under section 27(1)(b) of the Constitution was not an unqualified obligation to provide everyone with ‘sufficient water’ immediately. Rather, that obligation was one which required the state ‘to take reasonable legislative and other measures progressively to realise the achievement of the right of access to sufficient water, within available resources.’ By so holding, the Court also rejected the applicants’ invitation for it to quantify the amount of water per person that would be considered ‘sufficient’ under section 27(1)(b). In its view, to do so would amount to endorsing the ‘minimum core’ doctrine which the Court had rejected in Grootboom and Treatment Action Campaign.
6 Challenges to judicial enforcement of socio-economic rights

While there have been some successful outcomes for using the judicial process to enforce socio-economic rights in South Africa, the record of success in Ghana is nil. On the whole, the jurisprudence of the two apex courts reveals that even the best attempts of the courts to enforce socio-economic rights do not go far enough. In Ghana, private lotto operators have condemned the *Lottery* case as creating a 'dangerous situation which will not serve the public good or be in the public interest'. The socio-economic rights jurisprudence of the South African constitutional court has also been criticised as 'timid', 'deferential' and 'flawed'.

The reasons for this 'low energy' approach to enforcing socio-economic rights are not hard to find. Generally, courts are wary of making orders that are incapable of enforcement. Because they want to be respected and taken seriously, the last thing a court wants to do is to make a mockery of itself by making an order that cannot, or will not, be obeyed. Thus Chief Justice Archer of Ghana for instance, 'held the view that [the Supreme Court] like equity must not act in vain. In other words, it should not make orders that could be lawfully and legitimately circumvented so as to make the court a laughing stock.' Accordingly, even Justices of the most activist courts, like the Supreme Court of India, acknowledge the need to maintain a level of respect for the political branches by refraining from making orders that are incapable of performance. Justice SP Bharucha has thus cautioned that

> [the] court must refrain from passing orders that cannot be enforced, *whatever the fundamental right may be and however good the cause*. It serves no purpose to issue some high profile mandamus or declaration that can remain only on paper … It is of cardinal importance to the confidence that people have in the Court that its orders are implicitly and promptly obeyed and is, therefore, of cardinal importance that orders that are incapable of obedience and enforcement are not made.

Undoubtedly, these principles of judicial restraint operate on the minds of judges when they have to make decisions which potentially involve confrontation with the political branches. If courts face this level of self-inhibition even in cases of negative rights where they mostly have to order

---

75 31 December case (n 25 above) 50.
76 SP Bharucha ‘Inaugural lecture on public interest litigation at the Supreme Court Bar Association’s Golden Jubilee Lecture Series’ (2001).
governments to refrain from doing certain acts, then one can imagine what occurs when they have to make orders directing governments to take specific positive measures to realise socio-economic rights. It is in this light that the decisions in cases like the Lottery case, the fCUBE case or Grootboom’s case come as little surprise. For instance, in the Lottery case, the Court was of the opinion that ‘the enforceability of economic, social and cultural rights need not be implemented in the same way as the political and civil rights’.77 Those rights, the Court said, have ‘to be liberally construed in order not to interfere with the democratic mandates of successive governments’.78 Similarly the South African Constitutional Court has been restrained and deferential in its interpretation of the socio-economic rights in the South African constitution. In Mazibuko, Justice O’Regan observed that

[it] is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights.79

Not surprisingly, what could be considered as one of the victories of socio-economic right litigation in South Africa, Occupiers of 51 Olivia Road v City of Johannesburg (51 Olivia Road),80 was achieved through a political engagement process, albeit judicially supervised, and not by an outright order of mandamus by the Constitutional Court. In that case, the City of Johannesburg sought the orders of the High Court to evict about 400 people from some buildings in the inner city of Johannesburg which the city authorities considered unsafe for habitation.81 The residents opposed the application arguing among others that since the City had not provided them with adequate and alternative housing they had no right to evict them. Relying on Grootboom the High Court held that the City of Johannesburg had failed to develop and implement a plan that would ‘foster conditions to enable respondents to have access to adequate housing in the inner city’.82 Consequently, the Court ordered the City to refrain from evicting the residents but rather implement a programme that would ensure the progressive realisation of the right to adequate housing. On appeal, the Supreme Court of Appeal reversed and granted the order of evictions subject to the provision of temporary housing for evictees who were desperately in need of it.83

77 Lottery case (n 28 above) 1107.
78 As above, 1113.
79 Mazibuko (n 70 above) para 61.
80 2008 (3) SA 208 (CC).
82 Rand Properties, as above, para 32.
83 As above, para 78.
On further appeal to the Constitutional Court by the plaintiffs, the Court adopted a rather interesting approach to resolving the case. After hearing their arguments, it ordered the parties to ‘engage with each other meaningfully ... in an effort to resolve the differences’ taking account of ‘the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.’ In accordance with the order of the Court, the parties filed affidavits outlining the settlement they had reached following the engagement. Among others, it was agreed that the City should provide ‘all occupiers with alternative accommodation in certain identified buildings.’ ‘The nature and standard of the accommodation to be provided’ and the manner in which the rent was to be determined were specified in the agreement. All the affected residents were obliged to move into the alternative accommodation while the City continued its consultations with them to provide permanent housing solutions. The Court approved the settlement as part of its final judgment. It noted that the City should have made efforts to have a meaningful engagement with the occupiers both individually and collectively before considering the application for eviction. Considering the numerous constitutional obligations owed by the City towards its residents, the Court thought that the City had acted ‘in a manner that is broadly at odds with the spirit and purpose’ of the Constitution by seeking to evict the plaintiffs without first engaging them.

By adopting the process of meaningful engagement in arriving at its final decision, the Court showed that it was unwilling to make decisions and issue orders that involve serious budgetary and policy considerations. Rather, it would allow the political branches, which are best placed to make such decisions, to do so and only intervene where there have been serious breaches of the Constitution. From this perspective, it is apparent that socio-economic rights litigation is indeed unconventional and generally not suited for the judicial process. If a court were to accept such challenges without...
regard to the doctrine of separation of powers and the proper limits of checks and balances, it would cease to be a court of law and instead become a populist or activist forum for second-guessing executive and legislative policies. But since most courts remain what courts are, and perhaps should be, they end up rejecting populist challenges to government policy resulting in the kind of restrained and deferential opinions which the apex Courts of Ghana and South Africa have produced.

7 Conclusion

What then is the way forward? What mechanism should be adopted to implement socio-economic rights? And what role, if any, should the courts have in that process? I would submit that making the judicial process the primary mechanism for the enforcement of socio-economic rights would be misconceived. As discussed in the earlier sections of this paper, the very nature of socio-economic rights makes them ill-suited for judicial enforcement. Their implementation involves finding answers to crucial moral, political and, sometimes, ethical questions that are better handled by the political branches. The preferred and pragmatic alternative would therefore seem to be a political monitoring system which should, in appropriate cases, be complemented by judicial enforcement.

The idea of using a monitoring system to ensure the effective implementation of socio-economic rights is not altogether new. In fact, it is one of the main mechanisms employed at the international level for the implementation of various human rights treaties. Under the International Covenant on Civil and Political Rights 1966,91 the International Covenant on Economic, Social and Cultural Rights 1966,92 the African Charter on Human and Peoples’ Rights 1981,93 and the Convention on the Elimination of All Forms of Discrimination Against Women 1979,94 state parties are required to submit periodic reports to the monitoring bodies of those treaties on the steps they have taken to implement the obligations assumed. This mechanism if replicated at national levels, and strictly enforced, could prove quite effective in implementing socio-economic rights. To make it very effective, such reports could, for instance, be required of the government quarterly or half-yearly for specific sectors. They would set out in particularised detail the steps taken to implement socio-economic rights and the results achieved. This will ensure that periodically the representatives of the people are apprised of the government’s action on socio-economic rights. The political costs which are likely to follow if the government showed a consistent and systematic

91 Art 40.
92 Art 16.
93 Art 62.
94 Art 18.
pattern of non-performance, will definitely be a motivation for the government to take the implementation of socio-economic rights seriously.

The possible criticism of this approach could be that in cases where you have the governing party dominating the legislature, one is not likely to have the reports strictly scrutinised, and hence the essence of the reporting system will be defeated. That argument cannot be entirely correct. This is because the report, whether presented to a house with a strong opposition membership or to one with government party dominance, would end up in the public domain. The media and the general public would get to make their own assessments independently of what the legislature does, whether or not it is dominated by one party. The essence of the reporting system, thus, lies in the real pressure the government would feel not only from the legislature, but also from the media and a civic-conscious public to take socio-economic rights seriously. However as a counterweight to the intransigence of a government that may neither take concrete steps to realise socio-economic rights nor report on them, a measure like requiring Parliament to freeze future appropriations to the government until it complies may be worthwhile. Beyond this point, a judicial order enforcing compliance with the reporting requirement on pain of conviction for contempt and possible impeachment would also be appropriate.

It would seem that the 1992 Constitution of Ghana has already taken a step towards this political monitoring and reporting approach. Article 34(2) of the Constitution mandates that the President ‘shall report to Parliament at least once a year all the steps taken to ensure the realization of the [directive principles of state policy] and, in particular, the realization of basic human rights, a healthy economy, the right to work, the right to good health care and the right to education.’ In spite of this potent tool the Constitution has provided to ensure that socio-economic rights are realised for the ‘blessings of liberty, equality of opportunity and prosperity’ promised in the Constitution to trickle down to the masses, Parliament has failed to make Presidents and successive governments accountable to the people on how the nation’s resources have been utilised. This Parliamentary inertia to strictly invoke article 34(2) may partly be blamed on the failure to understand the interpretative differences between article 34(2) and article 67 of the 1992 Constitution. While article 34(2) enjoins the President to ‘report to Parliament all steps taken’ to ensure the realisation of the socio-economic rights in chapter Six of the Constitution, article 67 says ‘[t]he President shall, at the beginning of each session of Parliament and before a dissolution of Parliament, deliver to Parliament a message on the state of the nation.’

Unfortunately, Parliament and successive Presidents under the Fourth Republic have apparently deemed the usual ‘State of the Nation Address’ delivered to Parliament at the beginning of each session and which often contains nothing but the empty and recycled campaign promises as a
fulfillment of article 34(2). A critical reading of the two articles and an 
examination of the language used by the draftsman should, however, tell 
every reasonable and fair reader that delivering ‘a message on the state of the 
nation’ (‘State of the Nation Address’) referred to in article 67 cannot mean 
the same thing as ‘report[ing] to Parliament all steps taken’ under article 34(2). 
The differences are quite obvious. While the draftsman, in article 67, uses 
the expression ‘deliver … a message’ which would ordinarily mean 
delivery of a ‘speech’ or ‘address’, in the article 34(2) the expression ‘shall 
report’ is employed. In a speech or address, the President has the discretion 
to choose the items he wishes to address the nation on and what he wishes 
to tell the nation about those items. It is no wonder therefore that on almost 
all occasions, the opportunity offered by article 67 has been used to tout 
politically biased messages meant to excite the support bases of the person 
delivering the address. The expression ‘shall report to Parliament’ on the 
other hand as used in the context of article 34 could only mean ‘to give an 
account to Parliament’ or ‘to account to Parliament’ on the steps taken to 
realise the socio-economic rights in chapter six.

Again more instructive is the fact that while article 67 is silent on what 
should be the content of the ‘message on the state of the nation’, article 
34(2) particularises the thematic areas on which the President’s report card 
should give account to Parliament. The report in article 34(2) must 
picularise ‘all the steps taken’ to ensure the realisation of the Directive 
Principles and ‘in particular the realization of basic human rights, a healthy 
economy, the right to work, the right to good health care and the right to education’. 
Under article 34(2) therefore, no discretion arises; the report must give 
account of the items listed and nothing less. This is why I would submit 
that the perennial state of the nation address given by successive Presidents 
under the Fourth Republic cannot be taken to be a fulfillment of the 
obligation under article 34(2). Far from the usual thirty to forty-five minute 
political speeches usually presented as the ‘message on the state of the 
nation’, article 34(2) clearly envisages a situation where detailed reports 
outlining the steps taken to realise each of the socio-economic rights, and 
highlighting the successes and/or failures chalked on each of them are laid 
befor Parliament for scrutiny. The failure of successive parliaments and 
presidents under the Fourth Republic to heed article 34(2) is not only 
unfortunate, but also an unconstitutionality that the Supreme Court may 
ultimately have to address. Until Ghana and other emerging African 
democracies take this monitoring and reporting approach to the 
enforcement of socio-economic rights seriously, it will be difficult to see 
any significant improvement in the realisation of socio-economic rights.

With a robust political system of enforcement in place, adjudication of 
socio-economic rights could play then an effective complementary role. 
This could come in two ways: (i) negative enforcement of socio-economic 
rights and (ii) judicial orders for emergency humanitarian relief.
Concerning negative enforcement, the idea is that because most socio-economic rights are difficult to enforce positively, the court should leave positive enforcement to the political process and rather seize every opportunity that presents itself to stop governments from abridging socio-economic rights. In other words, since the government can generally not be compelled to satisfy a socio-economic right on demand, it should not be allowed, through policy or legislation, to frustrate an individual’s independent effort to realise a socio-economic right capable of personal realisation. This approach fits more into the traditional functions of the Court and does not present conflicts between the courts’ role and that of the political branches. The Constitutional Court of South Africa hinted about this in the Certification Judgment when it held that ‘[a]t the very minimum, socio-economic rights can be negatively protected from improper invasion’. So in the Lottery case for instance, by adopting this principle, the Court could have held that because the government may not be compelled to provide employment to the lotto operators on demand, it could equally not be allowed to throw them out of their own private businesses by monopolising the industry.

On humanitarian relief orders, the suggestion is that the courts should be able to make orders for the positive enforcement of socio-economic rights, but only under compelling humanitarian circumstances. Such circumstances would usually be cases where sections of the population find themselves in humanitarian crises resulting from natural disasters (e.g., floods, earthquakes) or other unforeseen catastrophes, and where the government has failed to take reasonable measures to remedy the suffering of the affected persons. Where such conditions exist, it is only prudent that the courts should be recognised as having the power to order the government to take positive measures to ameliorate the suffering of the people who find themselves in the humanitarian crisis. Alternatively, if instead of a natural disaster, there is a demonstrated, systemic failure of the government to realise a socio-economic right with the result that there is or likely to be gross human rights violations like mass starvation, deaths, a disease epidemic or widespread and proven destitution, then there is no reason why the court should not be able to intervene. The humanitarian relief order would thus create an exception to the principle that courts ought, generally, to abstain from making orders for positive enforcement of socio-economic rights.

The guarantee of socio-economic rights in national constitutions is definitely a step in the right direction, and is particularly important in the third world where majority of the population continue to live in abject poverty. At the very least, it shows the sense of priority such countries attach to eradicating poverty and bridging the wide gaps of inequality. But there is no doubt that the judicial process, as we have seen so far, is not very
suited for the enforcement of socio-economic rights. As earlier discussed, a number of factors explain why this is so. First, the doctrine of separation of powers teaches that courts must exercise restraint concerning matters within the exclusive domain of the legislature and the executive, although, socio-economic rights litigation will have judges run ‘a government by the judiciary’. Second, although courts are generally wary of making orders that would be difficult to obey especially where they require expenditure of economic resources, socio-economic rights would normally require the making of such orders. Thus because the realisation of socio-economic rights is largely tied to the availability of financial, human and technological resources they are best handled by the political branches, at least in the first instance. The courts are not the managers of the public purse; it is therefore difficult for them to determine whether the government has the financial capacity to carry out an order requiring budgetary allocation. With these complex considerations operating on their minds, it is not surprising that judges have tended to be deferential in their socio-economic jurisprudence. Accordingly, while I do not discount the role courts can play in social transformation, I would submit that building strong institutions of political accountability to monitor the day-to-day implementation of socio-economic rights would better serve the people than primarily depending on judicial enforcement which in any case is only triggered if someone brings a suit for an alleged constitutional violation.

And even in instances where the court’s intervention is appropriate to compel the government to take positive steps to realise a socio-economic right, ingenuity in formulating remedies and the need to guard against overambitious orders is still crucial. A court must be careful not to decree the impossible. Thus, instead of imposing its own view of what it thinks to be the appropriate measures the government ought to take to realise a particular socio-economic right, it could as a first option order that the government submit to the court, within a timeframe, a plan of action detailing all the steps, strategies, measurable targets and timelines by which the government undertakes to effectuate the particular socio-economic right. To ensure compliance, the court may further direct that the government submit a report, at periodic intervals, particularising all the steps taken, and targets met in implementing the action plan. In appropriate cases, the court may order that the claimants and the government negotiate to fashion out remedies acceptable to both parties. Where the government fails to provide a reasonable action plan or is unable to reach an agreement with the claimants as the case may be, the

96 This conclusion should be considered with the caveat that the need to expend financial, technological or human resources though usually associated with socio-economic rights, is not exclusive to them. Some civil and political rights such as the right to vote or fair trial would normally also require the expenditure of resources to effectuate them. But otherwise, generally, an order enjoining an infringement is sufficient to effectuate most civil and political rights.
court may then step in with its own orders probably formulated with inputs from court appointed experts or the country’s human rights commission. This structured judicial approach to enforcing socio-economic rights is less confrontational and strikes a fair balance between separation of powers and judicial checks and balances. It is well suited to the complementary role of the courts argued in this chapter and is likely to engender the confidence and respect of the parties involved in a socio-economic right litigation.
CHAPTER 10

A COMPARATIVE ANALYSIS OF MULTI-PARTY POLITICS IN GHANA AND MAURITIUS

Darsheenee Singh Ramnauth & Roopanand Mahadew

Abstract

Ghana and Mauritius have been examples of democracies in Sub-Saharan Africa. From a historical perspective, even though Mauritius achieved independence 10 years after Ghana achieved its independence, both countries share a lot of similarities on the political front. This chapter focuses on the evolution of multi-party politics from the advent of independence in these two countries and highlights how it has contributed in shaping and strengthening the concept of democracy. It demonstrates how multi-party politics has influenced civil and political rights from an international, regional and national perspective in terms of their implementation and enjoyment by their citizens. Furthermore it also analyses the power structure in the two countries, in terms of the executive, legislature and the judiciary and establishes how the evolution of multi-party politics has changed the democratisation of the power structure as well. It argues that interdependence of the state institutions has contributed to multi party politics in both countries. It further observes that respect for human rights and rule of law has also consolidated the democratic fabric in both countries. Furthermore, delving in the depth of the political and legal system, the chapter questions the holding of elections as an instrument of strengthening democracy and highlights the first post the post and the best loser system in Ghana and Mauritius respectively as a means of handling the cultural diversity in the two nations. Best practices from both countries are also highlighted to serve as examples that can be followed by other Sub-Saharan Africa countries.

1 Introduction

Ghana’s gaining independence is a landmark in Africa’s history of decolonisation and economic development. As Ghana approaches its 60th year of independence in 2017, it has been considered as an example on the democratic front on the African continent in the way it the state has been governed and especially in giving a voice to the citizens. In the same light, Mauritius, though having obtained its independence almost ten years after Ghana, is also one country shining by its example of how it has maintained and lived up to its image of being a democracy as it can be gleaned from
Comparative analysis of multi-party politics in Ghana and Mauritius

This chapter aims to do a comparative analysis of the evolution of multi-party politics in both countries, by highlighting how they overcame the challenges present in newly independent states (after they gained independence) crossing the transitional period from a colonised nation to a free state, and highlighting the influence of the introduction of multi-party politics in the democratisation process as well as the promotion and protection of human rights and rule of law in general. Broadly speaking, this chapter highlights the differences between both countries as their political histories and trajectories are largely different but also shows how both crossed the democratic transition periods and still maintained them peacefully to be two shining examples for democratic governance on the continent. The chapter firstly starts by giving an introduction of both countries, their geopolitical differences to clarify that the variables, on several levels, involved for both countries remain distinct and to set the pace for the comparative analysis.

The Republic of Ghana, a previous British colony, obtained independence in 1957. Spread across a land mass of 238,535 km² and bordered by Burkina Faso in the North, Togo in the East, Côte d’Ivoire in the West and the Gulf of Guinea and Atlantic Ocean in the south, it is a sovereign unitary presidential constitutional democracy. It is noted that the main system of rule in Ghana is a unitary presidential constitutional democracy which states that it gives the President and the Constitution the highest status in terms of decision-making. With a population around 27 million, Ghana is a multicultural nation, as can be gleaned from the variety of ethnic, linguistic and religious groups present in the country. Five percent of the population practice traditional faiths, 71.2 per cent adhere to Christianity and 17.6 per cent are Muslim. The main source of income, inspired from its diverse geography and ecology ranges from coastal savannahs to tropical jungles and the exports range from cocoa to gold to petroleum products. Ghana is a member of the Non-Aligned Movement, the African Union, the Economic Community of West

---

6. See n 5 above.
African States (ECOWAS), Group of 24 (G24) and the Commonwealth of Nations.9

Shifting from West Africa to South Eastern region of the mainland continent, located in the Indian Ocean, The Republic of Mauritius consists of several islands namely: Mauritius, Rodrigues, Agalega and St Brandon. It is to be noted that Mauritius also claims its territory on two islands whose ownership is currently disputed: The Chagos Archipelagos which is owned by the British (also known as Diego Garcia or the British Indian Ocean Territory) and Tromelin Islands, owned by the French. Mauritius has been an Arab, Dutch, Portuguese, French and English colony before and the country remains multilingual and multi-cultural.10

As per the World Bank’s Population Statistics in 2013, the Republic of Mauritius has a multi-ethnic population of 1.3 million.11 Compared to Ghana which has a rich royal history, Mauritius has no indigenous population as people were instead brought in from different parts of the world to work: Africans came as slaves, then Indians as indentured labourers after the abolition of slavery to work in sugarcane fields (sugarcane being the main export at that time), and in the early 1900s a small community of Chinese came as traders mostly for small shops. The ethno-religiousness of the different people on the island at present is divided as follows: Hindus (52 per cent); Muslims (16 per cent); Creoles of African ancestry (27 per cent); Chinese (3 per cent); and Franco Mauritians of European ancestry (2 per cent).12

In the footsteps of Britain, Mauritius follows the Westminster parliamentary system13 and the President is the Head of State while the Prime Minister is the Head of the Government. As for the main pillars of the economy are concerned, Mauritius shifted its focus from sugarcane as its sole export during its immediate years after obtaining independence to focus more in the services sector, focusing largely on tourism, offshore, financial and banking services and now serving as an Information Technology hub in the region. Mauritius belongs to the Southern African Development Community (SADC), and the Common Market for Eastern and Southern Africa (COMESA), Commonwealth of Nations as well

---

Organisation de la Francophonie (OIF) as it was both a British and French colony.\textsuperscript{14}

The chapter is divided into 5 sections, the first chapter delineating the history and the evolution of multi-party politics in both Ghana and Mauritius since the advent of colonialism, pre-and post-independence, also showing the neo-colonial influence which kept permeating both countries especially in governance matters. The second section then deals with the influence that the multi-partism had on the promotion, protection and enjoyment of human rights from the international, regional and national perspectives. The third section then analyses the role of the decision-making and oversight mechanisms and bodies in the democratisation process namely the parliaments, the courts, the electoral monitoring bodies and the national human rights commissions. It is followed by the fourth section which discusses the intricacies of the political and electoral systems in Mauritius and Ghana, highlighting the inner mechanisms of the political parties play a huge role in consolidating the democratic fabric. After a thorough analytical approach of the above mentioned 4 sections, section 5 then highlights the best practices in Mauritius and Ghana and finally the chapter gives some conclusions and recommendations for other countries to learn from the two democratic exemplars of the continent.

2 History of multi-party politics in Ghana and Mauritius

This section discusses the advent of colonisation and pre and post-independence movements in Ghana and Mauritius. It specifically demonstrates how the pre independence dynamics have largely influenced the political parties and their functioning today in the current political scenario. It also highlights how for political parties, ranging from independence till now, there has been a shift in the ideology of the political parties and the dissonance between those who fought for freedom and those parties which took birth after independence.

One cannot undermine the role that multi-partism has played in strengthening democracy. Jibrin Ibrahim, a well-known West African political scientist and scholar who played an active role in the civil society of Nigeria maintains that ‘multi-partism’ has become not only the latest addition to the many meanings ‘democracy’ has centrally acquired since the beginning of post-colonialism in Africa, but also the ‘yardstick with which recent societal developments in Africa are assessed’.\textsuperscript{15} This sentence


can be interpreted as multi-partism is key to the well-functioning democracy post-independence – in other words, how strong, how visible and how strongly rooted are these multiple political parties and how have they been playing their role in post-colonial Africa. How active and how committed have the people of Africa been in shaping and pushing these political parties, what has been the level of involvement from people from the grassroots levels to ensure that these political parties are representative of the voice of the people, instead of catering only to the elite class and a specific category of people- are few questions that need to be answered while discussing the role of multi-party politics in strengthening democracy in post-colonial Africa.  

Ghana’s pre-independence period was marked by a series of slavery, exploitation and convenience to the mother country instead of the colonised territory. Sutherland-Addy argues that after students had access to study abroad and be exposed to world machinations, they had ‘emancipation through education’ in Joseph Casely-Hayford’s words. They belonged to the class of elite lawyers and journalists who were pivotal in forming the first political party in the ‘Gold Coast’ as Ghana was called back then and began the final struggle for independence. It is noteworthy how it is people in closest contact with the masses influence their thinking. People in colonies were dissatisfied with their living conditions as it suited the mother country as explained above, that is, to serve the interest of the United Kingdom instead of Ghana which became much more accentuated post-cold war and therefore many started to manifest their discontent with colonial rule. Dr Kwame O Nkrumah, who was himself a product of the British earned education was considered the most ‘dynamic leader of the independence movement and his political consciousness greatly influenced the independence of Ghana’.

Ghana’s post-independence history was marked by a series of coup d’états, long years of military rule. Ghana’s first president was Dr Kwame O Nkrumah and has been followed by 3 Republics. The idea of a Republic, as defined by the Marriam-Webster dictionary is to be no longer governed by a monarch. Ghana being a republic means that it is now a sovereign
Comparative analysis of multi-party politics in Ghana and Mauritius

state whereby the power resides in elected individuals representing the
citizen body in a form of government. The key word remains elected
individuals who are therefore the voice of the people as their chosen one.
In a republic and in a democracy in general, the element or the agency of
choice remains crucial. The 3 republics, which have been stated above,
have been as follows: First Republic under Nkrumah’s rule (1960-1966),
Second Republic (1969-1972) and Third Republic (1979-1981). It is stated
that the ‘interludes of the civilian governments under these republics have
been short lived, unable to survive for up to three years without being
overthrown in a coup d’etat’.\textsuperscript{22} Therefore the question that may be asked
here is in the repetitive series of coup d’états, how can the term elected be
explained? A coup d’état is declared by the overtaking of the ruling authority
by the military and this situation is no longer the choice of the people but
it is a force imposed on the people. This means that from 1967 till 1981, for
almost 25 years, Ghanaians citizens had no voice in the decision-making
of their countries since their voice was always being crushed. It means that
immediately after independence, the beginning of the democratisation
process has been a downward slope.

As a beacon of hope, and the political awakening of many about the
realisation or the importance that a constitution plays in the democratic
pathway of a country ‘in the late 1980s, after nearly one decade of quasi–
military rule under the Provisional National Defence Council (PNDC),
there were strong internal and external pressures on the government which
finally led to the promulgation of a liberal constitution in 1992 and the
inauguration of a multi-party democracy in 1993, ushering in Ghana into
its Fourth Republic’.\textsuperscript{23} Since then, Ghana has held six successful multi-
set of Presidential and Parliamentary elections which was scheduled for
7 December 2016.

The Electoral Commission of Ghana currently has 30 political parties
which are registered with it and they are All People's Congress (APC),
Convention People’s Party (CPP), National Convention Party (NCP) –
merged with PCP to reform CPP, People's Convention Party (PCP) –
merged with NCP to reform CPP, National Independence Party (NIP) –
merged with PHP, forming PCP, People's Heritage Party (PHP)- merged
with NIP, forming PCP, Democratic Freedom Party (DFP), Democratic
People's Party (DPP), Every Ghanaians Living Everywhere (EGLE Party),
Ghana Democratic Republican Party (GDRP), Great Consolidated
Popular Party (GCPP), Ghana Freedom Party (GFP), Ghana National
Party (GNP), Independent People’s Party (IPP), National Democratic
Congress (NDC) – ‘Nkrumah/Rawlings' tradition, National Democratic

\textsuperscript{22} Thompsell (n 20 above).
\textsuperscript{23} A-Ga Abdulai ‘Political context study: Ghana’ (2009) http://www.polis.leeds.ac.uk/
assets/files/research/research-projects/abdulai-ghana-political-context-study-jan09.
pdf (accessed 19 June 2017).
Party (NDP), New Patriotic Party (NPP) – ‘Danquah-Dombo-Busia’ tradition, National Reform Party (NRP), New Vision Party (NVP), People’s National Convention (PNC), Progressive People’s Party (PPP), Reformed Patriotic Democrats (RPD), United Development System Party (UDSP), United Front Party (Ghana) (UFP), United Ghana Movement (UGM), United Love Party (ULP), United Progressive Party (UPP), United Renaissance Party (URP), Yes People’s Party (YPP) and Ghana Redevelopment Party (GRP). The main political rivalry in terms of ideology remains between Nkrumah’s continuing legacy, the NDC and the new elite or the new intellectualism, the NPP.

After having delineated the rise of Ghana’s political parties, Ghana’s liberal constitution, which was promulgated in 1992, has played a great role in strengthening the power of the people to have a say in the decision-making. Gyimah Boadi, a Ghanaian scholar from the Centre for Democracy and Development argues that in institutionalising multi party democratic governance via the 1992 constitution, a sharp contrast to the tumultuous years of military rule that Ghana went through, the progress that the country has made is indeed commendable.24 He further adds that there is ‘there is considerable evidence of political liberalisation which allows Ghanaians to enjoy a much wider range of rights and liberties, as well as the emergence of a vibrant civil society and a free and independent media that increasingly hold government accountable on behalf of citizens’.25 This thus shows that the way to democratic consolidation, though has been an uphill battle is synonymous to Ghana being like the Phoenix which rose from its ashes to rebuild itself into a strong, democratic nations, driven by the wants and voice of the citizens.

Furthermore, scholars such as Whitfield, Jones and Ninsin (2008) further add that Ghana’s political performance under the Fourth Republic has not only been about holding successful elections, but with the strong, active and meaningful participation of the different political parties, ‘Ghana has been touted as one of the political success stories in Africa’.26 It can also be gleaned that Ghanaians, especially the leaders of the political parties have understood and abided by the values of democracy, by showing that power cannot be held on to forever as there has been successful peaceful acceptance of elections results. This can be demonstrated by the peaceful transfer of power from the government of the National Democratic Congress (NDC) to the New Patriotic Party (NPP) following national elections in December 2000 and the same which followed in December 2016. This undoubtedly shows ‘how far Ghana has

25 As above.
travelled along the path towards democratic consolidation over the past decade’.  

In addition to it, One of the striking features of the multi-party politics helped made Ghana into the strong democratic state it is today is often known as The Rawlings Effect, as Ibrahim Jibrin puts it.  

It is also one of the most notable contributions to academic literature. Even though he himself came to power via a *coup d'état*, the fact that he allowed a liberal constitution to be put in place, and the economic development that it brought through, Ghanaians saw him as ‘a man of the people’ and the impact can still be felt today.  

Is it charisma or far sighted visionary leadership is one question that remains divided as an answer. However the interesting aspect is that in spite of the fact that he was military personnel, he agreed to go for the democratisation wave of the country, and did not insist on staying in power after the elections. The Rawlings effect or phenomenon also highlight the persona of a leader as to what should be the priority, is it one’s own immediate interest or benefit or the long term benefit or interest of the nation.

The scenario in Mauritius to obtain independence was slightly different from that of Ghana. Sheila Bunwaree and Roukaya Kasenally, both noted Mauritian sociologists and political scientists respectively, argue that,

while many countries can speak of their independence as being fuelled by nationalist sentiment, Mauritius experienced a different situation altogether: no nationalist sentiment existed in Mauritius. Anti-colonial feelings were expressed by the Hindu majority but large sections of the other ethno-religious groups preferred to maintain ties with the mother country. Mauritius was divided as it negotiated its way towards independence: 44% of the population voted against independence, but independence was finally granted to Mauritius in 1968.

The question that needs to be asked here is that can Mauritius really be called a nation where the citizens surpass or overcome the religious or community belongingness aspect to have the ‘national’ feeling.

The fact that 44 per cent of the Mauritian population was against independence can be explained by the fact that the ethno-religious factor played and still plays a huge role in the political scene of the country. As explained earlier, Mauritius has no indigenous population, everyone was brought from somewhere – a mixture of different origins, Indians, Chinese, Malagasy, Mozambicans, amongst others. With the abolition of slavery, many of them decided to go back and some decided to stay.

---

27 Whitfield, as above.
28 Jibrin Ibrahim (n 15 above).
29 As above.
30 Bunwaree & Kasenally (n 12 above).
However this labour was not enough for the sugarcane plantation and the ebony wood which was being exported to the UK and other countries and that was how the indentured labourers were brought in from India almost 182 years ago. Research shows that they were brought under the pretext of a richer and more fulfilling life, however later on they discovered things were as bad as it was in India.\(^{31}\) This is why most of the anti-colonial feelings, in search and hope of a better lifestyle came from the Hindu majority as compared to the rest of the ethno-religious groups. It can also be linked to the psyche of the Hindu majority – was the status quo preferable considering that they already stepped out for the unknown once (when they made the decision to leave their homeland and come to Mauritius) and now another unknown (the advent of independence) coming their way.

Bunwaree and Kasenally further add that ‘in spite of the tensions and conflicts preceding independence and fear of the large “Hindu hegemony”, Mauritius has never developed a “bullet” culture, adopting instead a culture of the “ballot”’.\(^{32}\) Once again, it can be attributed to the community sense of unity among the Hindu majority of having been uprooted and trying to establish a stable life on a foreign land. Post-independent Mauritius has had a relatively sound track record of holding free and fair general elections since independence without any major contestations. Elections have been held in 1976, 1982, 1987, 1993, 1991,1995, 2000, 2005, 2010 and 2014.\(^{33}\) It is noteworthy that Mauritius does not have a military and since its independence, establishing an army was not given any priority by any government which came into power. Even dating as at June 2017, the Ministry of Home Affairs and Defence falls under the office of the Prime Minister and not under the Office of the President.

It can be observed that elections in Mauritius have almost a festive like aspect to them with campaigns starting almost a year before elections – door to door campaign and a relatively high number of Voter turnout. It was noted that during general elections in 2014 was 74.11 per cent.\(^{34}\) Elections are carried out and celebrated with a lot of fervour, grandeur and pomp.


\(^{32}\) Bunwaree & Kasenally (n 12 above).


Bunwaree further adds that ‘political parties constitute the machinery for democratic control of political power as they articulate and aggregate the interests of diverse groups in society and form the basis of political pluralism’. There are several political parties in Mauritius but the three largest and most dominant ones are the Mouvement Militant Mauricien (MMM), the Labour Party (LP) or Parti Travailliste and the Mouvement Socialiste Mauricien (MSM). These three parties have largely dominated the electoral plane in Mauritius. Even though Mauritians abide by the ideologies of these different parties, the peoples and the families leading these parties have remained the same. It is largely familial patriarchal political rule from generations to generations. To suit the purpose and interest and as a clever political manoeuvre, each of these three parties has been in an alliance with one or the other at different times in different elections, sometimes even parties having completely fundamentally different or contrasting ideologies.

The issue of the ethno-religious aspect needs to be analysed in the context of a post-colonial or post-independence Mauritius. To understand the Mauritian political scenario, it needs to be looked at from the point of view that ethnocentrism and religion and community living is deeply embedded in the societal tissue. As it is put brilliantly by political scientists working on this issue: ‘the LPs pro-independence struggle allowed it at the time to rally most of the Indo-Mauritian groups (Hindus, Muslims, Tamils and others) behind it, while the Parti Mauricien Social Democrat (PMSD) essentially represented the Creole community and the minority group of people of European descent (the whites)’. The leader of the LP was a Hindu thus representing the majority of the workforce.

Sheila Bunwaree also adds that [h]owever, post-independence Mauritius saw the emergence of a new party – the MMM – that was to challenge the old LP guard and appeal to certain ethnic groups, namely the Muslims, a fair segment of the Creole community and certain minority strands within the Hindu majority group. The ‘hegemony’ that the LP had acquired vis-à-vis the Hindu community as an ensemble was eroding, and this was further exacerbated with the formation of the Parti Socialiste Mauricien (PSM) – a splinter party emanating from the LP which joined forces with the MMM for the 1982 general elections. The ethnic value of the PSM has been widely commented on, and to many political observers it allowed the MMM to move away from the established perception that it comprised only Muslims, Creoles and certain ethnic minority groups.

An analysis of this phenomenon also shows that the MMM came up as a result of pent up frustration from the performance of leaders post-independence. The MMM was a proof of the new elite – new blood surfacing, similar to the rise of the NPP in Ghana.

35 Bunwaree & Kasenally (n 12 above).
36 As above.
One more party which was created after independence was the MSM which was sort of the twig being broken off the main party which is the LP. The leaders of the MSM broke off from the LP because of ideologies and personal beliefs being changed and thus adopted a more socialist point of view- an ideology which was catered for the welfare of the citizens while being under the care of the government. It also needs to be noted that the MSM also had Hindu Leaders of Indian Origin as their principal political figures.

Furthermore, Sheila Bunwaree and Roukayya Kasenally also argue that

\[w\]ith the creation of the MSM in the early 1980s, the party recuperated and rallied a large section of the Hindus who had been staunch supporters of the LP prior to its 1982 decline. In fact, the period 1983-1989 saw the great reunion of the Hindu community, with the MSM taking on board for two successive elections (1983 and 1987) the LP as well as other minority parties. As for the PMSD, the presence and clout that it had secured among the Creole community during the pre-independence period steadily dwindled with the creation of the MMM. The PMSD has also suffered from multiple splits which have further fragmented its electoral base.37

The socialist aspect employed by the MSM allowed them to win the trust of the populace and the fact of being catered for and being provided the essential services such as health care, education, sanitation, basic services such as water, electricity and transport and also the de-monopolisation of the economy played in the favour of the MSM winning two consecutive elections.

In the Mauritian context, it is interesting to note how the political affiliations of many are mostly religiously or community motivated. It can often be seen that it is about community belongingness that becomes a motivating factor to vote instead of the strength of the electoral manifesto itself. It can also be argued that since Mauritius did not have an indigenous population, the fact that most of the population were brought to the country, they still attach a lot of importance to their roots. By showing loyalty to the political party where most of their community members are, there is a sense of security and a sense of brotherhood/sisterhood that permeates. For example, even after so many years of independence, one would still find that a large part of the Hindu community would vote for the LP and saying that for generations, the family has been voting for the LP and it is the LP that would eventually ensure that Hindus are given their rights, even though the MSM brought in the major or the first economic miracle.

37 As above.
As explained earlier, Ghana’s trajectory to independence was one vision—the tribal affiliations though prominent, but the efforts were joined as one state to obtain independence. This was however not the case for Mauritius. Ghana even before the colonisers came, had people living and residing on its territory but Mauritius was no man’s land. It was discovered by sailors and was occupied and then it was made into a habitable territory, albeit it was nobody’s home initially. To all those who were brought to Mauritius, this unknown piece of land was foreign to them and they had to make it their ‘home’ land.

Similar to Ghana, where Nkrumah was considered as the founding father and Rawlings the economic shaper of the country, in Mauritius the leader of the LP, Sir Seewoosagur Ramgoolam is considered the Father of the nation and Sir Anerood Jugnauth is seen as the man behind the economic miracle of the country, as having diversified the economy and created jobs at an unprecedented level with almost every household having a breadwinner or even two. As a parallel to the Rawlings effect in Ghana, in Mauritius it can be termed as The Jugnauth effect. One major difference between both countries though is that Ghana was part of the structural reforms proposed by the International Monetary Fund and the World Bank while Mauritius focused more on non-privatising basic services like health and education.\(^3\) Maybe the better economic performance of Mauritius in spite of having very little limited natural resources is the fact that it stood undaunted vis a vis these structural reforms as proposed by the International financial organisations.

3 Multi-party politics and their influence on civil and political rights

African history has seen its fair share of human rights abuses within the one party system ranging from abuse of power, arbitrary detention of opposition members among others. The political scenario is replete with dictators sticking to power and simply refusing to leave or see reason. With the advent of multiple political parties there has been a greater enjoyment, promotion and protection of human rights, especially on the civil and political rights starting from the right to stand as a candidate and the right to choose one’s representative freely. Multiple political parties have allowed broadening the perspectives and accountability for the ruling government by creating very strong oppositions. Ghana has gone through dictatorial rule and military rule however Mauritius has not. This section deals with the ratification and domestication of international and regional

---

treaties and exemplifies how through the democratisation process, it has been a long remarkable way for both Ghana and Mauritius.

### 3.1 International perspectives

Ghana’s and Mauritius’s commitment to human rights protection can be seen in the countries’ ratification of important human rights treaties at the international level. They are both state parties to the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (CESCR), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). It is noteworthy that Ghana was the first country to sign the Convention on the Rights of the Child in January 1990.39

Thus, it can be gleaned that both countries have demonstrated political will by signing and ratifying these two covenants which remain the founding documents for other regional and national instruments to be inspired from.

### 3.2 Regional perspectives

At the regional level, Ghana and Mauritius are both state parties to the African Charter on Human and Peoples’ Rights. They are also state parties to Convention on the Refugees and Internally displaced people in Africa (the Kampala Convention). Both countries have also signed and ratified the African Charter on the Rights and Welfare of the Child. Ghana is a state party to the Maputo protocol while Mauritius has only signed the document. Ghana is also a state party to the African Charter on Democracy, Elections and Governance (ACDEG) while Mauritius has only signed the said treaty.

Shifting the focus from the African Union to the regional level, Ghana is part of the ECOWAS and Mauritius is part of SADC. Ghana has ratified the ECOWAS supplementary protocol on Democracy and Good governance while Mauritius has ratified the SADC Gender Protocol.

Both these countries in terms of the ratification of the regional treaties have been examples in their respective regions. Thus, it can be understood that from the political plane, there is willingness to abide by the regional norms and standards of human rights instruments.

39 OSIWA and IDEG 2007 cited in Abdulai, n 23 above.
3.3 National perspectives

As far as the national perspectives are concerned, they are different for both the countries as they belong to different legal systems. Ghana follows the common law system\(^{40}\) while Mauritius is a unique hybrid legal system of both the civil code and the common law system since it was colonised both by the French and the English.\(^{41}\)

Article 40 of the Ghanaian constitution stipulates that there shall be respect for International Law and international treaties and covenants.\(^{42}\) While aligning these conventions to domestic law, Ghana’s establishment of human rights provisions after a terrible history of mass human rights violations is indeed impressive. Article 27 of the Constitution specifically provides for women’s rights ranging from maternity leave to equal rights for promotion of women.\(^{43}\)

To further consolidate human rights in the country, Ghana has a Human Trafficking Act of 2005 (Act 694) to combat the growing trafficking of children for forced labour; Disability Act of 2006 (Act 715) to protect and promote the rights of persons living with disability; a Domestic Violence Act of 2007 (Act 732) to protect women and girls from all forms of violence at all places. The NDC government also established Women and Juvenile Units (WAJU) in the Ghana Police Service to give special attention to addressing discriminatory acts against women and children in 1998.\(^{44}\)

To address the long years of injustice and human rights violations, the NRC established a National Reconciliation Commission to investigate and address past human rights abuses during the country’s periods of unconstitutional government between 1957 and 1993.\(^{45}\) Amnesty International reports that in October 2004 the government decided on a comprehensive reparations package that covers a range of acts including a formal presidential apology to victims of human rights abuses by state agents, scholarship and health benefits for survivors and their families; restitution of confiscated property; monetary compensation; and the need for institutional reforms such as training on human rights for the military, police,


\(^{42}\) Constitution of Ghana, art 40.

\(^{43}\) As above, art 27.

\(^{44}\) Prah (n 16 above).

Valji further adds that in 2005, the government issued a White Paper accepting some of the recommendations of the Commission, and promising to establish a reparation fund to compensate human rights victims. Around 2000 victims started to be paid in October 2007. What is commendable in Ghana’s respect and promotion of human rights is the will of the government to address the wrongs that has been done, though it had been done by previous governments. It is about the inclusion of the marginalised groups and giving special attention to ensure that they are not left behind. The policies are gender sensitive and even though it is still work on progress and a lot needs to be done, it can be observed that the beginning is in the right direction.

Mauritius on the other hand has not consistently suffered systemic mass human rights violations as compared to Ghana. It has been lucky never to have been under military or dictatorial rule. Some of the advances that Mauritius has made in the field of human rights at the national level can be the amendment of the rules of the political party stating that it is mandatory to have at least 1/3 of female representation in each constituency. Furthermore, as one of the pioneer countries in the region, after South Africa, Mauritius now has an Equal Opportunity Act which criminalises discrimination on the basis of sexual orientation. As such, it can be observed that Mauritius, though it ranks 1st on the Mo Ibrahim Index of Governance on the human rights and Rule of law factor does indeed have a long way to go from ratifying and implementing the regional AU treaties and domesticating them at the national level.

4 Multi-party politics and the democratisation of the power structures in Mauritius and Ghana

The democratisation process is only successful when alongside multiple political parties; there are strong, independent well-functioning institutions-institutions that help to consolidate the democratic psyche of the nation-institutions in which the citizens put their trust that will safeguard the interest of each and every one. Professor Prah puts it as follows:

While the will for democratic dispensation undoubtedly exists everywhere in Africa, this is only one side of the coin. The other side of the coin is the desirability of adequate and appropriate institutions, established and
respected procedures, accepted conventions and forms of social conduct through which democratic practice can be consistently routinized in the day to day running of a country. An honest commitment to democracy may not bring forth much in a reality where there still are vested interests in control of key instruments of the state, possibly legitimized by corrupted notions of ‘tradition’ and authority. Likewise, the best institutions and operational rules of democratic organisation are no more than a mere sham, if politicians do not use them in good faith.

The institutions, which are being dealt with in this section, are the Parliaments highlighting the difference between the two countries and the Electoral monitoring bodies.

4.1 The parliaments

The parliament remains a key institution in the democratisation process of the country. It remains at the heart of decision-making. Both countries’ parliaments underwent structural changes to where they stand and function today. It represents the seat of trust of the people that has been placed in the elected/chosen representatives.

Oquaye argues that the Parliament of Ghana has undergone many significant changes over the past two decades and that Parliament’s dissolution ‘on every military coup (1966, 1972, 1979, 1981) has checked the systematic development of the institution’. 49 Ghana’s shift to multi-party politics through the establishment of the new constitution in 1992 did not equate into an automatic fully functional Parliament with many time opposition parties boycotting parliamentary elections. Major changes were noticed after Ghana changed into a Fourth Republic where there were ‘raised expectations that Ghana’s parliamentary democracy would move towards a more consensus-driven politics, rather than the majoritarian zero-sum practices of the past’. 50 However this has not been the case, especially with the NPC and NDC shifting power positions, the debates in the parliament became more about the power play rather than the broader objective of debating the motion. Though the roles of the Parliament are clearly stated in the constitutions such as establishing Standing Committees as an oversight mechanism, the level of implementation is weak. The Parliament becomes a sort of passive aggressive forum where it is the most powerful who gets to have the say as his or her party is majoritarian in the Parliament. In the Ghanaian case, it also needs to be noted that it is the President who has the last say. It is clearly stated that the President has unitary powers as he is the head of the State and Government.

50 Gyimah-Boadi (n 24 above).
With regards to Mauritius, the Westminster Parliamentary model has helped Mauritius develop into a relatively strong multi-party democratic nation. Mauritius became a Republic on 12 March 1992 with a President appointed for a term of office of not less than five years by a prime minister and ratified by parliament. The Mauritian parliament is unicameral and all seats in the national legislature are elected. Elected MPs may remain in office for a maximum of five years, unless parliament is dissolved by a vote of no confidence or an act of the Prime Minister. It is important to note that there is no term limit to re-election for MPs. It is the elected Prime Minister who suggests the appointment of the President which is voted for or against by the Parliament. The President of the Republic of Mauritius appoints the Prime Minister and his deputy. The Prime Minister and his cabinet of ministers are accountable to parliament as the latter has the possibility of filing a ‘resolution of no confidence in the Government’.

The republican president appoints the leader of the opposition and the post is enshrined in the constitution. The leader of the opposition is chosen from among the members of the National Assembly whose number includes a leader who commands sufficient support in opposition to the government. It is also interesting to note that non-elected members, namely the positions of speaker and that of attorney general, may hold two offices of the legislature.

Bunwaree argues that ‘party representation in the post-independent Mauritian parliament has been varied. On numerous occasions the numerical dominance of the executive in the legislature, together with the often low representation of the opposition, has resulted in a highly skewed house that is unable to provoke constructive and engaging debates. This distorted aspect of parliament is exacerbated because MPs have to bear absolute party allegiance.’ Therefore this limits the effectiveness of the parliaments in fully effecting their duties. The recent addition to the parliamentary debates with the advances in technology has been the live streaming of parliamentary debates which allow for greater analyses and accountability from Members of Parliaments.

However despite the lacunas in the smooth functioning of the Parliaments, it is the advent of multi-party politics that has permitted voices from both sides and several sides to be heard, discussed and debated. As Mensah argues in the case of Ghana, if the country wants to go up the ladder, it needs to considerably strengthen its parliament.

53 Constitution of Mauritius, art 59.
54 As above, art 32.
4.2 The electoral monitoring bodies (EMBs)

One of the main works of EMBs is to organise transparent, free and fair elections. In as much as elections are not the only determinants of legitimate democracy, the works of EMBs are very vital to development of democracy as has been the crucial roles of these organisations in Ghana and Mauritius.

Mozaffar accordingly observes that EMBs are increasingly being seen as the fulcrum of effective electoral governance in democracies that are new. To him if one considers the world wide acceptance of the movement concerning the creation of EMBs, then elections will be considered to be games of football, whereas EMBs considered the officials refereeing the games. It is their duty to ascertain whether the players notably the political parties are in the known and have accepted the rules and regulations governing the game. It is also their duty to ensure that the rules and regulations are not just accepted but must also be ‘respected and observed’ by all the active players in the game. If a player breaks any of the rules, the official must caution or dismiss the player for the reason that the rules must be obeyed. Thus, the legitimacy and the way the public perceives the EMB as a refereeing body in terms of its role in democracy enhancements depends on its effectiveness in terms of how its overseers observes the rules in a manner of fairness and transparency. In the case of Ghana and Mauritius even though the EMBS have been active mostly during the election period, they have been instrumental in upholding the public’s faith in state institutions as a safeguard to the democratic tenets. In Ghana, EMBS have often approached the judicial systems or have been brought to courts to further strengthen their legitimacy.

5 Conclusion

Ghana and Mauritius have shown that political parties play a critical role in the democratisation process. One cannot undermine the fact that ‘political parties are key to the institutionalisation and consolidation of democracy’. Each country has its own different political, historical and geographical context, but vibrant and robust political parties are crucial actors in articulating and aggregating diverse interests, providing visionary political leadership, recruiting and presenting candidates, and developing competing political and policy programmes upon which the electorate base their choices during elections’. 

S Mozaffar ‘Patterns of electoral governance in Africa’s emerging democracies’ (2002) 23 International Political Science Review 89.
As an anti-thesis to one party rule or authoritarian rule, democracy is unthinkable without political parties. Political parties are primarily, the medium through which the voice of the populace is heard. Politics is finally the amalgamation of different political parties and the competition between their ideologies.

To conclude, Ghana and Mauritius though having different trajectories have made consistent efforts to shape and maintain the democratic fabric of their nations. For Ghana, the task has not been easy – shifting from long years of coup d'états and military rule to multi party politics. For Mauritius, as compared to Ghana, it has not been such an uphill battle but had mostly to balance the increasing division between the different ethno-religious groups present in the island, each with their own sense of belongingness and ideology.

Both these countries demonstrate how important it is for a nation to have the agency of choice – of being able to let citizens/voters choose whom they would want to be represented by – whom they would want to see as their voice. Multi party politics remain a key yardstick should one measure the democratic index of country. As a last line, multiple strong political parties who should ideally have the welfare of the nation at the core of their ideology are like the different ingredients that lead to a successful dish.

Other countries should learn how these two countries’ leaders voluntarily and willingly relinquish power by accepting the will of the people. To promote democracy in the different member states, leaders should try to address structural root causes that act as impediments in the implementation of democratic goals. Consider equal gendered representatives across the different tribes/ethno-religious groups so that people do not feel marginalised and left out. Create strong sacrosanct parliaments where irrespective of whether it is the President as the Head of State or the Prime Minister as the Head of government, where the legislative power remains entirely with the Parliament as the platform for the elected representatives of the people.
Ghana and Kenya have similar socio-political and economic conditions. Ethnicity has been a prominent feature of electoral politics in both countries. Despite the simultaneous democratic reforms, Ghana is classified as a consolidating democracy, while Kenya is labelled a hybrid regime. In Ghana, ethnicity is only a factor in the electoral process; in Kenya, ethnicity has polarised electoral politics and ethnic-based violence has come to characterise elections. Ghana’s democratic success has been attributed in part to the leadership role of the Electoral Commission. On the other hand, Kenya’s electoral management body has recently been plagued with allegations of bias and calls for the resignation of the Commissioners sparked violent demonstrations. Concern remains that many of the issues that ignited electoral violence in 2007 remain unresolved after a decade. This chapter discusses the role of Ghana’s institutions, its voting dynamic, and the impact of ethnicity on electoral processes, the role of electoral assistance and the peace narrative to draw lessons for Kenya on consolidating and deepening democracy.

1 Introduction

Deepening democracy refers to the participation by citizens in local political processes. This concept shifts the focus from elections to citizen empowerment by transforming the relationship between politicians and citizens from passive dependency to an active relationship; thus empowering citizens to demand the provision of public goods from the state.¹ This accords with the global recognition that holding regular elections is insufficient to address the deeper political and social challenges present in developing countries. Kivuva highlights the tension between progress and regression in Africa, characterised by frequent elections and consolidation of multi-partyism on one hand and a reversal of democratic

gains and entrenchment of electoral violence on the other.\(^2\) Where citizens are unable to meet their basic needs, in spite of holding regular elections, and economic development is not progressive, then the ‘nature, quality, efficiency and sustainability’ of democracy over time is questioned.\(^3\)

Held asserts that democracy’s challenge is the implementation of procedures that would allow the people’s will to be reflected and provide a basis for ‘sound and reasonable political judgment’.\(^4\) To hold elected representatives accountable, citizens need to be better informed about their rights and obligations and policies and decisions that affect them and be more active in political processes. Where citizens are so empowered, it is argued that the quality of governance and the nature of state-citizen relations improve, thereby promoting greater human development.\(^5\) This is what some authors have referred to as ‘the power of the thumb’.\(^6\) According to Khobe, a sustainable democracy must deliver – or at least be seen to deliver – beyond the ballot box and be part of the lived experience of citizens who experience better lives and are more meaningfully integrated into national development.\(^7\)

This chapter uses Ghana’s model to examine the link between political voice and the promotion of well-being of citizens in a country. While democracy is not synonymous with elections, many indicators on democratisation in Africa are based on the outcomes of elections. This chapter will therefore focus largely on electoral democracy. While electoral democracy is intended to offer citizens a voice and a choice,\(^8\) and citizen participation is central to the success of democratisation, in many African countries voting does not offer the citizens any meaningful choices, because the exercise of the franchise does not allow access to economic and social rights.\(^9\) Consequently, rather than empower people, the policies adopted by successive governments further disempower the people and alienate them from those in power, with the only differences between regimes being the style and intensity with which the disempowerment is achieved.\(^10\)

\(^8\) ODI (n 5 above) 8.
\(^9\) C Obi ‘No choice, but democracy: Prising the people out of politics in Africa?’ Claude Ake Memorial Papers No 2 Department of Peace and Conflict Research Uppsala University & Nordic Africa Institute Uppsala (2008) 16.
\(^10\) As above, 17.
Owusu highlights that periodic elections are not sufficiently deterrent of exploitative and corrupt leadership in fledgling democracies, and multi-partyism may be unsustainable in Africa due to its continued exclusion of people from the process. Dean further asserts that democracy fuels inequality. Rather than ending social inequality and producing mutual gain, ‘[r]eal existing constitutional democracies privilege the wealthy. As they install, extend, and protect neoliberal capitalism, they exclude, exploit, and oppress the poor, all the while promising that everybody wins’.

Ghana’s democratisation process is therefore unique in Africa. Beyond the electoral process, Ghanaians have succeeded in holding their representatives accountable due to an increase in political voice. Political voice refers to activity, whether carried out by individuals or organisations whose intent or effect is to influence government action either directly i.e. participating in policymaking or implementation or influencing the selection of those responsible for policy-making. Beyond elections, the concept extends to other modes of influencing government action, including use of the media, political parties, the work of civil society organisations, think-tanks, community-based organisations as well as individual action. Political voice is central to democracy and it is critical to enhancing the quality of governance in a country. As Schlozman et al point out, ‘[t]he exercise of political voice goes to the heart of democracy. In fact, it is difficult to imagine democracy on a national scale without the right of citizens to take part freely in politics’.

Ghana’s progress from a dictatorship to a multi-party democracy is considered one of the success stories of democratisation in Africa today. Ghana has been classified as a ‘functioning, multi-ethnic democracy’ and its human development progress considered remarkable. Despite a rocky

12 As above.
14 Dean, as above. Dean's sentiments in this regard are not novel. In 1946, George Orwell decried democracy as being meaningless, an amorphous term, used by ‘defenders of every kind of regime’, and who ‘fear that they might have to using the word if it were tied down to any one meaning’. He further asserted that ‘[W]ords of this kind are often used in a consciously dishonest way … the person who uses them has his own private definition, but allows his hearer to think he means something quite different.’ See ‘Politics and the English language’ on http://www.orwell.ru/library/essays/politics/english/e_polit/ (accessed 20 November 2016).
15 ODI (n 5 above) 8.
17 ODI (n 5 above) 8.
19 ODI (n 5 above) 6.
20 ODI (n 5 above) 7.
start, Ghana has managed to shake off the shackles of autocratic rule to become the ‘leader of the African democratic renaissance’,\textsuperscript{21} demonstrated by the peaceful handover of power from one regime to another and the increase in popular participation in decision-making.\textsuperscript{22}

While democratic developments within the developing world vary, Ghana has been identified as better positioned than countries like Kenya to address the challenges faced in the establishment of formalised democratic institutions.\textsuperscript{23} Its commitment to the provision of social services has been said to surpass that of a middle-income country.\textsuperscript{24} It therefore offers a good model for countries like Kenya seeking to create the link between citizen participation and provision of public goods and services. The next section reviews points of convergence and divergence between Ghana and Kenya’s systems.

2 Electoral democracy in Ghana and Kenya juxtaposed

Ghana is considered the epitome of political stability in West Africa. Like Kenya,\textsuperscript{25} multi-party democracy was restored in Ghana in the early 1990s. Ghana and Kenya also have similar socio-political and economic conditions. Ethnicity is also a prominent feature of electoral politics in both countries. Both Ghana and Kenya were also once one-party states. In Ghana, President Nkrumah declared himself ‘President for Life’ both of the Convention People’s Party (CPP) and the country.\textsuperscript{26} The dictatorial nature of the regime allowed the president to detain people without trial, to appoint and sack judges at will and to nullify court decisions,\textsuperscript{27} much akin to the situation in Kenya. Prior to the 2010 Kenyan Constitution, which provides for greater institutional accountability and citizen participation through devolved governments, it is said that governance

\begin{itemize}
  \item \textsuperscript{22} ODI (n 5 above) 7.
  \item \textsuperscript{23} Menocal et al (n 3 above) 31.
  \item \textsuperscript{24} ODI (n 5 above) 7.
  \item \textsuperscript{25} Via constitutional amendment in 1991, sec 2A, which had made Kenya a one-party state was repealed, opening up the space to multiple political parties. This was motivated largely by international pressure and withdrawal of support by Bretton Woods institutions, thus crippling the economy. See African Peer Review Mechanism ‘Country Review Report of the Republic of Kenya’ (2014) 41 http://us-cdn.creamermedia.co.za/assets/articles/attachments/03703_aprmkenyareport.pdf (accessed 16 November 2016); Menocal et al (n 3 above) 30.
  \item \textsuperscript{26} Gyimah-Boadi (n 21 above) 1; ODI (n 5 above) 19.
  \item \textsuperscript{27} Gyimah-Boadi (n 21 above) 1.
\end{itemize}
took place in the context of violence, intimidation, corruption and a general lack of transparency and accountability.  

Despite simultaneous democratic reforms, Ghana is classified as a consolidating democracy, while Kenya has been classified as a hybrid regime – one whose democratic processes are stuck in transition. According to Ottaway, hybrid regimes constitute:

ambiguous systems that combine rhetorical acceptance of liberal democracy, the existence of some formal democratic institutions and respect for a limited sphere of civil and political liberties with essentially illiberal or even authoritarian traits.

In such countries, the ‘culture and patterns of patrimonialism’ function alongside modern state features, with a ‘rhetorical acceptance of liberal democracy’ combined with ‘essentially illiberal and or authoritarian traits’. Such a system has a democratic exterior but little change takes place in terms of the norms, values and power relations. Obi refers to these ‘façade democracies’ as ‘anocracies’.

In both Ghana and Kenya, the opposition and civil society played a crucial role in transitioning to multi-party democracy. However, while Ghana is said to be enjoying a ‘prolonged honeymoon of democratic development as well as economic growth and poverty reduction’, the expectations of Kenyans that democracy would reverse decades of poverty, corruption and underdevelopment have not been met. There has been a shrinking of the democratic space, with increased regulation of civil society organisations.

Moreover, while in Ghana ethnicity is only a factor in the electoral process, ethnicity has polarised politics and ethnic-based violence has come to characterise Kenyan elections. It appears that in Ghana, ethnicity is not always determinative of the electoral success of a candidate or political party; rather, the extent to which elected officials deliver on issues that are important to citizens carries greater weight.

---

29 Menocal et al (n 3 above) 29.
31 Obi (n 9 above) 6.
32 Menocal et al (n 3 above) 29.
33 Obi (n 9 above) 6.
34 As above.
35 Obi (n 9 above) 6; APRM Report Kenya (n 25 above) 41.
36 Gyimah-Boadi (n 21 above) 4.
38 ODI (n 5 above) 29.
turnout, which is higher than some established democracies such as the UK and the US,\textsuperscript{39} appears indicative of citizens’ faith in the democratic system.

Kenya on the other hand has continued to experience a growing loss of faith in democracy, attributable in part to the fact that it does not appear to have yielded tangible economic benefits for the majority of the citizens.\textsuperscript{40} Afrobarometer surveys indicate that 80 percent of those interviewed in 2002, when President Moi’s 24-year reign ended, believed that the future would be better with the new government; this figure dropped to 33 percent in 2011.\textsuperscript{41} This growing loss of faith in democracy, together with alienation and apathy, contributes to a ‘non-transition to democracy’.\textsuperscript{42}

So what accounts for the differences in democratisation levels between Ghana and Kenya?

3 Drivers of Ghana’s progress: Increasing citizens’ political voice

Obi questions whether multi-party democracies in Africa are inclusive or do in fact give people real choices.\textsuperscript{43} He refers to such democracies as ‘tyrannies of choice’ where people do not fully understand the form of democracy, and are plagued by economic reform programmes that deepen the levels of poverty and have a debilitating effect on the middle class.\textsuperscript{44} Therefore, while they vote, they have little impact on political processes beyond elections.\textsuperscript{45} He argues that in most African countries, whereas people have a choice as to the political parties that come to power, they have little influence over the economic policies that are adopted by the parties once they form the government.\textsuperscript{46}

Menocal \textit{et al} refer to this as ‘shallow political participation’,\textsuperscript{47} and highlight its contribution to citizens’ frustration with the functioning of democratic institutions.\textsuperscript{48} This is especially so where key institutions such as the judiciary and political parties do not perform as they should or

\textsuperscript{39} In 2012, voter turnout was at 84 percent compared to 61 percent in the UK in 2010 and 54 percent in the US in 2012 respectively. See IDEA’s Voting Age Population (VAP) voter turnout analyser on www.idea.int (accessed 21 November 2016).

\textsuperscript{40} Kivuva (n 2 above) 6-7.

\textsuperscript{41} Kivuva (n 2 above) 4.

\textsuperscript{42} J Ihonvbere ‘Where is the third wave? A critical evaluation of Africa’s non-transition to democracy’ (1996) 43 \textit{Africa Today} 4, cited in Obi (n 9 above) 11.

\textsuperscript{43} n 9 above, 9.

\textsuperscript{44} As above.

\textsuperscript{45} As above, 10.

\textsuperscript{46} Obi (n 9 above) 10.

\textsuperscript{47} As above, 34.

\textsuperscript{48} As above, 34.
where they are not representative. This creates a danger of citizens pursuing political participation outside formal channels. For example, rather than political interest manifesting in institutional participation, such as elections, many youth channel their participation through ‘street democracy’ including through protests. Gyimah-Boadi concurs and adds that such democracies aggravate ethnic cleavages and tensions, breed social and political division, might inflame social and political instability and prevent national cohesion. The 2016 Mo Ibrahim Index of African Governance (IIAG) noted with concern that Kenya had demonstrated a decline in all three indicators of political participation: civil society participation, freedom of expression and freedom of association and assembly over the last 10 years.

Political voice proffers a solution to some of the weaknesses of the neoliberalist democracy project in Africa. Drawing from Ghana’s experience, increase in political voice opens up multiple avenues for participation in decision-making. Ghana has made one of the most remarkable changes in relation to political voice. Whereas it was ranked in the bottom 40 percentile in 1996, it ranked in the top 40 percentile in 2013. Research by ODI has lauded the responsiveness of elected officials to the citizens through the electoral process, primarily in relation to the provision of health and education services, at a time when there is scepticism within the developing world as to whether elections can go beyond clientelism and narrow, short-term interests. Lindberg and Weghorst laud this as a ‘pattern of ‘mature’ democratic accountability’, which not only serves to gradually entrench long-term accountability mechanisms but also encourages concern for the public good among politicians.

In addition, Ghana has welcomed external accountability measures in the form of the African Peer Review Mechanism (APRM) process. Despite not being among the mechanism’s pioneers, it has taken a lead in elaborating on and implementing the mechanism domestically. By

---

49 As above. Elder et al highlight the frustrations of many Kenyans with the highly nepotistic practices of political parties during the nomination process, with nominations often being awarded to ‘the highest bidder’, while those who received the highest number of votes are undemocratically removed from nomination lists. See Elder et al ‘Elections and violent conflict in Kenya: Making prevention stick’ (2014) 12.
51 n 21 above, 5.
53 ODI (n 5 above) 18.
54 ODI (n 5 above) 28.
55 ODI, as above.
57 Gyimah-Boadi (n 21 above) 6.
allowing independent think tanks and an independent presidential council to lead the process, it opened itself up to scrutiny by its citizens of government and its institutions outside the electoral process.58

Kenya’s trajectory has not been similar. Even after more than two decades of multi-party democracy, the adoption of the 2010 Constitution, an increase in political parties, media enterprises and greater freedoms, political voice is buffeted by rigging of elections, electoral violence, corruption and the limitation of political space for certain groups,59 all of which contribute to the regression to anti-democracy. This has the effect of nullifying the impact of institutional changes wrought by the Constitution, thus diminishing their impact on socio-economic and security interests of Kenyan citizens.60

Oloo decries the lack of equity of voice in the legislature and local government. He highlights that marginalised communities – women, persons with disabilities, racial and ethnic groups – have either weak representation or none at all in representative bodies.61 He further asserts that while descriptive representation – the idea that the outward, physical representation of a government official represents that of his constituents62 – does not guarantee adequate representation, full access to participation in the political sphere, public life and the relevant areas of decision-making allows their voices to be heard and their rights to be more respected.63 Mechanisms such as the Kenyan Constituency Development Fund (CDF), which allow for participation on developmental issues at the grassroots level, are also a useful avenue for increasing political voice, when properly managed.64

The 2016 spate of riots against the Independent Electoral and Boundaries Commission (IEBC) Commissioners in Kenya is considered by Lynch as a symptom of underlying lack of confidence in institutions.65 She asserts that the level of activism, despite police brutality and therefore full awareness of possible consequences, demonstrates a lack of confidence in the electoral process and the IEBC. Citing Cooper, she opines that the level of violence and disruption witnessed during the protests is a reflection of people’s perception that ‘the demonstration of destructive potential

58 Gyimah-Boadi, as above.
59 Kivuva (n 2 above) 1.
60 As above.
63 Oloo (n 61 above) 11.
64 Otieno (n 1 above) 11.
works’, especially where the concerns of a group are ‘neglected until they pose direct threats to public peace and financing’.66

An unhealthy party system poses a challenge to the consolidation of democracy. Ghana has a de facto two-party political tradition. Research by ODI indicates that motivation to vote for a party is driven by the party’s responsiveness in terms of basic delivery of services.67 Whereas there is little difference in ideology between the National Democratic Congress (NDC) and the New Patriotic Party (NPP), electoral competition between the two parties is credited with the reduction of school fees, greater accessibility to education and greater focus on health, resulting in the creation of Ghana’s National Health Insurance Scheme (NHIS).68

Conversely, the party system in Kenya is nebulous. Rather than being strong institutions that transcend regimes, Kenyan political parties are ethnic-based, personalised, and often take the character of the presidential flagbearer or main funder.69 With little ideological difference between political parties, it is hardly remarkable that party ideologies are hardly translated into policies.70 Moreover, the Political Parties Act allows for the formation of coalitions between parties.71 Whereas the Constitution requires all political parties to have a national outlook,72 many parties and coalitions are considered ‘ethnic coalitions of convenience and commitment, and thus, ethnic parties’.73 The weak institutionalisation of these parties and lack of organisational capacity precludes them from having a national impact, making many of the parties dormant between elections.74 Party coalitions are intended to demonstrate that they can overcome the divisive ethnic logic.75 However, since they are formed primarily with the aim of winning parliamentary majority, their propensity to fragment before and after elections make them fragile alliances.76 It therefore appears that in Kenya ethnicity is a stronger rallying point than party organisation for political participation.77 Since post-election violence has heavy ethnic undertones, the ethnic dominance over party politics makes the feasibility of future peaceful elections doubtful.78

67 ODI (n 5 above) 5.
70 As above.
71 Art 91(1)(a).
72 As above.
73 Elischer (n 37 above).
74 Menocal et al (n 3 above) 34.
75 Elischer (n 37 above) 9.
76 As above.
77 Elischer (n 37 above) 24.
78 As above.
On electoral democracy and socio-economic transformation, the modernisation approach posited that economic development is an essential element of democratisation; that in countries where democracy is well-formed, economic progress preceded political and civil rights.79 This link has been disputed, particularly because many countries that transitioned to democracy at the end of the 20th Century fell in the bottom half of the Human Development Index.80 Nevertheless, Przeworski and Limongi argue that while no minimum level of economic development is necessary to transition to democracy, economic development is key to sustaining democracy.81 Conversely, democratic regimes that do not sustain economic growth are more likely to break down, or at the very least are more fragile and unstable.82

When Ghana attained independence in 1957, ‘freedom, prosperity and national unity’ were the dreams espoused for the Ghanaian people.83 However, within a few years, corruption and financial mismanagement, broken down infrastructure, inadequate foreign exchange and a succession of coups and counter-coups turned these dreams turned into a nightmare.84 This affected crucial areas of the economy such as health and education as trained personnel left the country for better opportunities. This decrepit nature of the state led to Ghana being referred to as ‘a poster child of a failing African state, cursed with incompetent, corrupt and repressive governments presiding over instability, a stagnant economy, broken down infrastructure and a decaying society’.85

In stark contrast to the situation in the 1980s and 1990s, Ghana has recently managed to improve citizens’ lives by prioritising economic growth over economic, religious and class differences.86 Increased access to socio-economic rights – fuelled by electoral competition between the two main parties – propelled the democratisation process forward, transformed the class culture and resulted in the growth of a middle class which is organised and at the forefront of political participation.87 This middle class is credited with compelling Rawlings to open up the political space which resulted in formal democracy.88 Their demand for increased services and state responsiveness has been key to the deepening of democracy in Ghana and the growth in education has enabled the coming

79 Owusu (n 11 above) 171; GA Almond & S Verba The civic culture: Political attitudes and democracy in five nations (1963), cited in Menocal et al (n 3 above) 29.
80 Menocal et al (n 3 above) 30.
82 Menocal et al (n 3 above) 33.
83 Gyimah-Boadi (n 21 above) 1.
84 As above.
85 Gyimah-Boadi (n 21 above) 1.
87 ODI (n 5 above) 23.
88 As above.
together of Ghanaians of different backgrounds and fostered a joint commitment to nation-building.\(^89\)

Kenya’s on the other hand has been described as an ‘economy of affection’.\(^90\) Constitutional reforms in Kenya in 1991 were insufficient to entrench democracy because they neither altered the legal framework nor changed the existing undemocratic political culture.\(^91\) In the post-independent state, the extent of development of a region or access to public goods was dependent largely on the level of support that the region demonstrated for the presidency. As aptly pointed out by the APRM Report\(^92\) and Otieno,\(^93\) socio-economic development did not take place in regions that were opposed to the ruling party, with the phrase ‘\textit{siasa mbaya, maisha mbaya}’\(^94\) being used to express this basis of exclusion.\(^95\) Otieno highlights the marked difference in development levels between the regions that supported the President and those that supported the opposition.\(^96\)

While the exclusion of certain ethnic groups as a punitive measure was strengthened during President Moi’s rule, the seeds of exclusion had been planted by the first post-colonial government.\(^97\) The post-election violence of 2007/8 has been attributed in part to the ethnic exclusions and resultant political and economic discrimination of some citizens perpetrated by the political elite in the post-independent state.\(^98\) This has been exacerbated by a deliberate government policy, which spilled over from colonial rule, of investing only in the regions that were productive and therefore guaranteed the highest returns.\(^99\)

This led to the personalisation of the presidency, the perpetual exclusion of certain groups from governance and the belief that access to presidential power was the only way to secure access to state resources and services. This made the presidency highly coveted by every ethnic community, and its loss almost unbearable.\(^100\) Multi-party democracy therefore had little impact on the power relations between citizens and the state as political parties were, and continue to be, predominantly ‘regional,
ethnically based and poorly institutionalised'.\textsuperscript{101} Even with the promulgation of the 2010 Constitution and the establishment of devolved governments, the presidency has remained the coveted prize. Concern remains that rather than eradicate ethnicity and clientelism, devolved governments have continued to promote ethnicity and the formation of ethnic cleavages, much to the detriment of the minorities who were intended beneficiaries of the devolved system of government.\textsuperscript{102}

Owusu, reflecting on the democratic experience in Ghana, asserts that the realisation of the democratic promise depends largely on ensuring that majority of the citizens have access to ‘full participation, that is, including and beyond regular elections, the political system at all levels (centre and periphery) and access to the channels and opportunities for social and economic improvement and welfare’.\textsuperscript{103} He further asserts, citing Jennings, that in the few places where democracy has succeeded, it is because it is inseparably linked to the culture of the people.\textsuperscript{104}

Beyond the democratic transition processes, the entrenchment of democratic institutions is critical to sustaining democracy. Mass media serve as a watchdog, protector of the public interest and a crucial link between rulers and the ruled.\textsuperscript{105} Independence in the appointment of heads of state-owned media, a vibrant and independent media commission and constitutional and legislative protection of freedom of the press are among some of the measures that enable the media play its role as an institution of democratic governance. In particular, investigative journalism creates a culture of openness and makes democratically elected governments more accountable.\textsuperscript{106} By informing, educating and mobilising the public, citizens are better equipped for active participation.\textsuperscript{107}

In Ghana, the media began to blossom with the transition to democracy in 1992, which Gyimah-Boadi describes as transition from ‘a culture of silence to a culture of public disputation and active civic engagement.’\textsuperscript{108} There are now numerous newspapers and private radio stations with the freedom to cover political content.\textsuperscript{109} According to Reporters without Borders 2016 World Press Freedom Index, Ghana is

\textsuperscript{101} As above.
\textsuperscript{102} Elder \textit{et al} (n \textsuperscript{49} above) 16.
\textsuperscript{103} Owusu (n \textsuperscript{11} above) 164.
\textsuperscript{104} As above.
\textsuperscript{105} S Coronel ‘The role of the media in deepening democracy’ (2003) 4.
\textsuperscript{106} As above.
\textsuperscript{107} As above, 1.
\textsuperscript{108} n \textsuperscript{3} above, 5.
\textsuperscript{109} ODI (n \textsuperscript{5} above) 13.
ranked 26th in the world, only second to Namibia in Africa which is ranked 17th.\[^{110}\]

Article 35 of Kenya’s Constitution protects access to information. Nevertheless, Kenya ranks poorly in press freedom, coming in at 95th out of the 180 countries surveyed.\[^{111}\] The recent increase in the spate of terrorist attacks has been used as a pretext for limiting media freedom, especially where the media coverage concerns security-related stories.\[^{112}\] While Kenya has moved up 5 slots since 2015, RSF expresses concern about the dramatic decline in press freedom since the enactment of the Kenya Information and Communication (Amendment) Act\[^{113}\] and the Media Council Act in 2013.\[^{114}\] The Media Council and the Communications and Multimedia Appeals Tribunal are now empowered to receive complaints against journalists and media enterprises,\[^{115}\] and can impose a fine of up to Kshs 500 000 for a journalist and up to Kshs 20 million for each media enterprise that is found to be in violation of the Act or the Code of Conduct.\[^{116}\] While it is appreciated that these laws were passed in a context of global terrorism and national security concerns,\[^{117}\] the stiff penalties make it difficult, if not impossible, for the media to demand accountability and responsiveness from public officials in the interests of self-preservation. The restriction of media freedom is evidence of the regression that is characteristic of hybrid regimes.\[^{118}\]

Despite this blight on media freedom, social media platforms and the blogosphere have gained prominence, particularly among millennials, and are now a significant platform for addressing social justice issues.\[^{119}\] These platforms are referred to as a ‘third space’ and their users as ‘citizen journalists’. Although citizen journalists wear many hats – including activists, bloggers and political commentators – they wield a lot of

---

110 Reporters Without Borders (RSF) is the world’s largest NGO which focuses on defending media freedom. See https://rsf.org/en/ranking? (accessed 25 November 2016).
111 As above.
114 Act 46 of 2013. It repealed the Media Act of 2007 which established the Media Council of Kenya.
116 As above, sec 102E(1)(f); Media Council Act, sec 48.
117 RSF (n 116 above); see also Association of Women in Media in Kenya Laws governing media practice in Kenya: A journalists’ handbook (2014) iii.
118 Kivuva (n 2 above).
influence and have successfully rallied public support and protests on issues of corruption, land grabbing and abuse of state power.\textsuperscript{120}

Vernacular radio stations have also gained prominence in recent years. Despite concern about the potential use of these stations to spread ethnic hatred as in 2007,\textsuperscript{121} they have filled an existing gap in political voice by providing a platform for civic education and holding local leaders accountable by allowing residents to air their grievances.\textsuperscript{122}

4 Shared identity and common developmental leadership

It is said that ‘Ghanaians share an identity that has helped to foster unity across an otherwise diverse nation’.\textsuperscript{123} Where leaders and the political elite see beyond identity politics and focus rather on the shared vision of nation building, there develops a social cohesion which underpins, sustains and strengthens a democratic system.\textsuperscript{124} Both the 2008 and 2012 elections were closely contested and the death of President John Atta Mills in office and allegations of electoral fraud that followed posed a challenge to the electoral commission.\textsuperscript{125} Nevertheless, because the existing democratic channels and mechanisms were used to address electoral grievances, there was peaceful resolution of all these challenges.\textsuperscript{126}

Political parties in Ghana are required to have a national presence before being allowed to contest an election. Whereas this has strengthened the \textit{de facto} two-party political tradition, making it harder for smaller political parties to compete, being compelled to secure countrywide support created a deep-rooted sense of Ghanaian identity, which is credited with the restraint demonstrated in response to the flawed 1992 elections, as well as the decision by John Atta Mills to concede defeat in 2000.\textsuperscript{127}

Moreover, while the 2012 decision of the Ghanaian Supreme Court highlighted serious administrative and legislative shortcomings within Ghana’s electoral system, no significant conflict or political violence was

\textsuperscript{120} Ogola and Owuor highlight specific instances where social media was successfully used to rally public demonstrations to challenge illegal land grabbing and illegal transfer of land; as above, 234 ff.
\textsuperscript{122} As above, 16.
\textsuperscript{123} ODI (n 5 above) 8.
\textsuperscript{124} ODI (n 5 above) 21.
\textsuperscript{125} ODI (n 5 above).
\textsuperscript{126} As above.
\textsuperscript{127} As above.
recorded during that process.\textsuperscript{128} The judiciary was lauded for its independence in addressing the claims of voter fraud.\textsuperscript{129} In addition, the Electoral Commission, labouring under a dented image, invited stakeholders, in a participatory process, to contribute proposal reforms which were forwarded to the President. Despite the process of implementation being stalled by a court decision,\textsuperscript{130} there is a demonstrable commitment by electoral officials and the Executive to ensuring credibility of the electoral process.

On the contrary, the level of satisfaction with institutions in Kenya is low, as poignantly demonstrated in 2007.\textsuperscript{131} The post-election violence was attributed to lack of confidence in the judiciary. The intensity of the violence and the brutal reaction by the police were unprecedented and may have contributed to the low incidence of violence during the 2013 elections.\textsuperscript{132} Nevertheless, concern abounds that many of the issues that ignited the 2007 violence remain unresolved. While the International Criminal Court (ICC) provided a pacifying presence in 2013, the termination of the cases in 2016 removed this buffer.\textsuperscript{133} The lack of domestic prosecution for other perpetrators of violence has left many disillusioned and prone to mobilisation.\textsuperscript{134} While fear or deterrence of memory can preclude people from mobilising, perpetrating or retaliating against mass violence, Elder \textit{et al} caution that ‘a recent history of violent conflict serves as a broadly accepted risk indicator for future violence’.\textsuperscript{135}

Mbondenyi proposes that in the wake of the 2007/8 violence, watertight mechanisms should be developed to facilitate citizen participation and increase accountability and transparency in public affairs. Such a system is one that would extend equal opportunities to participate in governance to all citizens, thus allowing them to contribute to the governance of the country.\textsuperscript{136}

On one hand, it is asserted that Ghana has ‘a distinctive tradition of ideology-based political parties not evident in many other African countries’.\textsuperscript{137} Ghana has not experienced the divisive ethnicity that has fragmented many post-colonial African states.\textsuperscript{138} Despite ethnic tensions and communal conflicts, the country has remained relatively united.\textsuperscript{139}

\begin{thebibliography}{99}
\bibitem{129} ODI (n 5 above) 12.
\bibitem{130} UNDP (n 128 above) 3.
\bibitem{131} Kivuva (n 2 above) 1; Lynch (n 65 above).
\bibitem{132} Elder \textit{et al} (n 49 above) 10.
\bibitem{133} https://www.icc-cpi.int/kenya (accessed 3 December 2016).
\bibitem{134} Elder \textit{et al} (n 49 above).
\bibitem{136} Mbondenyi (n 28 above) 2.
\bibitem{137} UNDP (n 128 above) 2.
\bibitem{138} ODI (n 5 above) 8.
\bibitem{139} Gyimah-Boadi (n 21 above) 4.
\end{thebibliography}
While ethnicity features in the electoral process, and studies highlight the importance of a balanced presidential candidature between the north and the south to securing wide electoral support, there is no conclusive evidence that Ghanaians only vote along ethnic lines. Research by Lindberg and Morrison showed that ethnicity influences the voting choices of only 1 out of 10 Ghanaians. Ethnicity and family ties, while important, are therefore not determinative of voting patterns. On the other hand, the colonial vestige of forcing communities that had no previous interaction to coexist fuelled ethnic polarisation in Kenya. Rather than being uprooted by post-colonial governments, ethnicity was used for a two-fold purpose: as a means of strengthening political power and as a strategy for locking out political opponents.

Citizenship in Kenya has therefore become synonymous with ethnic belonging. This stunts democratisation as it is difficult to integrate the various communities into the democratic state without appearing to compromise the dearly held ethnic identities. Ethnicity’s impact on democratisation has either been dismissed by observers as a thing of the past or downplayed. Any measures directed at consolidating democracy are therefore ineffective as they fail to address the impact of ethnicity in governance processes. Unfortunately, despite the outcry for an overhaul of the electoral system that encouraged a ‘winner take all’ approach, the single member plurality (SMP) system has been retained. This system does not encourage inclusiveness, but rather promotes ethnic polarisation.

5 Role of institutions in deepening and sustaining electoral democracy

5.1 Electoral Commission (EC)

An independent and impartial electoral commission is an indispensable institution in the entrenchment of electoral democracy. Ghana’s EC was not always an independent body, having previously been a department

---

142 Lindberg & Morrison (as above) 121. See also Iddi (n 144 above) 72.
143 Mbondenyi (n 28 above) 4.
144 Mbondenyi (n 28 above) 4.
145 Mbondenyi (n 28 above) 4.
146 Mbondenyi (as above).
147 Mbondenyi (n 28 above) 5.
149 Khobe (n 7 above) 134.
under the Ministry of Local Government. Despite a rocky start to the management of elections, with the return to multi-party democracy in 1992, the EC is now regarded as independent, neutral and competent to hold credible elections. Some Ghanaians rated the EC as the most trusted governance institution in Ghana. The credibility is attributed to its institutional autonomy, the professional competence of the members, its financial independence, its diverse professional, gender and regional representation, its track record of competence in handling elections and elections related disputes, constant dialogue with the Inter-Party Advisory Committee (IPAC), and the competency of its staff. The EC’s leaders have had long experiences of elections management. Consequently, while the EC has laboured under a crisis of confidence at various times in its tenure, it is largely considered independent and enjoys the support of the public, political parties and donors.

Kenya’s electoral management body has long laboured under low public confidence. Following the botched 2007 elections, the Kenya National Dialogue and Reconciliation (KNDR) process resulted in the establishment of an independent commission to audit the 2007 General Elections. The Independent Review Commission (IREC) was tasked with reviewing all aspects of the 2007 elections and recommending reforms. The IREC found that the effectiveness of the then Electoral Commission of Kenya (ECK) was undermined by lack of transparency, incompetence of staff, bias and a poor communication strategy, which culminated in the hurried declaration of electoral results and swearing in of the incumbent President under unusual circumstances.

IREC made extensive recommendations on the structure and composition of the new election management body, appointment, tenure and remuneration of members of the Commission, transparent recruitment and professional competence of staff, accountability to Parliament and consolidation of the various election laws, many of which have been included in the Constitution and the Independent Electoral and Boundaries Commission (IEBC) Act. These included the establishment of the Interim Independent Electoral Commission (IIEC) as well as the Political Parties Liaison Committee (PPLC) which brings together the

152 Debrah et al (n 150 above) 4.
153 Debrah et al (n 150 above) 2-4.
154 Debrah et al (n 150 above) 11.
156 TI (n 155 above) 8.
158 Act 9 of 2011.
Registrar of Political Parties, the IEBC and political parties to dialogue over the electoral process and share information in order to build confidence in the electoral process both at the national and county levels. The IIEC was replaced by the Independent Electoral and Boundaries Commission (IEBC) in 2011.

Notwithstanding wide public support in the pre-election process, the effectiveness of the IEBC in handling the first elections under the 2010 Constitution was undermined by irregularities. Late amendments to the nomination rules, inconsistent decision-making mechanisms, the late introduction of and consequent failure of electoral technology, insufficient time for voter registration, lack of transparency in processing results as well as lack of a complete unified voter register all undermined the credibility of the IEBC. The widespread irregularities that characterised the 2013 elections were acknowledged by the Supreme Court in Raila Odinga & Others v IEBC & Others. These challenges were exacerbated by the complexity of holding elections for six different electoral positions on the same day.

Moreover, the IEBC battled a dented image in 2016, created by the refusal of the Commissioners to leave office to pave the way for the next team, amidst opposition-led protests calling for their removal on allegations of bias. The tug of war with the opposition was exacerbated by in-fighting, with some Commissioners expressing a desire to leave, while others determined to remain in office pending a formal Presidential directive. Calls for the resignation of the Commissioners sparked violent demonstrations, and police brutality in quelling the demonstrations was reminiscent of the pre-multi-party era. Both the decision to remove the Commissioners in the year preceding the election and the prolonged battle over tenure served to poke a hole in an already leaking ship.

Lynch cautions that the boldness of the protesters, despite evidence of police brutality, is a warning bell of a new culture of engagement premised on the idea that government only responds to its citizens when they pose a threat by destroying public property. Moreover, the police brutality not only smirked of impunity – a belief that it was acceptable to mete that level
of violence on protesters instead of arresting them and arraigning them in court – Lynch cautions that the protests may be a sign of more violence to come if the grievances of a disgruntled and idle Kenyan youth are not addressed by the government.\textsuperscript{168} It is incumbent upon the Kenyan government and policy makers to comprehensively consider these warning signs and adopt measures to address the needs of the youth and platforms for their meaningful participation in decision-making. The APRM Youth Kenya initiative offers one such platform.\textsuperscript{169}

5.2 Other actors: Inter-Party Advisory Committee and donors

Following the flawed 1992 elections and the decision by the opposition to boycott parliamentary elections in Ghana, there was a concern that the 1996 elections would suffer the same fate if the electoral system were not reformed. The boycott threat sparked electoral reforms in 1994.\textsuperscript{170} Among these was the decision by the EC to bring together representatives of political parties and donors to consult on the management of critical aspects of the election under the aegis of the Inter-Party Advisory Committee (IPAC). The platform was devolved to the regions and districts and it allowed for dialogue on contentious issues in the electoral process. The cooperation and participation of parties in the reform process served to mend the relationship and forestalled another boycott of the elections.\textsuperscript{171} The PPLC in Kenya, established in 2009,\textsuperscript{172} is modelled along the lines of IPAC, but is not credited with a similar role in the 2013 elections.

Donors are uniquely placed to facilitate the entrenchment of democracy through democracy assistance by requiring greater inclusion of marginalised groups,\textsuperscript{173} and financially supporting key channels for political participation by civil society and the media. Democracy assistance is considered to have played an indirect catalytic role in the transition to and it is credited with keeping Ghana’s democracy progressing on the right path, particularly where political voice is concerned.\textsuperscript{174}
5.3 The role of the peace narrative

Beyond shared identity, Ghana has made deliberate efforts to ensure peace and stability irrespective of electoral outcomes. In 1992, Jerry Rawlings, via constitutional amendment, retained some autocratic powers and as chair of the ruling Provisional National Defence Council (PNDC) military junta, was elected president on the ticket of the newly formed NDC and retained many of the members of the previous PNDC cabinet. Parliament became a de facto one-party legislature when the opposition boycotted the elections, and the former deputy chair of the NDC became speaker of the National Assembly, thereby ostensibly making the legislature a puppet of the government. Despite the opposition's disenchantment with the transitional elections, which they alleged were openly rigged, they chose to peacefully engage in civil disobedience and document their grievances rather than take up arms as has happened in Côte d'Ivoire, Sierra Leone and Kenya.

In the 2012-2013 electoral process, 'peace councils' brought together politicians from the two major political parties, religious leaders, chiefs and civil society organisations. Their joint appeals for peace were instrumental in tackling possible conflicts and promoting peace and stability.

In Kenya, the relative calm experienced during the 2013 general elections was a welcome relief to many. The peace narrative may have had some measure of success in the short term, but it has been criticised for ignoring intractable differences such as persistent land disputes, corruption and lack of accountability for crimes committed in the past. These peace campaigns were short-term (they ceased after the elections) and focused largely on the urban areas, thereby overlooking the rural areas. It is also argued that the relative peace witnessed in 2013 was a factor of the fear and the memory of 2007/8, and the calls for peace and respect for institutions by influential candidates. This tenuous peace was achieved under duress, rather than a wilful decision not to take up arms. The European Union's Electoral Observation Mission (EU EOM) noted self-censorship by the media as many media messages that did not conform to the calls for calm and peace, were filtered by the broadcast media.

175 Gyimah-Boadi (n 21 above) 2.
176 See Gyimah-Boadi (n 21 above) 5.
177 ODI (n 5 above) 13.
178 ODI, as above.
179 Elder et al (n 49 above) 13.
180 Elder et al (as above).
181 Elder et al reported the impact of former Prime Minister Raila’s call for peace and respect for the rule of law and the courts in quelling discontent with flawed nomination processes, particularly in low-income areas where he enjoyed wide support and loyalty; n 49 above 13.
182 Elder et al, as above.
183 n 160 above, 27.
Elder et al caution that these efforts neither addressed the deep divisions among ethnic communities nor the new triggers of conflict that have arisen since then.\textsuperscript{184} Taken together with the recent anti-IEBC protests, it is widely acknowledged that violence could erupt even prior to the 2017 elections due to these unresolved issues, particularly in Mombasa, Marsabit and Bungoma counties.\textsuperscript{185} It is therefore recommended that there be technical assistance towards mitigating triggers for election violence and factors fuelling mass political violence.\textsuperscript{186} Gyimah-Boadi has also credited the relative peace in Ghana to the success of the National Reconciliation Commission, modelled after the South African Truth, Justice and Reconciliation Commission (TJRC).\textsuperscript{187} He asserts that through public hearings and related processes, the National Reconciliation Commission provided some relief and closure to the victims of past human rights abuses and wrongs perpetrated by the state without a hostile response from the alleged perpetrators.\textsuperscript{188}

In Kenya, proposals for a transitional justice mechanism were first put forward during the regime change in 2002. However, due to disagreements among the political elite as to the form the mechanism would take, the proposals for such a mechanism were shelved.\textsuperscript{189} It was not until the 2007/8 post-election violence that calls for the mechanism were revived under the aegis of the KNDR, the mechanism through which the government and the opposition explored solutions to the political crisis. In addition to institutional reforms, constitutional review, the establishment of the Waki-led Commission of Inquiry into Post-Election Violence and the Truth, Justice and Reconciliation Commission (TJRC) were some of the positive outcomes of the negotiations.\textsuperscript{190}

Nevertheless, the success of the TJRC is difficult to assess. Public confidence in the mechanism waned as it was plagued by allegations of corruption, serious concerns about the human rights record of the Chairperson, significant delays and political interference as well as lack of political will for the mechanism.\textsuperscript{191} The success of the mechanism is heavily dependent on the extent of the implementation of the report, which is still pending.

\textsuperscript{184} As above, 14.  
\textsuperscript{185} Elder et al (n 49 above) 19.  
\textsuperscript{186} As above.  
\textsuperscript{187} Gyimah-Boadi (n 21 above) 5.  
\textsuperscript{188} As above.  
\textsuperscript{190} Asaala, as above.  
Toward deepening and sustaining electoral democracies in Ghana and Kenya: Opportunities for experience sharing

Despite Ghana’s much-lauded democratisation success, research indicates that governance in Ghana has not been on an upward trajectory in the last decade. Beyond the high ranking of Ghana in overall governance performance by the IIAG, it is also said to have registered the 8th largest deterioration on the continent in the last ten years.192 Although it has registered great improvements in the provision of healthcare and education,193 Gyimah-Boadi asserts that Ghana still has a long way to go in addressing the delivery of key public services including water, sanitation and environmental management, corruption and political patronage.194 Inequities exist across regions and income groups.195

On the other hand, while Kenya has progressively improved over the last ten years,196 many excluded groups are worse off than they were before devolution, a factor made worse by tax increases on basic commodities.197 Socio-economic inequality persists.198 Together with high youth unemployment rates and urban poverty, these inequalities fuel the capacity of the youth to be mobilised and given the ethnic nature of the exclusion, further exacerbate ethnic tensions and polarisation.199 It is imperative that specific policy measures are taken to address the needs of the disadvantaged groups.200

In 2006 and 2016, Ghana ranked number seven on the IIAG.201 On participation and human rights, it ranked number three on the continent; Kenya was ranked at number 12.202 Despite this high rating, the participation of women, youth, religious and other minorities in governance and decision-making in both countries remains alarmingly low.203 Gyimah-Boadi decry Ghana’s political culture, which remains intolerant towards certain identity groups.204 In Kenya, despite a constitutional dictate for inclusion,205 marginalised groups do not have meaningful opportunities to participate in political and public life. The EU
Deepening and sustaining electoral democracy in Kenya: Lessons from Ghana

EOM considered women’s candidature in the 2013 elections ‘disappointingly low’. Two attempts to pass affirmative action legislation to increase women’s participation in public life in line with article 100 of the 2010 Constitution failed to muster sufficient support in Parliament, demonstrating that lawmakers are yet to internalise the constitutional values of inclusiveness, non-discrimination and protection of the marginalised. For democracy to achieve ‘true and dynamic significance’, implementation of states policies and development programmes must be deliberated upon jointly by men and women, having equitable regard for the interests and aptitudes of both sexes.

Since citizenship demands ‘an equal distribution of entitlements, equal recognition of standing and protection of rights and interests of all citizens’, minimal participation turns marginalised groups into absent citizens and precludes them from articulating interests peculiar to that group, such as eradication of poverty. They are prised from democracy and relegated to spectatorship, or worse, victimhood. Moreover, by failing to ensure gender equity, women are impeded from contributing to development and consequently making it impossible to achieve the development goals.

Addressing gender inequality in the labour markets, education, health and related areas will result in the eradication of poverty and hunger. While reform of the electoral system to a mixed member representation system has been proposed to secure greater participation of women and

206 EU EOM report (n 160 above) 2.
211 The memorandum of objects of the 2000 Affirmative Action Bill tabled by Hon Beth Mugo urged that increasing women’s participation in Parliament would contribute to ‘redefining political priorities, placing new items on the political agenda that reflect and address women’s gender specific concerns.’ See WK Ochieng ‘Chimera of constitutionally-entrenched gender quotas: The contested judicial enforcement of quotas in Kenya’ (2016) 2 Journal of Law and Ethics 71.
212 Obi (n 9 above) 10.
214 As above.
ethnic minorities in Kenya, electoral reforms would be ineffective without simultaneously addressing the political and socio-economic context within which they operate.

Regarding corruption, in both Ghana and Kenya, corruption continues to pose a big hurdle to the full realisation of the benefits of democracy. Owusu asserts that corruption was fuelled by the colonial legacy and the belief that it was honourable to be convicted of crimes of political and administrative dishonesty and corruption. Ghana, however, is ranked better, with Transparency International Corruption Perception Index ranking it at number 56 in 2015. Its better performance is credited to investigative journalism.

Kenya continues to fare poorly in world rankings on corruption. According to the Index, Kenya was ranked 138 out of 169 countries. It scored a paltry 25 percent in the assessment. Githongo decries the inaction of the current government on eradicating corruption, despite it being the most vocal about ending corruption. This is corroborated by the lack of improvement in Kenya’s rating in the last two years. According to Mbondenyi:

Corruption has exacerbated the country’s socio-economic crisis to such a magnitude that the rules of fair play are either simply ignored or have been replaced with influence peddling and nepotism. This has eventually affected the competence, integrity and output of government. Moreover, it has entrenched socio-economic inequality as well as inequitable access to public resources and services amongst citizens. Whereas the government has attempted to establish anticorruption commissions and agencies, there has been a general lack of political will to end corruption in all spheres of society.

The concern is often not with corrupt activities, but rather that one’s own ethnic group is left out of the opportunities to enrich themselves or as it is referred to informally, ‘to eat’. As Githongo points out ‘... it’s not the corruption in itself that people object to but the fact that it is perpetrated

215 Khobe (n 7 above) 121.
216 Obi (n 9 above) 21.
217 n 11 above, 175.
219 As above.
221 https://www.theguardian.com/global-development/2015/aug/06/kenya-barack-obama-visit-anti-corruption-plan-democracy (accessed 4 December 2016); TI (as above).
222 n 28 above, 6.
predominantly by elite from one ethnic group to the exclusion of others, especially theirs.\textsuperscript{223}

Furthermore, devolution has resulted in disillusionment; instead of county governments addressing historical grievances and local problems, corruption, inequality and tribalism appear to have worsened.\textsuperscript{224} It is asserted that the only way to effectively fight corruption is to pursue political initiatives.\textsuperscript{225} Given the potential of inequality to fuel mass violence as was seen in 2007/8, and the recent spate of riots, Kenya’s situation is perhaps more urgent and volatile, especially in light of the forthcoming 2017 elections.

7 Conclusion

While the process of consolidating democracy is formidable, it is one well worth pursuing.\textsuperscript{226} Ghana’s progress since 1992 has demonstrated that democracy can work in Africa,\textsuperscript{227} and citizens can use their political voice to make demands that go beyond voting in elections.\textsuperscript{228} Ghana was once described as ‘a poster child of a failing African state’.\textsuperscript{229} Today it is hailed as the leader of the African democratic renaissance. This provides hope for hybrid democracies like Kenya whose trajectory has not been direct. As Menocal \textit{et al} assert, democratisation processes are often not linear,\textsuperscript{230} and a country can, over time, experience progress and reversals.\textsuperscript{231} Bratton and Mattes assert that ‘all regimes have been considered, at one point or another, as patrimonial or neopatrimonial in nature’.\textsuperscript{232}

While Ghana represents a good model from which to borrow lessons, Kenya still needs to own and sustain its own democracy project to ensure that it meets the peculiar needs of its people. As urged by Obi:\textsuperscript{233}

\ldots it should be recognised that local conditions and realities have a place in modifying, contextualising and particularising the universal \ldots The real challenge lies in returning power and ensuring social justice, and equitable redistribution of resources to the people, through a transformative process.


\textsuperscript{224} Elder \textit{et al} (n 49 above) 17.

\textsuperscript{225} A Mungiu ‘Corruption: Diagnosis and treatment’ (2006) 17 \textit{Journal of Democracy} 86.

\textsuperscript{226} Menocal \textit{et al} (n 3 above) 36.

\textsuperscript{227} Gyimah-Boadi (n 21 above) 6.

\textsuperscript{228} ODI (n 5 above) 30.

\textsuperscript{229} Gyimah-Boadi (n 21 above) 1.

\textsuperscript{230} n 3 above, 30.

\textsuperscript{231} Menocal \textit{et al}, as above, 31.


\textsuperscript{233} n 11 above, 30.
that would empower the masses to take control of the democratic project in the real sense of freely creating a government of the people, for the people, by the people.

Without strong political organisation, with grassroots presence, as well as efficient and honest leadership, there cannot be consolidation of democracy. If Kenya continues to invest in citizen participation at the local level as urged by Otieno, there will be a significant impact on the national democratic culture. This means that an audit of the challenges facing and weakening devolution is necessary. Such a bottoms-up approach, with citizens being empowered to participate locally, through such mechanisms as the Kenyan Constituency Development Fund (CDF), can complement the mainstream democratisation strategies, and make democratisation more robust. As opined by Ake

[the absence of enabling conditions for democratic participation at the grassroots is the greatest obstacle to democracy in Africa, just as the transformation of the society for the empowerment of ordinary people is the greatest challenge of democratisation.

When power is restored to the citizens, the patron-client relationship that has defined elections and governance in Kenya will be eroded. Until then, the Kenyan government must utilise all necessary legislative, policy and practical measures to ensure ethnic cohesion and consolidation of democracy in Kenya. Ghana has shown that this is an achievable African dream.

234 I Jennings Democracy in Africa (1963) 68-69, cited in Owusu (n 11 above) 165.
235 Otieno (n 1 above) 11.
Abstract

This chapter analyses the inception of the Global Financial Crisis (GFC) of 2008, how it impacted and still impacts the enjoyment of human rights through a decline in economic growth and constantly low revenue thereby adversely affecting the realisation of socio-economic rights in Ghana and Zambia. The chapter proffers the human rights-based approach as desirable to mitigate, if not fully counter, the ramifications of the GFC. The chapter argues that failure to utilise the human rights-based approach can have dire consequences for the most vulnerable in society. Consequently, the chapter concludes that, the adoption of social assistance schemes to protect the most vulnerable and marginalised groups of individuals in these countries; the adoption of human rights centred economic policies as well as of social protection policies; and the regulation of the financial sector by adopting policies more in line with the demands of the demoted groups of citizens should play a growing and important role to ensure the continuous enjoyment of socio-economic rights during economic crises.

1 Introduction

The 2008 global financial crisis (GFC) had adverse socio-economic effects on Africa because of Africa’s resource dependence on external actors, which makes Africa vulnerable to the dynamics of the global financial system and globalisation generally. As Orago notes, most African countries are reliant on ‘primary commodity exports, donor aid, debt funding through international bonds (Eurobonds), remittances from Africans in the diaspora, among others, which renders African economies vulnerable to global financial shocks’. The effect of the GFC continues to

be felt around the world especially in developing countries although most of these economies are on a recovery path.\(^3\) Whereas most parts of the world have made considerable strides in recovering from the GFC, most of Africa continues to experience a decline in economic growth and consistently low global growth projections as set out by the International Monetary Fund (IMF).\(^4\) Notably, the GFC’s debut was at the confluence of the financial, fuel and food crises.\(^5\)

The fact that the GFC is neither the first nor the last of its kind\(^6\) motivated this study, to uncover appropriate and practical human rights-based responses with which to counter future economic crises. Focusing on Ghana and Zambia, this chapter examines the impact of the GFC on the realisation of human rights particularly, socio-economic rights and the right to development. The study proceeds on the premise that though located in different parts of Sub-Saharan Africa (SSA), these countries present similar and divergent political, economic, and demographic characteristics worth examining. For instance, in terms of economic drivers, mining constitutes Zambia’s mainstay contributing about 70 per cent to export earnings.\(^7\) For Ghana, beside timber and gold, the agricultural sector remains dominant in the economy employing 56 per cent of the labour force and accounting for more than one third of national output.\(^8\) Although Ghana and Zambia were both colonised by Britain and are member states of the United Nations (UN) and African Union (AU), they each belong to different regional economic communities (RECs) and thereby represent different sub regional institutions. While Ghana is part of the Economic Community of West African States (ECOWAS), Zambia belongs to the Southern Africa Development Community (SADC). These characteristics make the two countries suitable choices for the case study, particularly considering that the study’s proposals could fit wider application beyond Ghana and Zambia.

The GFC sent shockwaves across the world and caused far-reaching ramifications characterised by the acceleration of unemployment, declines in cash inflows, reductions in household incomes and restrictions on access to goods and services. For Ghana and Zambia, these ramifications

---

7 Green (n 6 above) 22.
8 Insaidoo (n 3 above) 40.
were generally transmitted through contraction in international trade, drop in foreign direct investment, reduction in remittances from citizens in the diaspora and cuts in foreign aid. In other instances, corporations closed down their operations, which led to lower income tax revenue.

As a response to the ramifications of the GFC, Ghana and Zambia adopted measures to alleviate the impact of the GFC. Some of these measures shrunk government expenditures, thereby impeding social spending on basic services like health and education. Bilchitz contends that such measures are retrogressive and not in keeping with State Parties’ obligation to respect, promote, protect and fulfil human rights including socio-economic rights as entrenched in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other international legal instruments that provide for Socio-economic rights.

In terms of the right to development, the UN Declaration on the Right to Development (Declaration on the Right to Development) underscores in its preamble that, in order to promote development:

> [E]qual attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights. The promotion of, respect for, and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms.

The Declaration on the Right to Development also provides that States bear the primary responsibility for the creation of national and international conditions favourable to the realisation of the right to development.

At the African regional level, the right to development is enshrined in the African Charter on Human and Peoples’ Rights (African Charter). The African Charter is the first binding international human rights instrument to provide for the right to development. It provides that all peoples are entitled to their economic, social and cultural development. Further, State Parties, including Ghana and Zambia, are mandated individually or collectively, to ensure that the right to development is exercised. In sum, the GFC impeded development, exacerbated extreme poverty and

---

11 Orago (n 2 above) 1.
13 Declaration on the Right to Development, preambular para 9.
14 Declaration on the Right to Development, preambular para 14.
16 African Charter on Human and Peoples’ Rights, art 22.
undermined the capacity of developing states to create the requisite environment for the realisation of human rights. This is what informs the need to employ appropriate measures in reaction to GFC. The human rights-based approach is identified for consideration as an appropriate and meaningful response to the woes presented by the GFC.

2 The GFC and its implications on Ghana and Zambia

The 2008 GFC originated in the United States of America (USA), primarily caused by the collapse of the housing market in the USA, which resulted from the lax financial regulatory conditions and the lack of implementation of strict corporate governance conditions in the country and other developed economies. During the period leading to the GFC, credit became easily accessible in the USA because financial institutions effected loose loan policies and were not restricted by stringent credit risk management and control. This resulted in huge amounts of financial securities not backed by cash flow from mortgages. At this point investing in the housing sector in the USA was growing at a rate far beyond that of the broader economy.

Consequently, the mortgage market became inundated with all types of credits including the high-risk, unsustainable and predatory lending of mortgage brokers to people whose salaries were too low to pay off the loans and were not creditworthy by acceptable standards (sub-prime borrowers). The widened borrowing net resulted in a proliferation of homeownership, which escalated house price increases and consumer spending so that between 1997 and 2006, home prices increased by about 124 per cent. During this period, financial assets of all sorts ranging from credit card to companies' debt repayments were turned into securities and priced. The American financial system, without regulation and adherence to strict corporate governance principles, employed rapid financial innovation such that debt-risk could be traded and distributed with securitisation. This left the capital base of the financial institutions exposed to the ensuing collapse of the sub-prime mortgage market in the USA. The collapse occurred when prices for houses fell and people could not sell their houses to cover their debt. Thus, borrowers simultaneously defaulted on

19 Fundanga (n 10 above) 2.
21 Ajakaiye et al (n 18 above) 36.
22 As above.
their loans. As a result, credit dried up, interest rates surged and housing prices continued to drop\textsuperscript{23} leading to a recessionary economic environment in which global trade, stock market indices and commodity prices, suffered a considerable decline and culminated into the GFC.\textsuperscript{24}

The GFC affected Ghana and Zambia in various ways including ‘contraction in global trade due to reduced demand for African exports; drop in foreign direct investment and other capital inflows; falling remittances from African workers based overseas; and cuts in foreign aid.\textsuperscript{25} It is important to note that the intensity of the impact extended by the GFC transmission channels varied by country.\textsuperscript{26} According to Ackah \textit{et al} the GFC permeated the Ghanaian economy through key transmission belts such as the stock markets, banking sectors, foreign direct investment, remittances, trade and foreign aid.\textsuperscript{27} This was concurred by the Labour Research and Policy Institute, which proposed that the pronounced ramifications of the GFC on Ghana include limited access to international credit, reduced FDI and dwindling foreign exchange from international trade, reduced aid and grants, reduced remittances from Ghanaians abroad and a fall in income from tourism.\textsuperscript{28}

Because Ghana is a small open economy hooked on cocoa, gold and timber export-led growth, the global slowdown in commodity demand as a result of the GFC presented many adverse ramifications on Ghana’s international trade as well as on the labour market, access to credit, Foreign Direct Investment (FDI), Foreign Aid and Grants (FAGs), remittances and the country’s financial market.\textsuperscript{29} The GFC caused declines in cash inflows, household incomes and nutrition, access to health as well as education.\textsuperscript{30} The GFC also caused job losses, an insecure labour market and increased the cost of living in Ghana. These exacerbated the prevalence of hunger, disease and poverty.\textsuperscript{31}

In this context, the GFC undermined Ghana’s capacity to create jobs, secure the financial sector, make provision for social service expenditure,
sustain the growth of its economy and, more significantly, progress towards the attainment of the MDGs. When the GFC caused the Ghanaian currency (Cedi) to depreciate by way of high current-account deficits and other macroeconomic factors, it posed negative implications on the importation of goods and services. In particular, basic necessities such as consumer goods became too costly to import. This, in turn, caused the increase in prices of domestic consumer goods thereby reducing access to food especially for the indigent. The costs of importing or locally purchasing food and accessing other essentials such as transport, healthcare and education were prohibitive for many households. In light of these factors, the eradication of extreme poverty and hunger, the realisation of universal primary education, programmes to promote gender equality and empowerment of women, reduction of child mortality, improvement of maternal healthcare and prevention of HIV/AIDS and malaria and other diseases was impeded. The GFC by way of decline in remittances, particularly to individuals and households, aggravated the poverty levels and hunger in Ghana. The aggravated poverty levels and hunger hampered the progress on the realisation of most of the eight MDGs, especially MDG 1 on the eradication of extreme poverty and hunger as well as MDG 4 on reduction of child mortality and MDG 5 on the improvement of maternal health, which require consideration funds to be realised.

In addition, as a consequence of the GFC on the financial market, banks were reluctant to offer credit to many households and business enterprises for fear of loan defaults. Further, discount, interest, prime and lending rates increased. All these developments depressed share prices paid to clients and exacerbated the reduction in household incomes. Evidently, the MDGs were not spared from the sting of the

33 Quartey (as above) 17.
34 National development planning commission et al (n 30 above) 81.
35 MDG 1.
36 MDG 2.
37 MDG 3.
38 MDG 4.
39 MDG 5.
40 MDG 6.
41 National development planning commission et al (n 30 above) 81.
44 n 30 above, 80.
45 As above.
46 As above.
Ghana and Zambia’s experiences with the global financial crisis

GFC as elucidated in respect of the impact spread through dwindling remittances.

The GFC’s macroeconomic effect transmitted through the reduction in Official Development Assistance (ODA) inflow coupled with the consequence of reduced government expenditure, presented adverse implications on development and the attainment of the MDGs. This is because when governments, as did the Ghanaian government, reduce their expenditures, spending on health, education, poverty, and sanitation programmes are usually the first to suffer.\textsuperscript{47} Such developments placed a substantial portion of Ghanaians, particularly the indigent, in precarious situations and, more significantly, impeded the attainment of the MDGs. The GFC depressed investment and growth thereby undermining Ghana’s capacity to achieving the MDGs.

In Zambia, during the decade prior to the GFC, the Zambian economy experienced positive growth and macroeconomic stability.\textsuperscript{48} As a result, Zambia was on course to realising sustainable growth and attaining the MDGs. Against this backdrop, it is apposite to state that the emergence of the GFC threatened to reverse Zambia’s progress. For Zambia, the impact of the GFC was severe on trade and export earnings especially given that copper, which accounts for about 70 per cent of total export earnings, dominates the export sector in Zambia.\textsuperscript{49} Thus, the immediate impact of the GFC on trade was the fall of copper prices in 2008.\textsuperscript{50} This led to a plunge in the amount of reserves generated by the mining sector and a steep decline in the export earnings. Accordingly, the balance of trade was reduced from US$ 610 million in 2007 to $ 29 million in 2008.\textsuperscript{51} This situation adversely affected the profitability of the mines such that some mining units were shut down and workers were laid off. More workers from other sectors such as tourism also lost their jobs.

In terms of inflation and depreciation of the Zambian currency (Kwacha), in 2008 alone, the overall inflation rate rose from 8.5 per cent in January to 16.6 per cent in December.\textsuperscript{52} This rise is attributed to the GFC’s pressure on the exchange rate leading to an increase in the annual inflation rate and depreciating the Kwacha against major currencies such as the US dollar and the UK pound during the second half of 2008.

\textsuperscript{47} Orago (n 2 above) 1.
\textsuperscript{49} As above.
\textsuperscript{50} As above.
\textsuperscript{51} As above.
On the stock market, the GFC caused an aversion for domestic equities and a decline in demand for equities.\textsuperscript{53} The flow of foreign investments at the Lusaka Stock Exchange (LUSE) during the first quarter of 2008 switched from a net inflow of US$ 2.5 million to a net outflow of US$ 8.5 million in the first quarter of 2009.\textsuperscript{54} Similarly, turnover in foreign portfolio investment declined substantially while foreign portfolio gross inflows plunged to US$ 1.2 million during the fourth quarter of 2008 from a high of US$ 28.6 million in the third quarter of that year.\textsuperscript{55}

On the whole, the GFC threw a damper on the progress made towards \textit{inter alia} the attainment of MDGs.\textsuperscript{56} In terms of MDG 1,\textsuperscript{57} the GFC caused job losses in varying sectors including mining, tourism, export-based agriculture, and eventually in the manufacturing sectors.\textsuperscript{58} It is estimated that 8 100 workers were laid off from the mines in 2008.\textsuperscript{59} Food inflation escalated from 5.2 per cent in November 2007 to 21.3 per cent in January 2009.\textsuperscript{60} In addition, the prohibitive food prices impeded most of Zambia’s urban population from accessing food. Accordingly, the GFC undermined Zambia’s capacity to eradicate extreme poverty and hunger especially in urban areas. Against this backdrop, the GFC posed a threat to the achievement of MDG 7.\textsuperscript{61} Given the ‘close link between poverty and environmental degradation’\textsuperscript{62} the GFC’s impact on Zambia’s fiscal position both at public and private levels and the resultant job losses in, for instance, the mining and tourism sectors in 2008 and 2009 exacerbated the unemployment and poverty levels.\textsuperscript{63} Additionally, the GFC added to the numbers of indigent people who resorted to farming and exploiting natural resources like wood for their energy requirements and livelihood.\textsuperscript{64} Thus, the GFC counteracted Zambia’s capacity to reverse the loss of

\begin{footnotesize}
\textsuperscript{53} Ndulo \textit{et al} (n 48 above) 10.
\textsuperscript{54} Fundanga (n 10 above) 4.
\textsuperscript{55} Ndulo \textit{et al} (n 48 above) 12.
\textsuperscript{56} Ndulo \textit{et al} (n 48 above) 27.
\textsuperscript{57} Combat extreme poverty and hunger.
\textsuperscript{59} As above.
\textsuperscript{60} As above.
\textsuperscript{61} MDG 7 is concerned with ensuring environmental sustainability with the following targets, (a) integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources, (b) reduce biodiversity loss, achieving by 2010, a significant reduction in the rate of loss, (c) halve by 2015, the proportion of the population without sustainable access to safe drinking water and basic sanitation and (d) by 2020 to achieve a significant improvement in the lives of at least 100 million slum dwellers. United Nations ‘The millennium development Goals report’ (2014) 40 http://www.un.org/millenniumgoals/2014%20MDG%20Report%202014%20English%20web.pdf (accessed 5 October 2015).
\textsuperscript{64} Hansungule (n 62 above).
\end{footnotesize}
environmental resources and the general attainment of environmental sustainability in terms of MDG 7.65

The fall of domestic tax revenue as a percentage of GDP, from 18.7 in 2007 to 17.2 per cent in 2008 and 15.9 per cent in 2009 also reduced the government’s fiscal space.66 Within this framework, government disbursement allocations for several ministries (Ministry of Education, Ministry of Agriculture and Ministry of Community Development & Social Services) became more erratic.67 Furthermore, the funds received by these ministries from the central treasury decreased in 2009 compared to the amounts received in 2008. This presented adverse implications on the attainment of MDGs, especially the education68 and health69 related MDGs.

The GFC caused a reduction in the flow of ODA to Zambia and in turn, reduced disbursement allocations to recipient ministries such as the ministry of health. As a consequence of limited funds to the health sector, District Health Management Teams had to cut down on food, drugs and extension services to patients.70 In this context, the GFC undermined Zambia’s capacity to deliver nutritional and health amenities thereby impeding the reduction of child mortality and resultant attainment of MDGs 4, 5 and 6.71

The GFC not only undermined government’s capacity to deliver health services, it also impeded many households from accessing nutrition, transport and health facilities necessary for eliminating diseases and other health related conditions. The above analysis of the GFC’s impact, demonstrates a strong correlation between the GFC on one hand and the realisation of human rights on the other hand.

From a general perspective, the GFC constrained development and undermined human rights guarantees by inhibiting individuals from enjoying their socio-economic rights. Similarly, the GFC undermined Ghana and Zambia’s capacities to fulfil their obligations to promote and

65 As above.
67 As above.
68 MDG 2.
69 MDG 4, 5 & 6.
70 n 66 above, 29.
realise fundamental socio-economic rights in line with their international and regional human rights treaties. This backdrop exemplifies the correlation between human rights and the GFC’s impact. More specifically, the GFC adversely affected the enjoyment of socio-economic rights in that it aggravated hunger and poverty levels. It is commonly accepted that when a government faces a cash squeeze, such as the one facing Ghana and Zambia due to the GFC, it often resorts to cutting social programmes resulting in negative implications especially on the indigent. One of the GFC’s most severe effects was its acceleration of unemployment in the two countries, which depressed household incomes and negatively affected government revenue as a result of lowered consumption and thus reduced amounts of direct tax collected. In addition, diminished household income caused many households to descend into poverty, thus retreating on the progress made by government in the realisation of MDGs by 2015. The GFC diminished access to basic amenities such as food, housing, healthcare, work and social welfare programmes. This is particularly true for the vulnerable groups in society namely the indigent, women, children, minorities groups and migrants.

3 Is the human rights-based approach the answer to the impact of the GFC in Ghana and Zambia?

The main sub regional institutions of the African human rights system, especially through their respective judicial organs, have over the years contributed to the development of Africa’s human rights agenda. Although the respective sub regional institutions have adopted various human rights instruments and set standards that are worthy of note, the guarantee of human rights is primarily undertaken in accordance with the African Charter. Thus, because the sub regional systems largely defer to the existing African regional will focus on the interconnected regimes of social-economic rights at international, regional and national levels.

At the international level, the Universal Declaration on Human Rights (Universal Declaration) highlights the dignity and worth of the human person along with the equal rights of men and women. It stipulates that, ‘everyone as a member of society has the right to the economic, social and cultural rights indispensable for his dignity and the free development of his personality’. Some of the socio-economic rights that the Universal

72 Ajakaiye et al (n 18 above) 42.
76 Universal Declaration of Human Rights, art 22.
Declaration recognises are the right to property, the right to work and the right to social security. The socio-economic rights in the Universal Declaration were subsequently codified in the ICESCR.

Supplementary to the ICESCR is its fairly recent Optional Protocol, which was adopted on 10 December 2008, to provide a mechanism for individual complaints and access to remedies for victims of violations of socio-economic rights. This complaints mechanism is overseen by the UN Committee on Social, Economic and Cultural Rights (Committee on ESCR), which is the monitoring body of the ICESCR enjoined to carry out the functions provided for under the Optional Protocol. The Committee on ESCR also offers guidance on the implementation of socio-economic rights in the form of General Comments and concluding observations to State Parties. In the wake of the GFC and its impact on human rights, the Committee on ESCR through a letter addressed to the ICESCR States Parties echoed the states’ obligation to use the maximum available resources to fulfil economic, social and cultural rights, even in times of crisis.

At regional level is the African Charter, which constitutes a comprehensive instrument encapsulating a range of individual and group rights. The African Charter recognises all categories of human rights including individual rights, peoples’ rights, duties, some socio-economic rights and political rights. What is more distinct is that the African Charter is the first binding international human rights instrument to provide for the right to development. Article 22 of the African Charter provides that ‘all peoples are entitled to their economic, social and cultural development’. According to this provision, the right to development is to be realised with due regard to peoples’ freedom and identity and in the equal enjoyment of the common heritage of mankind.

The African Charter mandates State Parties, including Ghana and Zambia, to ensure that the right to development is exercised. It is noteworthy that the right to development represents a collective right and,

---

77 n 76 above, art 17.
78 n 76 above, art 23.
79 n 76 above, arts 22 & 25.
81 n 80 above, art 2.
82 n 80 above, para 7 preamble.
86 Viljoen (n 15 above) 226.
87 African Charter on Human and Peoples’ Rights, art 22.
therefore, distinguishable from other types of rights such as individual rights. The distinction between a collective right and an individual right was discussed by the African Commission on Human and Peoples’ Rights (African Commission) in the case of Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Endorois case).88

It is notable that the right-holders of the right to development belong to specific categories of individuals such as indigenous people, members of a given community and citizens of a state or even continent.89 It follows that the enforceability of the right to development is limited to common concerns of collectives and does not extend to subjective interests of individuals. This means that a claim for the right to development can only be successfully made by an eligible group of individuals as opposed to a single individual, or groups that does not meet the requisite classification as outlined in the Endorois case.

Even though the right to development may be considered restrictive in that it discounts individuals and focuses on peoples collectively, it remains crucial for advancing the needs of groups. For instance, the right to development can be employed to ensure that the needs of minority groups in a divided society receive equal treatment as the majority groups. Other notable features of the African Charter are reflected by its principles underlying the rights, duties and freedoms contained in it. Prominent principles of the African Charter include equal access to basic rights such as education, healthcare, work and work-related rights.90

In addition to the human rights regime at regional level,91 there are also policy-related mechanisms adopted to sanction sustainable economic development and the achievement of developmental goals. These mechanisms are relevant to the promotion and protection of socio-economic rights. Notable among them is the New Partnership for Africa’s Development (NEPAD)92 and African Peer Review Mechanism

---

88 Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (2009) AHRLR 75 (ACHPR 2009).
89 Viljoen (n 15 above) 226.
90 Hansungule (n 84 above) 2.
91 The African regional human rights regime comprises all the instruments under the African Union.
92 New Partnership for Africa’s Development (NEPAD) is a framework within which the African Union interacts with the rest of the world, particularly the industrialised countries and the multilateral global institutions. NEPAD’s main objective is to place African countries on a path of sustainable growth and development and thereby curb the escalating marginalisation of the continent. E Baimu ‘Human rights in NÉPAD and its implications for the African human rights system’ (2002) 2 African Human Rights Law Journal 303.
Both Ghana and Zambia are committed to NEPAD and the APRM mechanisms.

3.1 National implementation of international human rights obligations

Viljoen contends that the extent to which international human rights law becomes part of a country’s domestic law is closely linked to the status international law enjoys under that country’s domestic law. He also asserts that ‘the ultimate test of international human rights law is the extent to which it takes root in national soil’. This is taken to mean that ratification of international human rights treaties only becomes meaningful where their provisions can be enforced at the national level.

Ghana and Zambia, like most of Commonwealth Africa, both subscribe to the dualist approach to the incorporation of international law into national law. The Ghanaian Constitution provides that, duly executed treaties are subject to ratification by either an Act or a resolution of parliament supported by more than half of all the members of parliament. Similarly, Hansungule posits the Zambian position that, to constitute part of the domestic law, treaties have to be domesticated. This means that international treaties do not ipso facto form part of domestic law upon ratification.

It is noteworthy that neither Ghana nor Zambia has domesticated the African Charter. Currently, the only dualist state that has domesticated the African Charter is Nigeria. Nevertheless, Ghana and Zambia bear a significant responsibility to recognise the rights in the treaties they have ratified and give them effect through legislative and other measures. In terms of legislative measures, Hansungule makes a case that Bill of Rights

93 The African Peer Review Mechanism (APRM), established under the Declaration on Democracy, Political, Economic and Corporate Governance (Governance Declaration is NEPAD’s accountability mechanism. It is a self-monitoring mechanism, which aims to prompt states to draft a national program of action to remedy identified governance deficiencies. The APRM deals with four governance thematic areas namely; democracy and political governance, economic governance and management, corporate governance, and socio-economic development. C Heyns & M Killander ‘The African human rights system’ in C Heyns & K Stefiszyn (eds) Human rights, peace and justice in Africa: A reader (2006)214.
94 Viljoen (n 15 above) 518.
95 Viljoen (n 15 above) 517.
96 As above.
97 M Hansungule ‘Domestication of international human rights law in Zambia’ in Killander (n 34 above) 71; EK Quansah ‘An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana’ in Killander (n 33 above) 37.
98 Ghana: Constitution, art 75(2).
99 Hansungule (n 97 above) 71.
100 Viljoen (n 17 above) 522.
101 Viljoen (n 17 above) 517.
entrenched in constitutions, though not extensively; embody provisions of international law, which have been domesticated over the years.\textsuperscript{102}

Justice Archer in the Ghanaian case of \textit{New Patriotic Party v Inspector General of Police}\textsuperscript{103} stated that, the mere fact that the African Charter has not been domesticated does not mean that it cannot be implemented at domestic level.\textsuperscript{104} In an earlier case, \textit{New Patriotic Party v Attorney General (CIBA case)}\textsuperscript{105} Justice Atuguba held that principles of international human rights are enforceable to the extent that they can lend themselves to the Ghanaian context.

The Ghanaian Constitution leaves room for deference to international human rights norms by the courts and relevant government agencies. It provides that the fundamental human rights provided for under chapter 5 are not exclusive of other rights which are not specifically listed provided these other rights are inherent in democracy and are intended to secure the freedom and dignity of man.\textsuperscript{106} This provision of the Ghanaian Constitution obscures Ghana’s dualist position.

Based on the foregoing, it can be safely argued that in Ghana, the African Charter is enforceable. Besides, in the Ghanaian context, international treaties that have been ratified albeit not domesticated may be enforced provided that they either meet the requirements of article 33(5) of the Ghanaian Constitution or constitute international customary law. Appiagyei-Atua suggests that the African Charter has attained the status of a regional customary norm, having been ratified by all African states and considering the African Commission’s rich jurisprudence, which is premised on its provisions.\textsuperscript{107}

The Zambian Constitution does not expressly define the relationship between international law and national law.\textsuperscript{108} Nonetheless, like Ghana, there is a trend of adjudicating human rights issues, whenever possible, and placing reliance on relevant international human rights instruments even where the instruments have not been domesticated.\textsuperscript{109} This has been

\begin{enumerate}
\item[102] Hansungule (n 97 above) 74.
\item[103] \textit{New Patriotic Party v Inspector-General of Police} (2000) 2 HRLRA 1 (Supreme Court of Ghana). In this case the Supreme Court of Ghana found secs 7 and 8 of the Ghana Public Order Decree 1972 which required prior permission, at the discretion of the Minister of Interior, in order to hold a public meetings or processions, to be in violation of the Constitution as well as the African Charter in terms of freedom of assembly guarantees.
\item[106] n 98 above, art 33(5).
\item[107] Appiagyei-Atua (n 104 above) 196.
\item[108] Quansah ‘An examination of the use of international law as an interpretative tool in human rights litigation in Ghana and Botswana’ in Killander (n 97 above) 37.
\end{enumerate}
done on the premise that such international instruments have been ratified and do not derogate from or conflict with the constitution or national laws.110

For instance, the Zambian High Court pronounced itself in the case of Sara Longwe v Intercontinental Hotels111 in which Justice Musumali underscored that ratification of a treaty without reservation connotes willingness by a state to be bound by the treaty. Justice Musumali implied that a ratified international instrument can be applied to resolve an issue before court even though it has not been domesticated. In the more recent decision of Roy Clarke v The Attorney-General112 Justice Musonda nullified the deportation order issued by the Minister of Home Affairs against a British national resident in Zambia for exercising his freedom of expression enshrined in the Constitution. Justice Musonda noted that the applicant was being punished for doing something for which he would not have been punished if he were a Zambian national. Notable in this case is the court’s reliance on international human rights instruments.113 This decision was upheld by the Supreme Court in an appeal instituted before the by the Attorney-General.114

3.2 Guarantee of socio-economic rights in the Ghana and Zambian Constitutions

Both the Constitutions of Ghana and Zambian contain Bills of Rights enouncing a range of human rights, including socio-economic rights. Chapter 5 of the Ghanaian Constitution captures fundamental human rights and freedoms including socio-economic rights. These rights are binding both on the state and on private individuals and institutions.115 Additionally, chapter 6 of the Ghanaian Constitution provides for directive principles of state policy, outlining the political, economic, social, educational and cultural objectives to be implemented by state officials and individuals, for the establishment of a just and free society.116 The legal value of the provisions of chapter 6 of the Ghanaian Constitution has hitherto been the subject of debate and undergone positive development.

Judicial precedence and scholarly works have elaborated the legal value of the directive principles of state policy entrenched in chapter 6. In the Ciba case,117 the Supreme Court held in part that directive principles of

110 Quansah (n 108 above) 37; see also Hansungule (n 97 above) 71.
111 Sara Longwe v Intercontinental Hotels HP/765/1992 (High Court of Zambia).
112 Roy Clarke v The Attorney-General HP/003/2004 (High Court of Zambia).
113 ICCPR, art 13; n 60 above, arts 7 &13.
116 Quashigah (n 109 above) 24.
117 n 105 above.
state policy afford a yardstick by which policy decisions are to be implemented and provide a guide for judicial interpretation. Further, when a court applies them for interpretation, they are read and applied in conjunction with justiciable rights and freedoms set out in chapter 5 because they have no separate existence of their own. Quashigah endorsed the Supreme Court's decision in the *Ciba* case by positing that the provisions of chapter 6 extend judicial consequences. He asserted that:

> the directive principles of state policy are enforceable through fundamental human rights and freedoms provisions of the Constitution ... in the interpretation of this fundamental right provision, the court must take into account the directive principles provision ...

The view that directive principles of state policy are not independently enforceable before court has been superseded by the latter Supreme Court decision in the case of *Ghana Lotto Operators Association v. National Lottery Authority*. In this case, Justice Date-Bah held inter alia that 'the economic objectives laid out in article 36 of the Constitution are legally binding and not merely a matter of conscience for successive government'. He further declared that the directive principles of state policy are of themselves presumed to be justiciable. This is a revolutionary stance, which departs from the traditional conception of directive principles of state policy as non-justiciable. The Supreme Court endorsed the earlier position advanced by Justice Adade in *National Patriotic Party v Attorney General* (31 December case) that directive principles of state policy are an integral part of the constitution and therefore of equal binding force as other provisions of the constitution. Therefore, human rights provisions spelt out in chapters 5 and 6 of the Ghanaian Constitution are justiciable.

Similarly, part 3 of the Zambian Constitution protects fundamental rights and freedoms of the individual, which are mainly civil and political rights. Socio-economic rights are relegated to the directive principles of state policy set out under part 9 of the Constitution. These directive principles in part enjoin the state to provide citizens with an enabling economic, social and cultural environment. According to article 110 of the Constitution, the principles of state policy should guide the three organs of government in developing and implementing national policy on
one hand and in enacting laws and applying the Constitution and other laws, on the other hand. Part 9 of the Zambian Constitution however, provides that the directive principles of state policy are not justiciable.\textsuperscript{126}

Notwithstanding that under the Zambian Constitution, socio-economic rights are non-justiciable, Zambia remains bound to fulfil its international obligations including the socio-economic rights enshrined in treaties like the African Charter and the ICESCR in accordance with the principle of \textit{pacta sunt servanda}, espoused under the Vienna Convention on the Law of Treaties (Vienna Convention).\textsuperscript{127} It is noteworthy that the Vienna Convention proscribes State Parties from invoking municipal laws as an excuse for failing to implement obligations enshrined in international treaties.\textsuperscript{128}

On the whole, in discharging their human rights obligations, Ghana and Zambia are required to ensure the respect, protection and fulfilment of human rights as provided for at all levels of the human rights regimes including customary international law.\textsuperscript{129} In particular, the obligation to respect entails that states must refrain from interfering, directly or indirectly, with the enjoyment of human rights. Equally, the obligation to protect requires states to adopt measures to prevent third parties, including legal entities, from interfering with human rights while the duty to fulfil means that states must adopt appropriate legislative, administrative, budgetary, judicial and promotional measures towards the full realisation of human rights.\textsuperscript{130}

\subsection*{3.3 Measures employed by Ghana in response to the GFC}

In response to the GFC, the Ghanaian government waived import duties on fertilisers and agricultural inputs as well as on rice, wheat and yellow maize. Tax on most foreign and local basic amenities was matched.\textsuperscript{131} These measures called for the amendment of the Customs Excise and Preventive Service (Duty and Other Taxes) Act.\textsuperscript{132} Additionally, in an attempt to aid fishing communities to upsurge their output, the Excise Duty and Debt Recovery levies on premix fuel were removed,\textsuperscript{133} while for purposes of minimising the high cost of transportation, which was exacerbated by escalating oil prices, the Ghanaian government moved to
reduce taxes on all petroleum products.\textsuperscript{134} Furthermore, with respect to the energy sector, the government increased support for the production cost of electricity in order to cushion domestic consumers from high tariffs.

Prior to the onslaught of the GFC, Ghana already had in place a number of social protection and poverty reduction schemes. In order to counter the impact of the GFC, the Ghanaian government undertook to not only maintain but also expand the social protection and poverty reduction schemes that were in place prior to the GFC.\textsuperscript{135} For example, the government granted subsidies on fertiliser to ensure a uniform good harvest and curb the impact of rising food prices, which was causing food shortages.\textsuperscript{136}

The Ghanaian government put in place a number of structural changes aimed at:\textsuperscript{137}

- establishing a lean but effective and efficient government by cutting out ostentation and profligate expenditure, rationalising ministries and ministerial appointments and promoting service, humility and integrity as canons of government.

In terms of adjusting government expenditure, the government cut down disbursements on official foreign travels, workshops and conferences.\textsuperscript{138} Further, in an attempt to create a lean government, the total number of Ministries was reduced from twenty-seven to twenty-three.\textsuperscript{139}

Moreover, to stabilise the local currency in the face of the GFC’s fiscal reduction effect, the government sought to curb excessive profit repatriation by reviewing mining, oil and forestry firms’ agreements.\textsuperscript{140} Correspondingly, in order to promote investor confidence in Ghana and to salvage the declining economic and trade sectors, the Ghanaian government undertook measures to enforce the Foreign Exchange Act in terms of monitoring and reporting,\textsuperscript{141} and further took steps to implement the International Financial Reporting Standards (IFRS).\textsuperscript{142} These IFRS


\textsuperscript{135} Ackah (n 27 above) 23.

\textsuperscript{136} As above.

\textsuperscript{137} n 131 above, 45.

\textsuperscript{138} n 131 above, 45.

\textsuperscript{139} n 131 above, 46.

\textsuperscript{140} n 131 above, 291.

\textsuperscript{141} n 131 above, 291.

\textsuperscript{142} Ackah (n 27 above) 24.
were adopted in January 2007 to replace the Ghana National Accounting Standards (GAS) and to regulate, in accordance with international standards of financial reporting, Ghanaian public corporations including banks, insurance companies and listed companies on the Ghana stock exchange.\(^{143}\)

### 3.4 Measures adopted by Zambia in response to the GFC

The Zambian government’s reaction to the GFC was largely centred on expansionary fiscal policies meant to stimulate the economy.\(^ {144}\) Accordingly, the government increased its spending from 24.8 per cent of GDP in 2008 to 25.4 per cent of GDP in 2009.\(^ {145}\) Also the source of revenue for the 2009 budget was adjusted so that domestic revenues supported 70 per cent of the budget while the remaining was shared between donor funding and domestic borrowing with 18 per cent of the budget being financed by ODA and 12 per cent by domestic borrowing.\(^ {146}\) In order to support this expansionary budget and meet the shortfall from domestic revenues, government increased domestic borrowing from 1.3 per cent to 1.8 per cent of GDP. Beyond domestic borrowing, Zambia upsurge its borrowing from the planned 1.9 per cent to 3 per cent of GDP in 2009.\(^ {147}\) Moreover, in an attempt to build a dynamic economy, the government maintained a flexible and market-determined exchange rate.\(^ {148}\) However, the Bank of Zambia continued to closely monitor the market and take measures to safeguard the domestic financial system to maintain stability.\(^ {149}\)

Additionally, the Bank of Zambia enhanced its vigilance and interaction with the domestic financial system to ensure adherence to its supervisory guidelines and reduce the volatility of the exchange rate by increasing the supply of foreign exchange to the market.\(^ {150}\) During the fourth quarter of 2008, the Bank of Zambia made net sales of US$ 127.5 million to the inter-bank market in an effort to check the exchange rate. This resulted in the depletion of foreign exchange reserves causing the gross international reserves at Bank of Zambia to drop by 23 per cent between July and December 2008.\(^ {151}\)


\(^ {144}\) [Ndulo et al.](n 27 above) 23.


\(^ {146}\) As above.

\(^ {147}\) DW TeVelde et al. ‘The global financial crisis and developing countries: Phase 2 Synthesis ODI working paper 316’ (2009) 28.

\(^ {148}\) Ndulo et al. (n 48 above) 23.

\(^ {149}\) n 145 above, 6; Green et al (n 6 above) 43.

\(^ {150}\) n 145 above, 6.

\(^ {151}\) Ndulo et al. (n 48 above) 23.
In 2009 the government made major strides towards maintaining and attracting investment, particularly in the mining sector by offering concessions to mining corporations, meant to reduce the cost of production and increase profitability. Likewise, the government removed the windfall tax, retained the variable profit tax and increased capital allowance to 100 per cent, as an investment incentive. Furthermore, customs duty on heavy fuel oil was reduced from 30 to 15 per cent while tariffs on copper powder, copper flakes and copper blisters were waived. Finally, copper and cobalt concentrates were included on the value added tax import deferment scheme.

**Social measures**

At the time of the GFC explosion, Zambia already had an operational social protection scheme comprising a number of major social protection programmes such as the Public Welfare Assistance Scheme (PWAS), the Social Cash Transfer Scheme (SCTS), the Food Security Pack (FSP), the School Feeding Programme and the Urban Self-help Programme. The object of these programmes was to promote community capacity to develop initiatives to overcome the problems of extreme poverty and vulnerability and, at the same time, assist beneficiaries to fulfil their basic needs.

The government supported farmers through the Food Reserve Agency (FRA). During the harvest season, the FRA being the major buyer of agro-products fixed a higher buying price for all agro-products from farmers to guarantee a stable and ready market. This measure was undertaken to stimulate future production and enhance national food security.

With the exception of the PWAS and the FSP, the major social protection schemes are supported by donor aid. These schemes are valuable to their beneficiaries. However, their impact even before the explosion of the GFC did not benefit most of the indigent and vulnerable people due to poor targeting and low benefits, resulting from inadequate resources and funding. Additionally, although government undertook in its Fifth National Development Plan (FNDP) for the period 2006 to 2010, to scale up the funding for its major social protection schemes, these

---

152 n 145 above, 22.
153 As above.
154 As above.
156 See http://www.socialprotection.org/gimi/gess/ShowCountryProfile.action;jsessionid=2d1ae45bd9830603753a199f08991c3c02272719fd163acca0df77691bc294360.e3aTbhuLhNmSe34MchaRahaKhNzt0?id=238 (accessed 30 September 2015).
158 n 145 above, 11.
159 Ndulo et al (n 48 above) 33.
schemes suffered dwindling government budgetary allocations in the face of the negative implications that came with the GFC. The schemes that are reliant on donor aid for their operations suffered the aid deficit associated with the GFC.

In response to the GFC, government sustained certain structural reforms in the areas of Private Sector Development (PSD), Public Service Management (PSM) and Financial Sector Development (FSDP). Another measure undertaken by the Government to mitigate the impacts of the GFC involved the supply of affordable capital for enterprises. For instance, government sustained the Public Private Partnership Policy, which was launched in 2008 to accelerate the development of infrastructure in the country. The government also revived the Citizens Economic Empowerment Commission (CEEC), which was established by an Act of parliament to provide empowerment funds to citizens interested in venturing into business but lack capital to do so. The CEEC focuses on empowering citizens in economic sectors including tourism, mining, trade, manufacturing, agriculture, energy as well as wholesale and retail trade services sector. During the throes of the GFC, the CEEC sought to provide loans to struggling enterprises to revamp their business. To this end, in 2008 a total of 15 billion Kwacha was disbursed, creating employment for close to 1400 people. This programme, coupled with others ancillary to the Constituency Development Fund, was continued in 2009 with modest increment in disbursements.

3.5 Comparative analysis of Ghana and Zambia’s responses to the GFC

Ndulo et al describe the response of the Zambian government to the GFC as rather lacklustre. Similarly, Green et al postulate that prior to and during the GFC period, the Zambian government was disinclined to extend social transfer programmes in the form of cash, in-kind benefits, and bursaries, school feeding or healthcare costs. Accordingly, during the GFC period, with the exception of public sector pensions, Zambia’s social protection allocations were mostly negligible. TeVelde et al describe Zambia’s reaction to the GFC as largely devoid of growth-

---

161 n 145 above, 6.
163 As above.
165 n 145 above, 18.
166 Ndulo et al (n 48 above) 23.
167 Green (n 6 above) 44.
168 As above.
enhancing structural, institutional reforms and lacking the drive to diversify the economy.\textsuperscript{169} Ndulo \textit{et al} further point out that the discernible government response adopted to address the effects of the GFC was largely limited to fiscal policies, monetary and exchange rate policies.\textsuperscript{170}

These economic policies were targeted at government spending on infrastructure, health and education. This policy response would be creditable in light of the notion that implementation of prudent economic policies is vital for sustaining the growth of an economy.\textsuperscript{171} However, this policy response was largely unsatisfactory for more reasons than the sting of the GFC on the Zambian economy. The unsatisfactory performance is also attributable to government’s proclivity to expend resources thinly on distinct programmes without taking the significance of intra and inter-sectorial linkages into account.\textsuperscript{172} To exemplify, government forfeited potential tax revenues (windfall tax and tax breaks given to mining corporations) and facilitated the reopening of some mines that were closed.\textsuperscript{173} This relieved mining companies.\textsuperscript{174} However, it exacerbated Zambia’s already weak fiscal position as it significantly reduced the revenues from the mining sector.\textsuperscript{175} Consequently, other sectors, suffered significant turbulence in levels of budgetary allocations and actual disbursements.

Generally, the government’s policy response to the GFC was biased towards protecting key investments especially in the mining sector and sustaining diversification in agriculture. This approach protected jobs in the private industries and ensured food security mostly for farmers. Yet, the government’s reluctance to widely expend resources on key social programmes disadvantaged vulnerable groups with no connection to the agricultural or private industry sectors. This exacerbated the poverty levels in Zambia.

The foregoing response to the GFC undertaken by Zambia does not mirror a direction towards remedying the GFC’s threat to the realisation of human rights especially socio-economic rights, including the right to development. This deduction is based on the inadequacy of measures directed to promoting and protecting human rights. Most social protection schemes highlighted were either allocated negligible disbursements or executed in an uneven fashion. This response lacks the direction to mitigate the devastating effects of the GFC on lives and livelihoods, especially on the poorest people.

\textsuperscript{169} Te Velde \textit{et al} (n 147 above) 75.
\textsuperscript{170} Ndulo \textit{et al} (n 48 above) 23.
\textsuperscript{171} n 160 above, 4.
\textsuperscript{172} As above.
\textsuperscript{173} Green (n 6 above) 44.
\textsuperscript{174} Silumbe (n 164 above) 21.
\textsuperscript{175} Green (n 6 above) 33.
By contrast, the Ghanaian government made attempts to increase its social protection coverage in the wake of the GFC. For instance, some components of the Ghana National Social Protection Strategy (GNPS) were launched and coverage of a new social grants programme was extended during the GFC’s precursor (food crisis).\textsuperscript{176} More significantly, Ghana’s 2009 National Budget committed to sustain social protection expenditure, maintain its school feeding programme, Capitation Grant Scheme and extend participation in the National Health Insurance Scheme.\textsuperscript{177}

For both Ghana and Zambia, the GFC did not result in major social protection policy revisions or significant expansion of social protection provision. Nonetheless, Ghana extended some pre-existing programmes like the food distributions for vulnerable groups and school feeding programmes albeit on a modest scale.\textsuperscript{178} In addition, whereas the Ghanaian government reviewed mining, oil and forestry firms’ agreements with the intention to curb excessive profit repatriation and stabilise the local currency in the face of the GFC’s fiscal reduction effect, the Zambian government exacerbated its fiscal deficit by forfeiting potential tax revenues mostly from mining corporations.

At a cursory glance, the measures commissioned by the Ghanaian government appear responsive and progressive. Yet, most of the measures were not realised due to inadequate budgetary allocations, limited coverage, weak targeting mechanisms in some interventions, weak institutional capacity, low cost efficiency and effectiveness, inadequate support to informal sectors outside the agricultural sector, over concentration on protection and lack of coordination among implementing agencies.\textsuperscript{179} This informs the conclusion that the measures adopted by the Ghanaian government in reaction to the GFC fell short of the international human rights standards requisite for the advancement of human rights.

The absence of significant social protection measures employed by Ghana and Zambia reflects these countries’ disregard for the human rights-based approach, which is better clarified below.

\textsuperscript{176} Green (n 6 above) 47.
\textsuperscript{177} n 131 above, 280.
\textsuperscript{178} Te Velde et al (n 147 above) 28.
3.6 Defining the human rights-based approach and its application to the case of Ghana and Zambia

The human rights-based approach is defined as a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities, which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.

This means that states like Ghana and Zambia should view human rights norms and standards as the frame of reference and consider human rights implications in the planning, implementation and evaluation of strategies, policies and national economic and social development programmes. Under the human rights-based approach, the efficacy of a policy must be measured against its impact on fundamental freedoms and rights. For instance, a policy resulting in adverse implications like the exacerbation of hunger has to be reconsidered. The human rights-based approach to countering the impact of economic crises entails adopting a culture of human rights and placing it at the centre of all measures formulated in response to the crises. Particularly, the human rights-based approach entails placing the realisation of human rights among the objectives of development or recovery from crises. The human rights-based approach requires a constant monitoring of how measures adopted affect the enjoyment of human rights.

3.7 Rationalisation of the human rights approach

The effective enforcement of socio-economic rights is not only limited to the adoption of simplistic legislative, administrative and judicial measures. It also requires the use of the human rights-based approach as the foundation for government developmental programmes. Pillay, a former UN Commissioner for human rights advises governments to fully integrate human rights principles and standards into law and practice, in order to respond to economic downturns in a truly sustainable manner. This illustrates the primacy of human rights even in times of crisis. It also signifies that where there are conflicting national policy concerns, human

---

184 Viljoen (n 15 above) 570.
rights should be prioritised. In addition, the UN Office of the High Commissioner for Human Rights asserts that as economic, social and political conditions change, so should states formulate and implement appropriate regulations strengthening protection for human rights. This buttresses the position regarding the primacy of human rights. Consequently, crises such as the GFC should not form a basis upon which states can derogate from their obligation to uphold human rights.

A noteworthy rationalisation of the human rights-based approach states that although legislative, administrative and judicial measures at any level may be conceived and managed by states, they exist for the benefit of the people and not the states. It follows that measures to curb the effects of crises like the GFC are otiose if they are not people-centred and concerned more with the vulnerable groups of society. Oppong asserts that the human rights-based approach ‘sees the human being as the central object of development and not merely as its facilitating instrument; it treats individuals as the end and not merely the means of development’.

As Viljoen notes, ‘poverty is the greatest threat to and source of human rights violations in Africa’. Besides, the right to development implies that states must use public resources for public good. The UN High Commission on Human has reiterated the state duty to have regard to the principles of non-retrogression, progressive realisation, non-discrimination and minimum core obligations when adopting policies such as austerity measures because such policies raise significant implications for the protection of socio-economic rights. In addition, Oppong portends that it would be irrational to advocate that developing countries like Ghana and Zambia should only implement economic development when all human rights have been realised. For this reason, it is crucial to indicate that the human rights-based approach neither disregards the significance of economic growth to development nor lends itself as the exclusive solution to countering economic crises or ensuring human development. Instead, ‘what the approach advocates, is that respect for human rights should be an essential component of all development policies, including trade’. Needless to say, policies that promote economic growth such as trade, taxation and investment can also

188 n 184 above.
189 Viljoen (n 15 above) 570.
190 Oppong (n 183 above) 127.
191 Viljoen (n 15 above) 481.
192 United Nations human rights office of the high commissioner Report on austerity measures and economic and social rights submitted pursuant to General Assembly resolution 48/141.
193 Oppong (n 183 above) 127.
194 As above.
promote human rights when formulated and implemented in accordance with the human rights-based approach. It is therefore indispensable to properly align structural, economic and social policies to ensure a meaningful development that recognises the significance of synergies by different sectors.

4 Conclusion

This chapter has examined the genesis of the GFC and demonstrated how the GFC constrained development and undermined human rights guarantees by inhibiting individuals from enjoying their socio-economic rights in Ghana and Zambia. It has illustrated how the GFC diminished access to basic amenities, thereby impeding the attainment of the MDGs. The chapter has also illuminated how the GFC undermined Ghana and Zambia’s capacities to fulfil their obligations to promote, protect and realise socio-economic rights and the right to development, as provided for under the various international and regional human rights treaties. It then employed the nexus between the GFC and human rights to make a case for applying the human rights-based approach as an indispensable model for countering massive economic crises like the GFC. This is in light of the finding that Ghana and to a larger extent Zambia’s response to the GFC largely disregarded the human rights-based approach. Significantly, the chapter demonstrates that Ghana and Zambia are enjoined to implement human rights even in times of crisis.

In line with the findings of this chapter, the governments of Ghana and Zambia need to take definitive steps in reaction to future economic crises through adopting the human rights-based approach to such crisis to enhance socio-economic rights and the right to development. Since the realisation of human rights form the bedrock of the human rights-based approach, the starting point should be the domestication of all the relevant human rights treaties ratified by these countries to enhance the protection of human rights.

Given the shortcomings of the policies adopted by Ghana and Zambia in response to the GFC, policy reform constitutes the most pertinent recommendation in this chapter. Naturally, the primary recommendation is that all policies adopted to counter economic crises should be informed by the human right-based approach. In this regard, the Committee on ESCR has set out that states must 195

[ensure] that the measure is temporary to last only for the period of the crisis; demonstrate exhaustion of alternative measures and show that the proposed measure is necessary, proportionate and the least restrictive to the enjoyment of socio-economic rights; ensure that the measure is not discriminatory and is

195 n 20 above, 2.
supportive of social transfers to mitigate inequalities associated with crises and protects disadvantaged groups from being disproportionately affected. Also, demonstrate legitimate participation of affected groups in the policy adoption process; and ensure that the measure identifies the minimum core content of rights and ensures their protection at all times.

Ghana and Zambia are encouraged to adopt and implement measures aimed at enhancing access to basic socio-economic goods and services such as health care, education, housing, social security and cultural life.196 Sufficient safety nets and social assistance schemes should be adopted to protect vulnerable and marginalised groups who are the most unequipped against the shocks of crisis like the GFC.

In addition, human rights centred economic policies should be adopted and executed in a transparent, equitable and participatory manner that involves the various social groups. Before adopting economic measures, impact assessments should be undertaken to ensure that the measures in form and effect are non-regressive to human rights. The states should also adopt social protection policies and labour market responses to mitigate the impact of the crisis on employment, education and health care. This includes strengthening social assistance institutions and protection programmes. The strengthening of social assistance institutions should not be limited to funding government social welfare departments and social insurance institutions for civil servants but should extend to strengthening the capacity of non-governmental organisations (NGOs), having social protection mandates and being actively involved in the implementation of response measures. This will ensure human rights protection from the shocks of the crises and generate human development, which is indispensable for sustainable and resilient economic systems in the face of future economic crises.

The governments of Ghana and Zambia should also regulate the financial sector by adopting policy and legal measures to regulate banking services in times of economic crises to ensure that banks serve the interests of society through lending without discriminating against members of vulnerable groups. The Ghanaian and Zambian governments should also enjoin their central banks to balance the need to maintain low inflation on one hand with the responsibility to curb income inequities and sustain jobs, businesses and other means of livelihood on the other, through various credit and supervisory instruments. There is also the need to promote agricultural production in order to diversify the economic mainstays especially for Zambia whose economy is largely dependent on the mining sector. The promotion of the agricultural sector should focus on expanding domestic and regional markets for the food and consumer goods sectors.

196 n 130 above, 2.
In sum, the human rights-based approach is an essential tool in the mitigation of the impact of economic crisis. Ghana and Zambia’s experiences with the GFC have shown that failure to utilise the human rights-based approach can have dire consequences for the most vulnerable in society. The human rights-based approach is indispensable for the protection, promotion and fulfilment of human rights, particularly socio-economic rights and the right to development, as well as for meaningful economic growth.
Abstract
The democratisation process in Africa has recently taken a twist with the increased usage of social media platforms by citizens living and working abroad to champion democratisation in their countries of origin. The role of social media as conduits of participation for Diasporas is widely accepted, yet scholars have not explored how transnationals from Africa are using social media to contribute towards democratisation of their countries of origin. This chapter discusses the opportunities brought by social media (WhatsApp, Twitter, and Facebook), its diverse usage, and the complex challenges faced by Zimbabwean transnationals in utilising the cyberspace for democratisation of their home country. The chapter observes that social media platforms are convenient, affordable and have been adopted by transnationals as sources of information, platforms for airing individual opinions as well as supporting domestic events for democratisation. It contends that the influence of social media was felt during the 2016 activism in Zimbabwe, as WhatsApp, Twitter, and Facebook platforms provided avenues for transnationals to unite, support and join fellow nationals back home into action against despotic leadership. It argues, despite the growing importance of social media, the utilisation of these platforms is affected by the state’s negative attitude towards transnationals and the platform itself, trolls, jamming of signals, threats and criminalisation of its use. The chapter recommends that African governments must appreciate the advent of social media, and its wider significance for effective participation of citizens living and working abroad in the democratic processes of the countries of origin.

1 Introduction

Democracy is a contested concept, especially in repressive societies, where claims of state security and sovereignty are often used to undermine constitutional freedoms and human rights of minority groups. Democratic societies promote people’s freedoms, and cultivate as well as appreciate relations between government and civic groups, resulting in improved

attainment of rights and freedoms.\(^2\) Democracy is also inclusive, and accommodates even those opinions of groups or individuals who are part of the minority such as transnationals. Transnationals provide important contributions to the development of their countries of origin through remittances that provide a lifeline to relatives and friends left behind. De Haas\(^3\) highlights that remittances sent to developing countries increased from 31.1 billion in 1990 to 167 billion in 2005. In Ghana, remittances from transnationals remain higher than donor and multilateral aid.\(^4\) A study of Zimbabweans in Leeds, UK reported over 80 per cent of respondents were sending basic necessities back home.\(^5\) Similarly, a study by Bracking and Sachikonye\(^6\) revealed that half of families in Bulawayo and Harare (main cities in Zimbabwe), with relatives abroad were recipients of remittances from 2005 to 2006. However, the contribution of transnationals goes beyond remittances. Transnationals provide an important avenue for knowledge and information exchange.\(^7\) The knowledge and information sharing role of transnationals has transformed with the advent of technology and social media platforms (such as Twitter, Facebook, WhatsApp, personal blogs and YouTube). Courtesy of social media platforms, transnationals have become a force to reckon with in the democratisation process of their home countries. The Portland 2015 survey on ‘How Africa Tweets’ revealed that Twitter continues to provide an important platform for political discourse in Africa, with 8.6 percent of tweets in Africa being political as opposed to 2 percent in Europe and US.\(^8\) Despite these indications, studies have not extensively documented the innovative role of social media in influencing political participation of transnationals in affairs of their home countries. An attempt to document the contribution of transnationals in democratisation of their countries of birth tended to focus on transnational institutions and companies,\(^9\) and not

\(^2\) D Ammar-Attoh, & A Robertson The practice of democracy in Ghana: Beyond the formal framework. (Centre for Democratic Development: Accra 2014).

\(^3\) H De Haas ‘Migration and development: A theoretical perspective’ Paper presented at the conference on ‘Transnationalisation and Development(s): Towards a North-South Perspective.’ Centre for Interdisciplinary research, Bielefeld, Germany, 31 May-1 June 2007.


individuals *per se*. An attempt by previous studies to research on individual transnationals rather focused on their vital economic contribution in their home countries through remittances sent back home. However, very little was written on how social media has transformed transnational citizens’ participation in democratisation in their home countries.

The participation of African transnationals in political processes of their home countries faces numerous opportunities in this age of social media. This chapter seeks to examine the quest for public engagement by transnationals in the age of traditional media platforms, the migration to social media, and the opportunities that social media offer in public engagement of transnationals in events in their home countries. The chapter further highlights the various ways transnationals use social media and the challenges faced in utilising social media platforms as their avenues for advocacy, lobbying, capacity building and effective engagement in democratisation in their home countries. This chapter is divided into four sections. It commences with this introductory section, followed by some background information on the conceptualisation of transnationalism, social media and democratisation. In the third section, the chapter presents the migration from using traditional media to social media platforms by transnationals, and the opportunities that come with social media as an avenue for transnationals’ engagement in their home countries. The fourth section dwells on the challenges faced by transnationals in utilising social media as platforms for engagement in democratic processes in their home countries. The chapter ends with a conclusion section, which summarises the discussion, and proffers policy options on how African governments should reconsider social media as an avenue to tap into the best from their nationals abroad in discourses around democratisation, and ultimately, development. The study utilised document review of academic literature, and relevant online posts and documents from prominent bloggers and print media.

### 2 Defining transnationalism

This paper employs the concept of transnationalism, as different from the terms *migrant* and *diaspora*, which seem to paint a picture of a person who has permanently changed place of residence and dissociated herself or
himself from their home country.\textsuperscript{12} The concept of transnationalism portrays a migrant as a person who maintains interests in both the destination country as well as in the country of origin.\textsuperscript{13} This is unlike the term migrant, which connotes assumptions of being ‘uprooted’ from one place of origin to be ‘planted’ in a place of destination. The term migrant suggests a shift in belongingness from the migrant’s country of origin. Transnationalism therefore takes into cognisance the maintenance of links and identity in both countries. The term \textit{transnational} was borrowed from transnational companies, reflecting the links that an individual maintains even after moving to another country.\textsuperscript{14} Transnationalism views people around the world as being in a single social and economic space where they interact and contribute to consolidation of democracy through information sharing on approaches to deal with despotism. Transnationals of African descent often maintain links with family and friends in their countries of origin, and have an ultimate desire for their home countries to democratise, and develop. The theory is utilised in this chapter to illustrate the ties that continue to exist between transnationals and their home countries through various media platforms in contributing to democratic initiatives. The transnational perspective also helps to bring out the interactions that happen between transnationals and their home governments allowing for a move away from traditional methods of analysing the state and its citizens within the state borders.\textsuperscript{15}

The population of African transnationals increased from 23-34 million in the first 15 years of the twenty-first century.\textsuperscript{16} This number is likely to be significantly higher factoring the issue of undocumented African migrants around the world. The increase in African transnationals results from social, economic and political instability in countries of origin. Migrants from poor performing economies voluntarily emigrate to better economies for better jobs and a higher quality of life. In repressive societies, journalists and political activists are harassed, persecuted, and forced to flee their countries of birth by non-state purveyors of violence, security agencies, and government officials, thereby creating transnational media and political experts in exile. In Zimbabwe, the socio-economic and political crisis that rocked the nation since the year 2000 pushed over 3 million skilled and unskilled Zimbabweans into mainly: Botswana, South Africa, the United Kingdom, Australia and America.\textsuperscript{17} In 2015, Reporters Without Borders ranked Zimbabwe number 34 out of the 52 African

\begin{itemize}
\item Schiller \textit{et al} (n 12 above).
\item Schiller \textit{et al} (n 12 above).
\item Schiller \textit{et al} (n 12 above).
\end{itemize}
countries in the 2015 Press Freedom Index,\textsuperscript{18} which suggests relatively low levels of press freedom. The absence of press freedom forces journalists and like-minded individuals into the diaspora. The media cohort of transnationals from Zimbabwe include ex-Zimbabwe Broadcasting Corporation employees, who now run the SW Radio Africa in London and Studio Seven in Washington in an effort to keep news about their homeland flowing. Whilst some transnational media experts are working with broadcasting media, the bulk of exiled journalists and other transnationals utilise the cyberspace to debate about political processes and developments in Zimbabwe.\textsuperscript{19}

Transnationals are directly and indirectly affected by developments in their home countries. A majority of Zimbabweans in South Africa, the UK, the USA and other countries have strong desires to partake in their home country’s developments, and to return home.\textsuperscript{20} World Bank\textsuperscript{21} notes that interests of voluntary and involuntary African transnationals often intersect when it comes to matters of Africa’s development. The desire by transnationals to formally partake in the democratic processes of their home countries has been affected by many factors including lack of citizenship, negative almost hostile attitude from African governments and limited participation modalities. In most African countries, citizens are not able to exercise their citizenship rights such as voting when they reside outside the borders of the country. Additionally, most constitutions in Africa deny citizenship rights to individuals who obtain citizenship or are ‘naturalised’ in other countries because of the absence of provisions for dual citizenship rights.\textsuperscript{22} Zimbabwe’s 1980 Lancaster House Constitution did not recognised dual citizenship and those transnationals whose other citizenship in another country was known to the state, could be stripped of their citizenship. This has had implications on the ability of transnationals to formally belong, and contribute to democratic discourses in Zimbabwe in a significant way until 2013 when the new Constitution\textsuperscript{23} repealed the prohibition of dual citizenship. Indeed, the new Constitution of Zimbabwe brought a ray of hope, as it provides for dual citizenship for Zimbabwean transnationals though the major drawback remains the alignment of other

\begin{itemize}
\item \textsuperscript{18} J Adeyeye ‘How digital media displaced print’ \textit{New African} (2016) 35.
\item \textsuperscript{19} E Witchel & GL Wilson ‘Zimbabwe’s exiled press: Uprooted journalists struggle to keep careers, independent reporting alive’ \url{https://cpj.org/reports/2005/10/zim-da-fall05-2.php} (accessed 30 October 2016); Muzondidya (n 10 above).
\item \textsuperscript{20} A Bloch \textit{The development potential of Zimbabweans in the diaspora: A survey of Zimbabweans in the UK and South Africa} (IOM: Geneva 2005).
\item \textsuperscript{22} C Bill ‘Dual loyalties: What are the effects’ September 2004; C Rumpf ‘Citizenship and multiple citizenship’ (2000) presented at Managing Dual Nationality workshop, Berlin, 14-15 July 2000.
\item \textsuperscript{23} The Constitution of Zimbabwe, 2013 (as set out in sec 36 guarantees the right to citizenship for anyone who was born in Zimbabwe, and with a possible dual citizenship for a Zimbabwean who has gained a foreign citizenship.
\end{itemize}
local laws meant to operationalise this constitutional provision on citizenship. In including this progressive clause in the Constitution, Zimbabwe must have learnt from African countries such as Ghana, Côte D’Ivoire and South Africa that are conscious of the need for every citizen to participate in national activities through allowing for dual citizenship. As a beacon of democracy, Ghana adopted a Citizenship Act\textsuperscript{24} in 2000, which enables the acquisition of the citizenship of another country in addition to Ghanaian citizenship. Courtesy of the dual citizenship law, Ghanaians abroad have been able to identify themselves with their home country, and to meaningfully participate in Ghana’s political and economic transformation. Higazi\textsuperscript{25} documented how transnationals from Ghana are mobilised through the Ghanaian Pentecostal churches and ethnic associations to contribute towards the country’s development. Through the internet and social media links, Ghanaians abroad are working closely with their diplomatic missions to partake in their home-country’s activities. In 2001, Ghana made headlines for organising the Homecoming Summit for Ghanaians Living Abroad to explore synergies for nationals to partake in the development of their country.\textsuperscript{26} Since this summit, the National Council of Ghanaian Unions UK, and the Homecoming Organising Committee are continuously engaging and harnessing the potentials of Ghanaians abroad to invest in Ghana. The efforts of these stakeholders resulted in yet another Homecoming Summit held in Accra, Ghana from 5-8 July 2017,\textsuperscript{27} to afford Ghanaians abroad an opportunity to tap into the expertise of others and to give back to the society.

The emergence of the internet and social media platforms has necessitated the participation of transnationals in civic and public life in their home countries.\textsuperscript{28} In countries like Ghana that endeavour to engage its transnationals, social media has enhanced the government and its consular missions’ efforts to reach out to their nationals around the globe to partake in socio-economic and political development back home. In Eritrea, the diaspora community together with their connections within Eritrea created platforms such as the website www.dehai.org, which they used to effectively influence urban Eritreans into demonstrations and mobilise resources for lobbying government to adopt a new Constitution.\textsuperscript{29} Paradoxically, countries that disregard their nationals

\textsuperscript{24} Citizenship Act, 2000 (ACT 591) of Ghana stipulates that a citizen of Ghana may hold the citizenship of any other country in addition to his/her citizenship of Ghana http://www.ghanaimmigration.org/ACTS%20AND%20REGULATIONS/ACT%20591.pdf (accessed 30 September 2016).
\textsuperscript{25} Higazi (n 4 above).
\textsuperscript{26} JO Oucho, ‘The African diaspora and homeland post-conflict reconstruction in sub-Saharan Africa’ (2009).
\textsuperscript{27} Gov’t launches diaspora homecoming summit http://citimonline.com/2017/05/04/govt-launches-diaspora-homecoming-summit/ (accessed 14 June 2017).
abroad have seen an unwieldy army of transnational bloggers, digital entrepreneurs and citizen journalists thronging the cyberspace to serve a burgeoning online population with information, which is critical of the state of affairs back home. Of particular interest to this paper are the opportunities presented to transnationals by the advent of social media as their conduit of information and to freely contribute to democratic processes of their countries of birth. Social media has taken the world and Africa by storm since the turn of the twenty-first century. Studies in Egypt and other countries affected by the Arab Spring indicate that social media platforms increased linkages between people living within Africa and African citizens around the globe. On several occasions, transnationals have used social media platforms to freely discuss issues pertaining to transparency, accountability, rule of law, respect for human rights and ultimately, the development of their home countries.

3 Advent of social media: An opportunity for transnationals’ public engagement

Despite their zeal for participation in home-country’s political processes, this was a mammoth task for transnationals before the advent of internet and social media platforms. Only a few transnationals were able to voice their concerns through print media. Contributions of transnationals in print media have been through articles and letters to the editor section of newspapers. This often faced the challenges of limited space to publish one’s views, especially in state controlled media where only those few letters selected by the editor could be published, and absence of the opportunity to respond to previous letters. Both private and government controlled print media have only been able to provide a platform for a few transnationals to express their views through them. Many print media in Africa are a near exclusive preserve of the government, and a handful of the powerful, rich, and politically connected individuals in society. Old media platforms (print and electronic) are often monopolised, tow political party lines, making them not conducive for broader debates. For several years, the old journalism in several African countries has been blighted by the ‘brown envelope’ syndrome, with politicians and the rich paying petty bribes to obtain positive coverage.

30 Mpofu (n 11 above).
31 H Chorev ‘Social media and other revolution’ (2011) 5 The Moshe Dayan Center for Middle Eastern and African Studies 1.
33 Adeyeye (n 18 above) 35.
In Zimbabwe, the print media has traditionally been split between state owned media (Zimpapers)\(^{34}\) and independent media, mainly (Alpha Media Papers)\(^{35}\).\(^ {36}\) The state controlled daily media have been castigated for maintaining a pro-governmental stance, and being a mouthpiece of the government.\(^ {37}\) Before 1999, only three independent newspapers existed, namely Alpha Media Papers (The Zimbabwe Independent and The Standard), and the Financial Gazette but these were mostly accessible to middle class urbanites.\(^ {38}\) A daily tabloid, the Daily News was only added in 1999, and was strongly attacked by government from its inception for giving too much voice to the opposition resulting in two bombings at its offices and forced closure in 2003.\(^ {39}\) The closure meant that transnationals had to battle to air their views in the state controlled media, and the then reduced independent media platforms. The Daily News reopened in May 2010, and together with other independent, and state controlled media, provide a handful of transnationals some space to voice their concerns. As a result, transnationals continued to seek other favourable platforms to circumvent a state and elitist control of media forums to enable them freely express opinions.

In the first decade of the twenty-first century the media landscape went through constant mutation courtesy of the internet and social media which created opportunities for faster, more efficient and cheaper means of communication. Social media is unregulated, creates new content and accommodates new audiences owing to availability of new and cheaper mobile devices that can easily connect to the internet at lower costs. The advent of social networking sites such as Twitter, WhatsApp, and Facebook attracted millions of users,\(^ {40}\) and has led to the democratisation of information for anyone with interest in society. By May 2017, Facebook had 1.94 Billion monthly active users\(^ {41}\) while Twitter had 328 million

---

34 Zimpapers is a state owned company running several daily and weekly newspapers including The Herald, The Chronicle, The Sunday Mail and Sunday News in Zimbabwe. All the newspapers have an online edition linked to social media.
35 AMH is an independent media house free from political ties or outside influence. The media house publishes four newspapers: The Zimbabwe Independent, a business weekly published every Friday, The Standard, a weekly published every Sunday, and NewsDay, Southern Eye - our daily newspapers. All the newspapers have an online edition linked to social media.
37 Moyo (n 32 above).
38 Moyo (n 32 above).
39 Chatora (n 36 above).
The development of the leading social media platforms has improved communication among the world’s citizens. As Biven notes, these new platforms are transforming traditional journalism and even bringing the minority public (including transnationals) into the media arena to publicly engage with friends, relatives, social justice advocates and policy makers at home and abroad. However, as will also be shown later in this chapter, social media creates an un-regulated flow of information which may have both positive and negative effects. In Zimbabwe, most government departments, and officials (including Parliamentarians and Ministers) possess Twitter and Facebook accounts, where they share public developments within their portfolios, and engage with followers. Such platforms have bridged the communication gap between officials and citizens, especially transnationals. With social media, the posts and activities of government officials are scrutinised by transnationals who have expertise on the relevant field and suggestions for improvement are generated by way of comments. While it is difficult to evaluate the effect of suggestions provided through such channels, the fact that government officials hit the ‘like’ button or ‘share’ their posts means that they would have read the comments.

Social media platforms (Facebook and Twitter) have become avenues for citizens to fight corruption and embezzlement of funds by public officials. In 2016, Zimbabwe’s Minister of Higher and Tertiary Education, Science and Technology Development, Professor Jonathan Moyo was accused of embezzling state funds. Transnationals took turns to seek answers from him on Twitter. Courtesy of his Twitter account the accused Minister was quick to clarify the position, and answer questions from citizens in a more targeted manner and vice versa. Twitter and Facebook accounts expose accused public officials to question and answer sessions, and sometimes embarrassments, thereby breaking the traditional syndrome whereby corrupt officials shy away from journalists covering stories on them. Similarly, social media platforms make it difficult for public officials to threaten inquisitive journalists and followers, and to use the ‘brown envelope’ to stop media from reporting corrupt practices. Fear for reprisals can only grip local social media users whereas transnationals comment on the accused’s wall freely because it is often not possible to target these individuals for reprisals since they are out of the reach of local authorities. For these reasons, social media has transformed and revolutionised the media fraternity and political discourse in Africa, through breaking of barriers to communications and forcing government

---

44 https://twitter.com/ProfJNMoyo (accessed 17 November 2016).
officials to account for all their actions. For instance, a motion was raised in the Zimbabwean Parliament concerning a video footage that was circulated on WhatsApp, showing police beating up citizens. The motion compelled the Parliamentary Portfolio Committee responsible for human rights, and the responsible Minister to investigate the issue.

To many democrats, social media is 'best understood as a group of new kinds of online media, which share most or all of the following characteristics: participation, openness, conversation, debate, and connectedness'. For transnationals, the advent of social media has become a blessing: a platform for communication and access to information from their home countries. Print, online, and diaspora newspapers (The Zimbabwean, ZW News, Zimbabwe Situation, www.newzimbabwe.com, www.zimnews.net) and broadcasting media have become closely linked with social media platforms, and this has given transnationals access to news from their home countries at low cost, on their mobile devices, and enabled them to effectively engage under the comments column. Transnationals also get breaking news from their home countries through their relatives and friends, or prominent bloggers courtesy of Twitter, Facebook and WhatsApp forums. Indeed, the practice of blogging is growing in developing countries where repressive governments are stifling demonstrations and freedom of expression.

Faced with such a challenge, citizens abroad resort to behind screen activism through blogging, sometimes using pseudo names. Fortunately, one important attribute of social media is its capacity to allow for pseudo or anonymous comments from readers after each post, story or article, opening up opportunities for freedom of expression and speech for transnationals without fearing for reprisals from state agents. In most cases, social media platforms have brought together, and ensured coordination of activities of transnational activists, who often do behind the screen activisms, and those back home, who often participate in field activism. Online discussions between transnationals and field activists stimulate the later to coordinate activities, and share ideas and strategies to

49 Bivens (n 43 above).
strengthen field and online activism back home. In the words of Mayfield, new ideas, services, business models and technologies emerge and evolve at dizzying speed in social media. Indeed, social media platforms have the positive communication effect of breaking the physical barriers to civic and public engagement: through free debates and discussions on the situation back home. Conversely, there are some instances when social media platforms limit activism, and coordination of activities, including distraction of discussion and issues by trolls as discussed in the next section.

An overwhelming majority of Facebook users are exposed to online news through social network ties with colleagues and relatives online, without having to actively seek for it. As postulated by traditional media theorists, users of media platforms get news and access information, and become politically knowledgeable and engage in events taking place. This is made possible due to social media’s capacity to enlarge social networks which increases chances for posts to diffuse to a wider network of followers.

With social media, local and transnational bloggers are quick to remind government officials of the best democratic principles whenever they lose track. In a majority of cases, messages and videos are quickly developed and posted on Facebook, WhatsApp, and Twitter conscientising citizens to rise against the abuse of power, and in some cases mobilise citizens to take to the streets to show their disgruntlement. In Zimbabwe, #This Flag #Tajamuka (enough is enough) #Shutdown Zimbabwe activists and their leader, Pastor Evan Mawarire, used social media to instigate and mobilise Zimbabweans to demonstrate against socio-economic meltdown, and the proposed introduction of bond money in mid-2016. The movement, which just started as Facebook and

---

50 Mayfield (n 46 above).
53 Bond money was introduced in Zimbabwe in two forms. The first which was introduced in 2015 were the Bond coins, with the objective of providing small denominations for change during transactions, and this was met with little resistance. However the proposal for Bond notes (though still in small denominations of $2 and $5) was met with resistance because people feared the slow return of the Zimbabwe dollar which was wiped away by Inflation in 2008.
WhatsApp snowballed, and Zimbabwean transnationals\(^{55}\) took turns on various social media platforms to publicly share their thoughts of the events, and to mobilise more citizens to the streets. When Evan Mawarire self-exiled himself to South Africa\(^ {56}\), and later the US, social media forums were used to coordinate and mobilise people through YouTube,\(^ {57}\) WhatsApp and Facebook to partake in more strikes and demonstrations. Similarly, US based, self-exiled Zimbabwean musician Thomas Mapfumo expressed discontent with the government, and supported the movement through his videos posted on Facebook and YouTube on 19 July 2016.\(^ {58}\) Similar developments occurred in Nigeria, where the use of social media by demonstrators and protestors across the world with regards to the return of the ‘Chibok girls’ built up the international profile of the matter and piled pressure on Nigeria’s government, and the kidnappers to act on the issue. As Bivens\(^ {59}\) noted, social media provided an opportunity for transnationals to share their opinions with fellow countrymen and to add their voices to the democratisation process.

Taking advantage of their command of large followers, transnationals’ concerns on social media have the likelihood to reach many people, including policy makers, and powerful organisations that join hands to remind government and its agencies on the need to uphold democratic principles. A case in point is that of Itai Dzamara, a Zimbabwean human rights activist who led lone protests and inspired people through a call to ‘Occupy Africa Unity Square’\(^ {60}\) in 2015. He disappeared after being allegedly abducted by state security agents.\(^ {61}\) His case was publicised through social media, periodic vigils were held by transnationals abroad, and human rights activists in his memory back home.\(^ {62}\) Stories of his search and the vigils were posted on social media platforms, which generated momentum for social media users raising concern about his whereabouts, and calling the abductors to release him. The issue saw many actors, including government officials castigating the abductors, and pleading for his release. By so doing, transnationals and social media activists remind government of its duty to protect human rights and freedoms of its citizens. As social media groups are used to mobilise people for vigils, these informal gatherings and groups grow into permanent, transformational institutions holding events annually for transnationals to share political


\(^{56}\) https://www.youtube.com/watch?v=8sPrqK1c6G0 (accessed 20 August 2016).

\(^{57}\) https://www.youtube.com/watch?v=8sPrqK1c6G0 (n 53 above).

\(^{58}\) https://www.youtube.com/watch?v=18t31UjotSs (accessed 20 November 2016)

\(^{59}\) Bivens (n 43 above).

\(^{60}\) Occupy Africa Unity Square – A campaign that was led by human rights activist Itai Dzamara with a demand for regime change, improved livelihoods for Zimbabweans and reduced corruption.


views and devise solutions for political situations back home. Institutions of transnationals (such as the Restoration of Human Rights in Zimbabwe) have become important offline groupings for lobbying embassies and United Nations agencies to advance democracy and respect for human rights in Zimbabwe.

The social media revolution came with radical transformations of advocacy work. Beitbridge border post between Zimbabwe and South Africa was temporarily closed when migrants and transnationals demonstrated against the introduction of Statutory Instrument Number 64 of 2016 by government of Zimbabwe, to stop importation of some commodities, which were deemed available in Zimbabwe.63 The demonstrations were well coordinated and shared on WhatsApp and Facebook platforms between transnationals in Messina, South Africa, and those in Beitbridge, Zimbabwe resulting in the shutting down of the border for half a day.64 In June 2016, Zimbabweans abroad and locally mobilised citizens in Zimbabwe through social media to protest against Vice President of Zimbabwe, Phelekezela Mphoko’s 550 days stay in a luxurious hotel room (forcing the cash-strapped government of Zimbabwe to pay around US$1 023 for the presidential suite per day).65 This was a result of the fact that the Vice President was refusing to relocate to a US$2 million state mansion allocated to him as he claimed the house did not match his stature.66 After a series of protests organised through social media, and continued attacks by mainly transnationals on Twitter, YouTube and Facebook, the Vice President vacated the hotel to occupy his allocated house. Similarly, transnationals have used social media to mobilise Zimbabweans back home to reject the introduction of bond money by the Reserve Bank of Zimbabwe. Transnationals and social media activists convinced Zimbabweans that the bond notes could not be money and they would be used to steal real money from locals who would then be used to fund-raise for the forthcoming (2018) elections. Even with the basis of the arguments being unclear many Zimbabweans took time to listen and read the messages, culminating in sporadic demonstrations against the bond notes. These events forced the government to defer introduction of bond notes for several months (from May to 28 November 2016) in a bid to sensitise people on the basis, and how the notes would work. Of importance is the fact that government was taken to task through social media advocacy to stop the hurried introduction of the bond notes

65 'Mphoko moving to $2m mansion' https://www.theindependent.co.zw/2016/07/22/mphoko-moving-2m-mansion/ (accessed 20 August 2016); https://www.youtube.com/watch?v=TLEp6WypRT0 (accessed 20 August 2016).
66 As above.
until effective sensitisation of citizens on the merits, and on how the notes will be used. These events clearly remind government that with social media ‘gone are days when do-gooders’ can launch misguided policies with impunity.

Transnationals have also used social media platforms for capacity building of citizens, and that of local human rights defenders. Transnational bloggers, especially intellectuals enlighten followers on events in their home countries, and use their intellectual capacity to freely advice fellow comrades back home. When intellectual bloggers take to their social media walls to post or comment about events back home, followers know that it is ‘time to take notes’. One Zimbabwean transnational that comes to mind is Dr. Alex Magaisa, the University of Kent Law lecturer who often takes to his blog and other social media platforms to give legal and political meaning to events unfolding in Zimbabwe. When Pastor Evan Mawarire and Linda Masarira were arrested and appeared before Harare Magistrate Court on 13 July 2016 for mobilising people against the government through social media, a defence team of about 100 lawyers (affiliated to Zimbabwe Lawyers for Human Rights) was mobilised through social media. In addition, the defence team had continuous engagements with Dr. Magaisa and other concerned legal and human rights experts sharing notes on how to go about the case. The collaboration forged a strong defence that strengthened human rights litigation, and justice for human rights activists.

4 Challenges faced by transnationals in utilising social media for democratisation

While it is possible to find minimal consensus on the traditional roles of social media to inform, educate and entertain – it is almost impossible to clearly identify a common agenda on the goodness of social media platforms. The unquenchable thirsty for social media spaces comes with insatiable appetite for some transnationals to use the cyber-space to undermine their governments back home, and abuse other people’s rights. Because of the uncontrolled nature of social media platforms, virtually anyone who happens to be technologically literate can take to the cyberspace to write whatever the person thinks and sign off as a concerned citizen. In some instances, social media platforms are used to circulate false, misleading and oversimplified information that is detrimental to state security and may even infringe on an individual’s privacy. On several

67 ‘The Big Saturday Read Blog’ by Dr Alex Magaisa https://www.bigsr.co.uk.
social media platforms, influential leaders are defamed, and their characters, dignity and names are dragged through the mud simply because of belonging to political parties or associations that oppose the ruling party and vice versa. Indeed, some transnationals view themselves as in a foreign land because of the mismanagement and bad governance in their countries, hence social media presents an opportunity for them to hurl insults at the leadership back home. This class of transnationals have developed a negative attitude towards political dialogue; instead of constructive engagement they may expect a confrontational approach to completely overthrow the ruling government back home. This negative attitude towards dialogue by some transnationals results in a war of words on Twitter and Facebook with government officials. This has often resulted in government officials developing a negative attitude towards transnationals, and viewing them as enemies of the state bent on a regime change agenda.70

Already, the government of Zimbabwe has been sceptical of engaging transnationals, worse still through the cyberspace. Many African governments hold negative perceptions against their citizens abroad, and especially those who emigrate during hard times are demonised71 as unpatriotic cadres, whose views and comments about state of affairs back home are always unwelcomed. Indeed, many people view outmigration as a resemblance of government failure, and Weeks and Weeks72 further emphasises that this has inadvertently led to transnationals being viewed as a threat to state sovereignty. Clearly, African governments have little interest in engaging those who have turned their backs on Africa for a new life elsewhere.73 In Zimbabwe, this view emanates from the liberation struggle, when it was important to have physical presence in the struggle for one to be accredited with being part of the fight against colonialism. As a direct result, patriots and lobbyists in the democratisation process have neither been accepted nor even listened to when they are not present in the country. While this dislike of foreign based Zimbabweans has been largely blamed on the ruling Zimbabwe African National Union Patriotic Front (ZANU PF)74 party, McGregor75 notes that some opposition leaders also complained about how transnationals make many demands but are unwilling to contribute meaningfully to the development of their country.

73 B Mbiba (n 70 above).
74 ZANU PF is a political party in Zimbabwe that has been ruling Zimbabwe since the country attained its independence in 1980.
For an example, Professor Welshman Ncube who has been part of the opposition political parties since 1998 criticised transnationals during his time as Deputy Prime Minister in Zimbabwe’s Government of National Unity (2008 – 2013) for continuously attacking government initiatives yet they themselves do not contribute to national economic development.76

The antagonism between transnationals and home country governments pushes the later to adopt measures meant to curtail the involvement of transnationals in events back home. African governments, including Zimbabwe, Uganda, Ethiopia, Congo Brazzaville, Sudan and Burundi accuse civil society and opposition members of using the cyberspace to undermine democratically elected governments, and to disturb the peace and tranquillity in countries of origin.77 Social media users have seen their social media platforms and accounts being periodically hacked, and the bloggers being persecuted. In Uganda, the government has been hunting Tom Voltaire Okwalinga, or TVO, the anonymous anti-Museveni social media activist.78 At the height of Evan Mawarire’s Tajamuka79 (enough is enough), government through the Post and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ) informed mobile phone users that any abusive messages sent via social media will be traced back to their original source for prosecution.80

In many African countries, attempts have been made by governments to contain the use of social media platforms: through blocking of social media sites and tempering with internet speed during periods of political upheavals. In some instances, new legal frameworks are mooted to govern the use of social media by citizens. Amidst civil unrests sparked by social media forums, the government of Zimbabwe moved quickly to draft the Computer and Cyber Crime Bill81 to regulate the use of social media by citizens staying abroad and locally. In Nigeria, the Cybercrime Act led to the arrest of many Facebook bloggers before its withdrawal in May 2016, while in Kenya online bloggers and activists are frequently arrested, and detained for anti-President and government posts.82 In April 2016, the ruling party in Egypt proposed a new legislation to contain the excesses of Facebook, especially in relation to critical comments against the government.83 Similarly, many journalists and online bloggers are

76 B Mbiba (n 70 above).
77 Adeyeye (n 18 above) 35.
78 Adeyeye (n 18 above) 36.
79 Tajamuka is a Shona slang which is used by individuals to mean that they have decided to demonstrate. The slogan also included the Ndebele version ‘Sesjikile’ which carries the same meaning.
82 Binen-Onabanjo (n 8 above) 27.
83 Binen-Onabanjo (n 8 above) 27.
languishing in prison without trial for their use of social media platforms to question government policies and leadership decisions. In most cases, these are draconian measures adopted by the state to cripple the critical mind of society, and freedom of expression. To some extent the enmity between bloggers and the state reduces the keenness and eagerness by to-be transnational bloggers to publicly engage in political processes of their countries of birth through social media platforms.

Another challenge pertains to social media platforms’ vulnerabilities to manipulation by people with differing agendas. In the case of Zimbabwe, transnational bloggers including Dr. Alex Magaisa have complained that there is an eruption of ‘trolls’ who operate in a bid to disrupt online democratic movements. 84 Dr. Magaisa explains that trolls are individuals who join online groups or follow individuals online with the deliberate intention to disrupt, de-market or cause despondency. 85 Such individuals or strategies are often so effective that they have been used for high profile sabotage activities. African politicians often use this strategy to demoralise transnationals’ democratisation initiatives on twitter using various ironic themes such as Professor Jonathan Moyo’s ‘handeitione’ 86 (roughly translated to mean ‘bring it on’). Resultantly, lay social media followers may be swayed by such counters, and end up following blogs to enjoy such distractions. In some instances, trolls post false messages or counter messages to denigrate the blogger, sometimes false information disguised to portray a false picture of togetherness, and discredit the message posted. Some trolls go to the extent of impersonating the blogger or activist to counter a post meant to unite people against undemocratic tendencies by the state. By so doing, unsuspecting potential partakers to democratisation are forced to think that their efforts have failed.

In some scenarios, Twitter and Facebook collaborations or unity purpose is affected by trolls who join the discussion by adding racial, tribal or ethnic connotations to the issues. Cooperation among transnationals themselves for a single purpose of democratising their home countries is often limited especially in countries where there is conflict between races, tribes or regions. 87 Instead of uniting social media together for a common cause, some social media platforms have become forums to widen the

85 Magaisa (n 84 above).
87 T Ndlovu ‘Escaping home: The case of ethnicity and formal education in the migration of Zimbabweans during the Zimbabwean crisis’ in S Chiumb & M Muchaparara (n 66 above); K Newland ‘Voice after exit: Diaspora advocacy’ (2010).
Ndebele-Shona\textsuperscript{88} tribal feud emanating from the pre-colonial era. On racial terms, white and black Zimbabweans are always at loggerheads on social media platforms, with some white transnationals (especially those who lost their property during land reform programme) blaming all Black Zimbabweans for their dislocation.\textsuperscript{89} As previously documented,\textsuperscript{90} Zimbabwean transnationals in South Africa, UK and the US form tribally and racially exclusive lobby and advocacy social media groups to advance their different agendas, including conflicting expectations on what constitutes a democratic Zimbabwe. As a result of these disjointed efforts, transnationals have sometimes failed to become a true and effective cyberspace force to advocate for democratisation back home.

5 Conclusion

Transnationals are increasingly utilising social media platforms to publicly engage in issues happening in their home countries. There is however, controversy over this use of social media platforms in democratisation, with many African governments viewing it in a negative way. Despite these negatives, social media forums have been important to foster transparency, accountability, activism, advocacy, capacity building and public engagement between transnationals, fellow citizens, national and global policy and development partners. Social media forums break censorship barriers to citizen participation, and have become conduits for the struggle for rule of law and respect for human rights. With social media platforms, transnationals have gained a sense of belonging through advocacy, lobbying, awareness raising, and capacity building of citizens, and mobilising of fellow citizens to demand respect of human rights, accountability and other facets of good governance principles. This influence of social revolution has been visible mainly in public engagements and other informal processes of democratisation meant to facilitate public dialogue about democracy.

While it is difficult to quantify the effect of cyber-democracy, this chapter views the successful adoption of social media as an informal platform to publicly engage in matters of concern, to be an eye opener to the government of Zimbabwe, and that of other African governments must re-think the role of such platforms in the democratisation and development of their countries. Rather than stifle the use of social media, governments should be responsive and tap the best out of their citizens abroad. Africa’s beacons of democracy have only been those countries that endeavour to

\textsuperscript{88} Ndebele and Shona are the two main tribes in Zimbabwe, the Ndebele are predominantly found in the South-Western parts of Zimbabwe while the Shona, which is the biggest tribe are found in the central, Northern and South-Western parts of the country.

\textsuperscript{89} Muzondidya (n 10 above).

tap the better of their nationals, both locally and abroad. This gives an
impetus for Zimbabwe, and other African states to reconsider their
perceptions against transnationals, and their use of social media platforms.
Instead of responding to social media revolutions with arrests, use of
threats, trolls, jamming of signals and criminalising its use, the government
should endeavour to embrace the platforms to improve citizens’
participation, transparency, accountability, rule of law, efficiency in
service delivery and ultimately, development. Delivering a speech at the
2007 African Ministerial Diaspora Conference, the former President of
South Africa, Thabo Mbeki argued rightly that ‘there is an urgent need for
knowledge sharing and economic cooperation between Africa and the
Diaspora’.91 With the advent of social media African governments should
create synergies to cement public engagements with transnationals, in
good faith. Without efforts to publicly engage the African diaspora, a large
skill and knowledge base that can be utilised for Africa’s development
continues to go waste. The time to be receptive of the views of African
transnationals is now.

91 T Mbeki ‘Address at the AU-African Diaspora Ministerial Conference’ Gallagher
(accessed 21 November 2016).
PART IV: THE AFRICAN UNION AND THE REALISATION OF DEMOCRATIC GOVERNANCE AND HUMAN RIGHTS IN TWENTY-FIRST CENTURY AFRICA
Abstract

In this chapter, we explore the Pan-African influence in the design and implementation of the New Partnership for Africa’s Development (NEPAD) framework with the aim of highlighting the place of Pan-Africanism in twenty-first century regional cooperation and development of Africa. The chapter highlights the strong influence of the Pan-African ideals and thoughts of independent Africa’s founding leaders such as Kwame Nkrumah, Sédar Senghor, Sékou Touré and Kambarage Nyerere in the NEPAD framework. The chapter argues that these ideals are as sound today as they were when they were first articulated. However, it identifies teething challenges in the framework’s implementation such as the misapplication or misconstruction of the Pan-African ideals underpinning NEPAD. As a way forward, the chapter suggests practical ways of objectively auditing NEPAD’s performance by revisiting and recommitting to its Pan-African founding principles. With revitalised Pan-Africanism, the chapter argues that the NEPAD framework can facilitate the rediscovery of the shared aspirations of African peoples to actively participate in the common development and prosperity of Africa.

1 Introduction

The New Partnership for Africa’s Development (NEPAD) was formed to spearhead what its architects considered the renaissance of Africa.¹ This required addressing Africa’s underdevelopment through the promotion of good governance and strengthening of social, economic and political institutions as essential elements of development.² A discussion of Africa’s attempts at collective socio-economic and political development of which NEPAD is a fundamental component would be insincere and incomplete without revisiting the founding principles of the very idea of a unified approach by the African peoples to their development.³ The chapter argues

---

that NEPAD’s objectives are rooted in the ideals of Pan-Africanism as championed by pioneer African leaders like Kwame Nkrumah.

This chapter therefore analyses the NEPAD framework with the aim of testing it against the Pan-African ideals underpinning its formations. In so doing, the chapter identifies the Pan-African influence in NEPAD’s salient features as well as some of the challenges facing NEPAD and then proposes ways through which a rejuvenation of NEPAD’s Pan-African ideals can address some of these challenges and strengthen the NEPAD framework. Ultimately, the chapter’s argument is that Pan-African ideals are very much relevant to Africa’s development today, particularly in the implementation of this ambitious framework.

2 Pan-Africanism and the African development agenda

Pan-Africanism is a complex and multi-dimensional concept⁴ that continues to elicit considerable debate. As propagated by one of its greatest proponents Kwame Nkrumah, Pan-Africanism is best understood as an objective to be achieved.⁵ Discussing Nkrumah’s contribution to Pan-Africanism, Poe analyses the Pan-African debate and attempts a simplified definition as the attempt by African peoples to creatively harness their cultural diversity and innovate around their common challenges for the collective empowerment and development of the African peoples.⁶ For the purposes of discussing the NEPAD framework, this chapter adopts the above simplified understanding of Pan-Africanism as the collective attempt by African peoples to learn from their shared historical experiences and struggles, harness their diverse cultures and spur their development in all spheres of life.

There are indeed diverse viewpoints about the specific building blocks of Pan-Africanism.⁷ Prominent among these conceptions is Nkrumah’s idea of unity of the African peoples as a fundamental prerequisite to promoting development within a continental framework.⁸ This is a view shared by another celebrated Pan-Africanist, Julius Kambarage Nyerere, who also considered unity and the collective concern by all for the welfare of society as the basis upon which African societies are built and by which they can develop.⁹ Even though Nkrumah was also an ardent proponent

---

of the controversial idea of Africa as a united political entity, it is his passionate call for the unity of policy and action to strengthen Africa’s progress and development that is the concern of this chapter.\(^\text{10}\)

Nkrumah also considered as fundamental aspects economic and industrial development and (re)construction; entrenching democratic ideals; and resistance of any form of contemporary imperialism and foreign oppression or domination.\(^\text{11}\) On these, Nkrumah finds support from his mentee Sékou Touré who considered the pillars of the Pan-African movement as including responsible continental level exploitation of Africa’s resources for the benefit of Africa’s populations; harnessing the potential of the African peoples wherever they may be; and African economic independence.\(^\text{12}\) Léopold Sédar Senghor also considered technical and economic co-operation as fundamental to the success and prosperity of Africa and its peoples.\(^\text{13}\)

The overall objective of Pan-Africanism can therefore be summarised, at least for the purpose of this chapter, as the endeavour by African peoples to overcome – the geographic barrier of an expansive continent and peoples spread widely across the globe; contemporary effects of historical evils such as slavery, colonialism, apartheid and neo-colonialism; arbitrarily imposed colonial borders; and other natural and social barriers by harnessing positive values rooted in the diverse African cultures in order to achieve socio-economic and political development of the collective. This endeavour is aimed at promoting unity of the African peoples, ensuring economic (and political) integration of Africa, addressing Africa’s underdevelopment through a people-centric approach, enhancing the socio-economic and political status of Africans including in democratisation processes, and repositioning Africans to engage equally on the world stage as equal members of the global society.\(^\text{14}\)

3 The New Partnership for Africa’s Development (NEPAD) and the Pan-African influence

Evidence of the influence of Pan-African ideals in post-colonial relations among African states is to be found in the preamble of the governing document of the now-defunct Organisation of African Unity (OAU) which reflected the aspiration of the African peoples to transcend ethnic and

\(^{10}\) K Nkrumah _Africa must unite_ (1963) xvi.
\(^{11}\) Nkrumah (n 10 above) 222; _See also_ Nkrumah (n 5 above).
\(^{12}\) S Touré ‘A call for revolutionary Pan-Africanism’ quoted in Poe (n 6 above) 54.
national differences and harness and consolidate their human and natural resources for the collective development of the African peoples.\textsuperscript{15} The OAU’s successor, the African Union (AU) endeavoured to uphold the people-centred approach to continental affairs by prioritising the needs of the African peoples.\textsuperscript{16} Indeed the Constitutive Act of the African Union draws its inspiration from the Pan-African aspirations of the OAU’s founders.\textsuperscript{17} Its specific objectives include achieving continental unity, solidarity and development by harmonising and coordinating the collective effort of the African peoples.\textsuperscript{18}

The formation of the AU was deemed by some commentators as an African renaissance and a recommitment by Africa’s emerging leaders to spearhead new home-grown and innovative approaches to the continent’s challenges.\textsuperscript{19} Indeed one of the AU’s flagship programmes towards achieving the above objective is the NEPAD, which was launched in 2001 as a consolidation of a number of previous uncoordinated initiatives.\textsuperscript{20}

Considered by Hope as Africa’s last stand against potential slide into irrelevance,\textsuperscript{21} NEPAD’s agenda is heavily influenced by Pan-African ideologies and is centred around three broad components: African leaders’ commitment to democracy and good governance; identification of preconditions for sustainable development in Africa, priority sectors and development of resource mobilisation strategies; and a follow-up mechanism characterised by an institutional framework. NEPAD’s focus according to Tandon is designed to enable Africa take ownership of its development agenda by renegotiating its terms of engagement with development partners and authoritatively positioning itself globally through a literal renaissance.\textsuperscript{22} Indeed, the NEPAD is considered fundamental to the recovery Africa’s Pan-African drive.\textsuperscript{23}

NEPAD’s agenda undeniably focuses on areas around which Africa’s contemporary challenges revolve. In relation to democracy and good governance, member states are obliged to reflect principles of the rule of law, transparency, participation, accountability, socio-economic

\textsuperscript{18} Constitutive Act of the AU art 3.
\textsuperscript{22} Quoted in Maloka (n 1 above) 4.
\textsuperscript{23} Maloka (n 1 above) 7.
development and human rights in government processes. Governance here entails its traditional political understanding as well as in terms of economic responsiveness and corporate accountability. Proper management of Africa’s resources and adherence to proper standards of accountability in investment are therefore also elevated to the same level of importance as political governance. The aim here is to ensure that all government processes are responsive to and have the people as the central focus. This is an affirmation of the Pan-African ideal that considers the people as the main architects, drivers and beneficiaries of their destiny. Further, it is recognition of the complementarity and indivisibility of good governance and economic and social development.

NEPAD appreciates the fact that democracy and good governance can only thrive in an environment of peace and security and vice versa. Instability and insecurity have been linked to other cross-border social challenges such as transnational crimes, forced migration and the proliferation of arms. All these serve to not only threaten the physical survival and development of the African peoples, but also their harmonious co-existence and cooperation. As discussed in the preceding section, the survival and prosperity of the African peoples is a fundamental objective of the Pan-African movement and any threats to it is therefore a threat to the very ideals of Pan-Africanism. Towards this end, NEPAD advocates a Pan-African approach by demanding a collective response through regional mechanisms for early warning, conflict prevention, conflict resolution and post-conflict reconstruction. In response, the AU has since designed the umbrella African Peace and Security Architecture platform bringing together various continental and regional mechanisms as well as the African civil society.

NEPAD demands a rethink of Africa’s economic policies and partnerships in order to promote efficient use of Africa’s natural and human resources for the development of its peoples. This is in reaction to the unfortunate fact that while Africa is richly endowed with natural and human resources, the continent is still characterised by a low human development index partly due to misuse of resources and imbalanced economic engagement with global partners. In response, NEPAD calls upon Africa to redefine its relationship with global partners, turn the tables on exploitative economic partnerships, set its own terms of engagement and liberate itself from dependence on foreign assistance and imbalanced exploitation. The aim is an Africa setting itself as a major global economic

24  Hope (n 21 above) 390-391.
25  As above, 390-393.
player on its own terms and for the benefit of its peoples without either isolating itself or entrenching its exploitation by other global players.

NEPAD also insists quite strongly on African leadership and ownership of its development agenda in order to holistically address its challenges. This calls for home-grown African solutions derived through a consultative process which places the development agenda in the hands of Africans with their leaders providing the necessary leadership and the vast African human resource providing the intellectual capacity and manpower. This hopes to disabuse the notion of Africa as a recipient of ideas, rather viewing it as peoples and a continent able to innovate and successfully implement its own workable solutions to its problems. Indeed such collective leadership under the NEPAD framework is envisioned in the form of the Heads of State and Government Implementation Committee as well as the Steering Committee. It is a demonstration that Africa can take charge of and responsibility for its destiny in a manner that appreciates the African context while also striving for harmony with the global community of which it is inevitably part.

The responsibility of identifying challenges, formulating and implementing responses is entirely the duty of AU member states which fact makes the framework attractively Pan-African in nature as it advocates for Africa to take the lead in addressing its challenges. Ultimately, the development plans and projects conceived under the NEPAD framework must strive for harmony and synchrony with others not entirely within the framework in order to ensure an integrated and coherent approach to Africa’s development. Harmony and leadership are fundamental to the Pan-African ideal of collective response which also forms the bedrock of NEPAD.

Finally, NEPAD called for the creation of an institutional mechanism of follow-up, which was operationalised in the form of the African Peer Review Mechanism (APRM) initiated in 2002 and launched in 2003. This is a voluntary self-monitoring mechanism aimed at enhancing performance of member states and which has since proven to be the most

---

29 Hope (n 21 above) 397.
30 Chukwumerije (n 19 above) 59.
unambiguous, innovative and arguably successful NEPAD initiative. Thabo Mbeki, one of NEPAD’s chief architects, summarised the objective of APRM as foreseeing problems and either preventing their occurrence or arresting their spread through a multi-pronged non-adversarial regime of self-monitoring designed to encourage governments to improve their governance score and also provide an avenue for citizens and other stakeholders to judge this performance. Indeed, the APRM design provides a forum for stakeholders such as citizens and civil society to engage in monitoring and follow-up of government actions aimed at addressing challenges identified in the self-evaluation. Significantly, APRM also provides a platform for countries to share experiences on their challenges and to learn from each other on workable solutions through a quasi-interventionist process where leaders through the Heads of State and Government Implementation Committee give and receive positive criticism from one another. This is affirmation that all African states ought to be held to the same Pan-African standards. This design is intended to facilitate brainstorming on common issues and promote intra-African learning and innovation for the betterment of the African peoples through constructive dialogue by way of self-criticism, constructive criticism and collective vigilance and responsibility.

4 A Pan-African critique of NEPAD

The formation of NEPAD was indeed met with significant enthusiasm on the continent and beyond. However, like any other inter-governmental initiative, it also faced and continues to face significant criticism. The criticisms include calling into question the ability of NEPAD to deal with any of the ‘unending economic, political, security and cultural crises’ facing this continent such as conflict, inequality and the need for ‘the general upliftment of the people of Africa’, questions central to the achievements of Pan-Africanism. This dim view is supported by a number of separate but interlinked critiques.

33 Baimu (n 31 above).
36 Chukwumerije (n 19 above) 53 quotation from a speech by Chris Stals.
38 Ijeoma (n 14 above) 187.
39 E Neuland & D Venter ‘NEPAD and the African renaissance: Book review’ (2005) 21 Management Today 38; Muchie (n 3 above) 301.
In the first place, some commentators consider the initiative as too foreign-influenced or foreign-oriented. Concerns have been raised that the final product reflects the development ideals of the Bretton Woods foundations, with ‘neo-liberalism, and classical economics’ being the ‘framework that informs the NEPAD’ instead of the ‘more structural continental vision’. One reason for this is the extent to which the Group of Eight most industrialised nations (G8), the United Nations Economic Commission for Africa (UNECA) and the African Development Bank (ADB) were consulted in the process of setting up NEPAD. Secondly, there is a concern that the West has ‘high-jacked’ the APRM process, in that it has made participation in the APRM process a precondition for ‘development assistance, aid, debt reduction or cancellation’ thus impacting on the independence of African states in taking responsibility and deciding freely that they want to participate. This is while the ‘rationale for a peer review mechanism in Africa should be that Africa should move away from donor-imposed conditionalities’. Finally, there is the view that because NEPAD insists on political and economic governance, it is just restating the structural adjustment conditionalities of the IMF and World Bank. To the extent to which this criticism is true, the NEPAD framework is not in line with the Pan-African ideals aimed at eradicating this dependency on external, paternalistic assistance and calls for Africans to ‘take their destiny into their own hands’.

However, some of this critique is based on a misunderstanding of how NEPAD seeks to realise its commitment to African development. While the emphasis of NEPAD is on finding African solutions to Africa’s problems, its success depends on complementary support of all stakeholders, including non-African stakeholders considering that Africa does not exist in a vacuum, but rather as part of an international community. The Pan-African agenda in fact encourages such interaction and partnership between Africa and the rest of the world, emphasising that Africa should set the terms of engagement to be favourable to its peoples instead of subordinating itself to the interests of these partners. This is the approach that NEPAD has taken. However, this vision may to some

41 Maloka (n 1 above) 4; See Ijeoma (n 14 above) 190; see also SKB Asante ‘A partnership of unequal partners’ New African June 2003.
43 Abioye (n 42 above) 200.
44 Abioye (n 42 above) 199.
45 Maloka (n 1 above) 5.
46 Murithi (n 7 above) 1.
extent have gotten lost in the eagerness to gain support from external partners. There is thus a need for Africa to ‘declare its economic independence anew and identify programmes that will bring genuine development to the people who need it the most’.48

A second related critique is that NEPAD lacks a proper grassroots history. This is because ordinary African citizens were not adequately consulted, if at all, in the formulation of the framework and even today many ordinary Africans are not aware of the existence of NEPAD.49 This lack of knowledge potentially impacts on the legitimacy of the NEPAD framework, leading to expounded critique and ‘negativity about the NEPAD strategy’, but more importantly, it impacts on the success or failure of NEPAD’s Pan-Africanist aims.50 Central to Pan-Africanism and the NEPAD framework is the aspiration of universal freedom from oppression. By not consulting with the people and following a laissez-faire approach, the NEPAD framework is largely oblivious to the needs of the poorest on the continent.51 This is in contradiction to an idea at the core of Pan-Africanism, namely that of enduring universal freedom from oppression and equality for all people, leaving those that are most vulnerable at the mercy of market factors and multinational corporations through encouraging foreign direct investments. A second Pan-African aspiration is regional integration. By not catering for the needs of ‘local private and informal sector entrepreneurs’ in the project of regional integration, the African leaders and elite are missing out on the opportunity of increased regional economic integration that their ‘demands for better market opportunities across the region’ would stimulate.52

A third critique is that the NEPAD framework does not draw sufficiently on lessons that can be learnt from the European integration experience and previous African development plans.53 The European Union would not have been able to exist had there not been sufficient national integration and national level participation.54 Thus, ‘national anchoring is crucial for African unity for the simple reason that quite a number of things that Africans wish Pan-Africanism had achieved – democratisation, social equality and development – are quintessentially national projects or premised on the nation-state’.55 With regard to lessons to be learnt from previous African development plans, the Lagos Plan of Action was excellently geared towards addressing poverty, self-reliance,
and continental cooperation, good governance, ending wars and eradicating poverty, but at the time was sidelined in favour of the World Bank’s Berg Report on Accelerated Development in Sub-Saharan Africa which advocated individual state qualification for multilateral loans. The one lesson NEPAD did learn from this is that without international support, African development programmes are set to fail. However, the price Africa paid for this complete reliance on international support may have negative repercussions in terms of the Pan-Africanist ideals.

A fourth critique is the lack of substantial commitment by African leaders to Pan-Africanism and its manifestation in NEPAD. Despite the introduction of the APRM mechanism, NEPAD still only has very weak enforcement mechanisms. There is thus no way to ensure that heads of states are in fact committed to regional integration and without their support, regional integration remains a pipe dream. Thus, while NEPAD in its founding document proclaims to be built on Pan-African ideals and African leaders have an ‘emotional commitment to African Unity’, the lack of fiscal commitment and participation in the APRM by heads of states paint a different picture. It has even been postulated that ‘most of Africa’s problems can be resolved by mobilising the political will to address the internal social and political exclusion, authoritarianism, economic mismanagement and the misappropriation of state resources’. The idea of good governance, although provided for in NEPAD, has not yet taken root in most African countries.

It is clear that, to date, ‘NEPAD has not been able to achieve many of the strategies mapped out for achieving African integration’. It is only through uniting and presenting a common front that Africa can effectively defend its ‘action for progress and development’ when faced with foreign powers. NEPAD ‘seeks genuine partnership between Africa and its external partners based on mutual accountability and responsibility’. As evident above, it is arguable whether NEPAD has succeeded in this or has just managed to make African counties more vulnerable to exploitation through the imposition of laissez-faire economics. NEPAD thus, has to give more attention to the Pan-African ideals that underlies it. For example, there is a need for NEPAD to become the property of all Africans, and not just African leaders. NEPAD and its implementers should reaffirm its commitments to its Pan-Africanist goals of regional integration, empowering Africans to formulate their own solutions and

56 Muchie (n 3 above) 302.
57 Abioye (n 42 above) 193.
58 Olowu (n 40 above) 243.
59 Ijeoma (n 14 above) 185.
60 Murithi (n 7 above) 1.
61 Murithi (n 7 above) 7.
62 Ijeoma (n 14 above) 192.
63 Muchie (n 3 above) 298.
64 Abioye (n 42 above) 194.
addressing the marginalisation of Africans on their own continent. Measures should also be put in place to ensure that foreign interests are not allowed to dominate regional interests. The APRM is central in this regard in that it is ‘meant to provide higher levels of trust amongst African countries’ thereby stimulating regional trade leading to development, as well as ‘common positions for negotiation with other regions’.65

5 Conclusion

As Hope argues, NEPAD signals the resolve of twenty-first century African leaders to lead the African peoples in claiming their rightful place on the global stage.66 As aptly articulated by Thabo Mbeki, it was the hope of NEPAD’s architects that history would judge NEPAD as having delivered a new reality where Africa is defined by peace, prosperity, democracy and development and not by its past experiences with the cruelty of slavery, colonialism, racism, apartheid and neo-colonialism.67

As evidenced by the discussion above, NEPAD’s fifteen year existence has been characterised by chequered results. The framework has its successes. Likewise, it has been wounded a few of times, but it is certainly not dead.68 Consequently, if this ambitious initiative is to be realised, it is incumbent upon African leaders and indeed all Africans to objectively audit NEPAD’s performance since its inauguration by revisiting its Pan-African founding principles. This chapter has argued that NEPAD was founded on sound Pan-African principles, which are as noble today as they were when they were advanced by pioneer Pan-African thinkers. The shortcomings and challenges of NEPAD, some of which have been highlighted above, should not be considered as incurable imperfections, but rather as opportunities for learning. This chapter has argued for a revival of the Pan-African spirit that forms the foundation of NEPAD. This is only possible if Africa takes bold and innovative steps to overcome these challenges through a united collective intra-African approach.69 The revitalisation of Pan-Africanism as advanced by Kwame Nkrumah and his contemporaries is essential for the development of the African continent. The NEPAD framework presents an auspicious opportunity for such

65 Abioye (n 42 above) 197.
66 Hope (n 21 above) 387.
67 T Mbeki ‘New Partnership for Africa’s Development and African Union’ address to the joint session of both houses of the South African parliament on 31 October 2001 quoted in Hope (n 21 above) 388.
68 The statement is an adaptation from the 28 October 2016 address of the Deputy Chairperson of the South Sudan Joint Monitoring and Evaluation Commission Augustino Njoroge to the African Union Peace and Security Council where he stated that ‘The Peace Agreement may be wounded, but it is still alive’ in reference to the August 2015 South Sudan Peace Agreement (see M Birungi ‘JMEC advises AU Peace and Security Council to support efforts to implement peace agreement’ 29 October 2016 https://unmiss.unmissions.org/jmec-advises-au-peace-and-security-council-support-efforts-implement-peace-agreement (accessed 10 November 2016).
69 Muchie (n 3 above) 303.
revitalisation to enable Africa to rediscover the shared aspirations of its peoples and translate these aspirations to actions geared towards Africa’s development.
Abstract

Refugees and their protection are becoming an out-and-out predicament in Africa. This chapter examines the advances in legal protection that would benefit refugees on the continent focusing on the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 Convention) and the activities of the African Commission on Human and Peoples' Rights (African Commission). The OAU (now African Union) adopted the 1969 Convention to address the challenges faced by refugees in Africa. However, several decades later, the legal protection assured to a refugee in Africa is still a far cry from allowing refugees to reach a fulfilling standard of living. The chapter therefore, particularly centres on the lacunae that erode the legal protection afforded to refugees on the continent, from an international and regional refugee law perspective. It argues that African states should strive to comply with the letter and spirit of the 1951 Convention and the 1969 Convention and persist in upholding their conventional generosity and liberal refugee protection systems in order to offer effective protection to refugees in Africa.

1 Introduction

Protecting the rights of refugees has for many years been a major concern for the international community. The African continent in particular has long been engulfed in refugee protection crisis.1 The quandary of refugees in Africa is a relic of a continuing bequest of the conflicts, political turmoil,

---

human rights violations,2 poverty, natural disasters and environmental degradation3 that have inundated the continent and has led to the displacement of millions of people over several decades.4 In response to this, the Organisation of African Unity (now the African Union) adopted the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 Convention)5 to fill the gaps left by the 1951 United Nations (UN) Convention Relating to the Status of Refugees (the 1951 Convention). Africa therefore boasts of one of the most innovative and pragmatic refugee protection regimes in the world. Nonetheless, the 1969 Convention remains largely beyond stern examination.6 Justifiably, attention has been focused on the Convention’s notable legal novelty.7 For almost half a century since its adoption, the discussion has scarcely moved on amid declining standards of refugee protection in Africa.8

The ongoing armed conflicts in South Sudan, the brutal insurgencies in Somalia and northeastern Nigeria as well as the economic and political crises in Central African Republic, Burundi and Zimbabwe coupled with the adverse effects of global climatic change such as drought, reduced food production and famine in some parts of Africa9 have all contributed to the large-scale flow of refugees across Africa. Other contributing factors include socio-economic problems; religious and ethnic tensions; internal conflicts; liberation struggles and civil wars. For decades, refugee-hosting States in Africa have expressed concerns over the economic, social and security implications of receiving large numbers of refugees and its impact

3 See General Assembly Resolution S-19/2, 7, 9, 73, UN Doc A/RES/S-19/2 (19 September 1997).
8 Sharpe (n 6 above).
on their capacity to cope. The pull on resources, social cohesion and infrastructure, which has resulted from the so-called refugee burden has led to a more restrictive definition and application of refugee status, especially by the most stable and advanced economies on the continent. Many asylum seekers and refugees are usually categorised as economic migrants and consequently denied refugee status.

Nevertheless, African states have made significant advances in the progressive development of international refugee law despite often lacking the requisite resources to manage their refugee burden. Due to its Pan-African approach, the African refugee regime gives prominence to the concept of asylum, local integration and the principle of non-refoulement in dealing with the refugee problem on the continent. This chapter takes issue with the uniqueness of the African conception of asylum, local integration and the principle of non-refoulement to explore the developments in the African human rights system regarding the legal protection of refugees. Following the introduction is a discussion on the African refugee crises. Section three examines the advances made in protecting the rights of refugees in Africa emphasising the African Union (AU)’s concepts of asylum, local integration and the principle of non-refoulement. In section four, is an analysis of the manner in which the rights of refugees can be effectively protected, followed by a conclusion.

2 Legal protection for refugees in Africa: Conceptual issues

Shortly after the UN was formed, the international community introduced conventions, declarations and policies to offer adequate protection to refugees. The legal system protecting refugees is typified by the principle of state sovereignty and the exigent doctrine of humanitarian

14 See generally OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, art 2.
15 The Inter-Agency Standing Committee (IASC) argues that protection comprises all relevant activities targeted at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law. See IASC ‘Protection of Internally Displaced Persons: Inter-Agency Standing Committee Policy Paper’ (1999) 4.
considerations derived from international law. Legal protection for refugees can be traced back to the Universal Declaration of Human Rights (Universal Declaration). The critical and continuing refugee problems that confronted Africa in the 1960s such as mass population displacement due to the struggle for independence, drought and famine led the Organisation of African Unity (OAU) to come to the view that the 1951 Convention did not fully meet refugee needs in Africa.

The OAU then adopted the 1969 Convention in 1969 which sought to deal with these problems in an African context. The 1969 Convention has since been an effective regional complement to the 1951 Refugee Convention; it does not seek to rule out the functioning of the 1951 Convention in Africa. To a certain extent, the substantive procedures of protection provided for therein but excluded in the 1969 Convention apply. D’Orsi observes that the 1951 Convention, the 1967 Optional Protocol relating to the Status of Refugees (1967 Protocol) and the 1969 OAU Convention remain the key international human rights instruments for protecting the rights of refugees in Africa. Lomo argues that these instruments guarantee the rights of all refugees to inter alia housing, work, education, access to the courts, and freedom of movement within the territory and be issued identity and travel documents for refugees, to enable them to live decent lives.

States are obliged to protect these rights since they are applicable to all situations. Protection forms part of an integrated approach to fulfilling the basic needs of refugees and in obtaining full respect for the rights of

17 EA Daes *Status of the individual and contemporary international law: Promotion, protection and restoration of human right at national, regional and international levels* (1992) 34.
18 Universal Declaration, arts 7 & 14 (1).
19 28 July 1951, 189 UNTS 137, Can TS 1969 No 6 (entered into force 22 April 1954) [The 1951 Convention].
23 Art 21 of the 1951 Convention.
24 Arts 17, 18 & 19 of the 1951 Convention.
25 Art 22 of the 1951 Convention.
26 Art 16 of the 1951 Convention.
27 Art 26 of the 1951 Convention.
28 Art 27 and 28 of the 1951 Convention.
30 Lomo, as above.
refugees under international human rights law. António Guterres, the former UN High Commissioner for Refugees (UNHCR) emphasises that:

preserving humanitarian space, granting asylum, strengthening legal and institutional frameworks and achieving durable solutions with a holistic perspective of refugees, human rights and humanitarian protection combined underscores the critical importance of international organisations, governments and the civil society.

From the above, it is obvious that protecting the human rights of refugees is a basic obligation of the state parties to the relevant refugee conventions. Jastram and Achiron outline two conditions that states must meet to effectively protect the rights of refugees. First, the state must adopt domestic refugee legislation and policies that comply with international standards to create a basis for improving the conditions of refugees. Second, it must incorporate international human rights laws into domestic legislation specifically in critical areas where the Refugee Conventions are silent. Meeting these criteria would require states to institute an expert body to examine applications in order to guarantee the availability of procedural safeguards at the various levels to speed up the process. The UNHCR Executive Committee therefore encourages states to promote initiatives that offer durable solutions to ensure that local standards conform to the international normative standards for protection that is also responsive to particular regional and national circumstances.

Thus, the rights of refugees can be effectively safeguarded when states comply with international human rights standards and norms. Furthermore, African States that are signatories of relevant UN conventions have an inherent obligation to incorporate international human rights norms, standards, and good practice in their laws in line with the stated objectives of the UN under the UN Charter. There must also be a national body of experts to ensure compliance and speedy processing of refugee status applications to facilitate prompt local integration. Goodwin-Gill argues that ‘protection policies must be derived from the principles, explicit or implicit, in the existing law as developed and interpreted in practice and from the principles of fundamental human

34 As above.
35 As above.
36 UNHCR (n 16 above) 6.
37 UNHCR Executive Committee Conclusion No 81(k), 1997.
38 Art 1 of the 1945 UN Charter.
rights acknowledged by the international community.' 39 This, he contends, has become necessary because ‘it appears that protection had lost ground to the politics of solutions and to the even more uncertain politics of migration.’ 40 In a different study, Goodwin-Gill argues that ‘the conception of the refugee as an unprotected individual should be divorced from the politics of the moment and located in a space where the refugee can be recognised as a person of worth with dignity and basic human rights’. 41 Al Khataibeh and Al-Labady elaborate that the prime goal of refugee law is the protection of the rights of refugees in order to provide them with decent conditions, as well as to create the living conditions that will enable them to find a safe haven in the host country. 42

Writing on the protection of urban refugees in Dar es Salaam in 1999, Sommers identified, profiled and categorised refugees into four different groups:

1. those who have officially registered as refugees and have permission to reside in the cities;
2. those who have officially registered as refugees but lack legal rights to live in the cities;
3. those who have migrated to the cities to seek asylum at the UNHCR office; and lastly
4. those claiming to be refugees but don’t have any institutional recognition or protection. 43

From this, he argues that it is as a matter of preference that many refugees move to the cities because even though refugees are victims they do not aim to remain victimised. Thus, most refugees try to make the best of living during their forced exile instead of waiting passively for several years to be repatriated to their countries of origin. He further emphasises that the often hostile attitudes of most African governments towards refugees makes them susceptible to abuse and argues that their aspirations, rights and socialization or integration should be considered in laws and policies.

A survey conducted by Asylum Access, a refugee rights organisation, revealed that, ‘most refugees in Africa often lack legal status due to the fear of being apprehended and imprisoned’. 44 They also argue that this causes other protection challenges such as refugees being exploited by law enforcement officers as well as inadequate access to support services and durable solutions. For instance, although the 2006 Ugandan Refugees Act affords refugees the choice of self-settlement, the government has required

40 Goodwin-Gill (as above).
the majority of them to go to camps and through other means, has made self-settlement difficult for refugees who opt to reside in the urban centres.\textsuperscript{45} Some government officials in Africa have often adopted what may be termed a \textit{de facto} approach of accepting refugees. Kagan describes \textit{de facto} refugees as those who lack recognition for protection and assistance.\textsuperscript{46} He posits that \textit{de facto} refugee policy permits refugees to reside in the cities but denies them the rights or processes available to recognised refugees.

Pangilinan highlights that the legal and theoretical rationale for the strict measures that most governments adopt to reduce its refugee population include forced repatriation or outright rejection through closure of their borders.\textsuperscript{47} He argues that a government’s willingness to adopt alternatives to encampment demonstrates its openness to accept refugees into their cities, provided they meet set requirements. These eligibility requirements include demonstrable self-sufficiency, a place to live and employment.\textsuperscript{48} He concludes by highlighting a major challenge faced by refugees: that even if they are willing to forego humanitarian protection and assistance, most of them still prefer to be regarded and treated as refugees rather than ordinary migrants, particularly if doing this permits them to undertake status determination and access resettlement or repatriation assistance.

\section{Advances in protecting the rights of refugees in twenty-first century Africa}

Before unpacking the African refugee regime, there is a need to set out the exact nature of protection afforded to refugees under the 1951 Refugee Convention. The unqualified use of the word ‘asylum’ can lead to misapprehensions. There is no right to asylum in international law, which only explicitly provides for refugee status. If asylum means granting of permanent residence in a state, that granting of residence is still subject to the discretion of the host state.\textsuperscript{49} Although states can grant a right of permanent residence to recognised refugees, refugee status is not

\begin{itemize}
\item \textsuperscript{46} M Kagan ‘Legal refugee recognition in the urban South: Formal v. \textit{de facto} refugee status’ (2007) \textit{24 Refuge} 45.
\item \textsuperscript{47} C Pangilinan ‘Implementing a revised refugee policy for urban refugees in Tanzania’ (2012) \textit{2 Oxford Monitor of Forced Migration} 5.
\item \textsuperscript{48} J Bernstein & MC Okello ‘To be or not to be: Urban refugees in Kampala’ (2007) \textit{24 Refuge} 45.
\item \textsuperscript{49} Art 14 of the Universal Declaration of Human Rights, 1948 provide only a right to seek and to enjoy asylum, not a right to asylum. Furthermore, the UDHR is only a General Assembly Resolution and is not automatically legally binding. To be sure, some parts of the UDHR reflect customary international law or have been subsumed within rights in the International Covenant on Civil and Political Rights or International Covenant on Economic, Social and Cultural Rights, but art 14 was not.
\end{itemize}
necessarily permanent.\textsuperscript{50} The 1951 Convention offers refugees the right to \textit{non-refoulement} under article 33; in other words, the right not to be sent back to a state where the refugee’s life or freedom would be threatened. However, if refugee status is accepted to be declaratory rather than constitutive, as is generally recognised,\textsuperscript{51} then preventing a refugee from accessing the status-determination procedures within a state can be the equivalent of \textit{refoulement}. For instance, article 14 of the Universal Declaration of Human Rights, on the right to seek asylum is an indispensable add-on to \textit{non-refoulement}. Additionally, \textit{non-refoulement} is a custom and protects anyone, whose life or freedom would be threatened, not just article 1A(2) refugees who are the beneficiaries of article 33.\textsuperscript{52} Customary \textit{non-refoulement} is drawn from article 3 of the UN’s Convention against Torture.\textsuperscript{53} Returning anyone to a place where they would face torture, inhuman or degrading treatment or punishment would be a breach of a state’s international human rights law obligations.

In 1964, some African countries, including Burundi, Tanzania and Uganda realised that they were beset with the problems associated with hosting refugees and that the international community was not giving satisfactory consideration to the problems faced by both the host countries

\textsuperscript{50} See art 1C of the 1951 Convention, especially sub-para (5) 1C. This Convention shall cease to apply to any person falling under the terms of sec A if: (1) He has voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, he has voluntarily reacquired it; or (3) He has acquired a new nationality, and enjoys the protection of the country of his new nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connection with which he has been recognised as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality.

\textsuperscript{51} See para 28 of the UNHCR. \textit{Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees}, HCR/IP/4/Eng/REV.1, 1979 (re-edited 1992).28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfills the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognised because he is a refugee


and hosted refugees alike.\textsuperscript{54} The OAU Council of Ministers set up the Commission on the Problems of Refugees in Africa.\textsuperscript{55} This Commission visited the above mentioned countries and subsequently wrote an extensive report on the problems faced by refugees they were hosting. After careful consideration of the findings of the Commission, the OAU Council adopted a resolution that implored the African Group at the United Nations, with the assistance of other interested groups, to put forward a resolution to the UN General Assembly entreat ing the UNHCR to boost the assistance it was giving to refugees in Africa. The resolution also ‘invited the Commission to prepare a Draft Convention on all aspects of the problems faced by refugees in Africa’. Moreover, it appealed to the Administrative Secretary-General ‘to circulate the draft Convention to member states of the OAU for their observations and comments’.\textsuperscript{56}

The 1969 OAU Refugee Convention was expected to complement the 1951 UN Refugee Convention and focus principally on governing ‘the specific aspects of refugee problems in Africa’.\textsuperscript{57} Murray posits that\textsuperscript{58} ‘the adoption of the 1969 Convention could be construed to mean that African countries perceived the 1951 Convention as failing to adequately address some contextual refugee problems in Africa. The OAU considered it indispensable to adopt a convention that would address those problems. One such problem was the mass influx of refugees.\textsuperscript{59} It has been argued that the 1951 Convention was not drafted to deal with the problem of a mass influx of people fleeing various forms of persecution as is habitually the case with African refugees, but rather to deal with persons being persecuted by their countries. Mujuzi contends that this elucidates why the UNHCR had to deal with African refugees in the 1960s by relying on its ‘Good Offices’ established under the General Assembly Resolution 1673 (XVI) of 18 December 1961 instead of on the definition of a refugee provided by article 1 of the 1951 Convention.\textsuperscript{60}


\textsuperscript{55} Resolution CM/Res 19(II).

\textsuperscript{56} Resolution CM/Res 36(III) 1964, paras 4-8.

\textsuperscript{57} Resolution CM/Res 88(VII) 1966. It has been observed that ‘[t]he growing refugee problem in Africa led to the emergence of a regional refugee instrument, the ... (OAU) Refugee Convention. This contained a broader refugee definition that took into account the possibility of mass influx and generalised fears of violence. However, Deputy High Commissioner Sadruddin Aga Khan spoke with relief when the OAU decided that African states, though members of the OAU Refugee Convention, still needed to accede to the 1951 Convention. He declared that this demonstrated that the Convention had become “more universally recognised” – implying, of course, that it was not before.’ See SE Davies ‘Redundant or essential? How politics shaped the outcome of the 1967 Protocol’ (2007) 19 International Journal of Refugee Law 703 718.


\textsuperscript{59} Mujuzi (n 54 above).

\textsuperscript{60} As above.
It has been observed that many of the substantive provisions of the 1969 Convention signified a considerable departure from the 1951 Convention. This mirrored the objective of the 1969 Convention as proclaimed by its title to deal with specific aspects of the refugee problem in Africa. Rwelamira postulates that the final text of the 1969 Convention ‘advanced for only the specific aspects of the refugee problems in Africa which were not satisfactorily provided for by the 1951 Convention’. Consequently, many of the provisions in the 1969 Convention are seen as innovative.

The 1969 Convention enjoys a large support base from the 45 African states that have signed and ratified it. Many African countries have also adopted national legislation to domesticate the convention. For example, most of this legislation has incorporated the definition of a refugee provided by the 1969 Convention. This definition has been included in the refugee legislation of various African countries, including Angola, Benin, Burkina Faso, Burundi, Central African Republic, Gabon, Congo Brazzaville, Ghana, Lesotho, Liberia, Malawi, Mozambique, Nigeria, Rwanda, Senegal, Somalia, South Africa, Sudan, Tanzania, Uganda and Zimbabwe. This is an indication of the loyalty of these countries to give cause to the convention and to make certain that they offer effective protection to refugees and asylum seekers within their territories.

The 1969 Convention provides a unique definition of a refugee. The 1951 Convention defines a refugee as someone with a well-founded fear of persecution on the basis of his or her race, religion, nationality, membership of a particular social group, or political opinion. In contrast, 1969 Convention incorporates the same definition but removes the 1 January 1951 date limitation provided in the 1951 Convention that was

62 Eritrea, São Tomé & Principe, the Sahrawi Arab Democratic Republic (SADR), and South Sudan have neither signed nor ratified the 1969 Convention. Morocco is not a party to the convention having withdrawn from the OAU in 1985 after the AU accepted SADR as a member state. Morocco has since rejoined in 2016. Djibouti, Madagascar, Mauritius, Namibia, and Somalia have signed but not ratified the convention.
66 IC Jackson The refugee concept in group situations (1999) 143-176.
67 1951 Convention, art 1A provides: The term “refugee” shall apply to any person who: ... (2) who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or owing to such fear is unwilling to avail himself of the protection of that country or who not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or owing to such fear is unwilling to return to it.
68 1969 Convention, art I(1).
later agreed by most states, through the adoption of the 1967 Protocol,\textsuperscript{69} to no longer be applicable. Article I(2) of the 1969 Convention provides that:

the term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part [or] the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The UNHCR has been using both definitions in its operations in Africa\textsuperscript{70} notwithstanding the comparative easiness in applying article I(2) of the 1969 Convention in the case of mass influxes which is a usual feature of refugee movements in Africa.\textsuperscript{71} Practically, it has been observed that states and the UNHCR regularly rely only on article I(2) to recognise refugees in Africa. Article I(2) of the 1969 Convention unequivocally establishes objective principles which are based on the prevailing conditions in the country of origin to determine refugee status.\textsuperscript{72} Mandal observes that this objective principles ‘entail neither the elements of deliberateness nor discrimination inherent in the definition of the 1951 Convention’.\textsuperscript{73} Furthermore, article I(2) of the 1969 Convention contributed significantly to the drafting and adoption of the 1984 Cartagena Declaration. The Cartagena Declaration recommended the expansion of the traditional definition of a refugee in Latin America to embrace:

persons who have fled their country because their lives, safety or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.\textsuperscript{74}

The Executive Committee of the UNHCR (ExCom) held that the definition of refugee as provided in the 1951 Convention should be widened to include mass displacement and this was done without using the precise phrasing of article I(2) of the 1969 Convention.\textsuperscript{75}

\textsuperscript{71} See Part II.C.
\textsuperscript{75} R Greenfield ‘The OAU and Africa’s refugees’ in Y El-Ayouty & I W Zartman (eds) \textit{The OAU after twenty years} (1984) 224.
It is also trite that the 1969 Convention advanced an individual right to asylum. Asylum is ‘the foremost and most basic of the needs of a refugee and to grant him or her asylum represents the preliminary requirement for him or her to enjoy all the other rights’. However, the 1951 Convention does not create any individual right to asylum. Conversely, the Universal Declaration protects the right of individuals to ‘seek and to enjoy asylum’ but fails to recognise any individual right to asylum under international law. In 1981 however, the African Charter became the first international law instrument to give recognition to the right of persecuted individuals to ‘seek and obtain asylum’. The broad consensus is that the grant of asylum is within the restricted discretion of states since they have no responsibility to do so. Individual refugees have no right to asylum analogous to their right to ‘seek and to enjoy’ provided by the Universal Declaration. While the 1969 Convention mirrors this consensus, it nevertheless appreciably ‘strengthens the institution of asylum’ by providing that:

Member States of the OAU shall use their best endeavours consistent with their respective legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.

This call on states to grant asylum is ‘a further inroad into customary international law which tended to regard the grant of asylum as an exclusive right of the sovereign state,’ but is ‘certainly not a right to be enforced by an individual against a state’. Thus, the 1969 Convention continuously advances but does not enshrine an individual right to asylum. It characterises the grant of asylum as a ‘peaceful and humanitarian act’ that ‘shall not be regarded as an unfriendly act by any Member State’.

The 1969 Convention contributed to the advancement of the principle of non-refoulement especially its role in advancing a modest individual right

---

81 1969 Convention (n 2 above), art II(1). Presumably, ‘well-founded reasons’ must be read as referring to both the art I(1) and art I(2) refugee definitions, despite the fact that only art I(1) explicitly includes a requirement that the reasons for flight be well-founded.
82 Rwelamira (n 61 above) 170.
83 See R Murray Human rights in Africa: From the OAU to the African Union (2004) at 189
84 1969 Convention (n 2 above), art II(2).
to asylum. The position of the 1969 Convention on the principle of non-refoulement as a key characteristic of the concept of asylum is to some extent very significant. The principle of non-refoulement protects a person from being returned to a state where there is an actual likelihood that he or she may face persecution or torture. Several international refugee and human rights instruments have codified this principle or have had it read into them by judicial and quasi-judicial treaty monitoring bodies. It has been argued that the principle of non-refoulement has obtained the status of customary international law. This normative standard as expressed by article 33(1) of the 1951 Convention proscribes states from returning a refugee to a frontier where his or her life faces real risk or he or she faces persecution because of his or her race, religion, nationality, membership of a particular social group, or political opinion. Article 33 however permits a national security exception to this rule.

The provision on non-refoulement in the 1969 Convention borrows heavily from article 3(1) of the UN Declaration on Territorial Asylum. The 1969 OAU Convention provides:

no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in article I, paragraphs 1 and 2.

This provision is more expansive than the provision on non-refoulement in the 1951 Convention in two main respects. Firstly, the provision on non-refoulement in the 1969 Convention does not incorporate a national security exception. Nevertheless, it does not make non-refoulement absolute as has been argued by most scholars. Per articles I(4)(f) and (g), the application of the 1969 Convention and therefore the protection from refoulement ceases when the person concerned engages in a serious crime of non-political nature outside the country of asylum after being admitted as a refugee or seriously violates the objectives and purposes of the convention. The implication of this is that the 1969 Convention, similar to the 1951 Convention, permits expulsion in limited situations despite dealing with

85 1951 Convention (n 10 above), art 33; 1969 Convention (n 2 above), art II(3).
88 See Weis (n 72 above) 457.
89 1969 Convention (n 2 above), art II(3).
the latter rather obliquely. 91 Secondly, the provision of non-refoulement as enshrined in the 1969 Convention is applicable at frontiers while the 1951 Convention lacks such an explicit provision. Consequently, it has been argued that the principle of non-refoulement under the 1969 Convention is wider than the 1951 Convention. 92 The international refugee regime has, however, been aligned to the principle of non-refoulement as enshrined in the 1969 Convention. Goodwin-Gill and McAdam posit that ‘by and large, States in their practice and in their recorded views have recognised that non-refoulement becomes applicable at the moment when an asylum seeker presents himself or herself for entry either within a State or at its border.’ 93 For that reason, the conception of non-refoulement in the 1969 Convention is not necessarily more expansive than that of the 1951 Convention as far as their applicability at frontiers is concerned.

The 1969 Convention also formalised responsibility-sharing, temporary protection and voluntary repatriation which are significant aspects of refugee law. Article II(4) provides that:

> where a Member State finds it difficult in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.

This provision clearly expresses the concept of responsibility-sharing since such ‘appropriate measures’ may include financial support, inter-country resettlement, and political responsibility-sharing. However, Durieux and Hurwitz contend that each possible means of responsibility-sharing has been inhibited in practice because most African states have inadequate resources. 95

4 A step towards refugee rights protection: African Commission on Human and Peoples’ Rights

Another significant contribution of the African human rights system to international refugee law is the rich jurisprudence and activities of the African Commission on Human and Peoples’ Rights (the African Commission). Article 30 of the African Charter sets up the African

---

94 1969 OAU Convention, art II(4).
Chapter 15

Commission and article 45 mandates it to promote and protect the rights and liberties of African peoples on the continent as provided in the African Charter. The African Commission is further sanctioned to interpret human rights treaties and conventions in the African human rights system, which has been ratified by Member States. On this basis, the African Commission is authorised to interpret the 1969 Convention. Nevertheless, it is worth noting that the 1969 Convention was adopted a number of years prior to the adoption of the African Charter. The African Commission is further empowered, under articles 55 and 56, to receive individual communications claiming violations of any of the rights enshrined in the African Charter.

Through the individual communications mechanism, the African Commission has developed a rich jurisprudence on various human rights and fundamental freedoms that are pertinent to the rights of refugees under the African Charter. One such communication in which the African Commission dealt with the rights of refugees is the African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) v Guinea. In this communication, the complainant claimed that on 9 September 2000, the president of Guinea, Lansana Conté publicly declared on national radio that Sierra Leonean refugees residing in Guinea must be detained, investigated and restricted to refugee camps. The communication alleged that this speech impelled security officers, including police and military officials, as well as civilians to discriminate against refugees of Sierra Leonean origin and that this violated article 2 of the African Charter. It further claimed that Guinean security officials forcefully evicted Sierra Leonean refugees from their homes and refugee camps amidst widespread looting and extortion against them due to the same speech. In essence, the complainant claimed that the speech provoked security officials and civilians alike to team up against refugees of Sierra Leonean origin both inside and outside refugee resettlement camps. This led to widespread violence and abuse ranging from rape and physical assaults to shootings, which eventually resulted in ‘countless deaths of refugees through these attacks with others sustaining permanent scars as reminders of their time in Guinea.’

As would have been expected, the complainant did not claim that the government of Guinea had failed to comply with its commitment under the 1969 Convention and or the 1951 Convention. Nevertheless, the

96 Under arts 47 to 54, the African Commission has the mandate to entertain inter-state communications. However, at the time of writing this chapter, the African Commission had only dealt with one inter-state communication, Democratic Republic of Congo v Burundi, Rwanda and Uganda (2004) AHRLR 19 (ACHPR 2004).
African Commission relied on its mandate under article 60 read with article 12(5) of the African Charter to find that Guinea had violated rights enshrined in these international refugee conventions. The African Commission pragmatically contended, in respect of the mass expulsion of the refugees on the grounds of their nationality, that this conduct is not only unlawful and prohibited by the African Charter but also violates the other legal instruments to which Guinea is a State Party. Consequently, the Republic of Guinea was held to be duty bound to protect all persons against discrimination as provided in article 4 of the 1969 Convention, article 26 of the International Covenant on Civil and Political Rights (ICCPR) and article 3 of the 1951 Convention.

Aside from its jurisprudence, the African Commission has passed a range of resolutions calling upon some State Parties to respect the rights of refugees. Examples of such resolutions include one that called on Zaire (now the Democratic Republic of Congo) to respect the rights of refugees in that country during the then conflict and later a similar resolution passed on Sudan. A Memorandum of Understanding has also been signed between the African Commission and the UNHCR at the instance of the Commission with the intention to protect the rights of refugees in Africa. The Memorandum of Understanding includes modalities to guide the implementation of the document that requires both institutions to appoint a focal person for advancing and protecting the rights of refugees in Africa.

At its 34th ordinary session, the African Commission appointed Bahame Tom Mukirya Nyanduga to act as the Focal Person on Refugees and Displaced Persons in Africa, an office that was later upgraded to Special Rapporteur on Refugees, Asylum Seekers and Displaced Persons in Africa. The Special Rapporteur carried out various activities in promoting and protecting the rights of refugees and other forced migrants. For instance, in November 2008, the Special Rapporteur issued a statement condemning the xenophobic attacks that occurred in South Africa in 2008 and suggested a variety of measures that could be adopted by the South Africa government to protect migrant workers. The Special Rapporteur further closely examined the condition of refugees and

103 16th Annual Activity Report of the African Commission Annex IV art I. For the history and details of this memorandum, see Murray (n 3 above) 61–62.
104 16th Annual Activity Report of the African Commission Annex IV art I. For the history and details of this memorandum, see Murray (n 3 above) 61–62. The report of Activities by the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa for the Intersession Period from May to November 2008 (November 2008,
their rights in armed conflict and fragile countries and condemned the violation of refugee rights in those countries.\textsuperscript{105} On the situation of refugee rights in the Democratic Republic of Congo, the Special Rapporteur emphatically expressed disapproval of ‘the calculated attack and emptying of a resettlement camps hosting 50 000 refugees and IDPs in that country’.\textsuperscript{106} This is just a cursory discussion of some of the general activities of the African Commission pertinent to the promotion and protection of refugee rights in Africa.

5 Conclusion

The chapter discussed the advances made in protecting the rights of refugees in the African human rights system. It provided a brief description of the refugee problem in Africa and background to the adoption of the 1969 Convention. It has been illustrated that the 1969 Convention is innovative and addresses the unique challenges faced by refugees and hosting states in Africa. It also observes that the African Commission has put in place various measures to promote and protect refugee rights, ranging from the appointment of the Special Rapporteur to entertaining individual communications. It, however, argues that whereas the African Commission has considered various communications alleging violations of refugee rights, it has leaned more towards relying on the African Charter than the 1969 Convention.

Discussing the legal protection of refugees in Africa would not be complete without underscoring the relevance of finding sustainable solutions to the root causes of refugee production and flows. Conflicts, political crises and natural disasters are the dominant causes of forced displacement in Africa. This requires African states to take vigorous and pragmatic measures to prevent conflicts or to resolve political crises swiftly. Wide-ranging strategies for addressing the root causes of refugee flows should be put in place. This includes dealing with issues such as ethnic strife and conflicts, establishing firm foundations for democratic


\textsuperscript{105} Eg, it is reported that 'Commissioner Bahame Nyanduga reported on the situation of refugees, asylum seekers and IDPs and Migrants in Africa, in particular in countries affected by conflicts, namely, the DRC, Darfur-Sudan, Central African Republic, Chad, Somalia, Northern Uganda and Côte d'Ivoire. He observed that the conflict in these countries impacts negatively on the human rights of these people, in particular women and children.' See 23rd Activity Report of the African Commission para 76. See also 24th Activity Report of the African Commission paras 167–171. He has also monitored the human rights situation in Burundi and the plight of Liberian refugees in Ghana and that of Saharawi refugees in Algeria. See 24th Activity Report of the African Commission paras 164-166.

\textsuperscript{106} Report of Activities (n 102 above) para 9.
governance, respect for human rights and the promotion of shared economic growth and social progress.

The African refugee situation should not be seen as intractable as there are many success stories such as the large-scale repatriations of millions of refugees through the resolution of several conflicts during the cessation of hostilities and signing of peace agreements. Several thousands of refugees have returned home to Angola, Burundi, Liberia, Mozambique, Namibia and Sierra Leone, and South Africa. African states should thus strive to comply with the letter and spirit of the 1951 Convention and 1969 Convention as well as persist in upholding their conventional generosity and liberal refugee protection systems. African governments must boldly defy enticement to whittle down the standards and obligations set out in international refugee protection laws through domestic legislation, policies and practices.
Abstract

The issue of internal displacement has become a significant humanitarian crisis worldwide. As at 2015, 40.8 million people had been internally displaced. Next to the Middle East, Africa hosts the highest population of internally displaced persons. With incidences of on-going conflicts in various parts of the continent, IDP figures are expected to significantly increase. Unlike refugees, the plight of IDPs is heightened by the fact that IDPs remain within the borders of states and do not cross international borders. In response to the normative gap in responding to the needs of these persons, African leaders adopted the Convention for the Protection and Assistance of Internally Displaced Persons. At the heart of the narrative on safeguarding the interest of these persons are two elements, namely, ‘protection’ and ‘assistance’. Though contained in the title and utilised several times in the Kampala Convention, the content of these elements with respect to the different categories of displaced persons is not explicit in the Kampala Convention. This chapter engages this discourse in the context of the African regional human rights system.

1 Introduction

As early as 1963, Kwame Nkrumah echoed the fact that Africa’s common challenges needed to be resolved through the united acts of African states. This rhetoric has significantly cultured the regional response to many challenges including the issue of internal displacement, which has emerged as a pressing human rights challenge in Africa. As of 2017, more than 12 million people had been internally displaced on the continent.1 With rising conflicts and protractions in existing ones, more people are bound to be displaced. However, the internal displacement problem on the continent is not solely a result of conflict.2 Natural disasters particularly the problem of

---

climate change has also been a pertinent displacement challenge on the continent.³

Yearly, it is estimated that 26 million people are displaced by climate-related conditions.⁴ With heavy rainfalls in various parts of Africa and droughts in countries such as Somalia and Ethiopia, the risk of displacement due to climate change has surfaced in recent times with estimates that millions are bound to be displaced.⁵ Moreover, development projects have also become a pertinent root cause of internal displacement on the continent.⁶ Yearly, it is estimated that around 15 million people are displaced globally due to development projects.⁷ In Africa, the wave of development sweeping across several states have resulted in the displacement of millions of people in the last decade. With the pervading ideology that development projects are essential panaceas for economic growth, more people are bound to be displaced.⁸ A pertinent concern which the displacement reality has, in the last decade, raised in the regional sphere of humanitarian action is: How should the plight of those internally displaced be resolved? This question derives from the fact that internally displaced persons remain within the borders of states that are supposed to protect them. As these populations do not cross international borders, they are not refugees and as such do not fall within the thematic protection of the OAU 1969 Convention.⁹

In response to the need to protect persons internally displaced within the borders of a state, African leaders adopted the African Union Convention for the Protection and Assistance of Internally Displaced Persons (Kampala Convention).¹⁰ A central thesis of the Kampala Convention is the ‘protection of’ and ‘assistance to’ IDPs. While these two elements are at the heart of safeguarding the interests of IDPs, the

---

⁴ B Kamel 'Africa: Climate victims – every second, one person is displaced by disaster’ *Inter Press Service* 27 July 2016.
⁶ Adeola (n 2 above).
Kampala Convention does not explicitly define them, hence, the relevance of this discourse. The chapter discusses the development of the regional internal displacement framework in setting the stage on the relevance of the twin elements of protection and assistance. Afterwards, these elements central to safeguarding the interest of IDPs are discussed.

2 Regional norm on internal displacement

With more than half of the world’s 25 million internally displaced persons (IDPs) recorded in Africa in 2003, African leaders realised that there was a need to address the plight of the millions of IDPs on the continent. As individual state mechanisms were inadequate to cope with the situation due, in part, to the normative gaps in the protection of these persons, there were calls for a regional approach to addressing the challenge. While the Great Lakes region adopted a Protocol in 2006 which heavily mirrorst he Guiding Principles on Internal Displacement (Guiding Principles), at the regional level, there was a normative gap that African states resolved to address.

In 2004, the African Union Executive Council (AUEC) requested the African Union Commission (AUC) to develop a framework for the protection and assistance of IDPs. The Division of Humanitarian Affairs, Refugees and Displaced Persons within the Department of Political Affairs commenced the legal drafting of the framework. An Annotated Draft Outline on the Kampala Convention was prepared and presented to the Second African Union Conference on Refugees, Returnees and Internally Displaced Persons (Second AU Ministerial Conference Background Paper, Special Summit on Refugees, Returnees and Displaced Persons in Africa held in Addis Ababa, Ethiopia (5-11 November 2008).

Other reasons for these include the challenge of addressing the root causes of displacement and absence of institutional coordination.


The need for a regional instrument derived from the fact that lasting solutions to the concern required collaborative efforts. As a regional instrument would serve as a platform on which to advance such effort, states resolved to create a binding instrument. For the African Union Executive Council decision see AU Executive Council, fifth ordinary session 25 June - 3 July 2004, Addis Ababa, Ethiopia, Decision on the meeting of experts on the review of OAU/AU treaties, Doc EX/CL/95 (V) para 4(i).

At the meeting, Ministers expressed a collective resolve to address the issue of internal displacement and the refugee crisis on the continent. In June 2006, the AUEC endorsed the outcome of the meeting and requested the AU Commission to commence preparation for the Special Summit of Heads of States and Government on Refugees, Returnees and Internally Displaced Persons as proposed at the Second AU Ministerial Summit. Between 2007 and 2008, progressive draft documents of the Kampala Convention were debated and discussed by legal experts of Member states. During the AUEC meeting in Sharm El-Sheikh in June 2008, the AUEC noted with satisfaction the progress made in the completion of the draft Kampala Convention towards its adoption at a Special Summit of African leaders. In the build-up to the Special Summit, government experts on forced displacement welcomed the draft Kampala Convention and emphasised a commitment to adopt, sign and realise the obligations in the Kampala Convention upon entry into force. In October 2009, the Special Summit was held in Uganda and on 23 October, the Kampala Convention was adopted. Following 15 required ratifications, the Kampala Convention entered into force on 6 December 2012. As a paradigm shift in the global landscape of internal displacement, the Kampala Convention holds high hopes for lasting solutions to the plight of IDPs in Africa. Its emphasis on state obligations and specific requirement for collective action by states validates its normative efficacy as a framework for addressing internal displacement on the continent.

19 Beyani (n 15 above) 195.
21 As above, para 7.
22 African Union Explanatory note (n 18 above).
25 Kampala Convention (n 10 above).
Chapter 16

The Kampala Convention comprises of 23 articles,²⁸ eleven of which sets out state obligations. The first set of obligations is contained in article 3 on ‘general obligations relating to state parties’.²⁹ These obligations include preventing arbitrary displacement and marginalization of a ‘political, social, cultural and economic’ nature that may result in displacement,³⁰ respecting international human rights and humanitarian law principles relevant to the protection of IDPs; ensuring individual criminal responsibility and accountability of non-state actors for arbitrary displacement acts; meeting the needs of IDPs and promoting durable livelihood standards. States are further obligated to adopt laws and strategies on IDPs as well as make funds available for safeguarding IDPs. The second set of obligations relates to safeguards prior to internal displacement situations.³¹ States are required to respect international law, develop early warning mechanisms and cooperate with international actors, civil society organisations and humanitarian agencies. The third set of obligations emphasise the primary duty on states to protect and assist IDPs.³² States are enjoined states to cooperate with one another upon request, organise humanitarian actions, promote humanitarian personnel and ensure compliance by armed groups with the duty to safeguard IDPs in situations of armed conflict. The fourth set of obligations require international organisations and humanitarian groups to carry out their obligations in line with international standards and in conformity with the laws of the states in which operations are conducted.³³ International organisations and humanitarian groups are also mandated to respect the rights of IDPs and operate within the bounds of ‘humanity, neutrality, impartiality and independence’.³⁴

The fifth set of obligation relates to armed conflicts.³⁵ This set of obligation begins with a saving clause that the obligations shall not be construed as legitimising armed groups. While states are mandated to respect international law principles, specific duties that armed groups must ensure are also emphasised. These include – refraining from arbitrarily displacing populations; preventing humanitarian provisions to these persons; forcibly recruiting these persons, attacking humanitarian personnel and violating the civilian character of IDP settlements. The sixth set of obligations relate to the role of the African Union.³⁶ Significantly, the African Union is mandated to support efforts of states in the protection and assistance of IDPs. The right of the African Union to intervene in

²⁸ The Kampala Convention (n 10 above); MT Maru ‘The Kampala Convention and its contribution in filling the protection gap in international law’ (2011) 1 Journal of Internal Displacement 91.
²⁹ Kampala Convention (n 10 above), art 3.
³⁰ Kampala Convention (n 10 above) art 3(1)(a) & (b).
³¹ As above, art 4.
³² As above, art 5.
³³ As above, art 6.
³⁴ As above, art 6(3).
³⁵ As above, art 7.
³⁶ As above, art 8.
situation of ‘grave circumstances’\(^{37}\) is also emphasised as with the right of states to request African Union intervention in the furtherance of peace and security. The seventh set of obligations require states to respect the rights of IDPs and sets out general standards states should take in catering for IDPs during internal displacement.\(^{38}\) In carrying out these set of obligations, states are enjoined to cooperate with international organisations, civil society and humanitarian groups.\(^{39}\) While the eighth set of obligations relate to development-induced displacement,\(^{40}\) the ninth obligation relates to durable solutions.\(^{41}\) States are required to provide conditions for return, integration or relocation.

The tenth set of obligation relates to the provision of effective remedies.\(^{42}\) States are mandated to create ‘effective legal frameworks to provide just and fair compensation and other forms of reparations … for damages incurred’.\(^{43}\) In the establishment of effective frameworks, international standards are emphasised. The eleventh set of obligations requires states to ensure registration and documentation of IDPs.\(^{44}\) States are mandated to establish and maintain a database of IDPs. In this regard, they may cooperate with international organisations and humanitarian groups. States are also mandated to ensure that IDPs get adequate documentations and are to facilitate the issuance of new documentations, which has been lost or destroyed due to displacement.

There are five main objectives of the Kampala Convention outlined in article 2. These objectives are, supporting national and regional mechanisms in addressing internal displacement and proffering lasting solutions; creating a legal structure for avoiding internal displacement and advancing protection and assistance to IDPs on the continent; creating a legal structure for mutual partnership among states in addressing internal displacement; providing for the obligations of states in avoiding internal displacement and advancing protection and assistance to IDPs; providing for the obligations of non-state actors including civil society groups in avoiding internal displacement and advancing the protection and assistance to IDPs.

The Kampala Convention outlines an introductory premise to its essence within the African regional human rights framework. Not only were African leaders conscious about the severity of the issue, they also

\(^{37}\) As above, art 8(1).
\(^{38}\) As above, art 9.
\(^{39}\) As above, art 9(3).
\(^{40}\) As above, art 10.
\(^{41}\) As above, art 11.
\(^{42}\) As above, art 12(1)
\(^{43}\) As above, art 12(2).
\(^{44}\) As above, art 13.
Chapter 16

sought to affirm the obligation to realise human rights including the rights of IDPs. Recalling a plethora of human rights frameworks, African leaders, however, recognised that there was a ‘lack of a binding African and international legal and institutional framework specifically, for the prevention of internal displacement and the protection of and assistance to internally displaced persons’. Motivated by these reasons, African leaders understood the need for a regional framework as a normative essential for combating internal displacement in Africa.

Aside from normative protection, the Kampala Convention provide for institutional directions in addressing internal displacement. It establishes a collective union of state parties, emphasises the role of the African Commission on Human and Peoples’ Rights (African Commission) and the African Peer Review Mechanism and require states to report to these organs on progress made in addressing internal displacement concerns. The Kampala Convention further recognises the right of IDPs to approach the African Commission, the African Court or other relevant institutional mechanism. While states may not be precluded from making reservations to the Kampala Convention, article 22 prohibit states from making or entering into reservations ‘that are incompatible with the object and purpose of’ the Kampala Convention. As at May 2017, 27 states had the ratified with no known reservations.

The next section engages the meaning of the ‘protection of’ and ‘assistance to’ IDPs, which is severally emphasised by the Kampala Convention.

3 ‘Protection’ and ‘assistance’ of internally displaced persons

Central to a contextual understanding of the narrative on the protection and assistance of IDPs is the need to emphasise the distinctive nature of this category of persons. Article 1 of the Kampala Convention defines IDPs as persons ‘forced or obliged to flee or to leave their homes’ and ‘who have not crossed an internationally recognised State border’. While the first element places this category in the forced migration group, the second element distinguishes as a specific sub-set of the group. For refugees, the crossing of internationally recognised borders is a central theme in the

45 As above, para 2& 12 of preamble.
46 As above, para 13 of preamble.
47 As above, art 14.
48 African Union 2017 (n 26 above).
49 Kampala Convention (n 10 above) art 1(k).
narrative on their protection, including the principle of non-refoulement, which forbids states from engaging in a return exercise. For IDPs, the act of remaining within the border of states invokes a different regime of safeguard, which is encased in the protection and assistance narrative.

The duty to protect requires states to take necessary steps in avoiding an infringement of the right not to be arbitrarily displaced. Protecting this right require states to take ‘positive action’. One key action is the establishment of domestic legal regimes on internal displacement. However, laws alone are not sufficient. There must be in place effective institutional arrangements to monitor the implementation of these laws. In 2008, state legal experts on forced displacement emphasised the pertinence of these two steps affirming that states undertake ‘review and, where necessary, amend or strengthen national legislation and adopt national policies and establish explicit institutional frameworks for the treatment of Internally Displaced Persons’. Aside from law and institutions, effective remedies must exist in order for IDPs to have recourse to justice in event of violations. Article 12 of the Kampala Convention lends credence to this requirement in obligating states to establish a compensation regime ‘for damage incurred [by IDPs] as a result of displacement’.

The duty to assist in the field of internal displacement is fairly established. While the Kampala Convention speaks of this obligation in connection with humanitarian assistance, it does not clarify the nature of this obligation nor does it define the concept humanitarian assistance. However, the Kampala Convention gives an indication of what humanitarian assistance entails. In article 9(2)(b) of the Kampala Convention, basic necessities are listed – ‘food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services’. From this list, an evident point is that humanitarian assistance entails vital supplies for an adequate standard of living. The duty to ‘assist’, therefore, envisages the provision of these vital necessities determinable within the context of the displacement.

Two levels of obligations to protect and assist IDPs resonate from the Kampala Convention. The first is the primary obligation of states, while the second relates to the secondary duty of states to act in mutual cooperation to support IDPs.\(^{56}\) Notably, the second level of obligation places a restriction on the strict application of the doctrine of non-interference.\(^{57}\)

In international law, the second level of obligation in the Kampala Convention is justified in view of the global recognition of a collective responsibility on states to protect civilian populations.\(^{58}\) On the basis of this responsibility, interventions have been proposed and upheld. For instance, in Libya, the United Nations Security Council in its Resolution 1973 applied this responsibility in imposing a no-fly zone in 2011 and authorizing member states of the UN ‘to take all necessary measures’ in protecting the Libyan civilian population.\(^{59}\) Over the last decade, there has been a growing political wave of support for collective action by states in protecting humanitarian populations in circumstances where a state is either unwilling or unable to do so.\(^{60}\) It is within this context, that the second level of obligation emphasised in the Kampala Convention is indeed significant.

In line with the Kampala Convention, this second level of obligation may only be triggered in two ways.\(^{61}\) First, upon request of a member state and second, where the African Union utilises its prerogative under the article 4(h) of the Constitutive Act.\(^{62}\) A seeming instance of the application of the first aspect resonates in interventions from Chad and Cameroon to the Boko Haram insurgency.\(^{63}\) While the emphasis of the support from these states relates more to fighting the armed group, the protection of

---

\(^{56}\) The Kampala Convention (n 10 above), art 5(1).

\(^{57}\) As above, art 8.

\(^{58}\) This collective responsibility has been invoked in the context of grave circumstances triggering humanitarian actions and which affects international peace and security. See generally International Commission on Intervention and State Sovereignty *The responsibility to protect* (2001); J Genser & I Cotler (eds) *The responsibility to protect: The promise of stopping mass atrocities in our time* (2012); D Kuwali & F Viljoen (eds) *Africa and the responsibility to protect: Article 4(h) of the African Union Constitutive Act* (2014); AJ Bellamy *The responsibility to protect: A defense* (2015); P Hilpold (eds) *The responsibility to protect (R2P): A new paradigm of international law* (2015) 2-3; S Breau *The responsibility to protect and international law: An emerging paradigm shift* (2016).


\(^{60}\) See World summit outcome, adopted by the UN General Assembly, Resolution 60/1, UN Doc A/RES/60/1 (24 October 2005) Implementing the responsibility to protect, report of the UN Secretary-General, UN Doc A/63/677 (12 January 2009).

\(^{61}\) The Kampala Convention (n 10 above) art 5(2) & 8(1).

\(^{62}\) For a discourse on art 4(h), see also D Kuwali *The responsibility to protect: Implementation of article 4(h) intervention* (2011); D Kuwali & F Viljoen (eds) *By all means necessary: Protecting civilians and preventing mass atrocities in Africa* (2017).

displaced Nigerians has also been part of the interventions.\textsuperscript{64} In recent times, a test of the article 4(h) prerogative of the African Union was with the decision of the Peace and Security Council (PSC) to deploy an African mission to Burundi for the purpose of protecting the civilian population and restoring peace.\textsuperscript{65} In its communiqué, the Peace and Security Council called for the ‘mobilization of necessary assistance to alleviate the suffering of the internally displaced persons and Burundian refugees in neighbouring countries’.\textsuperscript{66} Although the AU Assembly declined to send troops,\textsuperscript{67} the PSC’s decision validates the likelihood of such intervention in safeguarding the rights of IDPs. Such intervention is important if protection and assistance of IDPs will be more than a lofty aspiration in situations where national institutions are unwilling or unable to protect IDPs.

4 Conclusion

The protection and assistance of internally displaced persons are integral principles in safeguarding IDPs. The duty to protect requires states to take positive action, including legal and institutional arrangements necessary for realising the right of IDPs. The duty to assist primarily requires states to provide basic amenities for livelihood sustenance. In realising these duties, there is both a primary obligation on individual states and a collective obligation on state parties to the Kampala Convention.

While time will tell whether this obligation will be met, the creation of the regional framework is a right step. On a practical note, it is essential for states to plan ahead of displacement; provide necessary funds in meeting protection and assistance needs; partner with regional and international organisations in advancing these duties; position staff with adequate skill and competence to effectively respond and put in place measures for measuring and evaluating implementation.

\textsuperscript{64} On 8 June 2016, the governments of Nigeria, Cameroon, Chad and Niger developed an action plan for the protection of IDPs and refugees displaced by the Boko Haram insurgency. Regional Protection Dialogue on the Lake Chad Basin: Abuja Action Statement (2016).

\textsuperscript{65} Communiqué, adopted at the 565th meeting of the AU Peace and Security Council, Addis Ababa, Ethiopia (17 December 2015).

\textsuperscript{66} As above, para 16.

\textsuperscript{67} TY McCormick ‘The Burundi intervention that wasn’t’ Foreign Policy 2 February 2016 http://foreignpolicy.com/2016/02/02/the-burundi-intervention-that-wasnt/ (accessed 29 November 2016).
Abstract

The African Union (AU) celebrated 2016 as the year of human rights with a particular focus on women, amplifying the call to respect, promote, protect and fulfil women’s rights. On this premise, it is timely to assess progress made in implementing the key continental instrument for the promotion and protection of women’s rights in Africa, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (Maputo Protocol). Parties to the Maputo Protocol have adopted measures to realise the women’s rights enshrined in the Protocol geared towards gender equality and women empowerment in their various jurisdictions. It is envisaged that these measures, when implemented, will transform women’s lives and elevate their status, which has been perpetually inferior. However, despite the adoption of the Maputo Protocol, Africa continues to experience negative indicators in women’s rights as the adopted legal and policy measures are hardly implemented. This chapter argues that, legislative and police changes will only have impact in the lived realities of African women if accompanied by competent institutions and budgetary allocation to programmes and services that affect women’s rights.

1 Introduction

The Protocol to the African Charter on Human and Peoples’ Rights relating to the Rights of Women in Africa (Maputo Protocol) was adopted on 11 July 2003 by the Assembly of the AU in Maputo, Mozambique and entered into force on 25 November 2005. It has so far been ratified by 37 States. Among other expectations, it was envisaged to protect women’s rights in all contexts (in peacetime and in armed conflict). It was also envisioned to guarantee gender equality, promote access to justice, ensure non-discrimination based on sex, provide equal rights in marriage, separation and divorce, safeguard the right to education for women and girls, eradicate harmful cultural practices and child marriage, ensure women’s participation in decision-making especially in the public and family spheres, and also protect vulnerable women such as widows, the
elderly women and those with disability.\textsuperscript{1} It mandates State Parties to eliminate discrimination against women through appropriate legislative, institutional and other measures.\textsuperscript{2} The legal authority of the Maputo Protocol emanates from the AU Constitutive Act that contains gender equality as part of its principles.\textsuperscript{3}

The call for intensified promotion and protection of women’s rights saw the 2016 Africa Human Rights Day commemorated under the theme ‘Women Rights – Our Collective Responsibility’ in line with the declaration by the AU that 2016 be designated the \textit{African Year of Human Rights with Particular Focus on the Rights of Women}. This specific focus on women’s rights was in view of the challenges still faced by African women and worsened by the patriarchal nature of African societies. The inadequate support for women’s rights from States Parties associated with lack of political will, inadequate allocation of resources in favour of women’s rights, as well as general reluctance to domesticate regional and international human rights instruments. These, coupled with incapacitated and poorly resourced human rights institutions and the negative attitude towards human rights monitoring bodies are some of the challenges that prevent full implementation of women’s rights treaties in Africa. Although there have been tremendous human rights gains over the years, generally, the women’s rights movement faces hurdles in the endeavour to promote and protect women’s rights.

Nevertheless, regarding the implementation of the Maputo Protocol, there is evidence of determination in creating an enabling environment for gender equality and championing women’s rights through pro-active compliance and implementation efforts by way of legislation, policies, and institutions support implementation. States have adopted legislative, policy and institutional measures to ensure the realisation of women's rights and these measures have had a significant impact in many areas affecting women’s rights as will be elaborated below. However, a lot still needs to be done before African women can celebrate the fruits of this Protocol.

\textsuperscript{1} FJ Mohamed ‘11 years of the Maputo Protocol: Women’s progress and challenges’ (2014) 57 \textit{Development} 71.

\textsuperscript{2} Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa art 2(1).

Chapter 17

2 The Maputo Protocol and women’s rights in Africa: A cursory appraisal

Article 26 of the Maputo Protocol, requires State Parties to ensure implementation of the Protocol at the national level and indicate in their periodic reports all legislative and other measures undertaken for the full realisation of the rights recognised in the Protocol. The record of states reporting to the African Commission on the implementation of the Protocol has not been very encouraging. Only South Africa, Malawi, Namibia, Burkina Faso, Senegal, and Nigeria have reported on progress made under the Protocol, in their State Reports.

Regarding institutional and policy reforms, many countries now have constitutionally mandated institutions such as national human rights institutions and gender commissions to monitor women’s rights. They monitor the adherence to gender equality, investigate cases of gender discrimination and inequality, undertake studies, make recommendations on how to enhance gender equality, advise public and private institutions on gender equality, and recommend prosecution on gender related human rights violations. Countries such as Zimbabwe, South Africa and Kenya have recently established national gender commissions. In Kenya, the National Gender and Equality Commission Act of 2011 gave birth to the National Gender and Equality Commission. The National Gender and Equality Commission is obligated to observe and respect ‘impartiality, gender equality and gender equity, inclusiveness, non-discrimination and protection of the marginalised groups.

Where there are no gender commissions, National Human Rights Institutions have tried to mainstream gender in their mandates. For example, the Malawi Human Rights Commission has provided a platform for the government to fight against domestic violence and the Nigerian National Human Rights Commission has a Gender Desk responsible for women’s rights issues.

Most countries have ministries of ‘women’s affairs’ or ‘gender’ to formulate policy on women’s rights. In Côte d’Ivoire for example, the Equality and Gender Directorate in the Ministry of the Family, Women and Social Affairs is ‘responsible for coordinating government activities in

---

4 Maputo Protocol, art 2.
6 Zimbabwe Gender Commission Act (chapter 10:31).
8 Kenyan National Gender and Equality Commission Act 2011.
the fight against gender discrimination, the adoption of the National Policy on Equal Opportunities, Equity and Gender, promotes the consideration of gender in the public and private sectors'. The country also benefits from the National Equity and Gender Observatory (ONEG) that 'monitors, assess and formulates proposals for the promotion of gender equality in the political, economic and social spheres of life, punishing excision practitioners'. In Kenya, the Monitoring and Evaluation Framework for Gender Mainstreaming plays an influential role in gender policy and enactment of gender related legislation.

In terms of non-discrimination and gender equality, discrimination is a serious challenge that exacerbates the plight of women in Africa. Women and girls suffer various forms of discrimination despite widespread advocacy against it. In some societies the male child is held with high esteem and the girl child largely discriminated against. As a result of this discrimination, girls experience gruesome challenges such as early and forced marriage, female genital mutilation (FGM) and other harmful cultural practices, sex slavery and child sex, as well as other forms of exploitation that compromise their dignity and undermine any efforts made for their personal development. Non-discrimination is an important feature of the Maputo Protocol. State Parties are obligated to combat all forms of discrimination through legislative, institutional and other measures.

In order to deal with this challenge, the non-discrimination clause is now a common characteristic in most constitutions. In Zambia, article 11 of the Constitution guarantees protection against gender discrimination. The Swaziland and Lesotho constitutions also guarantee equality. The new constitutions of Kenya and Zimbabwe have non-discrimination and equality clauses as well. Under the Constitution of Kenya, everyone has the right to live in a society free from discrimination. Article 27 states that ‘every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality includes the full and equal enjoyment of all rights and fundamental freedoms’. Additionally, part 3 of the Bill of Rights in the Kenyan constitution highlights affirmative action requirements with regards to vulnerable sections of society which include women. The Namibian constitution similarly guarantees

12 Côte d'Ivoire State Periodic Report (n 11 above).
13 n 9 above.
14 Maputo Protocol, art 2.
16 Equality Now ‘Maputo Protocol a journey to equality’.
18 As above.
equality and freedom from discrimination based on their sex and other
grounds.\textsuperscript{19}

While African states are embracing gender equality and non-
discrimination, retrogressive discriminatory tendencies are still evident in
some instances. For example, although the Nigerian Constitution (section
42) has an explicit non-discrimination clause that includes discrimination
on the basis of sex, sections 26(2) and 29(4)(b) of the same Constitution
invalidates the non-discrimination guarantee established in section 42.
According to section 26(2), a Nigerian woman cannot transmit nationality
to her non-Nigerian spouse. Another controversial provision is section
29(4)(b), which provides that a woman is assumed to have attained
majority upon marriage. This is not the case for men. This provision
enables and arguably emboldens the practice of child marriage since girls
below the age of 18 are automatically considered adults once they get
married. This makes it almost impossible to prosecute perpetrators of child
marriage, which has many dire consequences for the girl child. Again,
there are some provisions of legislative instruments like the Police Act that
are discriminatory to women. For example, section 121 of the Police
Regulations provides that women police officers shall, as a general rule, be
employed on duties which are concerned with women and children.
Section 126 of the Police Regulations also provides that

\begin{quote}

a married woman police officer who is pregnant may be granted maternity
leave in accordance with the provisions of general order (a federal government
instruction that regulate the condition of public officials) and an unmarried
woman police officer who is pregnant shall be discharged from the force and
can only be re-enlisted with the approval of the Inspector General of Police.\textsuperscript{20}
\end{quote}

This provision clearly discriminates against unmarried women, contrary to
the provisions of the Maputo Protocol.

Most Embassies and High Commissions demand that a woman can
obtain a visa and other documents only when there is proof of her spouse’s
consent while men are not subjected to such requirements.\textsuperscript{21} These are just
a few illustrations of the discrimination that women are subjected to both
in law and practice.

\textsuperscript{19} Namibia State Periodic Report 2011-2014 http://www.achpr.org/files/sessions/58th/
\textsuperscript{20} Nigerian Police Regulations 1968 (No 53) (chapter 359).
\textsuperscript{21} ‘The rights of women’ Blueprint 2 September 2015 http://www.blueprint.ng/the-
rights-of-women/ (accessed 31 October 2016).
Attempts to adopt a Gender and Equal Opportunities Bill that was designed to domesticate the Maputo Protocol and CEDAW was shot down by the Nigerian Senate.\textsuperscript{22} The Bill also intended to eradicate gender discrimination in all areas and advocate for equality in marriage, divorce, widowhood, property ownership, inheritance, and other rights.\textsuperscript{23} Critics rejected the Bill on the basis of its exclusion of the Sharia laws that are recognised in the Constitution.\textsuperscript{24}

For many decades decision-making and public participation, and public positions were either male dominated or entirely exclude women. With the progressive developments such as the adoption of the Maputo Protocol, that obligates State Parties to ‘take specific positive action to promote participative governance and equal participation of women in the political life of their countries through affirmative action and other measures such attitudes have begun to change’. Women have now began to occupy spaces and positions previously male dominated. The introduction of quotas systems has increased women’s participation. Rwanda is a shining example.\textsuperscript{25}

The Kenyan Constitution sets the agenda for gender equality in decision-making by empowering the Parliament to enact laws that promote the representation of women in Parliament.\textsuperscript{26} It established quotas for women in any elected body such as Parliament and Senate.\textsuperscript{27} Each gender should not constitute more than two thirds of any elected body.\textsuperscript{28} This means that in the National Assembly there shall be at least 47 women and 16 in the Senate.\textsuperscript{29} Further, the Political Parties Act 2011 of Kenya provides opportunities for women to enter into politics.\textsuperscript{30} According to this act, membership of a political party must reflect gender balance and this is envisaged to increase the number of women in politics in Kenya.\textsuperscript{31} The Political Parties Act Code of Conduct requires political parties to ‘respect, uphold and promote human dignity, equity, social justice, inclusiveness and non-discrimination and protection of the marginalised and respect, uphold and promote human rights and the rule of law’.\textsuperscript{32} Such a framework creates a conducive environment for women

\begin{itemize}
  \item \textsuperscript{24} n 24 above.
  \item \textsuperscript{25} Mohamed (n 1 above).
  \item \textsuperscript{26} Constitution of Kenya (n 17 above).
  \item \textsuperscript{27} n 9 above.
  \item \textsuperscript{28} Constitution of Kenya (n 17 above).
  \item \textsuperscript{29} As above.
  \item \textsuperscript{30} n 9 above.
  \item \textsuperscript{31} n 9 above.
  \item \textsuperscript{32} n 9 above.
\end{itemize}
to participate in politics. However, this Act has faced a number of challenges in implementation, which still need to be resolved.

In Rwanda, at least thirty per cent of decision-making positions should be occupied by women.\textsuperscript{33} The implementation of such legislative framework has resulted in an increase in women’s representation in influential decision-making positions, especially in the legislature. Senegal has also progressed in this area. Under the Senegalese Parity law of 2010, all political parties and coalitions must have equal numbers of male and female candidates.\textsuperscript{34} Similarly, Burkina Faso has experienced an increase in the participation of women in politics as a result of the legislative measures that were taken. In 2014, there were 20 women, out of 127 seats, in Parliament (15.7 per cent).\textsuperscript{35} In 2009, a law on quotas for legislative and local elections that requires parties to have a minimum of thirty per cent women candidates on their party lists was adopted.\textsuperscript{36} Parties that fail to adhere to the law are subject to a fifty per cent cut in their electoral campaign funding.\textsuperscript{37} Consequently, representation of women at national and local levels of government has steadily increased.

The Malawi Gender Equality Act also introduces quotas in the public service. Section 11 states that

\begin{quote}
Notwithstanding anything contained in the Public Service Act and subject to subsection (2), an appointing or recruiting authority in the public service shall appoint no less than forty per cent and no more than sixty per cent of either sex in any department in the public service.\textsuperscript{38}
\end{quote}

Important milestones in the continent include the appointment of a female Chief Justice of Nigeria,\textsuperscript{39} two consecutive female Chief Justices in Ghana,\textsuperscript{40} a female president in Liberia (Ellen Johnson Sirleaf) and a female president in Malawi (Joyce Banda). Countries such as Rwanda, Senegal, Mozambique, Seychelles, Angola, Tanzania and Uganda have a high number of women in parliament.\textsuperscript{41}

\begin{itemize}
  \item \textsuperscript{33} Equality Now (n 16 above).
  \item \textsuperscript{34} Inter Press Service ‘Breakthrough for women in Senegal’s Lower House’ 2 August 2012 http://www.ipsnews.net/2012/08/breakthrough-for-women-in-senegals-lower-house/ (accessed 30 October 2016).
  \item \textsuperscript{36} As above.
  \item \textsuperscript{37} As above.
  \item \textsuperscript{39} Nigeria State Periodic Report
  \item \textsuperscript{40} Africanews ‘Ghana to have second successive female Chief Justice http://www.africanews.com/2017/05/12/ghana-to-have-second-successive-female-chief-justice/ (accessed 6 June 2017).
\end{itemize}
Traditional leadership positions such as chieftaincy are male dominated because they are regulated by customary law that is largely patriarchal. In South Africa this has been challenged through the courts. In *Bhe v Magistrate, Khayelitsha* the Constitutional Court declared unconstitutional and invalid the African customary rule of male primogeniture which only allows an oldest male descendant or relative to succeed the estate of a deceased man.\(^42\) In Sierra Leone where chieftaincy is also male dominated and regulated by traditional norms and values, the newly adopted Chieftaincy Act encourages women to contest for Paramount Chieftaincy positions.\(^43\) In Zimbabwe more women have been appointed in traditional leadership positions.\(^44\)

Despite these commendable accomplishments, a lot still needs to be done as there exists a contradiction between legislation and reality in some jurisdictions. For example, although the Namibian Constitution contains affirmative action clauses and laws such as the Local Authorities Act, Act No. 6 of 1992, encourages women’s participation in the public sphere, there is still gender imbalance in decision-making positions in the public sphere. Women constitute 27 per cent in Parliament, 12 per cent in the Regional Councils and 42 per cent in the Local Authority Councils.\(^45\) In Gambia, out of 58 parliamentary seats, only six are women.\(^46\)

3 The Maputo Protocol and sexual and reproductive rights in Africa

One of the most contentious themes in the discourse of women’s rights is the area of sexual and reproductive rights. Women in Africa find themselves in unfortunate circumstances where they are ‘policed, investigated and penalised for engaging in sex work, sex outside of marriage, obtaining abortions, HIV exposure and transmission and same-sex intimacy’.\(^47\) Article 14 of the Maputo Protocol guarantees women’s right to health, including sexual and reproductive health. The African Commission on Human and Peoples’ Rights has developed General Comment 2 that articulates the nature and content of sexual and reproductive rights.

---


\(^43\) African Development Bank Group ‘Sierra Leone country gender profile’ 16.

\(^44\) T Chigwata ‘The role of traditional leaders in Zimbabwe: Are they still relevant?’ (2016) 20 Law Democracy and Development 69.

\(^45\) Namibia Periodic Report (n 19 above).


reproductive rights as espoused in article 14 of the Maputo Protocol.\textsuperscript{48} The General Comment provides interpretive guidance on the obligations of State Parties towards promoting the effective implementation of article 14 of the Maputo Protocol.\textsuperscript{49} In reality, indicators in the area of sexual and reproductive rights are still poor and there is slow pace of implementation of the Protocol in this area.

Under article 14(2)(c) of the Protocol, State Parties shall protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and were the continued pregnancy endangers the mental and physical health of the mother or the foetus. Despite the progressive provisions in the Maputo Protocol, accessing safe abortion remains either difficult or not even a possibility in most parts of Africa. Safe and legal abortion is still not viewed as woman's human right. It is significant to mention that 14 countries prohibit abortion under any circumstances even when it is essential to save the life of the mother.\textsuperscript{50} This has increased unsafe abortion procedures. Of the estimated 5.6 million abortions carried out in the region every year, only an estimated 100,000 are performed under safe conditions.\textsuperscript{51} Statistics from the negative consequences on unsafe abortion are appalling. Many women either die (26,000) or suffer from serious health complications (1.7 million).\textsuperscript{52} Nigeria for instance, has a high prevalence of unsafe underground abortions.\textsuperscript{53} About 760,000 illegal and unsafe abortions are estimated to take place in Nigeria every year and out of these abortions, between 3,000 to 34,000 women die.\textsuperscript{54} Unsafe abortion remains a major contributor to maternal morbidity and mortality.\textsuperscript{55}

In Ghana, although the Reproductive Health Policy and Strategic Plan for Abortion Care has resulted in many improvements to women’s access to health services, unsafe abortion continues to be a serious problem.\textsuperscript{56} Abortion is acceptable if it is performed by a doctor, in a health facility in cases of incest, rape, foetal deformity and also in situations where the life

\textsuperscript{48} General Comment 2 on art 14 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.
\textsuperscript{49} General Comment 2 (as above).
\textsuperscript{51} n 51 above.
\textsuperscript{52} n 51 above.
\textsuperscript{55} A Bankole \textit{et al} (n 53 above).
of the mother is in danger.\textsuperscript{57} This legal provision is unknown to most Ghanaians hence the high prevalence of unsafe abortions.

In Zimbabwe, although women can abort in circumstances where they have been raped, the process is cumbersome and most women end up not accessing such services. The case of Mildred Mapingure is an example of how a woman who had been raped failed to procure an abortion due to hindrances in the legal system.\textsuperscript{58} Mapingure was raped in 2006 but failed to get emergency contraception within the prescribed 72 hours to prevent pregnancy because she could not get a police officer to accompany her to the doctor, as required by the law. Upon confirmation of her pregnancy, she failed to terminate the pregnancy because she was only able to get the magisterial certificate when it was too late to terminate. She was erroneously told that the magisterial certificate was a requirement for her to terminate the pregnancy under the Termination of Pregnancy Act.\textsuperscript{59} In its judgment, the Supreme Court ruled that section 5(4) of the Zimbabwean Termination of Pregnancy Act (1978) is incompetently framed and lacks adequate clarity as to what exactly a victim of rape or other unlawful intercourse is required to do when confronted with an unwanted pregnancy, and therefore should be amended.\textsuperscript{60}

Only three countries (Cape Verde, South Africa, and Tunisia) have laws that allow induced abortion for any reason – laws that have had a hugely positive public health impact. In view of the suffering that women go through in illegal and unsafe abortion, there is need to liberalise laws that restrict abortion. The fundamental thing that governments can do is to invest in the provision of safe abortion services. In this way, women’s sexual and reproductive rights will be guaranteed and more importantly lives will be saved.\textsuperscript{61} The benefits of relaxing abortion laws can be seen in the South African experience where abortion-related deaths dropped by 91 per cent from 1994 to 2001, during which period abortion was legalised and made available on request.\textsuperscript{62}

Furthermore, the inadequate budgetary allocation to sexual and reproductive health sectors negatively impacts the realisation of these rights. In its General Comment 2, the African Commission states that

\textsuperscript{57} Aniteye & Mayhew, as above.
\textsuperscript{58} Mapingure v Min of Home Affairs & Others, S-22-14.
\textsuperscript{60} n 60 above.
\textsuperscript{62} S Griffin ‘Literature review on sexual and reproductive health rights: Universal access to services, focussing on East and Southern Africa and South Asia’ https://assets.publishing.service.gov.uk/media/57a08c2940f0b64974001036/LitReview.pdf (accessed 26 November 2017).
pursuant to article 26.2 of the Protocol, paragraph 26 of the Abuja Declaration and paragraph 7 of the Maputo Plan of Action, State parties should allocate adequate financial resources for the strengthening of public health services so that they can provide comprehensive care in family planning/contraception and safe abortion. This includes making specific budget allocations under the health budget at national and local levels, as well as tracking expenditures on these budget lines. Information on health expenditures should be available to facilitate monitoring, control and accountability.63

In addition, there are infrastructural hindrances, because of low budget allocations to health in general and to the reproductive health sector in particular. Existing infrastructures, including facilities and equipment, are unable to cope with the rising sexual and reproductive health demands, especially in remote and rural areas where the majority of the population lives.

This specialised kind of budgeting (gender budgeting) is yet to be embraced by African States except in the area of HIV/AIDS. Security and defence in most countries dominate budget allocations. In 2007, the defence budget in Ethiopia and Eritrea was an estimated 80 per cent of the national budget. With such a budget allocation, areas such as the health sector that provides sexual and reproductive services are neglected.64 While it is true that national governments face competing priorities for resources, absence of financial commitment for sexual and reproductive issues has generally been attributed to lack of political will by governments. Poor funding of this sector leads to weakened health systems with obsolete or no infrastructure to ensure access to reproductive services. Again, in situations where there is increased privatisation of health services, the poor are denied access to services that become unaffordable, which leads to loss of lives or other complications, which could be avoided, leading to for example, and increase in maternal mortality.

The picture is, however, not all bleak as some African states have made modest legislative progress on the issue of sexual and reproductive rights. For example, the Gender Equality Act of Malawi specifically provides for the right to adequate sexual and reproductive health under law covering issues such as access to sexual and reproductive health care services, access to family planning services, protection from sexually transmitted infections, self-protection from STIs, choice of whether and when to have a child, fertility control, and choice of contraceptive method.65 Similarly, in Senegal, the 2005 Law in Relation to Reproductive Health recognises reproductive health as a ‘fundamental and universal right guaranteed to all individuals without discrimination based on age,

63 General Comment No 2 (n 48 above), para 62.
65 Malawi State Periodic Report (n 38 above).
Taking stock of the Maputo Protocol

sex, wealth, religion, race, ethnicity, matrimonial situation or any other situation.

Under this law there is access to contraceptives and other basic services, such as pregnancy and sexually transmitted illnesses testing for those who are 15 years or older and abortion is only available in cases where the life of the mother is in danger.

Despite these few positive measures that have been cited, there is still limited access to sexual and reproductive health services by women and girls such as family planning and safe abortion. Prominent barriers include poverty, gender based violence, poor management of health systems, lack of information and inadequate resources. The notion of sexual and reproductive health rights is also characterised by gross misconception with some labelling it a western construct. In most parts of Africa, sex and sexuality are largely shunned subjects and considered taboo. This attitude comes with unwillingness to discuss issues related to sexual health and stigmatisation of those who do not conform to socially accepted sexual norms and behaviours such as sexual minorities and adolescents who have sex before marriage. As a result, there is blatant opposition for the promotion of sexual rights.

Regarding marriage, article 6 of the Maputo Protocol provides that States Parties shall ensure equality between men and women in marriage and shall enact appropriate legislation to this end. The Protocol provides for women’s rights on issues relating to minimum age of marriage, consent, marriage registration, nationality, retaining a maiden name and property acquisition. Some State Parties to the Maputo Protocol have aligned their laws to the Protocol to improve the status of women in the institution of marriage that has, in some cases, continued to be characterised by unfair relations between men and women largely favouring men. Women who suffer most are those married under customary laws that are based on patriarchal beliefs and attitudes. In Sierra Leone, the Registration of Customary Marriage and Divorce Act protect persons entering into customary marriage from forced marriages. In Kenya, equal rights for men and women are guaranteed during a marriage and at its dissolution and equality between male and female parents and spouses is guaranteed in the acquisition of citizenship through birth and marriage.

67 n 67 above.
68 Griffin (n 64 above).
69 Maputo Protocol, art 6.
71 n 9 above.
Although the minimum age of marriage is still contested, there seems to be acceptance of 18 years as the minimum age as stipulated in the Maputo Protocol. However, the problem of child marriage continues to be prevalent in Africa. In Sub-Saharan Africa, at least 40 per cent of girls marry before their 18th birthday. Some of the highest prevalence rates are in Niger (77 per cent), Central African Republic (60 per cent) and Chad. In some jurisdictions there are contradictions in the legislative framework. For instance, in Eritrea, according to the Logo Chwa Code of Customary Law, girls can marry at 15 while the Eritrean Civil Code stipulates 18 years. In Namibia, while the Marriage Act sets 18 years as the minimum age, in terms of the Combating of Immoral Practices Act, it is an offence for someone to impregnate or marry someone younger than sixteen years old. Further, in Namibia various ethnic groups do not set a minimum age for marriage, as readiness for marriage is generally determined by one’s attainment of puberty, ‘an acceptable level of social maturity’ or family consent. These benchmarks (‘attainment of puberty, family consent and an acceptable level of social maturity’) leave underage girls susceptible to child marriage. In Malawi, under article 22 of the Constitution, a person who is 18 years of age may enter into marriage without parental consent, while persons between 15 and 18 must obtain parental consent before entering into marriage. The Constitution does not explicitly prohibit marriage of children below 15, but provides that the state is obliged merely to ‘discourage’ marriages where either party is under age 15. In Ghana although the legal age of marriage is 18, marriage can take place at 16 with parental consent.

There, however, has been some progress in eradicating child marriage in Africa. Fifteen countries (Burkina Faso, Chad, the Democratic Republic of Congo, Ethiopia, Eritrea, Ghana, Madagascar, Mali, Niger, Sierra Leone, Senegal, Sudan, The Gambia, Uganda, and Zimbabwe) have launched the African Union campaign to end child marriage and its harmful effects. The campaign was launched in 2014.

74 Namibia Periodic Report (n 19 above).
75 As above.
76 Malawi Periodic Report (n 38 above).
Many States have also introduced measures to curb child marriage. In The Gambia, amendment to the Children’s Act of 2016 abolished child marriage.\(^78\) In Tanzania, the High Court ruled that Tanzania’s laws on marriage were unconstitutional and discriminatory as they allow girls to marry at the age of 14.\(^79\) The Court imposed a punishment of thirty years jail term for perpetrators.\(^80\) In Ethiopia, perpetrators of child marriage face a hefty sentence of up to seven years in prison.\(^81\) The new Zimbabwean Constitution sets the minimum age of marriage at 18.\(^82\) One of the major challenges in eradicating child marriage is its acceptance by families and society as a culturally legitimate practice.\(^83\)

In conformity with the provisions of the Maputo Protocol, States Parties are moving towards legislation that encourages tolerance and non-discrimination. Laws tackling either domestic or sexual violence have been enacted or reformed. Liberia passed the Rape Amendment Act and amended the Liberian Penal Code, which expanded the definition of what constitutes ‘rape’, to include

intentionally penetrates the vagina, anus, mouth or any other opening of another person (male or female) with his penis, without the victim’s consent or intentionally penetrates the vagina or anus of another person with a foreign object or with any other part of his body … without the victim’s consent or if the victim is less than 18 years old.\(^84\)

In Liberia again, the Gender and Sexually Based Violence Act provides for the creation of a specialised court to try cases of sexual violence. In the same vein, sexual violence against women is a criminal offence under the Penal Code and Domestic Violence Act in Malawi.\(^85\) The reviewed Penal Code of Malawi came into law in 2010. It has, among other things, extended the definition of sexual activity and revised the age under which a girl may consent to sexual intercourse.\(^86\) The Gender Equality Act of Malawi criminalises sexual harassment which is defined in section 6 as:

A person commits an act of sexual harassment if he or she engages in any form of unwanted verbal, non-verbal or physical conduct of a sexual nature in

\(^78\) Opening Statement by Her Excellency Vice President of the Gambia Madam Isatou Njie Saidy delivered by Hon Mama Fatima Singhateh, Attorney General and Minister of Justice at the 59th Ordinary Session of the African Commission on Human and Peoples’ Rights.


\(^80\) n 80 above.

\(^81\) Human Rights Watch (n 72 above).


\(^83\) Human Rights Watch (n 73 above).

\(^84\) Committee on African Affairs’ ‘Gender-based violence laws in sub-Saharan Africa’ 19.

\(^85\) Malawi Periodic Report (n 38 above).

\(^86\) As above.
circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.\textsuperscript{87}

In Kenya, the Constitution; the Sexual Offences Act; the HIV Prevention and Control Act; the Children’s Act; the Prohibition of Female Genital Mutilation Act; the Counter-Trafficking in Persons Act; the International Crimes Act; the Truth, Justice and Reconciliation Act; the Witness Protection Act; and the Witness Protection Amendment Act are some of the pieces of legislation that have been enacted to respond to violence against women.\textsuperscript{88} As a case in point, under the Sexual Offences Act, a woman cannot be coerced to have sexual intercourse for the purposes of widow cleansing rituals.\textsuperscript{89}

In Namibia, the Combating of Domestic Violence Act, Act No. 4 of 2003, contains an extensive definition of domestic violence to include physical, sexual, economic, verbal, emotional and psychological violence, intimidation and harassment.\textsuperscript{90} It further provides for the issuing of protection orders and police warnings in domestic violence matters. It also has provisions, which gives added protection to complainants that lay criminal charges against their abusers. The Act gives police specific duties in domestic violence incidents, including the duty to help complainants get access to medical treatment and collect their personal belongings.\textsuperscript{91}

Despite the above measures that have been taken by some States, violence against women is still widespread in Africa. Generally, there are no reliable statistics on domestic violence to ascertain the extent of this problem. In Nigeria, there are neither specific laws nor policies prohibiting domestic violence or otherwise protecting victims. On the contrary, section 55 of the Penal Code permits wife beating as a form of chastisement as long as it does not inflict grievous bodily harm.\textsuperscript{92} According to the 2014 Kenya Demographic and Health Survey, 45 per cent of Kenyan women aged between 15 to 49 years have experienced physical violence, with 14 per cent of these having been sexually abused.\textsuperscript{93} The same survey showed that in Kenya there is high prevalence and acceptance of wife beating.\textsuperscript{94} As a result, severe and repeated domestic violence goes unpunished.

As Africa moves towards revolutionising the status of women’s rights, the continued existence of harmful cultural practices is a reality that stakeholders in the women’s rights movement continue to grapple with.
Article 5 of the Maputo Protocol specifically focuses on harmful cultural practices. It states that State Parties shall eliminate all harmful cultural practices that negatively affect women’s rights and contrary to international human rights norms and standards. Practices such as bride kidnapping (ukuthwala), widowhood practices including wife inheritance, sex initiation, mandatory virginity testing and female genital mutilation (FGM) continue to be practised. The perceived sacredness of culture often results in some sensitivity to cultural practices and therefore in the denial of some human rights violations which occur within a cultural milieu.

In Malawi, shocking revelations of a sexual rite of passage were reported recently where young girls were sent to sex initiation camps to have their virginity broken by men known as hyenas. The ritual exposes young girls to sexual and reproductive problems and increases the risk of contracting HIV and other STIs. This is despite the presence of the Gender Equality Act that prohibits harmful practices. A progressive stance was taken in Malawi where the President ordered the arrest of one of these sexual predators and investigation into the practice.

Female Genital Mutilation (FGM) is another cause for concern. Its prevalence varies, ranging from 10 per cent in the Democratic Republic of Congo to 89 per cent in Eritrea. In Nigeria, an estimated 19.9million (27 per cent) of girls and women had undergone FGM in 2013. Article 5 of the Maputo Protocol mandates States Parties to prohibit ‘all forms of FGM’ through enactment of legislative measures and supportive sanctions. There have been campaigns to eradicate this obsolete tradition: for example, the 2003 Afro-Arab Expert Consultation for the Prevention of Female Genital Mutilation, resulted in the adoption of the Cairo Declaration on Legal Tools to Prevent FGM. So far, across the continent, twenty out of twenty-nine countries that traditionally practiced FGM have specific laws against the procedure. For instance, the Burkina Faso Criminal code and the law on the fight against excision

---

95 Maputo Protocol, art 5.
96 ‘The sex initiation camps of Malawi where ten-year-old girls are sent by their families to lose their virginities’ Daily Mail 5 February 2014.
97 Malawi Periodic Report (n 39 above).
100 Maputo Protocol, art 5.
102 Mohamed (n 1 above).
criminalised FGM. Côte d’Ivoire, has since 1998, criminalised FGM. Recently, the Gambia passed a law prohibiting FGM.

Another harmful cultural practice that violates women’s rights is the ‘cleansing’ of widows through rituals. Some of the rituals involve a situation where a widow is forced to have unprotected sexual intercourse with a social outcast such as a person with mental disability for example. This exposes the widow to HIV/AIDS and other STIs.

In some parts of South Africa, bride kidnapping (ukuthwala), a general culturally acceptable practice, which involves the abduction of a woman or girl by the family or friends of the husband-to-be for the purposes of marriage, is still practiced. Recent cases of ‘ukuthwala’ involve intergenerational relationships where young girls get married to older men exposing them to HIV/AIDS, STIs and violating their rights including the right to education. The South African government has been using legislative and other measures to address the issue. A recent court judgment saw a man being sentenced to 22 years in prison.

4 Women’s labour rights

Women’s labour rights have for a long time been a struggle for women in African and many parts of the world. The Maputo Protocol provides that State Parties shall ensure equality in issues to do with employment. Remarkable progress has been made in the area of maternity leave where, in most countries, women are guaranteed paid maternity leave. Such measures are evident in the Sierra Leone case where women are sent on paid leave or leave with social security benefits and guarantees against dismissal for working mothers, irrespective of their marital status, during a reasonable period before and after childbirth. This is equally true of Ghana. The Namibian Labour Act, Act No. 11 of 2007, makes explicit provision for maternity benefits and outlaws discrimination in workplaces on the basis of pregnancy and HIV and AIDS status, and prohibits sexual

103 Burkina Faso Periodic Report (n 35 above).
104 Côte d’Ivoire Periodic Report (n 11 above).
105 n 78 above.
109 Jezile v S and Others (A 127/2014) [2015] ZAWCHC 31; 2015 (2) SACR 452 (WCC); 2016 (2) SA 62 (WCC); [2015] 3 All SA 201 (WCC) (23 March 2015).
111 Sierra Leone State Periodic Report (n 71 above).
112 Sec 57 of the Labour Act 2003 (Act 651).
Taking stock of the Maputo Protocol

harassment.\textsuperscript{113} While such progress is being celebrated, gender based discriminatory trends still exist. A case in point is that of the Nigerian Labour Act that prohibits women from undertaking underground work in mines and working in the night except for nurses and women in management.\textsuperscript{114} Under the same law, women cannot be accompanied by their spouses to their place of deployment whilst men enjoy such privileges to the extent that they can be accompanied by more than one wife.\textsuperscript{115}

5 Conclusion

Although 2016 was declared the year of human rights with special focus on women’s rights, only two thirds (40 out of 55) of the AU Member States have ratified the Maputo Protocol, 14 years after its adoption and very few have domesticated it. It is imperative for the remaining States to ratify the Protocol as it provides the basis upon which reforms on women’s rights can be realised and can enable citizens to hold governments accountable for women’s rights. Ratifying the Maputo Protocol would ‘have a momentous effect on the rights of women on a continent that has historically seen women bear the multiple brunt of poverty, exclusion and experience wars and civil unrests’.\textsuperscript{116}

This chapter has highlighted that there has been notable progress concerning the realisation of women’s rights since the adoption of the Maputo Protocol. While one cannot wholly attribute this progress to the Maputo Protocol it is arguably, untenable to suggest that the Maputo Protocol has had no influence in the many positive changes that have been seen in legislation and policy on women’s rights since 2003. The Maputo Protocol has thus contributed to the improvement of legislative and policy provisions on women’s rights and consequently an improvement on women’s human rights in Africa. While this contribution is noteworthy, it also important to highlight that patriarchy, harmful customary practices and conservative religious beliefs remains some of the major obstacle hindering the successful implementation of gender sensitive reforms.

The chapter also highlights that many states have failed to adopt gender budgeting which require allocation of specific funds towards the realisation of women’s rights. While legislative and policy changes are steps in the right direction, these would only lead to change in the live realities of African women if accompanied by relevant institutional and funding allocations to ensure the effective realisation of women’s rights. Consequently, African governments must in addition to legislative and policy reform, provide the necessary funding and competent institutions to

\textsuperscript{113} Namibia Periodic Report (n 19 above).
\textsuperscript{114} Nigeria Labour Act, secs 56(1) and 55(7).
\textsuperscript{115} Nigeria Labour Act, sec 34(1).
\textsuperscript{116} Mohamed (n 1 above).
implement programmes and services that advance women’s rights. The Maputo Protocol holds great promise for the realisation of women’s rights in Africa if effectively implemented.
Abstract

Some six decades ago, Ghana’s Kwame Nkrumah led the struggle for the ‘total liberation of the African continent’ and echoed the idea of a United States of Africa. He formed the Union of African States in 1958 until the establishment of the Organisation of African Unity (OAU) in 1963 – one apparatus through which Nkrumah hoped to bring his Pan-African dream alive. However, his idea of a continental state mainly focused on Africa’s political liberation; he did not anticipate the magnitude of the unique dynamics that would prevent the continent from attaining that noble objective more than fifty years after. This fallout led to the establishment of the Africa Union (AU), a successor to the OAU in 2000, to surpass the pushbacks of the OAU’s mandate. The AU’s mandate is to fast-track Africa’s political and economic integration. To this end, the AU has developed a fifty year plan – Agenda 2063 – through which it aspires to attain its Pan-African vision of a transnational democratic state by 2063. This chapter therefore analyses the viability of a transnational democratic state in Africa by 2063 and how to avoid the same resentment that befell Nkrumah’s Pan-African agenda. It conceptualises transnational democracy in Africa within the context of Agenda 2063, African instruments (on democracy, elections, governance, human rights, peace and security), and the contemporary challenges confronting African statehood. Finally, it articulates a practicable marshalling and more realistic paradigm for attaining the AU’s lofty aspirations of a transnational democracy by 2063.

If the idea of transnational democracy cannot be so easily dismissed then the prospects for its realization must be addressed.

- Tony McGrew
1 Introduction

In this era of globalisation, state autonomy has lost its sanctity to the tensions between democracy as a territorially delineated concept and economic interdependence.\(^1\) The expanding frontiers of transnational alliances against the previously sacrosanct expression of state sovereignty have significantly placed the administration of democratic governance beyond national control.\(^2\) The emergence of various international actors like political intergovernmental authorities, international financial institutions, multinational corporations and international non-governmental organisations suggests, perhaps, a shaping of a new global order. Schaffer claims that since globalisation has distorted the once established relationship between political authority and socio-economic and cultural borders, ‘we need to build new democratic institutions beyond or above the state.’\(^3\) The idea of ‘transnational democracy’ has, thus, evolved as a relatively new term to describe democratic governance on a regional or global scale and away from the national socio-political sphere.\(^4\)

The concept of transnational democracy captures the phenomenon of democratic governance beyond national borders. It is a nuanced term in global governance lacking definitional precision. Scholastic difficulties abound with pegging democracy to several levels of political communities. When assessed from the prism of contemporary politics or economics, whether from the perspective of globalisation, regionalism, nationalism or neoliberalism, it is almost difficult to conceptualise its ramifications. Yet, its complexities have not paused the curiosity of multilevel governance scholars to attempt to delineate its scope and meaning. Several suggestions have been made. Held, a foremost proponent of the concept, aptly describes transnational democracy as ‘democracy across national, regional and global networks.’\(^5\) Anderson defines the concept as ‘a crossing of borders and a bridging of dichotomies.’\(^6\) To him, it is the interaction

---

1 T McGrew ‘Transnational democracy: Theories and prospects’ 7 http://www.polity.co.uk/global/pdf/GLOBAL%20Democracy.pdf (29 December 2016); Dryzek argues that ‘[t]he theory and practice of democracy have close historical ties to the state.’
4 C Browne ‘Democratic paradigms and the horizons of democratization’ (2006) 6 Contretemps 47.
between state and non-state actors across different territorial levels. Rather than exclude, it includes and transcends ‘the national’. Various forms exist. Held suggests ten models of democracy, the more prominent of which he likens to *cosmopolitan democracy*. He describes this as the complementary development of independent political resources and administrative capacity on a regional and global basis alongside those at the local and national levels. To the cosmopolitans, ‘democracy can no longer stand for a national “community of fate” that autonomously governs itself’. Dryzek, on the contrary, believes that *cosmopolitanism* is global, implying a ‘transcendence of national identities and values’, which does not suitably articulate the idea of transnational democracy.

However, other scholars have questioned the idea that governance can be democratic at the transnational level. Bohman argues that the international sphere is hardly democratic because it is composed of ‘surrogate publics’ administered through ad-hoc consultations and self-appointed civil society organisations. To him, it is a sphere characterised by the phenomenon of ‘agency’, where the unmonitored use of delegated sovereign authority can amplify the antidemocratic tensions within modern states by creating ‘a reversal of control’ between the agent and the governed – a phenomenon that erodes the original idea of democracy. Other thoughts have evolved to proffer clarity on the concept. McGrew suggests other forms of democracy beyond territorial borders – deliberative or discursive democracy, liberal-democratic internationalism, and radical democratic pluralism. McGrew hypothesises these forms of transnational democracy through political theories, that are not necessary to explain here because, they do not sufficiently address the unique elements and contexts that shape Africa’s drive for a transnational democratic state.

The idea of transnational democracy in an African context, as contemplated in this work, transcends the effects of globalisation on the territorial applications of democracy in African states. It envisages a single democratic order for the whole continent whereby member states are administered by one government, like a continental state of sorts, unlike

---

7 As above.
8 Held (n 5 above) 305; Held (n 5 above) 353.
9 As above; also see J Bohman ‘Democratizing the transnational polity: The European Union and the presuppositions of democracy’ in Eriksen (n 5 above) 84 (Bohman describes Held’s *cosmopolitanism* as a ‘well-articulated multilevelled institutional structure.’).
10 EO Eriksen & JE Fossum ‘Reconstituting democracy in Europe’ in Eriksen (n 5 above) 14.
11 Dryzek (n 5 above) 49.
12 Bohman (n 9 above).
14 McGrew (as above).
15 See the respective works of McGrew & Held above.
the European Union (EU) which envisages the dominance of the existing nation-states in its working. The idea presupposes an interconnected and interdependent democratic socio-political order operating beyond national frontiers.\textsuperscript{16} It can, in short, be described as democracy across African nations. It conceives the existence of a ‘hierarchical relationship’ between a democratically constituted supranational political structure and its constituent member states.\textsuperscript{17} Two major sentiments drive the call for Africa’s unification and transformation into a single democratic entity – \textit{Pan-Africanism} and \textit{African renaissance}. In the case of Pan-Africanism, the first rallying ideology was the common history of slavery, colonialism, and racial prejudices of Africans worldwide and, of course, the political, socio-economic and geographical contiguity of African states. These necessitated, as early as the nineteenth century, the call that Africans must unite to protect and actualise their common destiny.\textsuperscript{18} The second sentiment – African renaissance – evolved as a response to the demands for Africa’s revival from years of poverty, disease and conflicts. This new thinking was developed to set Africa on the path of sustainable development and peace in order for Africa to play a more prominent role in world affairs. These sentiments sufficed in justification of a harmonisation of continental governance through the formation of the Organisation of African Unity (OAU) in 1963, and later the African Union (AU) in 2000.

The commemoration of the 50th anniversary of the OAU/AU on 26 May 2013 marked a quantum leap in the AU’s overarching objective of continental unity, and moved it one-step closer towards actualising its long-term Pan-African dream of a transnational democratic African state. In its 50th Anniversary Solemn Declaration, AU member states emphatically reaffirmed their commitment to ‘Africa’s political, social and economic integration agenda’ and ‘[a]ccelerate action on the ultimate establishment of a united and integrated Africa.’\textsuperscript{19} To take their declaration beyond words, they pledged to develop a 50-year continental programme that is people-driven and people-centred. They also promised to articulate the goals and ideals of the Solemn Declaration in their various national development plans;\textsuperscript{20} thereby, reorganising the original idea of the AU in a very profound way – as not a weak regional intergovernmental


\textsuperscript{17} J Hoeksma ‘Concretizing transnational democracy’ 14 August 2015 https://www.peacepalacelibrary.nl/2015/08/concretizing-transnational-democracy/ (29 December 2016).


\textsuperscript{20} As above.
superstructure or loose association of African states, but as the basis for continental or transnational government.\textsuperscript{21} The pledges in the Solemn Declaration thus inspired the spontaneous preparation of the AU’s Agenda 2063 (Agenda) by the AU Commission and its subsequent adoption by the AU Assembly at its 24th Ordinary Session in Addis Ababa, Ethiopia, in January 2015.\textsuperscript{22}

This chapter therefore seeks to carefully evaluate the viability of a transnational democratic state in Africa by 2063: Firstly, by looking at Africa’s gradual gravitation towards continental statehood through the lens of Pan-Africanism, its historical consolidation and culmination in the OAU’s formation; and secondly, by analysing the conditions that supposedly led to the campaign for Africa’s renaissance through a process that is people-driven and people centred. By predetermining the idea of a transnational democratic African state on these two pillars, the chapter will consider Africa’s journey to continental nationhood and proffer ways to avoid the same pushbacks that befell Nkrumah’s Pan-African agenda. It will also conceptualise transnational democracy in Africa within the context of Agenda 2063, African regional standards (on peace and security, democracy, elections, governance, human rights) and the contemporary challenges confronting African states. Finally, it will articulate a practicable marshalling and more realistic paradigm for attaining the AU’s lofty aspirations by 2063.

2 Pan-Africanism and the OAU

Africa’s gravitation towards a transnational democratic state was basically inspired by the ugly history and past experiences of its peoples with slavery, racism and colonialism. The resistance to colonial and racial oppression led early Pan-African political activists in the diaspora and subsequent anti-colonial national liberation struggles in Africa to lay the foundation for a harmonious consciousness among ‘black’ people about the shared challenges that Africans faced.\textsuperscript{23} The struggles against the indignities of slavery, white supremacists’ cruelty towards Africans in Europe and America, colonial domination, and the economic plundering of continental Africa kindled a political movement in the 19th and 20th centuries that placed at its core the goal of promoting the common humanity and destiny of all Africans. These historical ingredients set the stage for the early development of Pan-Africanism and gave momentum to the struggles by African peoples against racial, political and economic subjugation.

\textsuperscript{21} As above.
The political philosophies of prominent Pan-African figures like Edward Wilmot Blyden, Henry Sylvester-Williams, WEB Du Bois, Paul Robeson, George Padmore, Malcolm X, Martin Luther King Jr, and many others, championed the need for Africans to pursue a shared vision and destiny. The bitter vestiges of slavery and the rise in racial discrimination in the 19th century led to the formation of the first African association in the United States (US) in 1897 and the organisation of the first Pan-African meeting, on the initiative of Sylvester-William, in London in 1900. In that meeting, African leaders drew global attention for the first time to the debilitating effects of colonialism and racism on Africans. It was also the first time the term ‘Pan-Africa’ was introduced in the lexicon of international relations and made part of the vocabulary of African political philosophers. Yet, despite the electrifying speeches and high-wired resolutions adopted, nothing much was achieved and no similar convocation was organised for nearly two decades.

Du Bois subsequently revived the Pan-African movement with the support of many continental and diaspora Africans through his establishment of the first Pan-African Congress in Paris in 1919. On top of the agenda was the poignant articulation of the total liberation of Africa and her peoples from racial, political and economic domination anywhere and everywhere. This was closely followed by a series of other Pan-African Congresses held in London and Brussels in 1921, in London and Lisbon in 1923, in New York City in 1927, in Manchester in 1945, in Dar es Salaam in 1974, in Kampala in 1994, and more recently in Accra in 2014. As the activities of the Pan-Africanists blew across the tensely segregated societies of Europe and America as well as the colonial shores of Africa, it birthed a fierce political movement that sowed a seed of civil disobedience and resistance to colonial rule.

The 1945 Manchester Congress marked a decisive moment in the history of the meeting for two reasons. First, it witnessed, for the first time, representation of political parties from Africa and the West Indies. Second, the forum ‘gave way to radical social, political, and economic
demands. Congress participants unequivocally demanded an end to colonialism in Africa and urged colonial subjects to use strikes and boycotts to end the continent’s social, economic, and political exploitation by colonial powers.28 The effect was that the Pan-African philosophy profoundly resonated with the fiery resistance movements in colonial Africa, particularly British and French West Africa that it led to Ghana’s independence and spurred, perhaps too early, the call for Africa’s unification.

Ghana’s independence from Britain on 6 March 1957 marked a significant milestone for Africa in its struggles against the clutches of colonialism. Being the first sub-Saharan African state to gain freedom from colonial rule, Ghana led the way for the total emancipation of the continent and its political unity.29 At the vanguard of Ghana’s Pan-African campaign was father of African nationalism, Dr Kwame Nkrumah, whose exceptionally progressive ideas, staunch grit and undying belief in Pan-Africanism inspired many national liberation movements across Africa against colonial rule.30 During his Independence Day speech, Nkrumah dedicated Ghana to the pursuit of freedom for all African states, echoing that Ghana’s independence was meaningless unless it was linked to Africa’s complete independence from imperial domination.31 Unless Africans presented a united continental front, Nkrumah stressed, Africa was no match for its oppressors whose strength was belied in its disunity.32 Nkrumah predicated his Pan-African political philosophy on the freedom and unification of Africa and its islands as the most potent basis for Africa’s reckoning with the rest of the world.33 He made a case for African peoples to work tirelessly for their complete liberation and unification, and poignantly underscored that Africa’s strength lies in a united policy and action for development.34

Soon after independence, Nkrumah championed the call for the establishment of a continental African state. In furtherance of his idea, he organised the first ever Conference of Independent African States on 15 April 1958 and initiated steps that saw Ghana and Guinea unite as a nucleus for a proposed union of African states in November 1958.35 He passionately followed up this process with extensive discussions with Guinea and Liberia in July 1959 with a view to establishing the

28 Blackpast.org (n 25 above).
31 As above; K Nkrumah Towards colonial freedom (1962) 44-45.
32 K Nkrumah Africa must unite (1963) xi.
33 As above, xvi.
34 As above.
35 Nkrumah (n 31 above) 126-127.
Community of Independent African States. Although the Community did not eventually take off, Nkrumah’s unification plan was subsequently animated by the formation of the Ghana-Guinea-Mali union in April 1961, which was called, the Union of African States (UAS). The UAS was the first concrete attempt to form a transnational African state. With the leaders of other newly independent African countries joining Nkrumah’s bandwagon, several conferences were organised in furtherance of the unification agenda. From these conferences, three blocs of independent African states emerged: the Casablanca group comprising Ghana, Algeria, Egypt, Guinea, Libya, Mali, and Morocco; the Monrovia group composed of Nigeria, Liberia, Ethiopia, Sierra Leone, Congo (Kinshasa), Somalia, Togo, and Tunisia; and the Brazzaville group made up of twelve Francophone African states – Cameroon, Congo-Brazzaville, Côte d’Ivoire, Dahomey (Benin), Gabon, Upper Volta (Burkina Faso), Madagascar, Mauritania, Niger, the Central African Republic, Senegal and Chad.

Whilst the three blocs were essentially Pan-Africanist in their objectives, sheer differences in their approach to Africa’s unification quickly realigned them into two. The Casablanca group, through an incredibly radical approach, favoured the pursuit and vigorous attainment of a politically united federation as a prelude to continental economic integration. This approach, unfortunately, did not get the support of the Monrovia group led by Nigeria and Liberia which had coalesced with the Brazzaville group, and had over 20 independent states as against the Casablanca group’s seven. Nkrumah acknowledged that ‘there were crucial differences of opinion when it came to questions of methods and procedures’. The Monrovia group, apparently, was not prepared to handover their hard-won sovereignty to an overarching political federation to be controlled. The group rather sought a gradualist approach to unification, and accentuated the need for economic cooperation as a stepping stone for common action. They emphasised nationalism over Pan-Africanism, autonomy over amalgamation, respect for territorial integrity, and non-interference in states’ internal affairs.

Many of the gradualist states soon after independence fixated more on the promises of their newly found nationalities than on the Pan-African dream. They were not sufficiently inspired, perhaps, to see through Nkrumah’s lens the possibilities and potential of what a continental government holds for Africa’s future – a formidable and resourceful political superstructure, an integrated economic and socio-cultural space, a common defence arrangement, and a common foreign policy. More so, the weakness of the new African states, which were plain contraptions of

36 Nkrumah (n 33 above) 141.
37 As above, 145.
38 Nkrumah (n 31 above) 249.
39 As above, 250.
several pre-colonial African communities, coupled with the pressure to deliver the dividends of independence promises, saw them become dependent on foreign aid, form blocs along colonial lines, and enter defence pacts with former colonial masters.40 They clung tenaciously to ‘their new-found sovereignty as something more precious than the total well-being of Africa’ and sought alliances with the same European states that came together to balkanise the continent for the benefit of their rapacious neo-colonialist interests.41 This lack of oneness and the conflict in political and economic objectives substantially deflated Nkrumah’s fiery passion to see Africa unite.

Even though Nkrumah’s aggressive diplomatic approach to Africa’s unity was hardly a success, it laid the foundation for the reconciliation of political differences and the establishment of the OAU.42 It also helped forge and kindle the consciousness among African national liberation leaders such as Nnamdi Azikwe, Jomo Kenyatta, Julius Nyerere, Robert Sobukwe, Haile Salessie, Gamal Abd El Nasser, Patrice Lumumba, among others, that a united support for Africa’s total decolonisation was both a moral imperative and a practical necessity, despite their apparent differences.43 To Nkrumah, ‘all African states should henceforth unite so that the welfare and well-being of their peoples can be assured.’44

In the founding Charter of the OAU of 1963, member states resolved to reinforce links between their states by establishing and strengthening common institutions.45 By this resolve, a continental state was envisioned to promote the unity and solidarity of member states. In keeping with this vision, they agreed to coordinate and harmonise their general policies on political and diplomatic cooperation; the economy (including transport and telecommunications); education and culture; health, sanitation and nutrition; science and technology, and defence and security.46

The OAU was incredibly instrumental in promoting Africa’s interests on the global stage. By coordinating and deploying shared political values, African states adopted common African positions and voted as a bloc on international issues affecting Africa and Africans at the United Nations (UN). The OAU presented a veritable platform for freeing the rest of Africa from the shackles of colonial domination, dismantling South Africa’s Apartheid policy, and addressing the refugee crisis at the time. However, as much as its establishment was plausible in many respects, it was not exactly the kind of transnational governance apparatus Nkrumah had

40 As above; n 25 above, 145.
41 Nkrumah (n 33 above) 145.
43 Fleshman (n 30 above).
44 Charter of the OAU 1963 preamble.
45 As above.
46 Charter of the OAU 1963 art 2(1)(a) & (2).
conceptualised. It was simply a stepping stone to the ultimate – an all-
Africa political federation. That it was epoch-making did not stop
Nkrumah from condemning its inadequacies. To Nkrumah, the OAU
Charter was merely ‘a Charter of intent, rather than a Charter of positive
action’ that only provided a basic machinery for the execution of its
declared goals. He was not impressed that it contained no provision for
an operational military arrangement that could give effect to the OAU’s
objectives. He was also not pleased that it emphasised the sovereignty,
territorial integrity and independence of member states over their
interdependence. He said:

There was much talk of the inviolability of ‘sovereignty’, and ‘territorial
integrity and independence’, regardless of the fact that most of our national
frontiers are relics of colonialism, and irrelevant within the context of the
African nation.

The discordant emphasis on the approach to continental integration and
the differences it generated among African states blocked the opportunity
for Africa’s early renaissance and substantially weakened the OAU’s
authority and impact. Despite its objectives to coordinate and harmonise
policies in six thematic areas, it was hardly successful in two. If at all there
was any measure of visible success, it was in political and diplomatic
cooperation and, perhaps, technical cooperation.

The OAU recorded several major setbacks despite its laudable strides.
It could not prevent the failure of democratic governance in many new
African states immediately after their independence, and the ensuing
military coups as well as the gross human rights abuses that occurred in the
60s and 70s. Neither could it manage the wars and armed conflicts that
erupted on multiples fronts and the resulting refugee problems that
followed. The Sudanese Civil War (1955 to 1972), the Burundian
Genocide (1972), the Nigerian Civil War (1967 to 1970), the Libyan-
Egyptian War (1977), the Agacher Strip War between Mali and Burkina
Faso (1974 and 1985), the Ethio-Somali War (1977 to 1978), the Uganda-
Tanzania War (1978 to 1979), the Chadian-Libyan War (1978 to 1987),
the Eritrean War of Independence with Ethiopia (1961 to 1991), the
Rwandan Genocide 1994, are only but a few cases where the OAU had no
visible impact. Its sacred principle of non-interference in the internal
affairs of member states and its lack of a comprehensive security and
conflict prevention policy made it seem like a toothless bulldog. The OAU
also failed to address the prevailing issues of poverty and disease on the
continent.

47 Nkrumah (n 31 above) 249.
48 As above, 250.
49 E Hansen ‘Africa: Perspectives on peace and development’ in E McCandless &
Importantly, however, the incidents described above led to a paradigm shift in the OAU’s approach to the sovereignty and territorial integrity of member states. The OAU adopted a number of important treaties, including the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (Refugee Convention), the Cultural Charter for Africa 1976, the Convention for the Elimination of Mercenarism in Africa 1977, and the African Charter on Human and Peoples’ Rights 1981 (African Charter). These dealt with issues that were previously considered to be sacrosanct and within the exclusive spheres of member states. The Refugee Convention, for example, saw state parties undertake to submit reports and provide information as well as statistical data to appropriate OAU organs on the condition of refugees, the implementation of the Convention, and the legislative measures they have taken regarding refugees. Even at that, it had no monitoring mechanism. Similarly, the African Charter established a Commission before which issues of human rights violations within a state may be reported and allows states to complain about the human rights situation in other states. In 1999, the Democratic Republic of the Congo filed a human rights complaint against Burundi, Rwanda and Uganda alleging that the respondents had committed grave human rights violations in its rebel-held provinces through their respective armed forces.

The OAU, however, had no accomplishment of any kind on the economic front. For nearly three decades, it adopted no economic integration policy of any sort whatsoever. It turned out that none of the gradualist states that seemed favourably disposed to the idea advocated for it any longer soon after the OAU’s establishment. Like Nkrumah had feared, it was all talk and no action, and certainly a major blow to his vision of an African common market. Nkrumah’s idea of an African common market was to remove the competition that existed among African states and, in its place, establish one overarching economic frontier for the benefit of all. He reckoned that if all member states pooled their individual investments into one integrated plan, it would have greater impact on shared development. ‘[T]he total integration of the African economy on a continental scale,’ Nkrumah noted, ‘is the only way in which the African states can achieve anything like the levels of the industrialised countries.’ He proposed that the common market should have a common currency, devoid of the influence of external currency zones. He also stressed that:

53 Nkrumah (n 33 above) 163.
54 As above.
55 As above.
The unity of the countries of Africa is an indispensable precondition for the speediest and fullest development, not only of the totality of the continent but of the individual countries linked together in the union.

Yet, in all this, the major pushback to Nkrumah’s Pan-African agenda was its non-democratisation. Whilst it was presented as people-focused, it was never people-driven. Nkrumah essentially failed to muster the support base of the very African people whose interest he claimed to pursue. The effect was that his idea was disconnected from the people on the ground, and his people resented him for his heavy investment in the Pan-African project while his constituents suffered.

It was only in 1991 that the economic integration agenda of the OAU came to light with the adoption of the Treaty Establishing the African Economic Community 1991 (AEC Treaty) in Abuja, Nigeria. The AEC, a parallel but integral intergovernmental arrangement within the OAU framework, was created to drive the process of economic integration on the continent. With the entry into force of the AEC Treaty in 1994, the OAU became known as the OAU/AEC. Essentially, the Treaty was a realisation of the Lagos Plan of Action for the Economic Development of Africa and the Final Act of Lagos, which were adopted in 1980 in Lagos, Nigeria. By the commitments undertaken, both documents were intended to ‘pave the way for the eventual establishment of an African Common Market leading to an African Economic Community’ by the year 2000. The AEC Treaty succeeded in realising that object. It contains across-the-board provisions that hinge on harmonisation of national policies in the fields of transport and communications, agriculture, trade, money and finance, energy, national resources, human resources, education, culture, and science and technology. In order to achieve the Treaty’s objectives, the AEC plans to adopt and establish, in stages, a common trade policy, a common external tariff and a common market in relation to third-party states, and to gradually remove, among member states, impediments to ‘the free movement of people, goods, services and capital, and the right of residence and establishment.’

By the end of the 20th century, the journey towards a transnational African state was still far from being a foregone conclusion. If anything, it was a longwinded and staggered one, with several footnotes and intrigues along the way. To President John Kufuor, ‘[f]ifty years on, most of these

56 See the AU Constitutive Act art 33(1), where it provides that maybe the OAU Charter ought to remain operative ‘for the purpose of enabling the OAU/AEC to undertake the necessary measures regarding the devolution of its assets and liabilities to the Union.’
57 Lagos Plan of Action 1980 preamble 3(v); also, Final Act of Lagos arts 1 & 2.
58 AEC Treaty art 4(2)(e).
59 AEC Treaty art 4(2)(f)-(i).
Transnational democracy in Africa and the AU’s agenda 2063

337

dreams remain largely unfulfilled."60 Contending interests, nationalism, conflicting economic and political objectives, as well as the inability of the OAU to curb pockets of political instability and conflicts around the continent were some of the challenges that choked and continued to clog the wheels of Africa’s unification. No sooner had African leaders adopted the African Charter for Popular Participation in Development and Transformation (Arusha 1990), did democratic governance and human rights observance descend to an all-time low. The decade between 1990 and 2000 witness a truncation of the re-emergence of democratic rule by military coups d’état in several African countries and recorded a mix of some of the most horrifying civil conflicts in African history as well as positive reconciliatory trajectories.61

Between 1990 and 1994, for example, the tensions between the Hutus and the Tutsis (invented through the Belgian and German Hamitic hypothesis of racial superiority) claimed nearly one million lives in Burundi and Rwanda due to failed diplomacy on the part of the OAU, the UN and more prominently western nations including the US.62 More so, the civil unrests in Angola, Ethiopia, Liberia, Sierra Leone and Sudan witnessed some of the vilest humanitarian crises in African history. Yet, that decade also saw, in the face of impending murderous horrors, the fall of the Apartheid regime, the institution of black democratic rule in South Africa, the emergence of democracy in Nigeria and other states after protracted military dictatorship, and most importantly, the transformation of the OAU/AEC into the AU. It also saw African leaders crave stronger accountability for international crimes like genocide, crimes against humanity and war crimes, and for gross human rights violations. The thirst for accountability propelled African leaders to gladly subscribe to the Rome Statute of the International Criminal Court, push for stronger human rights protection mechanisms through the establishment of an African Court on Human and Peoples’ Rights in 1998, and adopt several pro-democracy declarations.63 The chain reactions in that decade, in other words, were a perplexing paradox. But that was not all there was to it.


3 Africa’s renaissance and the AU

The independence of Namibia in 1990 followed by the fall of the Apartheid regime in South Africa in 1994 – the last two major bastions in the fight against colonialism on the continent – and the reappearance of multiparty democracy across Africa, gave a new stream of hope for Africa’s development and unity. These events spurred excitement not just among Africans but also the rest of the world about Africa’s impending re-awakening from a past ravaged by armed conflicts, dictatorship, and poverty. The fact that these events crystallised just at about the end of the century brandished the dawning twenty-first century as an African century.64 This optimism led to what was subsequently christened the ‘African Renaissance’ – the rebirth or revival of Africa.65 It marked the renewal of the African identity as one which has risen from the ashes of the past and is braced up for the promises of the future. African Renaissance is a belief rather than a phenomenon that Africans, more than anyone else, must be responsible for the decisions and policies that promote peace and prosperity on the continent. It is an Africa-focused and Africa-driven call that requires Africans to proffer home-grown solutions to African problems. ‘Besides being a proposal to harness Africa’s potential,’ Louw asserts, ‘it also is an effort to remove the sources of conflict, restore its self-esteem and turn it into a zone of economic prosperity, peace and stability.’66

The idea of African renaissance was first propagated by Senegal’s Cheikh Anta Diop in his book Towards the African renaissance: Essays in culture and development, 1946-196067 and subsequently endorsed by Nelson Mandela in a speech delivered at the Oxford Centre for Islamic Studies on 11 July 1997 where he stated that the African identity which is the result of Africa’s engagement in world history enables it to contribute to the creation of a new global order ‘through the reconstruction of our countries and the rebirth of our continent.’68 He emphasised that an acknowledgement of our own heritage is essential to the forging of new

65 As above, 4.
66 As above.
identities, as nations and as a continent. The recovery of our history is both a precursor of renewal and is promoted by it.69

Although John Kufuor of Ghana once rightly said that the story of African Renaissance is not a novel one,70 it is widely acknowledged that it was Thabo Mbeki who popularised the idea. Mbeki - more than anyone - activated a new thinking of a prosperous Africa redefined by an African identity, liberated from neo-colonial influence in all its forms, driven by the will and expression of its peoples, and by the unity of purpose of all African states. Not Mbeki's indelible words alone but the vision behind them that electrified the idea of African Renaissance. Beginning from his famous 'I am an African' speech of 8 May 1996 during the adoption of the South African Constitution, Mbeki envisioned Africa's 'rise from the ashes' irrespective of the setbacks and difficulties of the moment.71 In establishing that Africa's renaissance is imperative for Africa's unity, Mbeki said of African states that 'none of our countries is an island which can isolate itself from the rest and that none of us can truly succeed if the rest fail.'72 Yet, it is his rooting of his idea of African Renaissance on not only the involvement of African peoples but also their ownership of it that stands it out from the setback of Nkrumah's Pan-Africanist campaign. Mbeki believed that:

African Renaissance, in all its parts, can only succeed if its aims and objectives are defined by the Africans themselves, if its programmes are designed by ourselves and if we take responsibility for the success or failure of our policies.73

To more properly operationalise his idea, Mbeki presented a roadmap to the OAU which he dubbed the Millennium African Recovery Programme (MAP). MAP was intended to provide 'a coherent, but focussed, strategy and implementation programme to address the problems of Africa.'74 As if this new idea simultaneously engulfed the continent at the same time, a programme similar to MAP was, elsewhere, being passionately articulated by Senegal's Abdoulaye Wade in form of the Omega Plan for Africa (Omega).75 The objective of Omega was to assess the challenges African states were having in their quest to meet up with their developed counterparts and to raise the required funds under the most favourable

---

69 President Nelson Mandela's lecture (n 68 above).
70 n 60 above.
73 As above.
74 n 64 above.
circumstances. Wade thought that the logic of Africa’s early postcolonial experience of development with the developed world was underpinned by credit and aid which only led to more debt: ‘Credit has led to debt deadlock, which, from instalments to re-scheduling still exists and hinders the growth of African countries.’ And so, Wade proposed Omega as a new way of forging progress for Africa through international support in a manner that actually translates to economic development.

As the events immediately preceding the beginning of the new millennium unfolded, the renewed optimism for Africa’s revival specifically targeted the reformation of the OAU/AEC and the economic development of the continent – two essential ingredients for Africa’s movement towards continental statehood. Having realised that the original structures of the OAU did not live up to expectation, its reorganisation was certain. In the Fourth Extraordinary Session of the Assembly of Heads of State and Government in Sirte, Libya, African leaders unanimously adopted the Sirte Declaration on 9 September 1999 in which they recognised that ‘our Continental Organisation needs to be revitalised in order to be able to play a more active role and continue to be relevant to the needs of our peoples and responsive to the demands of the prevailing circumstances.’ It was, thus, decided that an African Union be established in accordance with the ‘ultimate objectives’ of the OAU Charter and the AEC Treaty. It was also decided that the AEC Treaty be implemented earlier than projected, and that there be established for the proposed Union, an African Court of Justice, an African Central Bank, an African Monetary Union, and a Pan-African Parliament. As ‘pillars’ for realising the objectives of the AEC and the Union, regional economic communities (RECs) were to, at the same time, be strengthened and consolidated. The effect of the Sirte Declaration was far-reaching as it proposed a drastic transformation of the OAU from a loose and weak continental organisation to one with a stronger grip on African states.

However, the duplication of initiatives for Africa’s renaissance like MAP and Omega achieved anything but harmony of purpose. The potential for conflict and its prospective impact on Africa’s eagerness to achieve stronger unity and develop would have been catastrophic had it

76 As above.
77 As above, 37.
79 As above, para 8(i).
80 As above, para 8(ii)(a), (b) & (c); Africa Recovery ‘Transforming the Organisation of African Unity into the African Union’ (2001) 15(3) Africa Recovery 22.
not been spontaneously curtailed. To avoid the impending duplicity, African leaders were spurred to seek a fusion of both Mbeki’s MAP and Wade’s Omega Plan into one all-encompassing whole. The result was the birth of the ‘New African Initiative’ on 3 July 2001. The initiative is an integrated and innovative ‘made in Africa’ development agenda that aims at getting African leaders to commit themselves and their countries to a continued effort aimed at poverty eradication and economic development. It was presented to the OAU Assembly and adopted on 11 July 2001 in Lusaka, Zambia. The policy framework of the initiative was subsequently developed and finalised at the first meeting of the Heads of State and Government Implementation Committee (HSIC), and led to the formation of the New Partnership for Africa’s Development (NEPAD) in Abuja, Nigeria, on 23 October 2001. The founding member states of NEPAD were Algeria, Egypt, Nigeria, Senegal and South Africa.

NEPAD is an integrated strategic development plan with political, economic, developmental and security dimensions. In the NEPAD Declaration of 2001, African leaders resolved that Africans will determine their own destiny and invited the rest of the world to complement their efforts. They also called for ‘a new relationship of partnership between Africa and the international community, especially the highly industrialised countries,’ to overcome the development gap between them and Africa. To bring the goals and aspirations of NEPAD into fruition, a secretariat was established in 2001 to coordinate its policies and projects. In a bid to get the buy-in of developed economies to support Africa’s new development initiative, NEPAD’s HSIC met in Rome, Italy in June 2002, and recommended that AU member states adopt its proposed Declaration on Democracy, Political, Economic and Corporate Governance. The essence of the Declaration was to ensure ‘a strong statement of reaffirmation by African leaders of their strong commitment to the principles of good governance.’ In the Declaration, African leaders resolved to establish an African Peer Review Mechanism (APRM) as a separate mechanism to be voluntarily acceded to by AU members for the

84 As above.
87 NEPAD Declaration 2001 paras 7-8.
89 As above.
purpose of self-monitoring, ‘based on mutually agreed codes and standards of democracy, political, economic and corporate governance.’ The aim of the APRM is to ensure that policies and practices of the volunteering states comply with the mutually agreed democratic, political, economic and corporate governance principles enshrined in the Declaration.

4 The AU and the foggy ‘government’ structure

The transformation of the OAU into the AU on 9 July 2000 was significant to Africa’s Pan-African history and overall integration objective. The OAU’s inability to galvanise continental unity beyond the liberation of the African continent from colonialism, by itself, was distressing. It was also helpless in suppressing unconstitutional changes of governments, preventing mass atrocities and gross human rights violations, effectively promoting democracy and good governance in many African states, and charting a feasible course for continental integration. These inexcusable shortcomings gave African leaders even more reasons to rethink the conditions for its continued relevance in meeting their ultimate aspirations. The emergence of Africa’s Renaissance and the establishment of the pacesetting NEPAD required that the OAU needed to shed off its old skin and put on new toga of authority in terms of its ability to set and enforce its own standards and policies. A new continental vehicle or, at least, a refurbished one was needed.

The demands of change led inevitably to the transition to the AU. Four important summits led to the operationalisation of the AU: The Sirte Extraordinary Summit in Sirte, Libya which called for the establishment of the AU in its declaration of 9 September 1999 (famously known as 9.9 99); the Lomé Summit in Lomé, Togo which saw the adoption of the Constitutive Act on 11 July 2000; the Lusaka Summit in Lusaka, Zambia from 9 to 11 July 2001, which drew the roadmap for the AU’s implementation; and the Durban Summit in Durban, South Africa, which saw the AU’s official commencement and its first Assembly of Heads of State and Government in July 2002.

The AU Constitutive Act, unlike the OAU Charter, adopts a more integrative approach to continental governance and appropriates to the regional body tougher powers than its predecessor. The Act incorporates

90 Declaration of Democracy, Political, Economic and Corporate Governance 2002 para28; n 78 above, 5.
92 Constitutive Act 2000, art 3(a).
the objectives of the defunct OAU and complements those of the AEC. By its tenor, the AU is empowered to take more decisive steps where the need arises. For instance, it can intervene in a member state by a decision of the Assembly under grave circumstances of war, crimes against humanity or genocide, or it can be requested to intervene by a member state in distress ‘in order to restore peace and security’.95 The AU can also condemn and reject unconstitutional changes of governments.96 The Act empowers the Assembly to impose sanctions of a political and economic nature on member states that fail to comply with AU decisions and policies or default in the payment of their contributions to the Union,97 and allows the Union to suspend governments that come to power by unconstitutional means.98 It also empowers the AU Assembly to issue directives on the restoration of peace, and management of wars, conflicts, and emergency situations on the continent. Importantly, it makes provisions for the participation of African peoples in the affairs of the Union through the establishment of the Pan-African Parliament (PAP), a brainchild of the AEC. The purpose of PAP is to facilitate the effective implementation of ‘objectives and policies aimed at integrating the African continent within the framework of the African Union.’99

The tone of the AU’s tough powers has enabled member states fall in line with its principles, and created a conducive environment for Africa’s democratisation to thrive. In addition to deploying peace support missions to Somalia, Darfur, Central African Republic, Mali, Comoros, Sudan, and Burundi,100 the AU has suspended and imposed sanctions on Burkina Faso (2015), Burundi (2015), Mali (2012), Madagascar (2010), Guinea (2009), Niger (2009), Mauritania (2008) and Togo (2005) due to the unconstitutional changes of government or continuing undemocratic regimes in those countries.101 The AU reaffirmed its lethargy for unconstitutional changes of governments with the adoption of the African Charter on Democracy, Elections and Governance 2007 (ACDEG). One of the objectives of ACDEG is to nurture, support and entrench good governance in order to establish conditions for ‘citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs.’102 The AU has also consolidated on its continent-wide democratisation process by adopting

95 Constitutive Act, art 4(h) & (j).
96 Constitutive Act, Art 4(p).
97 Constitutive Act, art 23; ACDEG, art 23.
98 Constitutive Act, art 30; ACDEG, art 23.
102 ACDEG, art 2(6) & (10).
norms that combat terrorism and corruption, promote collective action on
defence and aggression, promote cultural cooperation that strengthens
African unity, ensure women and youth participation in decision-making
processes up to continental levels of governance, and protect the rights of
internally displaced persons.  

Additionally, the PAP in Midrand, South Africa, has also greatly
enhanced the AU’s continental governance democratic structure by
preparing it for its future role as the continent’s main parliamentary
institution. Currently, PAP functions to ensure the participation of all the
peoples of Africa in the economic integration and development of the
continent. Its ultimate objective is ‘to evolve into an institution with full
legislative powers, whose members are elected by universal adult
suffrage.’  Member states have an equal number of five parliamentarians, which must reflect the diversity of the public opinions in
each national parliament, and at least one of whom must be a woman. Importantly, the AU democratisation process in the journey towards
continental government incorporates gender mainstreaming and balance in all its affairs. It does so not only at the PAP level but in virtually all its
organs and institutions. In furtherance of this gender mainstreaming
objective, the AU adopted a Gender Policy in 2009 that seeks to ‘eliminate
barriers to gender equality in the continent.’ All these taken together
with the Agenda 2063 vision make up an integrated whole in its march
toward statehood.

It is suggested that if existing AU organs including the former OAU
institutions absolved by the AU are anything to go by, then it may well
be that there already exists a continental governance structure in the
works. Presently, the AU boasts a weak three-arm government structure.
There is an executive hierarchy comprising the Assembly (which also plays
a pseudo-legislative role), the Executive Council, the Peace and Security
Council, the Permanent Representative Committee (PRC) and the
Specialised Technical Committees (STC). For its legislature, there exists
PAP responsible for effectively implementing the objectives and policies of
the AU. For the judiciary, there is the African Court of Justice. Whilst it is

---

105 PAP Protocol, art 4.
107 See the organs established under the Constitutive Act, the AEC Treaty (including their respective supplementary protocols – Protocol on Amendments to the Constitutive Act of the African Union 2003; Protocol relating to the Establishment of the Peace and Security Council of the African Union 2002 and the PAP Protocol).
not yet operational because the Court’s enabling Statute has not attained the necessary number of ratifications, it is noteworthy that before the adoption of the Constitutive Act, there was already established an African Court on Human and Peoples’ Rights, and it remains the only active regional court on the continent. There is an attempt to fuse this Court with the Court of Justice, and a more recent attempt to add an international criminal law section to the merged court. If this happens, there will be one African Court with three sections – a general section for community law matters, a human and peoples’ rights section, and an international criminal law section (which will have three chambers – a Pre-Trial Chamber, a Trial Chamber and an Appellate Chamber).108

In terms of administration and policy formulation, the AU has an established civil service structure in the AU Commission (AUC) with functional departments headed by commissioners with specific portfolios such as peace and security, political affairs, social affairs, economic affairs, trade and investment, infrastructure and energy, human resource, science and technology, and rural economy and agriculture. Importantly, the AUC is headed by a Chairperson (formerly called the Secretary-General), an office that is, in many respects, modelled after that of a presidency or prime minister of a state. The office has a chief of staff, a chief adviser, special advisers and advisers. The chief of staff commandeers the Bureau of the Chairperson, which comprises offices,109 directorates,110 units,111 committees112 and divisions.113 In the AUC departments, are divisions and units (and sometimes, clusters), which are each composed of an internal hierarchy.

The AUC also has specialised bodies created to carry out mandates in relation to specific issues on the continent. They include human rights bodies like the African Commission on Human and Peoples’ Rights and the African Committee of Experts on the Rights and Welfare of the Child;114 legal organs like the AU Advisory Board on Corruption and the AU Commission on International Law;115 and financial institutions like the African Central Bank, the African Monetary Fund, and the African Investment Bank. All these institutions make up the continental

109 Office of the Secretary-General to the Commission; Office of the Legal Counsel; and Office of Internal Audit.
110 Directorate of Women, Gender and Development; Directorate of Strategic Planning, Policy, Monitoring, Evaluation and Resource Mobilisation; Citizens and Diaspora Directorate; and Directorate of Information and Communication.
111 New Partnership for Africa’s Development (NEPAD) Coordination Unit.
112 Intelligence and Security Committee.
113 Protocol Services Division; and Partnership Management and Coordination Division.
114 African Charter.
governance superstructure and cumulatively paint a foggy picture of an African regional government in the making.

5 Agenda 2063: From something abstract to something concrete

In the drive towards continental statehood, a clear vision and roadmap are essential if the ultimate objective of full integration must be realised. Agenda 2063 presents a long-term idea and detailed action plan for steering the AU’s Pan-African vision of ‘an integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in the international arena.’\(^{116}\) By this ambitious Agenda, the AU hopes to politically integrate all 55 states on the African continent.\(^{117}\) The five-decade plan highlights and promises an important milestone in what past Pan-African political philosophers and independence national liberation leaders envisioned as the total liberation, unification and development of Africa and her peoples. It is timely and apt, and probably the ‘golden talisman’ that Africans have long awaited to chart a realistic course for the amalgamation of Africa and all its islands as one indivisible political and socio-economic entity.

In its introductory paragraphs, the Agenda echoes ‘the Pan-African call that Africa must unite in order to realise its renaissance’\(^{118}\) – a call that marked the life and time of Nkrumah. As already stated above, Nkrumah imagined quite early, as far back as 1957, that the best safeguard for Africa’s freedom and collective prosperity was a political union of African states.\(^{119}\) Like Nkrumah, the Agenda declares that by 2063 ‘Africa shall be an integrated, united, peaceful, sovereign, independent, confident and self-reliant continent.’\(^{120}\) The Agenda is based on seven key aspirations:

(a) a prosperous Africa based on inclusive growth and sustainable development; (b) an integrated continent, politically united and based on the ideals of Pan-Africanism and the vision of Africa’s Renaissance; (c) an Africa of good governance, democracy, respect for human rights, justice and the rule of law; (d) a peaceful and secure Africa; (e) an Africa with a strong cultural identity, common heritage, values and ethics; (f) an Africa where development is people-driven, unleashing the potential of its women and youth; and (g) Africa as a strong, united and influential global player and partner.


\(^{117}\) Morocco returned to the AU in January 2017 after withdrawing its membership in 1984 due to the then OAU’s recognition of Western Sahara as part of Saharawi Arab Democratic Republic (SADR).

\(^{118}\) n 22 above.

\(^{119}\) Nkrumah (n 33 above) xi.

\(^{120}\) n 22 above.
Commendably, the Agenda goes a step further to peg specific deadlines for the realisation of these aspirations.\textsuperscript{121} It proposes, among other things, to ensure migration by all African states to digital TV broadcasting by 2016, launch a continental free trade programme by 2017, increase access to broadband internet by 10 per cent by 2018, introduce an African passport and abolish visa requirements for all Africans to African countries by 2018, silence the guns and end all wars on the continent by 2020, achieve consensus on the form of continental government by 2030, increase the quality of Africa’s infrastructure to world-class standard and boost intra-Africa trade growth from 12 per cent in 2013 to 50 per cent by 2045, and increase Africa’s share of international trade from 2 per cent to 12 per cent.\textsuperscript{122} The timely achievement of these milestones is expected to fast-track the AU and its member states’ pull towards a fully-fledged continental government by 2063.

The Agenda’s time-specific integration objective is fundamentally plausible for its goal-orientedness and elucidation as against the initial obscurity of Nkrumah’s ideas that left many African leaders uncertain at that time of what a continental African state would look like. Two reasons justify this point: First, Agenda 2063 is devoid of the personalisation that Nkrumah and Gaddafi’s call for a ‘United States of Africa’ drew to themselves. It is the result of a ‘consultative process’ mirrored by not just a top-down approach but the cohesive involvement of several layers of stakeholders including African peoples. Surely, it has come with some forcefulness but not with the uncalculated urgency that marked its early activism so much so that it had the tendency of brooding scepticism and suspicion among conservative Francophone Africa and big states like Nigeria about the leadership ambitions of its propagators over the proposed continental government.\textsuperscript{123} Secondly, the Agenda strongly voices a democratic foundation centred on and driven by Africans. This is essential because the ‘idea of democracy above the national level,’ Kaplánová reasons, ‘has evoked the need to advocate a more democratic supranational order’;\textsuperscript{124} thus, cloaking the gravitational process with a democratic face in a remarkable way. Complementary to the 2063 vision

\begin{footnotes}
\item[121] n 22 above, para 2.
\item[122] n 22 above, paras 16 & 17.
\item[124] P Kaplánová ‘Transnational democracy, legitimacy and the European Union’ (2015) 4(1) Journal of Universal Excellence A54; see also Bohman (n 9 above) 66 (where Bohman considers that the growing ‘democratic deficit’ at the supranational level needs to be addressed because its processes of normative development are often of a political nature that is often far removed from the influence of citizens); cf Eriksen & Fossum (n 10 above) 31 (where they argue that it is the nation states that suffer ‘democratic deficits’ because states lack national control over decisions taken outside their borders which have consequences for citizens).
\end{footnotes}
are several well-articulated AU policy documents and strategies that are all geared towards the goal of unification.\footnote{125}

Interestingly, the AU is underway to achieving some of the Agenda’s major milestones. With Morocco’s comeback to the AU in 2017, the plan to end all remnants of colonialism and liberate all occupied African territories, including Western Sahara, Chagos Archipelago and the Comorian Island of Mayotte seem feasible by the set time of 2020.\footnote{126} Also, the African passport introduced in July 2016 will facilitate the free movement of Africans within Africa and create room for the abolition of visa requirements for all Africans by 2018.\footnote{127} On the political front, it is clear that nearly all African states have accepted democracy as an ideal form of government. The AU and RECs’ spontaneous imposition of sanctions and willingness to act against unscrupulous governments that acquire power by unconstitutional means lend credence to the democratisation of governance and the AU’s lethargy for unconstitutional changes of government. Most recently, the Economic Community of West African States (ECOWAS) intervened in the Gambia’s 2016 post-election crisis to avert the imminent humanitarian disaster that Yahya Jammeh’s refusal to relinquish power would have occasioned to the Gambian people.\footnote{128} In 2012, the AU also initiated the process for the establishment of the Continental Free Trade Area (CFTA) by 2017, which seeks to double intra-African trade by 2022, strengthen Africa’s position in international trade negotiations, and establish the proposed regional financial institutions by agreed timeframes.\footnote{129}

However, as detailed and promising as the Agenda might be, it is nonetheless more abstract than pragmatic in many of its projections. The Agenda promises to see through the continent’s migration to digital broadcast by 2016, increase broadband penetration in the continent to 10 per cent by 2018, increase broadband connectivity by 20 percentage points, abolish intra-Africa visa requirements for all Africans by 2018, and, most

\footnote{125 These are represented through the African Peace and Security Architecture (APSA), African Governance Architecture (AGA), Continental Free Trade Area (CFTA); Continental Education Strategy for Africa (CESA); Continental Technical and Vocational Education and Training Strategy; Human Rights Strategy for Africa (HRSA); Program Infrastructure Development for Africa (PIDA); Comprehensive Africa Agriculture Development Programme (CAADP); Africa Regional Strategy for Disaster Risk Reduction; Great Green Wall for the Sahara and Sahel Initiative; Accelerated Industrial Development for Africa (AIDA), etc.}

\footnote{126 n 22 above, para 22.}


\footnote{129 n 22 above, 17.}
ludicrous of all, silence the guns and ‘end all wars’ by 2020. As of January 2017, only a hand-full of African countries had completed the digital migration process. Although Nigeria and South Africa have pledged to complete migration by 2017, this would be two years beyond the original date set by the International Telecommunications Union. More so, the AU has not incentivised or supportively monitored the migration process in any way; thus, leaving out very poor African countries that have more pressing economic issues to address. Again, there is no accurate way of assessing the extent of broadband penetration and connectivity in order to track the AU’s progress indicators. In the case of the visa abolition, there is yet no country on the continent that has adopted a timeline within which to abolish visa requirements for all African states by 2018. With stiffer visa requirements recently adopted by South Africa and Ethiopia, it is extremely doubtful that visa abolition for African states would materialise soon. Yet, the one most shrouded in grandiosity is the aspiration to ‘silence the guns’ and ‘all wars’ by 2020. As of January 2017, armed conflicts of some sort still persist in Algeria, Cameroon, Chad, DR Congo, Ethiopia, Kenya, Libya, Mali, Nigeria, Somalia, Sudan, South Sudan, Uganda, and other African countries. Despite the AU’s African Peace and Security Architecture (APSA) and the REC’s mechanisms of conflict prevention, there is no assuring indication that these conflicts will be resolved and the smoking guns put out by 2020.

If there is one other potential setback that the Agenda faces, it is the non-involvement and absence of support of the African peoples. Whilst the AU echoes that the Agenda is people-centred and people-driven, this is clearly not what is reflected on the ground. Even though there are no available statistics to show how many Africans have a fringe idea of the AU, it is arguably an awfully low number. As it stands, there is a real likelihood that the 2063 vision is the machinations of a few armrest-sitting people in the AUC, and thus lacking the needed consultations and democratic inputs of the African peoples. If this is the case, the Agenda may already have a faulty foundation. Like Nkrumah’s idea of African nationalism and unification which, though focused on Africa and Africans, was hardly backed by Africans at the time, the Agenda may also fall through the cracks if, indeed, it is not driven by and centred on the African people. Again, there is no indication that African states have integrated the timelines of the Agenda in their national policies in line with their pledge in the 50th Anniversary Solemn Declaration of 2013. If this is the situation, then the Agenda is doomed to fail.

Chapter 18

6 Arguments against a continent-wide state

The dream of a transnational African state may sound fantastic but its shining promise is dimmed by quite a number of important factors. First, like the Nkrumah era, there is still an unseen rivalry between countries that are essentially gradualist in their approach to continental integration and those that are not. Many states are more poised to forge a national identity for the people in their colonially inherited territories and may prefer integration which is more economic than political. The recent ‘Brexit’ vote by the United Kingdom and the emergence of Donald Trump in the US are indicative of the rise of nationalism and may have reinforced the sentiments of gradualists in Africa that a political union may not be the way to go after all. Also, it is incontrovertible that many African states hold their national sovereignties more dearly than others and may not yet anticipate their fusion into a larger continental state. In South Africa, for example, where there is a high level of nationalism, the South African Constitution neither specifically indicates nor anticipates any special relationship with the rest of Africa let alone integrating with it. Additionally, the repeated xenophobic incidents between its citizens and ‘foreign’ Africans do not quite illustrate favourably a readiness to integrate economically and politically with the rest of Africa. If anything, South Africa has increasingly taken more steps against immigrants from other African countries that may be considered antithetical to the continental integration agenda. Even states like Ghana whose Nkrumah radically championed the call for integration have long expunged the idea of the Union of African States from their Constitution. In its 1960 Constitution, Ghana made provisions for the ‘early surrender of sovereignty to a union of African states and territories.’ This provision has mysteriously disappeared from the 1992 Ghanaian Constitution. The absence of provisions on integration in many national constitutions demonstrates the scepticism about the African state project.

Second, issues around identity politics, the ethnicisation of development and its resultant effect on statehood in Africa also puts a question mark on the capacity of a continental superstructure to manage ethnic rivalries and tensions within the framework of a broader African state. For example, many African states have become latently fragile due to the impact of identity politics on national stability and state institutions. ‘Ethnicity,’ according to Jeng, ‘has often formed part of the analytical

132 As above.
133 Constitution of Ghana 1960 preamble, arts 2 & 13(1).
framework that tries to deconstruct the primary, if not central, causalities of internal conflicts’ in Africa. If ‘federal’ states like Central African Republic, DR Congo, Ethiopia, Nigeria, Somalia and Tanzania are structurally problematic, substantially fragile, embroiled in serious internal problems and incapable of rallying together as nation states, then suggestively the likelihood of one continental government holding the 55 pieces of significantly diverse African states together is very slim. One can speculate that if Nigeria, the oldest federation on the continent, with over 400 ethnic groups, is still grappling with nationhood more than six decades after adoption of federalism in 1954, how much more a continental state? The AU is still structurally too weak to govern over one billion people on a continental scale. A continental three-arm structure and an African Standby Force are not enough to effectively hold the body together if the foundations of the proposed political union are structurally defective. Africa will need more than that. Presently, the AU proposes to use RECs as building blocks for the realisation of its political and economic integration objectives. Yet, no REC has completely forged a sub-regional union state that has tested its ability to maintain stability over a period of time and managed the cancerous elements of ethnicity and religion in politics. To not fail, the AU cannot afford to be the first and only test experiment there is.

Third, indicators like the continent’s gross domestic product (GDP) and intra-Africa trade needed for determining the economic viability of the proposed continental state are still very weak. With a cumulative GDP equal to only that of France, Africa and the AU will need to do more in terms of shoring up Africa’s economic base to execute and independently sustain its development agenda for the entire continent. Since a merged population outlook of over one billion Africans will require economic and development projections that reflect the vast number of people, African states will need a seamlessly interconnected, interdependent and integrated intra-trade network across major economic lines. With many states currently trading less internally with fellow African states, it is clear the much-needed economically symbiotic foundation necessary for integration is still lacking. If African states do not yet consider that they have more to gain trading with other African states than with non-African states, then the prospect of taking the integration agenda more seriously is even less likely. Agenda 2063 projects ‘the principle of self-reliance and Africa financing its own development.’ This means that there must, at least, be some measure of self-reliance on the part of many, if not all, African states before integration.

Fourth, the pervasiveness of internal conflicts and wars poses a significant threat to continental unity. Francis states that wars and armed

conflicts make it ‘impossible to achieve the economic growth and development objectives of integration.’ To him, these conditions ‘have undermined the achievement of the regional economic integration and development objectives’ of Africa. Besides, African leaders have themselves undermined Africa’s capacity and ability to promote continental peace through their lack of political will. If Africa must integrate, the conditions for peace and development must not only be guaranteed but supported and coordinated on a continental scale. Presently, the AU’s approach to conflict management on the continent is reactive and does little to prevent potential conflicts and humanitarian crises from blowing up. Perhaps, the AU can be more proactive in deploying the instruments of preventive diplomacy and force, if necessary, to avert potential humanitarian conflicts before they occur like ECOWAS did in The Gambia in January 2017.

Fifth, the process of integration is hardly driven by the African people themselves. The AU and its Agenda 2063 profess on paper to be people-driven and people-centred, but it is absolutely not clear what this translates to in reality. For example, are the African people really interested in continental integration? How have they exhibited that interest? What was the consultative procedure that was followed in developing the Agenda and to what degree did the African people participate in the decision-making process? Who will be the true sovereigns – the people or the amalgamating states? Does the democratisation process of the proposed transnational state promise a deliberative democratic approach where the people are directly involved in continental governance or will it continue to be through their elected or selected representatives? What will continental democratic governance mean for the lay African in the street? Presently, there is a great disconnect between the people and the AU integration objectives. Year-in and year-out African leaders attend and participate in AU activities in Addis Ababa but the decisions they supposedly adopt on behalf of their people hardly ever translate to policy implementation on the ground. With the simultaneous rise of poverty and nationalism, there is reason to fear that the AU may lose popular support should the final decision on integration be referred to its people because there is yet to be any evident correlation between integration and development for the average African.

Finally, and closely connected to the first point, is the potential setback continental integration may ultimately face when the time comes for African states to surrender their sovereignties. If political unification will

---

137 T Murithi ‘African institutions: Securing peace and development across borders’ in McCandless & Karbo (n 49 above) 507.
138 n 128 above.
139 Constitutive Act art 4(c); n 22 above, paras 3, 47-58.
eventually be achieved, then states must be willing and available to submit a portion of their sovereignty to the centre. But the likelihood of that happening will be based on concessions and conditions. Will South Africa which is about the most technologically advanced state in Africa open its borders to Africans from other countries? Will Egypt which has the strongest military in Africa need an African Standby Force or submit itself on the same terms as Somalia? Will Nigeria which has a population that is half of the entire West African sub-region, four times as populated as South Africa and nearly 180 times as populated as Lesotho or Djibouti submit itself on the same terms as these countries? These issues are not yet clear and they are not insurmountable either. For more than five decades of African solidarity on the OAU and AU platforms, if there have been any principles that have consistently featured in nearly all major regional instruments, they are the principles of sovereignty, independence and non-interference in member states’ affairs. Given the eagerness to integrate, it is yet not certain if big African states and those still close to their colonial masters like French-Africa will willingly submit their sovereignties to the transnational state superstructure or what the response of foreign powers like the US, UK and France will be. These are real issues which must be overcome.

7 Conclusion

At the start of this chapter, the idea of a transnational democratic African state was identified as an evolving framework within which Africa’s political integration is being projected. From the Pan-African struggles in the 19th century to the formation of the OAU and subsequently the AU, the goal of pursuing a common African destiny has never been more alive. The AU’s Agenda 2063 alongside a litany of other policy papers and strategies present a veritable roadmap for not only achieving Africa’s integration agenda but also realising its place in the world. The plan for transnational democratic governance in Africa has come a long way, but its immediate and long-term hurdles are still far from being overcome. The AU, as the primary vehicle for accomplishing Africa’s unification, for instance, still suffers from three shocking administrative quandaries: It is perpetually dependent on EU funds to finance more than 90 per cent of its annual budget; it is unable to prevent or halt armed conflicts, large scale pandemics and endemic poverty; and, it has been unable to facilitate intra-African trade among its member states for more than two decades since the adoption of the AEC Treaty. Ideally, these inadequacies are antithetical to the vision of Africa’s integration and renaissance, and they question the genuineness of AU member states’ commitment to the Pan-African project.

140 OAU Charter, art 2(c); Constitutive Act, art 3(b).
141 Nkrumah (n 33 above) 185.
While Africa’s integration undoubtedly holds optimistic promises, these promises cannot be contemplated in abstraction. They must be articulated more pragmatically through the will to act and the determination to domesticate action. African states must make concrete efforts to translate AU decisions into practical results. The political will to further Pan-Africanism is an indispensable necessity at the regional level and the transformation of decisions taken in Addis Ababa to policies at the national level is an absolute imperative. If continental political integration must be achieved, then African leaders and peoples, more than anything, must be at the forefront of its objectives. While Nkrumah had an absolutely incredible idea of the opportunities that continental statehood promises the common African, his non-democratisation of his grand vision and non-involvement of ordinary Africans in its realisation warranted his major setbacks. The AU’s echoed commitment to realise total integration through a people-focused and people-driven Agenda 2063 process might well be the game-changer in its gravitation to continental government. Only time will tell what the ultimate results would be!
BIBLIOGRAPHY

Journal articles, books and book chapters


Ake, C ‘The unique case of African democracy’ (1993) 69 International Affairs 243


Allah-Mensah, B ‘Women in Politics and the public life in Ghana’ (Friedrich Ebert Stiftung: Accra 2005)
Ambe, O ‘Globalisation and the rest of Africa’ (2009) 5 Journal of International Politics 5

Ammar-Attoh, D & Robertson, A The practice of democracy in Ghana: Beyond the formal framework (Centre for Democratic Development: Accra 2014)


Apt, NA ‘Support sources and well-being of the elderly in Ghana’ (1986) 19(2) Zeitschrift Fur Gerontologie 90


Babou, CA ‘Decolonization or national liberation: Debating the end of British colonial rule in Africa’ (2010) 632 The Annals of the American Academy of Political and Social Science 47


Barrientos, A; Gorman, M & Heslop, A ‘Old age poverty in developing countries: Contributions and dependence in later life’ (2003) 31 World Development 557


Bernstein, J & Okello, MC. ‘To be or not to be: Urban refugees in Kampala’ (2007) *24 Refuge* 45


Bivens, RK. ‘The internet, mobile phones and blogging – how new media are transforming traditional journalism’ (2008) *2 Journalism Practice Journal* 113


Bratton, M & Logan, C. ‘From Elections to Accountability in Africa?’ (2014) *1 Governance in Africa* 3

Breau, SC. *The responsibility to protect and international law: An emerging paradigm shift* (Routledge: New York 2016)


Chigwata T. ‘The role of traditional leaders in Zimbabwe: Are they still relevant?’ (2016) *20 Law democracy and Development* 85

Chorev, H. ‘Social media and other revolution’ (2011) *5 The Moshe Dayan Centre for Middle Eastern and African Studies* 1


D'Orsi, C  ‘Strengths and weaknesses in the protection of the internally displaced persons in Sub-Saharan Africa’ (2012) 77 Connecticut Journal of International Law 73


Daes, EA  Status of the individual and contemporary international law: Promotion, protection and restoration of human right at national, regional and international levels (United Nations:New York1992)


Debrah, E & Graham, E ‘Preventing the oil curse situation in Ghana: The role of civil society organisations’ (2015) 7 African Studies 21

Debrah, E, Asante, EKP & Gyimah-Boadi, E  A Study of Ghana’s Electoral Commission (CODESRIA: Dakar 2010)

Denning, L  The discipline of law (London: Butterworths, 1979)


Durieux, JF & Hurwitz, A ‘How many is too many: African and European legal responses to mass influxes of refugees’ (2004) 47 German Yearbook of International Law 128


Fraser, A ‘Poverty reduction strategy papers: Now who calls the shots?’ (2005) 32 Review of African Political Economy 317


Gil de Zúñiga, H & Valenzuela, S ‘Social media use for news and individuals’ social capital, civic engagement and political participation’ (2012) 17 Journal of Computer-Mediated Communication 319

Gil de Zúñiga, H, Copeland, L & Bimber, B ‘Political consumerism: Civic engagement and the social media connection’ (2013) 16 New Media & Society 488


Glick, N & Salazar, NB ‘Regimes of mobility across the globe’ (2013) 39 Journal of Ethnic and Migration Studies 183


Goodwin-Gill, GS & McAdam, J The refugee in international law (Oxford University Press: Oxford 2007)


Hilpold, P (ed) The responsibility to protect (R2P): A new paradigm of international law (Brill Nijhoff: Leiden & Boston 2015)


Holt, SS & Ljungberg, E ‘Age and the effects of news media attention and social media use on political interest and participation: Do social media function as leveller?’ (2013) 28 European Journal of Communication 19


Ihonvbere, J ‘Where is the third wave? A critical evaluation of Africa’s non-transition to democracy’ (1996) 43 Africa Today 345


Kjær, AM ‘From “good” to “growth-enhancing” governance: Emerging research agendas on Africa’s political economy’ (2014) 1 Governance in Africa 2

Konadu-Agyemang, K ‘The best of times and the worst of times, structural adjustment programs and uneven development in Africa: The case of Ghana’ (2000) 52 The Professional Geographer 474


Kraus, J ‘The struggle over structural adjustment in Ghana’ (1991) 38 Africa Today 21


Lazarus, J ‘Participation in poverty reduction strategy papers: Reviewing the past, assessing the present and predicting the future’ (2008) 29 Third World Quarterly 1206

Legum, C Pan-Africanism: A short political guide (2nd ed) (Frederick A. Praeger Inc Publisher: New York 1965)


Lindberg, SI & Morrison, M ‘Are African voters really ethnic or clientelistic? Survey evidence from Ghana’ (2008) 1 Political Science Quarterly 95

Bibliography

Lomo, ZA ‘The struggle for protection of the rights of refugees and IDPs in Africa: Making the existing international legal regime work’ (2000) 18 Berkeley Journal of International Law 6


Lumb, RD Australian Constitutionalism (Butterworths 1983)


Marks, S ‘What has become of the emerging right to democratic governance?’ (2011) 22 European Journal of International Law 507

Maru, MT ‘The Kampala Convention and its contribution in filling the protection gap in international law’ (2011) 1 Journal of Internal Displacement 91


McGregor, J ‘Rethinking the boundaries of the nation: Histories of cross border mobility and Zimbabwe’s new ‘diaspora’ (2013) 4 Critical African Studies 47


McLeod, JM; Daily, K; Guo, Z; Eveland, JRW; Bayer, J; Yang S & Wang, HSU ‘Community integration, local media use, and democratic processes’ (1996) 23 Communication Research 179

Menocal, AR; Fritz, V & Rakner, L ‘Hybrid regimes and the challenges of deepening and sustaining democracy in developing countries’ (2008) 15 South African Journal of International Affairs 31

Mohamed FJ ‘11 years of the Maputo Protocol: Women’s progress and challenges’ (2014) 57 Development 71

Mozaffar, S ‘Patterns of electoral governance in Africa’s emerging democracies’ (2002) 23 International Political Science Review 89


Muchie, M ‘Pan-Africanism: An idea whose time has come’ (2000) 27 Politikon 297


Mutua, MW Kenya’s quest for democracy: Taming the Leviathan (Lynne Rienner Publishers: Boulder 2008)


Muzondidya, J ‘The Zimbabwean Diaspora: Opportunities and challenges for engagement in Zimbabwe’s political development and economic transformation’ in Murithi, T & Mawadza, A (eds) Zimbabwe in transition: A view from within (Fanele: Johannesburg 2011)


Namatovu, R & Espinosa, C ‘Engendering the global financial and economic crisis: Unveiling the links between formal and informal sectors in the mining regions in Zambia and assessing the gender implications’ (2011) 2 International Journal of Business and Social Science 66


Newland, K Voice after exit: Diaspora advocacy (Migration Policy Institute: Washington DC 2010)


Nyonator, F, Ofosu, A, Segbafoah, M & D’Almeida, S ‘Monitoring and evaluating progress towards universal health coverage in Ghana’ (2014) 11 *PLOS Medicine* 91

Ochieng, WK ‘Chimera of constitutionally-entrenched gender quotas: The contested judicial enforcement of quotas in Kenya’ (2016) 2 *Journal of Law and Ethics* 61


Oppong, N ‘Ghana’s Public Interest and Accountability Committee: An elusive quest for “home-grown” transformation in the oil industry’ (2016) 34 *Journal of Energy & Natural Resources Law* 313


Owusu, M ‘Democracy without development: The perils of plutocracy in Ghana’ in Ninsin, K (ed) Issues in Ghana’s electoral politics (CODESRIA: Dakar 2016)


Pangilinan, C ‘Implementing a revised refugee policy for urban refugees in Tanzania’ (2012) 2 Oxford Monitor of Forced Migration 5


Prempeh, HK ‘Africa’s “constitutionalism revival”: False start or new dawn?’ (2007) 5 International Journal of Constitutional Law 469


Pye, LW Aspects of political development: An analytic study (Boston: Little, Brown and Company 1966)


Rankin, MB ‘Extending the limits or narrowing the scope? Deconstructing the OAU refugee definition thirty years on’ (2005) 21 South African Journal of Human Rights 406

Rothstein, B The quality of government: Corruption, social trust, and inequality in international perspective (Chicago and London: University of Chicago Press 2011)
Bibliography


Schiller, NG; Basch, L & Blanc-Szanton, C Transnationalism: A new analytical framework for understanding migration’ (1992) 645 Annals New York Academy of Sciences 1


Segal, A ‘Can democratic transitions tame political successions?’ (1996) 43 Africa Today 369

Sen, A ‘Democracy and its global roots: Why democratisation is not the same as westernisation’ (2003) 14 New Republic 28


Spieker, H ‘The right to give and receive humanitarian assistance’ in Heintze, HJ & Zwitter, A (eds) International law and humanitarian assistance (Springer-Verlag: Berlin Heidelberg 2011)


Tang, G & Lee, LFL ‘Facebook use and political participation: The impact of exposure to shared political information, connections with public political actors, and network structural heterogeneity’ (2013) 31 Social Science Computer Review 763–773


Thuo, L ‘Realising the inclusion of youth with disabilities in political and public life in Kenya’ Africa Disability Rights Yearbook (2016) 25

Towner, T ‘All political participation is socially networked? New media and the 2012 election’ (2013) 31 Social Science Computer Review 527


Unsworth, S ‘What’s politics got to do with it? Why donors find it so hard to come to terms with politics, and why this matters’ (2009) 21 Journal of International Development 21 883–894


Victoria, B ‘Diaspora, cyberspace and political imagination: The Eritrean diaspora online’ (2006) 6 Global Networks 161


Ward, WEF The history of Ghana (Virginia University Press: Virginia 1963)

Weeks, G & Weeks, J ‘Immigration and transnationalism: Rethinking the role of the state in Latin America’ (2015) 53 International Migration 122


Weis, P ‘The United Nations Declaration on Territorial Asylum’ (1969) 7 Canadian Yearbook of International Law 92


Xenos, V & Loadermen, BD ‘The great equalizer? Patterns of social media use and youth political engagement in three advanced democracies’ (2014) 17 Information, Communication & Society 151

Yankah, EKA ‘Four shades of equality: The jurisprudence of the Supreme Court on the distribution of marital property after divorce’ (2016) 2 GIMPA Law Review 3


Papers


African Union ‘Addressing the challenge of forced displacement in Africa’ Conference Background Paper, Special Summit on Refugees, Returnees and Displaced Persons in Africa held in Addis Ababa, Ethiopia (5-11 November 2008)


Grebe, E ‘The evolution of social protection policy in Ghana’s Fourth Republic: Contributory social insurance reform and limited social assistance for the ‘extreme poor’ under NPP and NDC governments, 2000-2014’


Ibrahim, J ‘Democratic transition in West Africa’ CODESRIA Monograph Series 2003

International Commission on Intervention and State Sovereignty The responsibility to protect (2001)

Kamel, B ‘Africa: Climate victims – every second, one person is displaced by disaster’ Inter Press Service 27 July 2016


Meldrum, A ‘Where we have hope: A memoir of Zimbabwe’ (2004)


Poole, A ‘Political economy assessments at sector and project levels’ (Washington DC: World Bank 2011)


Schieber, G; Cashin, C; Saleh, K & Lavado, R ‘Health financing in Ghana’ (Washington, DC: World Bank 2012)


UN Secretary-General ‘The causes of conflict and the promotion of durable peace and sustainable development in Africa: Representative of the Secretary-General, 7-15, UN Doc A/52/871-S/1998/318 (13 April 1998)


World Bank ‘Improving the targeting of social programs in Ghana’ (Washington, DC: World Bank 2012)

World Food Programme ‘Comprehensive food security & vulnerability analysis: Ghana 2012 (Executive Brief)’ (Accra: World Food Programme 2012)

Reports


Miranda, RLT ‘Impact of women’s participation and leadership on outcomes’ United Nations Department of Economic and Social Affairs, Division for the Advancement of Women Economic Commission for Africa Inter-Parliamentary Union Expert Group Meeting on Equal participation of women and men in decision-making processes, with particular emphasis on political participation and leadership 24 to 27 October 2005


International human rights soft law instruments


African Union ‘Sirte Declaration’ Fourth extraordinary session of the Assembly of Heads of State and Government 8-9 September 1999 Sirte Libya EAHG/Draft/Decl (IV) Rev.1

African Union Assembly of Heads of State and Government decision on the integration of the APRM into the African Union, Assembly/AU/Draft/Dec 527 (XXIII), 26-27 June 2014, 23rd ordinary session


AU Executive Council ‘Fifth ordinary session 25 June - 3 July 2004, Addis Ababa, Ethiopia, Decision on the meeting of experts on the review of OAU/AU treaties’ Doc EX/CL/95 (V) para 4(i)

AU Executive Council ‘Ninth ordinary session, 25-29 June 2006, Banjul, the Gambia, Decision on the ministerial conference on refugees, returnees and internally displaced persons’ Doc EX.CL/259 (IX)

AU Executive Council ‘Thirteenth ordinary session, 24-28 June 2008, Sharm El-Sheikh, Egypt, Decision on the situation of refugees, returnees and internally displaced persons’ Doc EX.CL/413 (XIII)

African Union Declaration on Democracy, Political, Economic and Corporate Governance (2002)


Implementation of the African Union Convention for the Protection and Assistance of Internally Displaced Persons (IDPs) 2009 (The Kampala Convention)


Organization of African Unity, Resolutions Adopted by the First Ordinary Session of the Assembly of Heads of State and Government held in Cairo, Egypt, from 17 to 21 July 1964, Resolution CM/Res 19(II)/ AHG/Res 1(I)

Organization of African Unity, Resolutions and Recommendations adopted by the Third Ordinary Session of the Council of Ministers held in Cairo, Egypt, from 13 to 17 July 1964, CM/Res 31 (III)/CM/Res 47 (III)

Organization of African Unity, Resolutions Adopted by the Eleventh Ordinary Session of the Council of Ministers held in Algiers, Algeria, from 4 to 12 September 1968, CM/Res.149-174/CM/Res 88(VII)

Organization of African Unity/African Economic Community Assembly of Heads of State and Government ‘Decisions and Declarations’ Thirty-Seven
Bibliography


Regional Protection Dialogue on the Lake Chad Basin: Abuja Action Statement (2016)

Communiqué, adopted at the 565th meeting of the AU Peace and Security Council, Addis Ababa, Ethiopia (17 December 2015)

Speech delivered by Chaloka Beyani at the first ministerial meeting of the Economic Community of West African States (ECOWAS) on internally displaced Persons in Abuja, Nigeria (7 July 2011)


UN General Assembly Resolution 60/1 on Implementing the responsibility to protect, UN Doc A/RES/60/1 (24 October 2005), report of the UN Secretary-General, UN Doc A/63/677 (12 January 2009)

UN General Assembly Res 217(III)(A), UNGAOR, 3d Session, UN Doc A/810, (1948) 71, art 14(1)

UN General Assembly Resolution S-19/2, 7, 9, 73, UN Doc A/RES/S-19/2 (Sept 19, 1997)


UNHCR ‘Executive Committee of the High Commissioner’s Programme Note on International Protection’ 45th Session, UN Doc A/AC.96/830 (7 September 1994)

Website


‘Brief History of Mauritius’ https://www.maurinet.com/about_mauritius/brief_history (accessed 26 June 2017)


‘Ghana’s demographic profile’ http://www.indexmundi.com/ghana/demographics_profile.html (accessed 26 June 2017)


‘Mauritius Parliament’ http://mauritiusassembly.govmu.org/English/Pages/default.aspx (accessed 23 June 2017)

McCormick, TY ‘The Burundi intervention that wasn’t’ Foreign Policy 2 February 2016 http://foreignpolicy.com/2016/02/02/the-burundi-intervention-that-wasn’t/ (accessed 29 November 2016)


‘Political Parties in Mauritius’ http://www.indexmundi.com/mauritius/political_parties_and_leaders.html (accessed 23 June 2017)


News articles


Adogla-Bessa, D ‘UN against social media ban on Election Day’ Citi Fm 18 June 2016 http://citifmonline.com/2016/06/18/un-against-social-media-ban-on-election-day-ibn-chambas/#sthash.PHKXZcce.dpuf (accessed 17 November 2016)


Asante, SKB ‘A partnership of unequal partners’ *New African* June 2003


‘Beit bridge fires: Activists close border, business slumps’ *Zim Eye* 9 August 2016


iCrossing ‘What is Social Media’ 1 August 2008 http://www.icrossing.co.uk/fileadmin/uploads/eBooks/What_is_Social_Media_iCrossing_ebook.pdf (accessed 20 October 2016)


‘Itai Dzamara Abducted by CIO’ *Zim Eye* 9 March 2015

Jackson, D ‘Freedom of speech should never mean freedom to abuse. As a victim, I welcome plans to unmask cowardly internet trolls’ *Daily Mail* 12 June 2012 http://www.dailymail.co.uk/debate/article-2158120/Freedom-speech-mean-


‘Malawi arrests “hyena” man who bragged about sex with children’ CNN 27 July 2016

Mapfumo, T ‘Mugabe is a dictator says Thomas Mapfumo’ YouTube 19 July 2016 https://www.youtube.com/watch?v=18t31UjotSs (accessed 20 November 2016)


Moyo, J https://twitter.com/ProfJNMoyo (accessed 17 November 2016)

‘Mphoko moving to $2m mansion’ The Independent 22 July 2016

Newsday Zimbabwe Live ‘VP Mphoko hotel stay protest’ YouTube https://www.youtube.com/watch?v=TELp6WypRT0 (accessed 20 August 2016)

Statista ‘Number of active Twitter users worldwide from 1st quarter 2010 to first quarter 2017’ accessed 15 June 2017 from https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/

Nyabor, J ‘We’ll pass RTI Bill this year-Bawumia’ Citi 97.3fm 2 February 2017 http://citifmonline.com/2017/02/02/well-pass-rti-bill-this-year-bawumia/ (accessed 21 June 2017)


‘Over 100 lawyers turned out to help this guy – for free’ Metro 13 July 2016 http://metro.co.uk/2016/07/13/over-100-lawyers-turned-out-to-help-this-guy-for-free-6004404/#ixzz4RVuqoN7P (accessed 20 October 2016)


'The sex initiation camps of Malawi where ten-year-old girls are sent by their families to lose their virginities' Daily Mail 5 February 2014


'To save women’s lives in Africa, bring abortion out of the shadows' The Guardian 12 November 2010


‘Zanu PF MPs walk out on Police Brutality Motion’ News Day 20 August 2016
