

**THE ROLE OF THE PAN AFRICAN PARLIAMENT IN PROMOTING
CONSTITUTIONALISM AND DEMOCRATIC GOVERNANCE IN AFRICA:
LESSONS FROM OTHER SUPRANATIONAL PARLIAMENTS**

By

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Declaration of Originality

I, **Osy Ezechukwunyere Nwebo** hereby declare that this thesis is my original work and it has not been previously submitted for the award of a degree at any other university or institution.

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Dedication

To all the heroes past in the fight for the promotion of constitutionalism and democratic governance in the world especially in Africa

Acknowledgements

The completion of this work was made possible by God's grace. For His abundant blessings, strength, courage and perseverance to sit for hours putting together this work, I remain forever grateful as always. In deed the journey to this destination looked too far and too difficult in view of other competing challenges for attention during the period, but today I can say that all is well that ends well.

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List of abbreviations

ACBF	African Capacity Building Foundation
ACJ	African Court of Justice
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACDEG	African Charter on Democracy Elections and Governance
ACRWC	African Committee of Experts on the Rights and Welfare of the Child
ACTHPR	African Court on Human and Peoples' Rights
ACHPR	African Commission on Human and Peoples' Rights (African Commission)
ACDEG	African Charter on Democracy Elections and Governance
AGA	African Governance Architecture
AMIS	AU Mission to Sudan
APRM	African Peer Review Mechanism
ASF	African Standby Force
ASEAN	Association of South East Asian Nations
AU	African Union
AUABC	African Union Advisory Board on Corruption
AUC	African Union Commission
CAFE	Committee on Finance, Evaluation and Administration
CEMAC	Central African Economic and Monetary Community
COMESA	Common Market for Eastern and Southern Africa
CSO	Civil Society Organizations
EAC	East African Community
EAEC	European Atomic Energy Community
EALA	East African Legislative Assembly
EC	European Commission
ECK	Electoral Commission
ECCAS	Economic Community of Central African States
ECOSOC	Economic, Social and Cultural Council
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community

EEC	European Economic Community
EP	European Parliament
ESCR	Economic Social and Cultural Rights
EU	European Union
FDI	Foreign Direct Investment
ICC	International Criminal Court
ICRC	International Committee of the Red Cross
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGAD	Intergovernmental Authority on Development
ILO	International Labor Organization
IPI	International Parliamentary Institution
IPPF	International Planned Parenthood
IPU	Inter-Parliamentary Union
ISS	Institute for Security Studies
JAES	Joint Africa-EU Strategy
LPA	Lagos Plan of Action
MNC	Multinational Corporation
MOU	Memorandum of Understanding
MEP	Member of the European Parliament
MP	Member of Parliament
NATO	North Atlantic Treaty Organization
NATO-PA	Parliamentary Assembly of the North Atlantic Treaty Organization
NEPAD	New Partnership for Africa's Development
NGO	Non-governmental organization
NHRI	National Human Rights Institution
NTC	National Transitional Council
OAU	Organization of African Unity
OHADA	Organisation Pour l'Harmonisation en Afrique du Droit des Affaires
OSISA	Open Society Initiative of Southern Africa
PACE	Parliamentary Assembly of the Council of Europe

PAYC	Pan-African Youth Council PAYC
PAP	Pan African Parliament
PCJHR	Committee of Justice and Human Rights
PSC	Peace and Security Council
PRC	Permanent Representatives Committee
REC	Regional Economic Community
RPB	Regional Parliamentary Body
RPA	Regional Parliamentary Associations
SADC	Southern African Development Community
SADC PF	Southern African Development Community Parliamentary Forum
SAP	Structural Adjustment Program
SCSL	Special Court for Sierra Leone
SDG	Development Goal
SEA	Single European Act
SICA	Central American Integration System
TFEU	Treaty on the Functioning of the European Union
TNRO	Transnational Regional Organization
WEMOU	West African Economic and Monetary Union
UNAIDS	United Nations Program on HIV/AIDS
UNDP	United Nations Development Program
UNCITRAL	United Nations Commission on International Trade Law
UNDESA	United Nations Department of Economic and Social Affairs
UNIFEM	United Nations Development Fund for Women
USA	United States of America

Abstract

The thesis further advanced the recognition that the promotion of constitutionalism and democratic governance is imperative to the achievement of sustainable development and that the deficit of constitutionalism and democratic governance is the major problem militating against the realization of Africa's development initiatives. It underscored the increasing role of regional organizations in promoting constitutionalism and democratic governance in their regions through their parliaments. In this connection, the thesis focused on the role of the Pan African Parliament (PAP) in promoting the African Union (AU) agenda on constitutionalism and democratic governance' (the agenda). It investigated the problem of the generally perceived ineffectiveness of the PAP in promoting the agenda in Africa. The research methodology adopted is doctrinal with the aid of a combination of descriptive, analytic, prescriptive and comparative study of other supranational parliaments that play similar role with the PAP.

Approached from two scenarios, the thesis first demonstrated that the limitation of the powers and functions of the PAP to advisory and consultative role only under the PAP's Protocol, coupled with its institutional weakness are factors that can militate against PAP's effectiveness in promoting the agenda. The thesis also demonstrated that potentials exist under the extant Protocol for the PAP to creatively undertake advisory, consultative and oversight functions, as well as propose model laws for adoption by the AU Assembly to effectively promote the agenda. Second, the thesis analyzed the transformation process of the PAP from a parliament without legislative powers to a parliament with enhanced legislative powers and functions by the Revised PAP Protocol and the problem of its ratification. It argued that the slow pace or reluctance of AU member states to ratify the Revised Protocol is mainly attributable to the intergovernmentalist approach to the implementation of the AU integration agenda and the underlying sovereignty concerns of African leaders. Furthermore, existing gaps and ambiguities in the Revised Protocol as well as possible implications of its operationalization were identified.

Learning from the experiences of other supranational parliaments in promoting constitutionalism and democratic governance in their regions, the thesis concluded that despite its potentials the transformation of the PAP is imperative for its democratic legitimacy and empowerment for greater effectiveness. In this respect, the thesis made a number of recommendations ranging

from: amendment of certain sections of the Protocol; strategic non-legislative options; and diplomatic engagements with critical stakeholders.

Keywords: Advisory; Consultative; Constitutionalism; Democratic Governance; Domestication; Integration; Intergovernmentalism; Model Laws; neofunctionalism; Ratification; Sovereignty; Supranationalism; Transformation

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Chapter One

General Introduction

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1.1 Background

The idea of constitutionalism and democratic governance has been so venerated that it has become a universal principle that needs to be promoted in every modern society whether at the global, regional, sub-regional, state or local level. This is because of its overarching importance as the bedrock on which the achievement of sustainable socio-economic development and justice is anchored. In other words, the culture of constitutionalism and democratic governance can trigger a virtuous cycle of development. Hence, political freedom empowers people to press for political systems that enforce the rule of law and accountability on the part of government and expand social and economic opportunities to enhance overall development. Thus, the importance of the culture of constitutionalism and democratic governance in modern societies cannot be over emphasized as it impacts on every aspect of social development.

International cooperation and collaborative efforts are crucial for the effective promotion of the culture of constitutionalism and democratic governance at the national level. Against this background, global and regional organizations are now increasingly involved in promoting

constitutionalism at the national level.¹ In this regard, international organizations have developed legal frameworks² and policies to uphold fundamental constitutional values, including the rule of law, democracy and the protection of human rights.³ This practice recognizes the simultaneous existence of domestic and transnational interactions requiring the promotion of the core values of constitutionalism and the authority of international organizations to promote constitutionalism at the level of states. Against this backdrop, this study argues that international organizations can propose supranational constitutional model legal order for adoption and domestication by their state members. In this way, constitutionalism and democratic governance can be promoted by international institutions especially through their parliament.⁴

It must be noted however, that although most of the emergent post-independence African governments made strong commitments to establish democratic governments and to promote constitutionalism in line with international legal instruments which they signed and ratified, yet at best, they only succeeded to establish ‘constitutions without constitutionalism’.⁵ Nevertheless, most if not all of the leaders continue to lay claim to the prevalence of constitutionalism and democratic governance in their respective countries. They are quick to boast of the existence of national constitutions and the conduct of periodic elections as evidence in justification of their claim. However their constitutions and their conducts in government abysmally fall below the internationally acceptable benchmarks.

This implies that though the existence of a constitution is a necessary adjunct of constitutionalism, not all constitutions can promote constitutionalism particularly those that do

¹ M Wiebusch ‘The role of regional organizations in the protection of constitutionalism’ International IDEA Discussion Paper 17/2016 p8 [www.idea.int.Publications](http://www.idea.int/Publications) ‘ Catalogue:(accessed 20 December 2016).

² Such International legal frameworks include: International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966).

³ Member states of regional organizations usually agree to these constitutional standard frameworks and commit themselves to abide by signing and ratifying the relevant treaties.

⁴ This can be achieved through the process of supraconstitutionalization or international constitutionalization which is used in this work not only to describe enabling or constraining of the production of public international law, but extends to the extent to which norms and institutions beyond the state transform domestic constitutional orders and constrain domestic law-making.

⁵ HWO Okoth-Ogendo ‘Constitutions without Constitutionalism: Reflections on an African Paradox’ 1996 in CM et al Zoethout (eds) *Constitutionalism in Africa A quest for Autochthonous Principles*, Gouda: Quint Deventer, pp3-25: see also AMB Mangu *The Road to Constitutionalism and Democracy in Post-colonial Africa The case of the Democratic Republic of Congo* (Unpublished LLD Thesis) Pretoria University of South Africa. P 187 : AMB Mangu ‘Constitutional Democracy and Constitutionalism in Africa’ conflict trends, 2006 – kms 1 isn.ethz.ch (accessed 10 July 2016).

not contain democratic principles or are made without complying with democratic processes. In reality, most African countries established constitutions without complying with the provisions, while the elections they conducted fell short of the established conditions for free, fair and credible elections. These features render such governments undemocratic irrespective of the fact that they have constitutions. As a result, Africa's record on constitutionalism and democratic governance remains an unhappy one.⁶

Up till today, Africa as a continent continues to face the challenge of constitutionalism and democratic governance. The problem of constitutionalism and democratic governance deficit in Africa leads to state fragility and the consequent incidents of perennial political agitations, conflicts, instability, insecurity, *coup d'etats* and civil wars in many parts of Africa. Its concomitants are abuse of power and impunity amongst African leaders which continue to hold sway with negative impact on social development. It has therefore been rightly suggested that 'although African governments were expected to embrace and promote constitutionalism and democracy at independence, they neglected the same with impunity'.⁷ Rather, after independence, these leaders acquired absolute powers and became visibly and notoriously oppressive.⁸

Thus, Africa's constitutional history remains that of an excellent case study of the myriad of difficulties that most post-colonial African states have faced and continue to face in the process of self-discovery.⁹ Indeed, weak governance and the associated political instability, insecurity and lack of peace hinder development and socio-cultural harmony, state-building and socio-economic justice. Therefore, it is arguable that at the heart of Africa's missed development opportunities and instability lies the fundamental problem of constitutionalism and democratic governance deficit. Accordingly, one of the major challenges facing Africa today remains how to effectively uphold constitutionalism and democratic governance which are key conditions for

⁶ See CM Fombad 'Post-1990 Constitutional Reforms in Africa A Preliminary Assessment of the Prospects for Constitutional Governance & Constitutionalism' (2008) *The Resolution of African Conflicts The Management of Conflict Resolution & Post-Conflict Resolution* 179-199 p 179.

⁷ MK Mbondenyi & T Ojienda 'Introduction to and overview of constitutionalism and democratic governance in Africa' (2013) *Constitutionalism and Democratic Governance in Africa: Contemporary Perspectives from Sub-Saharan Africa* Pretoria University Law Press(PULP) p 2.

⁸ A Casunkanmi 'Constitutionalism and challenges of development in Africa' *International Journal of Politics and Good Governance* vol. 5 No 5.4 www.onlineresearchjournals.com/ijopagg/art/ (accessed 20 August 2016).

⁹ See MK Mbondenyi & T Ojienda (n 7 above) p 3.

sustainable socio-economic development and progress. Unfortunately, available recent reports clearly indicate that constitutionalism and democratic governance in Africa are in steady and ominous decline.¹⁰ The situation therefore requires international collaborative intervention to be able to reverse the trend.

Against the above background, the founders of the Organization of African Unity (OAU), now African Union (AU)¹¹ recognized the urgent need for a collective effort to address the challenges of constitutionalism and democratic governance deficit in Africa. Hence, the organization began the process of setting an agenda for the promotion of constitutionalism and democratic governance in Africa. Thus, the ‘AU agenda on constitutionalism and democratic governance’¹² is aimed at promoting democratic principles and popular participation, to consolidate democratic institutions and culture and to ensure good governance. These principles are contained in the AU treaties and legal instruments especially the African Charter on Human and peoples' Rights, the African Charter on Democracy, Elections and Governance, and various other AU normative frameworks, decisions and declarations.

In recognition of the need for common institutions with powers and resources to discharge their respective mandates the AU established organs with powers to drive the process of promoting the AU policies and programs. This was foreseen as crucial for Africa to realize its dream of an integrated, prosperous and peaceful Africa, driven by its own citizens. One of the organs established by the AU to promote its policies and programs especially the AU agenda is the Pan African Parliament (PAP). This is in recognition of the role of parliaments at both national and regional levels, as necessary institutions for the promotion of constitutionalism and democratic governance. Through their traditional legislative oversight and representative functions and powers, parliaments exert influence on policy making processes and subsequent execution, in

¹⁰ This trend is evident in the report of the 2016 Mo Ibrahim Foundation index which disclosed that “progress has been slowed by a decline of -2.8 score points in Safety & Rule of Law. The decline in this category is concerning. 33 countries, home to almost two-thirds of the continent’s population, have experienced a decline in Safety & Rule of Law since 2006, 15 of them quite substantially. All four constituent sub-categories of Safety & Rule of Law show negative trends”. See <http://mo.ibrahim.foundation/news/2016/progress-african-governance-last-decade-held-back-deterioration-safety-rule-law/> (accessed 12 April 2017).

¹¹ In this study also referred to as ‘the Union’.

¹² Otherwise in this study referred to as ‘the AU agenda’ or ‘the agenda’ where the context so admits.

order to ensure the effective realization of the objectives of governments at both national and supranational levels.¹³

The PAP was established under the Constitutive Act of the African Union¹⁴ in order to ensure the full participation of African peoples in the development and economic integration of the continent. The establishment of the PAP is informed by a vision to provide a common platform for African peoples and their grass-roots organizations to be more involved in discussions and decision-making on the problems and challenges facing the continent.¹⁵ It has power to examine, discuss or express an opinion on any matter within its mandate.¹⁶ The objectives are to *inter alia* promote the principles of human rights and democracy in Africa; encourage good governance, transparency and accountability in member states.¹⁷

The establishment of the PAP was in fulfillment of the determination of the AU to provide an institution that will effectively represent the African peoples and ensure their full participation in the AU governance. The composition, functions, powers and organization of the PAP are defined in the “Protocol to the Treaty Establishing the African Economic Community Relating to the Pan African Parliament”.¹⁸ The PAP was foreseen as the appropriate pivotal organ that will drive the process of the effective promotion of constitutionalism and democratic governance in Africa. The foregoing clearly demonstrates the commitment and recognition of the importance of the promotion of the agenda by the AU.

However, the first problem is that there is a general perception that the PAP has not been effective in promoting the agenda. This study thus focuses on investigating the role of the PAP in

¹³ A Alam ‘Importance and Role of Regional Organisations’ <http://www.scribd.com/document/37995239/importance-and-role-of-regional-organisation> (assessed 21 December.2016).

¹⁴ See arts 5 & 17 of the Protocol.

¹⁵ See the preamble to the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan African Parliament.

¹⁶ n 14 above.

¹⁷ See the preamble to the Constitutive Act of the African Union (2000/2001), particularly art 3 (g) and (h) on the objectives of the Union and art 4 (m) (n) (p) on the principles of the Union respectively. See equally the preamble to the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan African Parliament. See particularly art 3 (2) & (3) on the objectives of the Parliament and 11 (1) dealing with the functions and powers of the Parliament respectively.

¹⁸ ‘The Protocol to the Treaty Establishing the African Economic Community Relating to the Pan African Parliament’ in this work referred to as ‘the Protocol’ came into force in 2003.

promoting the effective implementation of the policies and objectives of the AU¹⁹ especially the commitment ‘to promote the principles of human rights and democracy in Africa²⁰, as well as to ‘encourage good governance, transparency and accountability in member states.²¹ The above principles are prominently provided for in the PAP’s strategic plan.²² They also fall within the concept of constitutionalism which in our view is the only antidote against impunity and all forms of abuse of power by African leaders.

Though the PAP as presently constituted has a limited mandate,²³ it has no doubt made appreciable achievements in promoting constitutionalism and democratic governance in Africa within the 14 years of its existence.²⁴ This is evident from its role in the collaborative engagement with the African Union Commission (AUC), where members of the Parliament are deployed to Election Observation Missions (EOM) to various parts of Africa.²⁵ This process has established a good foundation for sustaining Africa’s democratic ideals by making recommendations that contribute to the strengthening of democracy and stable governance on the continent.

Members of the PAP also play critical role in promoting Peace and Security in Africa by participating in fact finding missions in countries with underlying security and human rights challenges. The PAP also organizes regional meetings to advocate for the ratification, domestication and popularization of the African Union’s legal instruments especially those that aim to promote constitutionalism and democratic governance. Through these activities the PAP interacts with relevant stakeholders and issues reports, resolutions and recommendations to the policy organs of the AU for consideration and possible implementation.²⁶ The above roles

¹⁹ See art 3(1) of the Protocol.

²⁰ See art 3(2).

²¹ See art 3(3).

²² Objective 3 of the PAP Strategic Plan 2014-2017 provides for “promoting human rights, democracy and good governance in Africa.

²³ The Protocol in art 3(1) clearly states that ‘until such time as the Member States decide otherwise by an amendment to this Protocol: i) The Pan-African Parliament shall have consultative and advisory powers only’.

²⁴ The PAP was inaugurated on March 18 2004.

²⁵ Members of the Pan-African Parliament have participated in EOM in countries such as Angola, Ghana, Senegal, Gambia, Congo, Libya, Burkina Faso, Sierra Leone, Djibouti, Equatorial Guinea and Kenya to mention but a few.

²⁶ This was the case in Darfur-Sudan, Central African Republic, Mauritania, Libya, Tunisia, Cote D’Ivoire, Sierra Leone, Liberia and Saharawi Arab Democratic Republic and Mali.

notwithstanding, its prospect of the effective promotion of the agenda in Africa remains a huge challenge. This is arguably due to its limited legislative mandate.²⁷

The second problem is the fact that though the Protocol was recently revised,²⁸ giving the PAP enhanced legislative functions it remains in the cooler due to undue delay by member states in ratifying same to make it operational. The delay which also affects the other AU legal instruments is arguably attributable to lack of ownership, commitment and resistance from member states. This is because some member states are not willing to subject their legislative sovereignty to a supranational parliament. The unwillingness of the political leaders of some member states to subject or share their legislative sovereignty with a supranational institution like the PAP is apparent from the protracted debate that characterized the adoption of the Revised Protocol. Although it is now more than four years since the adoption of the Revised Protocol yet it has not been ratified. Therefore, the PAP remains a parliament without clear legislative powers till today.

Against the above background, the study aims to examine the role of the PAP in carrying out its mandate based on two scenarios. The first scenario involves the analysis of what the PAP is presently doing and what it can imaginatively do more effectively based on its powers under the extant Protocol. Based on the first scenario, the study sets out to examine the factors militating against the effectiveness of the PAP in promoting the agenda. Furthermore, it goes on to demonstrate that despite its limited mandate, the PAP possesses the potential within the Protocol to devise more imaginative ways to effectively promote the agenda. The PAP can achieve this by carrying out its consultative and advisory powers more creatively, by proposing model laws for consideration and adoption by the Assembly and effective use of its oversight powers and committee works to make appropriate recommendations for the consideration of the policy organs. The study further argues that the PAP's potential in this regard is not being fully exploited and the prospect of achieving it needs to be explored.

²⁷ Article 2(3) (1) of the Protocol provides that 'the Pan African Parliament shall have consultative and advisory powers only.

²⁸ The newly revised Protocol (in this study referred to as ('Revised Protocol') was adopted at the AU summit in Malabo on June 2014 by the Assembly of Heads of State and Government. It enhanced the status of the PAP as the legislative organ of the AU and enhanced its powers and functions as well.

The second scenario involves an analysis of the transformation process of the PAP, the justification for the revision of the Protocol, the problem of the ratification of the Revised Protocol and suggests measures to accelerate the achievement of the required number of ratifications for its operationalization. Furthermore, it analyses the possible legal and administrative implications of the operationalization of the Revised Protocol and the possible institutional capacity challenges that will arise from the enhanced mandate of the PAP. There is no scholarly research on the above issues therefore they need to be studied in order to identify the challenges and the possible solutions.

Furthermore, the study analyses the powers and functions of the PAP in comparison with that of other supranational parliaments with similar mandate with the PAP. In this regard, the role of the Parliamentary Assembly of the Council of Europe (PACE)²⁹ and the European Parliament (EP) are studied. The objective is to see what significant role they are playing in promoting constitutionalism and democratic governance in Europe. In the same vein, the significant role of relevant sub regional parliaments in Africa for example the East African Legislative Assembly (EALA) and the ECOWAS Parliament in promoting constitutionalism in their member states is also examined. The above studies are undertaken with a view to identifying areas from where the PAP can possibly learn from their experiences in the promotion of constitutionalism and democratic governance in their various regions.

In the first instance, the role of the Parliamentary Assembly of the Council of Europe (PACE) is relevant and apt because it is the parliamentary arm of the Council of Europe, a 47-nation international organization dedicated to upholding human rights, democracy and the rule of law in Europe. The mandate of PACE is similar to that of the PAP under study. In other words, the Parliamentary Assembly is a consultative body of the Council of Europe just as the PAP is in Africa. Though the PACE is a consultative body of the Council of Europe without legislative powers, it has been proactive and effective in promoting constitutionalism and human rights in Europe. Unlike the PAP, many of the organization's important instruments were conceived by the Assembly hence it is often called the Council of Europe's "engine".³⁰ The Assembly is made

²⁹ In this chapter referred to as 'the Assembly'.

³⁰ www.europewatchdog.info/en/structure/parliamentary-assembly/ (accessed 30 May 2017).

up of parliamentarians from the national parliaments of the Council of Europe's member states, and generally meets four times a year for week-long plenary sessions in Strasbourg.

Though a consultative and deliberative parliament without legislative powers like the PAP, the PACE is responsible for the election of the Secretary General of the Council of Europe, its Human Rights Commissioner and the judges at the European Court of Human Rights. In particular, it can review the situation of human rights protection and the promotion of fundamental freedom in any member states and can make proposals to the Council in respect of the negotiation and conclusion of new treaties as well as in the amendment of existing ones. The above roles of PACE make the institution ideal for analysis in this study in relation to the first research assumption which states that 'the PAP possesses the potential to promote constitutionalism and democratic governance in Africa despite its limited mandate'³¹, learning from the experience of the PACE.

In the second instance, the analysis of the role of the EP is relevant because unlike the PAP, the EP has fully evolved as the legislative institution of the European Union (EU).³² Furthermore, unlike the EP whose members are directly and democratically elected with full legislative competence, members of the PAP are appointed by their respective national parliaments while its powers are advisory and consultative only. The EP exercises the legislative functions of the EU together with the Council of the EU and the European Commission, exercises budgetary powers,³³ as well as carrying out oversight and supervisory powers over the functions of the other organs.³⁴ In particular, the EP's involvement in treaty revision and its right to intervene before the European Court of Justice enable it to uphold democratic principles in Europe.³⁵

The role of other African regional parliaments especially the EALA and the ECOWAS Parliament in promoting constitutionalism in their member states is also relevant to this study in that the two institutions are more advanced than the PAP in terms of the acquisition of legislative

³¹ This is discussed in chapter 4 of this work below.

³² The EP takes part in the adoption of the European Union's legislations in various ways. It has co-decision powers (renamed the ordinary legislative procedure) with the Council depending on the subject matter, art 294 TFEU.

³³ art 314-319 TFEU.

³⁴ art 233, 2290 and 291 TFEU.

³⁵ The European Parliament: Powers/EU facts sheets/European Parliament www.europarl.europa. (accessed 20 January 2017).

powers even though they operate within the same African cultural and political environment. In this context and in relation to the second assumption,³⁶ it is arguable that the prospect of the PAP to more effectively promote constitutionalism and democratic governance in Africa can be enhanced, learning from the experiences of the role of the other regional parliaments in the promotion of constitutionalism and democratic governance in their regions.

The study recognizes that some of the supranational parliaments acquired legislative competence immediately upon establishment while some others gradually and incrementally evolved into parliaments with legislative powers. In other words, the treaty establishing a regional parliament may endow the parliament with legislative status as the legislative organ of the regional body with clear powers to carry out legislative functions while in some other regional organizations this may come as a latter development. The later is the process envisaged for the PAP under the Protocol.

The study however argues that though the powers of the PAP could evolve as envisaged under the Protocol, the Protocol itself also envisaged a periodic review of the Protocol in order to determine how the PAP could be made more effective in the light of the prevailing circumstances.³⁷ The point at this stage is that there are certain legislative powers and functions being carried out by some of the above comparable parliamentary institutions especially the EP, the EALA and the ECOWAS Parliament which the PAP can adopt to enhance its effectiveness and facilitate the process of regional integration without reinventing the wheel.

1.2 Problem Statement

Though the PAP was established and inaugurated more than 14 years ago,³⁸ with the mandate of promoting the AU agenda, the general perception is that so far it has not been effective. In the first place this is arguably due to the fact that the PAP as noted above is established as a parliament without authority to exercise legislative powers. Rather, its powers and functions are limited to advisory and consultative roles only. As such it lacks the legitimacy and incentive to effectively promote the agenda. Another problem is that the PAP lacks the institutional capacity

³⁶ See 4.2 below, where it is argued that ‘the transformation of the PAP from a parliament with advisory and consultative powers only to a parliament with legislative powers can enhance its prospects of effective promotion of constitutionalism and democratic governance in Africa’.

³⁷ These are discussed in chapters 4 and 5 of this study.

³⁸ The Protocol came into force in 2003 and its inaugural sitting was in March 18 2004.

it requires to fully exploit its available powers under the Protocol, albeit limited to advisory and consultative functions. In other words, though the PAP remains an advisory and consultative body, it possesses the potential under the present Protocol to creatively undertake advisory, consultative and oversight functions, and also propose model laws for adoption by the Assembly to promote the agenda. This potential is yet to be clearly understood and exploited by the PAP to make the difference. The above argument is without prejudice to the contention that the effectiveness of the PAP can be atrophied by lack of meaningful legislative powers.³⁹

The second issue arises from the attempt to strengthen the PAP by adopting the Revised Protocol which declared the PAP as the legislative organ of the AU⁴⁰ with enhanced powers and the fact that it has not yet been ratified as required by the Protocol.⁴¹ On the other hand, even when the Revised Protocol comes into force, there are possible potential structural and administrative capacity challenges that may pose a threat to its effective functioning as a result of the enhanced powers. The challenge of the ratification of the Revised Protocol and the possible implications are serious problems requiring serious study with a view to identifying their ramifications and possible ways of addressing them.

The foregoing are problems that may negatively impact on the capacity of the PAP to effectively deliver on its mandate of promoting the AU agenda. In this regard, this study examines what PAP can effectively undertake within its mandate, how it can obtain the required ratification of the Revised Protocol, the possible implications and how they can be addressed. Furthermore, the study examines the role of other supranational parliaments whose agenda on constitutionalism is undergirded by more evolved legislative powers and functions in order to identify what the PAP can learn from their experiences.

1.3 Objectives of the Study

It cannot be gainsaid that the effectiveness of every institution to deliver on its mandate fundamentally depends on whether the law establishing it makes robust provisions enabling it to function effectively. In this regard, the study takes cognizance of the fact that the powers of the

³⁹ As discussed in chapter 4 of this study.

⁴⁰ The legislative mandate of the PAP is provided for in art 8(1) of the Revised Protocol.

⁴¹ See art 23 of the Revised Protocol provides that the Protocol shall enter into force thirty (30) days after the deposit of the instruments of ratification with the Chairperson of the Commission by a simple majority of the member states.

PAP are limited to carrying out advisory and consultative powers only. Against this background, the objective of the study is to analyse the prospects of the PAP to effectively promote the agenda notwithstanding its limited mandate.⁴² Secondly, the study examines the problem of the transformation of the PAP particularly, the challenge of ratification of the Revised Protocol, the possible implications of its operationalization and recommends possible solutions.

Against the above background, the study analyses the powers and functions of the PAP under the Protocol to demonstrate that it possesses the potential to promote the agenda despite its limited mandate. In this regard, the study argues that the PAP possesses the potential to creatively and imaginatively achieve its mandate through model law-making, oversight functions and discussions on challenges facing the continent and making necessary recommendations to the Assembly,⁴³ despite its limited mandate. On the other hand, the study further argues that the PAP deserves to be further strengthened with enhanced legislative powers to enable it perform its functions more effectively. In this connection, the problem of the ratification of the revised Protocol and the possible implications of its eventual operationalization are analyzed, learning from the experiences of the other supranational parliaments.⁴⁴

Specifically, the objectives of this study are:

- a. To explain the AU agenda on constitutionalism and democratic governance in Africa.
- b. To examine what role the PAP is playing in Promoting Constitutionalism and Democratic Governance in Africa
- c. To identify the problems militating against the effectiveness of the PAP in promoting constitutionalism and democratic governance in Africa and how they can be overcome.
- d. To analyze the transformation process of the PAP from a parliament with advisory and consultative powers only to a parliament with enhanced legislative powers and the possible implications.

⁴² As stated earlier, art 3 (1) of the protocol limited the powers of the PAP to advisory and consultative role only pending its evolution into full legislative powers by amendment of the protocol.

⁴³ Assembly in this study refers to “the Assembly of Heads of States and Government of Member States of the African Union”. See art 1 of the Protocol.

⁴⁴ The other supranational parliaments and their roles in promoting constitutionalism and democratic governance in their respective regions and what lessons the PAP can learn from them are discussed in details under chapter 6 of this study.

- e. To examine what Role other supranational parliaments are playing in promoting constitutionalism and democratic governance in their member states and what the PAP can learn from their experiences.

1.4 Research Hypothesis/Assumptions

- 1.4.1 The PAP possesses the potential to promote constitutionalism and democratic governance in Africa despite its limited mandate.
- 1.4.2 The transformation of the PAP from a parliament with advisory and consultative powers only to a parliament with enhanced legislative powers is imperative to enhance its prospects of effective promotion of constitutionalism and democratic governance in Africa.

1.5 Research Questions

In light of the above, the study attempts to provide answers to the following questions:

- a. What is the AU agenda on constitutionalism and democratic governance in Africa?
- b. What role is the PAP playing in promoting constitutionalism and democratic Governance in Africa?
- c. What are the problems militating against the effectiveness of the PAP in Promoting Constitutionalism and democratic governance in Africa and how can the PAP overcome them?
- d. What are the factors militating against the transformation process of the PAP from a parliament with advisory and consultative powers only to a parliament with enhanced legislative powers and the possible implications.
- e. What role are other supranational parliaments playing in promoting constitutionalism and democratic governance in their member states and what can the PAP learn from their experiences?

1.6 Justification for the Study

Regional organizations have been recently playing important role in strengthening and upholding constitutionalism and democratic governance in their member states. For this purpose, they develop international standard or benchmarks and regulatory frameworks through treaties and various instruments depending on regional peculiarities for adoption by their member states. In

some cases sanctions are provided to enforce compliance and in more serious cases of violations leading to total breakdown of law and order or civil war, regional bodies directly intervene through the organs established for that purpose, in order to assist in designing and restoring constitutional order. In their efforts to carry out their mandates, these institutions are necessarily confronted with a number of challenges which militate against their effective performance. The role of these international institutions and the challenges they encounter in carrying out their mandates attract global interest. However, they have not so far attracted so much attention from African scholars especially with respect to the role of African supranational parliaments.

Against this background, the intervention of the AU through its supranational parliamentary institution which the PAP represents and the challenges it encounters in promoting constitutionalism in Africa deserve proper analyses. However the effectiveness of the PAP in carrying out its mandate has not received the serious attention it deserves. This study therefore analyses the role of the PAP in the promotion of the agenda. The study identifies the challenges militating against the effectiveness of the PAP in executing its mandate under the Protocol especially in promoting the agenda. The study is significant as it seeks to identify measures that can be adopted to creatively and imaginatively enhance the capacity of the PAP to effectively carry out its functions under the extant Protocol, despite its limited mandate.

Furthermore, the transformation of the PAP from a parliament with advisory and consultative powers only to a parliament with legislative powers has not materialized due to the challenge of ratification by member states as required under the Protocol, more than 4 years since its adoption. This is a major challenge which deserves proper study in order to see how the required ratification can be achieved to make it operational. Requiring proper analysis also is the possible implications of the operationalization of the Revised Protocol in terms of the possible new administrative and political challenges. The ultimate result is the contribution to knowledge and best practices that the PAP can leverage on, learning from the experience of the other relevant supranational parliaments whose roles are examined in this study. The emerging recommendations from the findings are presented for possible adoption by the PAP and the AU and applied to enhance the prospects of the PAP to effectively promote and foster the AU agenda. There is little research product in this area of the law which apparently leaves a gap that deserves scholarly attention. The outcome of this study will therefore contribute to the body of

knowledge in this area of the law and also to improve on the visibility of the PAP as an important continental parliament for the promotion of the agenda.

1.7 Research Methodology

The research methodology is doctrinal and essentially library based. The research relies on information gathered from primary sources which will involve the use of library, the examination of the relevant laws and regulations, case laws and soft laws, AU and other international legal instruments/treaties, publications, journals, interviews which are not structured. Information gathered from secondary sources is also used. These will include information gathered from text books, journal Articles, discussions with experts in the area as well as information from existing research work in the relevant subject areas, including lecture notes, periodical, mimeographs, reports, magazines and media reports and publications. The method is essentially analytical, explanatory and prescriptive.

The research analyses the constitution, organization, powers and functions of the PAP, bearing in mind that it is a relatively young institution with an organizational structure and powers that are yet to be fully developed and which are subject to periodic revision. For this purpose, visits to the relevant offices of the AU Commission and PAP respectively will be embarked upon in order to gather relevant information to the study. In the final analysis, the current powers and organizational set up of the PAP is compared with that of the PACE, EP, EALA and ECOWAS Parliament respectively which are more mature and comparable parliamentary institutions. This is with a view to determining the best practices that can be recommended for possible adoption to enhance the effectiveness of the PAP in promoting the agenda.

1.8 Scope and Limitations

The promotion of constitutionalism and democratic governance is a global challenge because of its importance in the maintenance of international peace, security and fundamental requirement to achieve sustainable development and as such a very complex and wide subject. Furthermore, the PAP as an important organ of the AU has many objectives and functions amongst which is the promotion of constitutionalism and democratic governance. However the research focuses on the role PAP is playing as a pivotal organ of the AU in driving the process of promoting the agenda on constitutionalism and democratic governance in AU member states, its challenges and

prospects. However, references are made where necessary to other functions of the PAP for the proper elucidation of their linkages to the promotion of the agenda.

There is no doubt that the study will benefit from the experiences of the role of diverse comparable supranational parliaments both within and outside Africa. However, in order to limit the challenges of the wide range of relevant regional parliaments, the research narrows the scope of the study to the role of the PAP in promoting the agenda, drawing from the experiences of the PACE, EP, EALA and ECOWAS Parliament respectively. Again, where necessary, references are made to other relevant supranational parliaments in order to enrich the study.

1.9 Literature Review

The review of the literature on the role of the PAP in promoting constitutionalism and democratic governance in Africa is carried out from two perspectives. The first perspective looks at the literature on the conceptualization of the idea of constitutionalism and democratic governance and the justification for the international organizations' involvement in moderating states' constitutionalism and democratic governance. The second specifically looks at the role of supranational parliaments in promoting constitutionalism and democratic governance in their member states with particular reference to the role of the PAP. There is a deluge of literature on the former, few of the relevant ones of which are highlighted for brevity and management of space. The literature on the later is still developing hence the PAP is a relatively young and evolving institution and this study seeks to add to the existing scholarly work on it.

On the first perspective, it is apposite to recognize that with the disappearance of the cold war from the international system and the emergence of market-oriented global integration new opportunities for the establishment of a liberal international order based on the principles of constitutionalism and democracy was created.⁴⁵ Thus, there is now an increasing acceptance of the fact that democracy and good governance are not a luxury, but a fundamental requirement to achieve sustainable development.⁴⁶ Mangu in his article, 'Constitutional democracy and constitutionalism in Africa' reiterates the inextricable interrelated relationship between

⁴⁵ Ernst-Ulrich Petersmann 'Constitutionalism and International Organizations' <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1450&context=njilb> (accessed 19 August 2017).

⁴⁶ 'The Role of Parliament in Promoting Good Governance' *Economic Commission for Africa* <https://repository.uneca.org/handle/10855/22131>. (accessed 19 August 2017).

constitutionalism and democracy. He further reiterates the fact that defining constitutionalism and democracy remains a challenge though the veneration of the two concepts remains among the most enduring and probably justified vanities of liberal democratic theory.⁴⁷

Constitutionalism as a concept remains nebulous and various scholars have diverse ideas about what it really means.⁴⁸ Whatever one's approach⁴⁹ or perspective might be in defining constitutionalism, its abiding principle remains the idea of a limited government. As McIlwain puts it, the true constitutionalism is essentially what it has been almost from the beginning: the limitation of the government by law.⁵⁰ Andrew agrees with McIlwain and simply states that it is a complex concept but describable in two words; 'limited government'.⁵¹

Expanding on the idea of limited government, Rosenfeld explains that constitutionalism is basically 'a three-faceted concept' which requires imposing limits on governmental powers, adherence to the rule of law, and the protection of human rights.⁵² In this light, he asserts that the touchstone of constitutionalism is the concept of limited government under a higher law.⁵³ It proclaims the prevalence of the rule of law by subjecting government officials to the limitations of a higher law in the exercise governmental powers. Thus, whether one looks at the concept of constitutionalism from the descriptive, prescriptive, functional, traditional, modern lens, the underlying philosophy as stated by Fombad is the need to design constitutions that are not merely programmatic shams or ornamental documents that could be easily manipulated by politicians, but rather documents that can promote respect for the rule of law and democracy.⁵⁴

⁴⁷ AM Mangu 'Constitutional democracy and constitutionalism in Africa' *Conflict Trends*, Volume 2006, Number 2, 1 January 2006, pp 3-8(6).
<http://www.ingentaconnect.com/content/sabinet/accordc/2006/00002006/00000002/art00002>.

⁴⁸ AB Mangu 'The quest for Constitutionalism and Democracy in the Democratic Republic of Congo' <https://dkashironge.wordpress.com/2014/11/18/the-quest-for-constitutionalism-and-democracy-in-the-democratic-republic-congo/> (accessed 20 July 2017).

⁴⁹ Mangu (n 47 above) identifies two main approaches to constitutionalism, namely the traditional and modern approaches, may be distinguished.

⁵⁰ McIlwain, C.H., *Constitutionalism: Ancient and Modern*...22; "The most ancient, the most persistent, and the lasting of the essentials of the true constitutionalism still remains what it has been almost from the beginning, the limitation of the government by law" as quoted by Mangu (n 2 above).

⁵¹ WG Andrews p13 as quoted by Mangu (n 47 above).

⁵² Rosenfeld, M. (1994) "Modern Constitutionalism as Interplay between Identity and Diversity", in Rosenfeld, M. (Ed) *Constitutionalism, Identity, Difference, and Legitimacy. Theoretical Perspectives*, Durham & London: Duke University Press, pp 27-28.

⁵³ CM Fombad 'Strengthening constitutional order and upholding the rule of law in Central Africa: Revising the descent towards symbolic constitutionalism (2014) *African Human Rights Law Journal* 412-448 416.

⁵⁴ See Fombad (n 53 above).

Therefore, constitutionalism must be based on a defined minimum set of core values and a well-defined process and procedural mechanisms to hold government accountable⁵⁵

Discussing the concept of constitutionalism and democratic governance in Africa, Mbondenyi and Ojienda⁵⁶ agree with the association of constitutionalism with the idea of limited government stressing that in modern constitutional systems, the term ‘constitutionalism’ has come to suggest limited government. Citing Henkin, the authors opined that constitutions have become a blueprint for a system of government where authority is shared among a set of different branches and limitations are implied in these divisions⁵⁷ thereby laying the foundation for external checks designed to safeguard the people’s liberties,⁵⁸ which is an essential feature of a democratic government. However, although all governments have constitutions, not all are necessarily constitutional governments. This explains why it has been so easy for any post-colonial African governments to use constitutions to legitimize authoritarian rule though they all proclaimed their commitment to democracy, good governance and respect for human rights.

As regards democracy, Dahl⁵⁹ identified the existence of high level of civil liberties; political pluralism; and political participation that provide the choice for the electorate to select candidates in free and fair elections as a condition for a society to be regarded as democratic. According to Babawale⁶⁰ ‘it is doubtful whether one can validly talk of democracy in the absence of participation, competition and the guarantee of civil liberties.’ Democratic governance otherwise referred to as good governance is presented in this study as the key to development.⁶¹ In this sense, it is simply defined as governance based on fundamental democratic principles that satisfy the developmental needs and aspirations of the members of the

⁵⁵ n 53 above.

⁵⁶ K Mbondenyi and T Ojienda ‘Introduction to and overview of constitutionalism and democratic governance in Africa’ *Constitutionalism and democratic governance in Africa: Contemporary perspectives from Sub-Saharan Africa 2013*: Pretoria University Law Press (PULP) 5.

⁵⁷ L Henkin *Foreign affairs and the Constitution* (1972) 3.

⁵⁸ MK Mbondenyi *International human rights and their enforcement in Africa* (2010) 89-90 (n 55 above)

⁵⁹ R A Dahl, *Democracy and its critics*. (New Haven: Yale University Press, 1989) 221.

⁶⁰ T Babawale *Nigeria in the crises of governance and development: A retrospective and prospective analyses of Patriarchy and constraints of democratic political space of women in Nigeria selected issues and events, education, labor and the economy*, (Lagos: Political and Administrative Resource Center, 2006), p. 35.

⁶¹ Democratic Governance-The Key to Development *The Concept of Democracy and Governance*. Available at: <<https://cuvillier.de/public-file>> (accessed 2 December 2016).

society. It emanates from a legitimate government that does not act arbitrarily but manages a country's economic and social resources in a transparent, accountable and responsive manner to achieve developmental goals.⁶²

Mangu⁶³ revisits the two highly venerated twin concepts of constitutionalism and democracy and asserts that defining the two concepts remains a challenge. He also reflects on the related concepts of constitution, elections, and multipartyism. Citing Rosenfeld, he argues that constitutionalism is “a three-faceted concept”, as it requires imposing limits on governmental powers, adherence to the rule of law, and the protection of human rights. Constitutionalism is the antithesis of arbitrary rule. Its opposite is despotic government, the government of will instead of law. With regard to democracy, he adopts the definition of Abraham Lincoln as “government of the people, by the people and for the people”, a political system characterized by the participation and government of the people through their freely elected representatives. He highlights the current state of constitutionalism and democracy in Africa and stresses some challenges that need to be overcome to ensure the establishment and consolidation of constitutionalism and democracy on the continent.

The paper by Pelizzo, Riccardo and Staphenurst, Rick on ‘The role of parliament in promoting good governance in Africa’,⁶⁴ investigates the relationship between democracy, development and good governance in Africa and argues that in the African continent what is really needed to promote development in the continent is good governance. The paper further explains that the relationship between good governance and development is remarkably stronger and more significant than the relationship between democracy and development and suggests that in order to promote development in Africa it is even more important than in the rest of the planet to promote good governance.

While this study agrees with the conclusion that it is more important to promote good governance in Africa than in the rest of the world, it disagrees with the distinction between democracy and good governance in terms of which one is stronger for development. This is

⁶² See the report of the United Nations Development Program [UNDP], 2004.

⁶³ In his paper AM Mangu Constitutional Democracy and Constitutionalism in Africa (n 47 above).

⁶⁴ Pelizzo, Riccardo and Staphenurst, Rick (2007). The role of parliament in promoting good governance in Africa https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101133 (accessed 20 August 2018).

because of the position of this study that neither democracy nor good governance can exist without the other hence the two concepts are mutually re-inforcing. The paper however, explains the important role of parliaments to promote good governance not only by controlling the executive branch of government but also as to how the parliament can promote good governance by controlling itself and the behavior of its members.

The above literature shows that the concepts of ‘constitutionalism’ and ‘democratic governance’ are mutually reliant and reinforcing. Both concepts serve the same purpose and non can exist without the other. In other words, that the concepts of ‘constitutionalism’ and ‘democratic governance’ are mutually reliant and reinforcing, serve the same purpose and non can exist without the other. However these literatures though incisive are not linked with the role the PAP can play in promoting the twin concept of constitutionalism and democratic governance in Africa.

In reviewing the literature from the second perspective it is instructive to begin by recognizing that the long standing state-centric narrative is that constitutional law and constitutionalism are embedded in the modern states. But when the state itself becomes disembedded from its dominant position in the global order,⁶⁵ the state should logically submit its authority to supranational organizations. Therefore regional organizations have a justification for developing legal frameworks and policies to uphold fundamental constitutional values, including the rule of law, democracy and the protection of human rights. Gutto⁶⁶ in his paper ‘Constitutionalism, Elections and Democracy in Africa: Theory and Praxis’, reviews and interrogates the meaning and interrelationship between constitutionalism, elections and democracy in terms of theory and the diversity of practices. He analyzed interaction between international and African regional norms and standards and national norms and standards and concludes that modern national constitutions are mediated by sub-regional, regional and international agreements. He argues thus:

⁶⁵ n 57 above.

⁶⁶ S Gutto ‘Constitutionalism, Elections and Democracy in Africa: Theory and Praxis’
<https://www.scribd.com/document/191487748/Prof-S-Gutto-Constitutionalism-Elections-and-Democracy-in-Africa-Theory-and-Praxis>.

Given a globalised world in which individual states are compelled to enter into sub-regional, regional and international associations with each other for specified purposes, the constitution of any one country is often influenced by, and must be interpreted and operationalized within, the broader external context and arrangements. In other words, there are many fields in which states traditionally enjoyed “exclusive national sovereignty” but which are now mediated by the sub-regional, regional and international constitutional norms and standards. It is for this reason that most written constitutions today provide specifically for the modalities for concluding treaties (agreements) and the application and status of international customary law in the domestic sphere.⁶⁷

Wiebusch provides some justification for the direct external enforcement of international constitutionalism and argues that the involvement in national constitution enforcement can thus be viewed as efforts from a regional body to assist member states comply with their regional obligations and commitments.⁶⁸ The article has not however explained how this direct involvement can be achieved in practical terms having regard to possible resistance of national governments in defence of state sovereignty.

Nzewi⁶⁹ in his article ‘Influence and Legitimacy in African Regional Parliamentary Assemblies: The Case of the Pan-African Parliament’s Search for Legislative Powers’, examines non-legislative avenues for parliamentary influence and legitimacy in the PAP. He agrees that the push for legislative powers for the PAP and other regional assemblies is a legitimate pursuit as far as parliamentary functions go. He however, asserts that there are political and institutional challenges that may arise with particular reference to the complication of sovereignty concerns of heads of state. Relying on the earlier unsuccessful attempt of the PAP to acquire legislative powers through an amendment of the Protocol he presented arguments for and against the transformation of PAP from a parliament with advisory and consultative powers only to one with legislative competence. He queried the level of preparedness of the PAP to take up the mammoth

⁶⁷ See Gutto, (n 66 above).

⁶⁸ M Wiebusch *The role of regional organizations in the protection of constitutionalism* International IDEA Discussion Paper 17/2016.

⁶⁹ O Nzewi ‘Influence and Legitimacy in African Regional Parliamentary Assemblies: The Case of the Pan-African Parliament’s Search for Legislative Powers’ *Journal of Asian and African Studies* 49.(4) 493. <https://www.google.com/search?q=Influence+and+legitimacy+by+O+Nzewi&ie=utf-8&oe=utf-8&client=firefox-b-ab> (accessed 15 July 2017).

task of law-making and the responsibilities required in terms of specialization, research and knowledge competencies, and resource and capacity generation. He disagrees with the view that the PAP needs legislative powers to increase its political legitimacy and to exercise influence in the AU, especially in delivering the dividends of good governance in Africa. Rather, he recommends the exploitation of alternative means (non-legislative forms)⁷⁰ of achieving legitimacy given its current form and the realities of AU governance, especially the tendency of member states to resist supranationality.

In line with the above reasoning, Nzewi⁷¹ probes the role of the PAP in the AU, given the struggle of AU institutions for relevance in the highly intergovernmental milieu of African regionalism. Taking into consideration the historiography of the AU integration and its institutions⁷² he views the non-interference legacy of the OAU as well as the highly intergovernmental culture of African regionalism as institutionalized baggage with the potential of crippling a supranational leaning institution like the PAP. Based on this central argument, he concludes that PAP in practice plays no effective role in AU decision making. He did not however proffer any solution to the baggage of the highly intergovernmental culture of African regionalism efforts.

Demek⁷³ traces the history of the establishment of the PAP and focuses on its functions and powers, appointment and composition and states that the PAP faces daunting challenges. He also looks at the stages of development of the EP especially with regard to how the PAP could benefit from its experience and concludes that the current mandate of PAP is not adequate and needs to be strengthened. The question of how the current mandate of the PAP can be made adequate so that it functions more effectively remains unaddressed by the article.

⁷¹ OI Nzewi 'The Role of the Pan African Parliament in African Regionalism (2004-2006): an Institutional Perspective' A thesis submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy (PhD) Public Affairs School of Public Management and Administration in the Faculty of Economic and Management Sciences University of Pretoria, South Africa 2008
<https://repository.up.ac.za/bitstream/handle/2263/23528/Complete.pdf?sequence=8> (accessed 19 August 2017)..

⁷² The problem is how to strike a balance between the concerns of sovereignty by member states and the demands of the AU tendency towards supranationality (sovereignty versus supranationality).

⁷³ T Demeke 'The new Pan-African Parliament: Prospects and challenges in view of the experience of the European Parliament' *African Human Rights Law Journal*.

In interrogating the parliamentary status of the PAP, we note that various academics and commentators on the role of the PAP have expressed the view that the institution is a mere ‘talk shop’. This is a name used to describe an ‘institution that undertakes workshops, seminars and conferences largely for the benefit of the parliamentarians’.⁷⁴ In fact, the role of the PAP has been so undermined, to the extent of asking whether it ‘will ever be a real continental legislature - or will it remain forever a glorified talk shop?’⁷⁵ This goes to show the extent of the general perception of the ineffectiveness of the PAP as a continental parliament.

Dinokopila,⁷⁶ in his thesis on ‘The Role of Pan African Parliament in Promoting Human Rights in Africa’ highlights that Regional Parliamentary Assemblies (RPAs) and International Parliamentary Institutions (IPIs) are relevant to the promotion of human rights. He expressed the view that the PAP like other RPAs and IPIs is equally relevant to the promotion of human rights in Africa, but argues that the role of the PAP in this regard has thus far been negligible due to the absence of full legislative powers, limited budgetary powers and undemocratic appointment of members of the PAP. He agrees with the description of the PAP as a talk shop, though capable of using its current consultative powers to become an influential talk shop as regards the promotion of human rights and the decision-making process of the AU in general. Viljoen⁷⁷ also expresses the view that the PAP serves mainly as an ineffectual ‘talkshop’, he however acknowledges that the PAP has passed a number of resolutions and recommendations aimed at the attainment of the AU’s objectives by invoking its power to examine ‘any matter’ and to make any recommendations aimed at the attainment of AU’s objectives.⁷⁸

This study while agreeing with the conclusion of the thesis of Dinokopila and others that the role of the PAP in the promotion of human rights has not been as effective as expected this study disagrees that the PAP thereby deserves to be described as a mere talk shop. The position of the

⁷⁴ BR Dinokopila ‘The role of the Pan-African parliament in the promotion of human rights in Africa’ (2016), LLD Thesis, University of Pretoria, Pretoria available at the Theses and dissertations (Centre for Human Rights) 545

⁷⁵ W Zambara ‘Pan African Parliament must stop its ‘talk-shop’ and get down to real business’ (2009), Cape Times No. 119 <http://www.ccr.org.za/index.php/media-release/in-the-media/newspaper-articles/item/273-pr-119> (accessed 14 June 2017): see also Dinokopila (n 73 above).

⁷⁶ BR Dinokopila (n 74 above).

⁷⁷ F Viljoen *International Human Rights in Africa* (2012) <https://books.google.co.za/books?isbn=0199645582> (accessed 20 October 2017).

⁷⁸ See Viljoen (n 76 above) 175.

study is justified considering some of the positive roles the PAP has been playing so far in promoting human rights despite its limitations.⁷⁹ The study however agrees with the thesis on its further conclusion that the PAP must learn from the experiences of other regional parliaments and must explore imaginative ways according to which it could deal more pragmatically with human rights issues. It has therefore been rightly suggested⁸⁰ that it is imperative that the PAP should move towards creating better synergies with members of civil society and as such, the creation of a forum where the Parliament and civil society can consult each other consistently will certainly improve the promotion and protection of human rights in Africa.⁸¹ In other words there is need for the PAP to establish an institutional framework for collaboration with credible civil society groups for effective mutual support in promoting the agenda which includes human rights. This also requires to be further explored by this study.

In determining whether to arrogate full legislative powers to a supranational parliament Nzewi argues that the preparedness of the institution to take up the mammoth task of law-making and the responsibilities required in terms of specialization, research and knowledge competencies is critical.⁸² He therefore queries whether at its formative stage and considering the stage of AU early experience in regionalism a supranational parliament with full legislative powers can be ideal in the face of the attendant huge capacity and competency challenges. The argument is that with limited capacity in technical, research and human resources a supranational parliament will find it challenging to effectively undertake full legislative activities. Nzewi's argument apparently assumes that the PAP is making a case for the arrogation of full legislative powers. On the contrary, the study disagrees with his premise and rather argues that the PAP at this stage is rather making a case for enhanced legislative powers and not for full legislative powers, though this is the ultimate aim of the African leaders as clearly provided for by the Protocol.⁸³

The study by Mpanyana⁸⁴ analyzes the PAP's prospects of transformation into a full legislative

⁷⁹ The various efforts of the PAP to promote human rights in Africa are detailed in chapter 4 of this study.

⁸⁰ BR Dinokopila 'The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration' (2013) 2 AHRLJ 302-323 <http://www.ahrlj.up.ac.za/dinkopila-br> (accessed 20 December 2017).

⁸¹ See Dinokopila (n 80 above).

⁸² See Nzewi (n 71 above).

⁸³ See arts 2(3) and 11 of the Protocol respectively.

⁸⁴ S Mpanyane 'Transformation of the Pan-African Parliament: A part to Legislative Body?' *ISS Paper 181* March 2009 <https://www.files.ethz.ch/isn/99267/PAPER181.pdf> P. 1 (accessed 20 August 2017).

body and the likely paths along which the transformation could take place based on his reflections on PAP's mandate and the way in which the body has operated during its first term. He also undertakes a comparative analysis of similar institutions, such as the EP and the EALA and states that the EP which shares certain commonalities with the PAP particularly as a supranational body has full legislative powers and the EALA is the only regional parliament in Africa⁸⁵ has obtained some legislative and supervisory powers, despite being a relatively young institution. He further identifies the different paths leading to the PAP's possible transformation taking into account the existing structural and capacity challenges facing the PAP which must be confronted for the transformation to be successful.

While the suggestions are appreciated, Mpanyena's argument again appears to be premised on the assumption that the PAP is making a case for the transformation of the PAP into a parliament with full legislative powers which as we have explained above is not the case. In any case, this study argues that the PAP requires transformation or strengthening to make it more effective hence power is needed to acquire more power or influence.

Based on the above literatures, it cannot be gainsaid that achieving constitutionalism and democratic governance requires the existence of a strong, effective and efficient parliament. It is also not in doubt that international organizations are increasingly and justifiably establishing supranational parliament for this purpose. It is equally clear from the above that there is consensus on the argument of scholars that the PAP is established as an institution without legislative powers and that it lacks the necessary administrative and professional capacity to effectively deliver on its mandate. Therefore the PAP needs to be strengthened with enhanced legislative powers to be able to establish its relevance in the AU. What has not been agreed upon is the part to the strengthening of the institution. This study explores further how the above can be achieved. However, while waiting for enhanced legislative powers it can make itself more relevant by exploiting its available powers under the extant Protocol.

⁸⁵ At the time Mpanyene's study, the EALA was the only African regional parliamentary institution with legislative powers. However, the position has now changed with the ECOWAS Parliament having currently acquired legislative powers under the ECOWAS Supplementary Act.

Secondly, with the exception of the works of Dinokopila⁸⁶ and Viljoen⁸⁷ which focused on human rights⁸⁸ most of the available literatures on the role of the PAP and its transformation⁸⁹ did not specifically focus on the promotion of the wider concept of constitutionalism and democratic governance dimension which is the central focus of this study. Furthermore, all the literatures considered above pre-date the adoption of the Revised Protocol. As such, they did not take into account the current developments and the possible implications of the changes in the Revised Protocol. The foregoing are gaps which this study sets out to investigate among other relevant issues, with a view to enhancing the effectiveness of the PAP in promoting the AU agenda.

1.10 Structure of the Thesis

The thesis is organized in seven chapters within the context of the research problem and the relevant research questions, the ultimate responses to which are analyzed to enable us arrive at the appropriate conclusions and recommendations. In this connection, the thesis addresses issues around the following chapters:

Chapter One sets out the introduction and background of the study, the research problem, the objective of the study, the research hypothesis, the questions arising from them, as well as the Justification for the study. The other relevant issues covered in this chapter include the research methodology, the limitations and a review of the literature on the subject.

Chapter Two deals with the theoretical bases for the international organizations' role in promoting States' Constitutionalism and democratic governance and discusses the role of international institutions in promoting constitutionalism and democratic governance in their member States. In particular the following issues are analyzed: the link between constitutions and constitutionalism; constitutionalism and the rule of law; constitutionalism and democratic governance; constitutionalism and International Organizations; international organizations' legitimacy in promoting States' constitutionalism; sovereignty and the challenge of constitutionalism; and the role of parliaments in promoting constitutionalism.

⁸⁶ Dinokopila (n 74 above)

⁸⁷ Viljoen (n 77 above)

⁸⁸ The protection of human rights is critical to the promotion of constitutionalism and democratic governance and indeed constitutes one of the core elements of constitutionalism and as such is an aspect of the wider concept of the duo.

⁸⁹ That is, from a parliament with advisory and consultative powers only to a parliament with enhanced legislative powers.

Chapter Three examines the OAU/AU agenda on constitutionalism and democratic governance in Africa and demonstrates the commitment of the AU in promoting the agenda. Based on the theoretical foundation laid in chapter two, the treaties and other legal instruments adopted by the AU with the aim of promoting the agenda are examined. In this connection, the Constitutive Act of the African Union and the other relevant instruments are examined vis a vis the role of the PAP in promoting their objectives.

Chapter Four discusses the establishment of the PAP as the pivotal organ of the AU for the purpose of promoting the AU agenda on constitutionalism and democratic governance in Africa focusing on its effectiveness. The vision of the AU in establishing the PAP and the rationale for its limited mandate, as well as its powers and functions are examined, showing clearly that in spite of its limited mandate the PAP has done much to promote constitutionalism and democratic governance in Africa, though there is still room for improvement. It further explains that the PAP can creatively undertake more oversight, advisory and consultative functions and to also propose model laws for adoption by the Assembly.

Chapter Five analyzes the transformation of the PAP from a parliament with advisory and consultative powers only to a parliament with enhanced legislative powers and functions. The background to the transformation process and the important changes in the Revised Protocol are explained. In particular, the challenge of the ratification of the Revised Protocol and the possible implications of its operationalization as well as the possible ways of overcoming them are analyzed.

Chapter Six examines the powers and functions of other comparable supranational parliaments based on the foundation laid in chapter two, as well as the issues and challenges identified in chapters four and five. This is with a view to identifying areas from where the PAP can possibly learn based on their experiences in the promotion of constitutionalism and democratic governance in their member states. In this connection, the role of the PACE and the EP in promoting constitutionalism in Europe and the role of relevant sub regional parliaments in Africa particularly, the EALA and the ECOWAS Parliament in promoting constitutionalism in their member states are examined. It argues that there are certain legislative powers and functions

being carried out by some of the above comparable parliamentary institutions especially the EP, the EALA and the ECOWAS Parliament which the PAP can adopt to enhance its effectiveness.

Chapter Seven as the last chapter summarizes and concludes the study based on the findings and lessons that emerged from answers to the research questions addressed in the preceding chapters. Finally, appropriate recommendations are made for the effective promotion of the AU agenda on constitutionalism and democratic governance by the PAP. The recommendations are presented in three headings as follows: proposal for the amendment of the Protocol; proposal for non-legislative options for the PAP; and proposal for PAP's visibility, civil society and citizens' engagement.

Chapter Two

Theoretical Basis for International Organizations' Role in Promoting States' Constitutionalism

Chapter Outline

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2.1 Introduction

This chapter discusses the theoretical bases for the international organizations' role in promoting states' constitutionalism and democratic governance. It conceptualizes constitutionalism, its ramifications and relationships *vis a vis* other concepts that impact on constitutionalism and democratic governance and analyses the role parliaments play in this regard. Our analyses goes beyond the state-centric concept of constitutionalism and discusses constitutionalism at the international level (supraconstitutionalism), showing its impact and the growing influence of the role of international institutions in moderating states constitutionalism, as well as the challenges they face in this regard.

Specifically, the chapter discusses the following concepts: The Link between Constitutions and Constitutionalism; Constitutionalism and the Rule of Law; Constitutionalism and Democratic Governance; Constitutionalism and International Organizations; International Organizations' Legitimacy in Promoting States' Constitutionalism; Sovereignty and the Challenge of Constitutionalism; The Role of Parliaments in Promoting Constitutionalism; and Concluding Remarks. The chapter concludes that international institutions especially

parliaments (with particular reference to the PAP), have important role to play in promoting constitutionalism and democratic governance in member states and should be strengthened legally and logistically in order to perform effectively.

2.2 The Link between Constitutions and Constitutionalism

In the first place, it was the idea of a constitution and the need to ensure that it effectively serves its purpose that gave rise to the idea of constitutionalism. A democratic constitution is an indispensable factor in establishing a solid foundation for constitutionalism to flourish. Therefore a fair understanding of the concept of constitution is imperative for a clearer understanding of the concept of constitutionalism. A constitution in its broad sense can be defined as the organic law, system or body of fundamental principles according to which a nation, a state, body politic or organizations are constituted and governed.¹

In this broad or wider sense, a constitution is the means by which a people organizes a government for itself and defines the aims and objectives of the political association, the conditions of membership, the rights and obligations of the members, the organs and powers necessary for the conduct of the affairs of the association and the duties and responsibilities of those organs to the individual members.² With particular reference to a state, a constitution is the means by which the structure or framework of government and its processes, the powers of its officials and their limits, the fundamental rights of the citizens and the necessary democratic institutions for the operation of the system as defined and protected in a supreme document³ or by convention.⁴

It must be noted however that the concept of constitution and constitutionalism though frequently conflated are by no means synonymous.⁵ This implies that the existence of a constitution should not be equated with the existence of constitutionalism. In this regard, David Fellman notes that ‘constitutionalism should not be taken to mean that if a state has a

¹ *Imonikhe v Attorney General (1992) 7 SCNJ 197.*

² BO Nwabueze *Ideas and Facts in Constitution Making* (1993) p. 11: The Morobundiya Lectures, Spectrum Books see also *OE Nwebo Critical Constitutional Issues in Nigeria* Owerri: Versatile Publishers ed. (2011) p 11.

³ This obtains in the case of countries with written constitutions.

⁴ This is the case in countries with unwritten constitutions.

⁵ D Kumar ‘What is the difference between Constitutionalism and Constitutional Questions?’

constitution, it is necessarily committed to the idea of constitutionalism'.⁶ In other words, the idea of constitutionalism goes beyond the bare text of the constitutional framework to incorporate not only legal but various social, political and even moral aspirations and uses.

Thus, it is not enough for a country to be ruled in terms of a constitution, it is equally important that such constitution must have been a product of a democratic process⁷ and that it contains the core democratic principles or values that impose limitations on both the rights of the government and that of the governed as well in order to achieve democratic governance. For instance, the totalitarian regimes of the former Soviet Union and Apartheid South Africa, and to more or less extent the former military governments of Uganda and Nigeria to mention but a few, were states that had identifiable documents as their constitutions but without constitutionalism, hence the governments enjoyed absolute and unlimited powers.⁸ Surely, constitutions of the above nature cannot promote constitutionalism and democratic governance principles and values.

Constitutionalism can therefore be described as 'a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law'.⁹ The concept has both prescriptive and descriptive uses. Used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people's right to 'consent' and certain other rights, freedoms, and privileges. Used prescriptively, its meaning incorporates those features of government which are seen as the essential elements of the constitution.¹⁰ In clear terms, the descriptive approach describes what constitutions are, while the prescriptive approach addresses what a constitution should

<http://www.preservearticles.com/2011092714111/what-is-the-difference-between-constitutionalism-and-constitutional-questions.html> (accessed 30 June 2017).

⁶ Cited by Kumar (n 5 above).

⁷ Today, the legitimacy of the Constitution of the Federal Republic of Nigeria, 1999 is still being challenged by Nigerians as the people's constitution in that the process of its making was not adjudged as democratic. The Nigerian constitution was made by the military after constituting a constitutional conference with terms of reference stating 'no go areas' and subsequently signed it into law by the then military Head of State after doctoring same, without the approval of the Nigerian people in a referendum or plebiscite. Nigerians are now saying that the phrase in the pre-amble which says 'we the people of Nigeria' is a fraud and are now calling for a democratic constitution that truly represents the people's aspiration.

⁸ This point was driven home in the Nigerian case of *Labiya v Enretiola (1991) 3NWLR Pt 615 p. 640* where the Supreme Court held that the decrees of the then Federal Military Government were superior to even the unsuspended sections of the Nigerian Constitution.

⁹ <http://www.definitions.net/definition/constitutionalism>.

¹⁰ n 9 above.

be. There is also the traditional and the modern approach to constitutionalism.¹¹ The traditional approach emphasizes on the idea of limited government while the modern approach emphasizes on the idea of democratic values.

The whole essence of constitutionalism is to impose limitations on the powers of government and to ensure that government officials are bound to observe both the limitations on power and the procedures which are set out in the nation's constitution in the performance of their constitutional duties. In the apt statement of McIlwain, 'constitutionalism is the antithesis of arbitrary rule. Its opposite is despotic government, a government of will instead of law'.¹² Emphasizing this point, Fellman¹³ explains that 'constitutionalism is descriptive of a complicated concept, deeply embedded in historical experience, which subjects the officials who exercise governmental powers to the limitations of a higher law'. He further asserts that the touchstone of constitutionalism is the concept of limited government under a higher law.¹⁴ It proclaims the prevalence of the rule of law by subjecting government officials to the limitations of a higher law in the exercise of governmental powers.

On the difference between constitution and constitutionalism, Chauhan¹⁵ explains that while constitutionalism is 'a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law containing institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry, a constitution is a set of fundamental principles or established precedents according to which a state or other organization is governed. Thus, whether one looks at the concept of constitutionalism from the descriptive, prescriptive, functional, traditional or modern lens, the underlying philosophy is the need to design constitutions that are not merely programmatic shams or ornamental documents that could be easily manipulated by politicians, but rather documents that can promote respect for the rule

¹¹ In discussing the traditional and the modern approaches legal scholars generally favor the first, which is based on rules and institutions while political scientists, sociologists, historians, and economists tend to adopt the latter'.

¹² CH McIlwain *Constitutionalism Ancient and Modern* (1947) pp 21-22.

¹³ Cited by R Chauhan in <https://www.quora.com/What-is-the-difference-between-constitution-and-constitutionalism#!n=18> (accessed 20 August 2016): see also CM Fombad 'Strengthening constitutional order and upholding the rule of law in Central Africa: Revising the descent towards symbolic constitutionalism' (2014) *African Human Rights Law Journal* (2014) 412-448, p 416.

¹⁴ See n 13 above.

¹⁵ See R Chauhan, (n 13 above).

of law and democracy,¹⁶ promoted by some inbuilt restrictions on the powers conferred by it on governmental organs. This implies that a political organization is constitutional to the extent that it contains institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry, including those that may be in the minority.

Thus, as aptly stated by Fombad, constitutionalism combines the idea of a government limited in its actions and accountable to its citizens for its actions. It rests on two main pillars: first, the existence of certain limitations imposed on the state, particularly in its relations with citizens, based on a certain clearly-defined set of core values; second, the existence of a clearly defined mechanism for ensuring that the limitations on the government are legally enforceable.¹⁷ Fombad concludes that in this broad sense constitutionalism has certain core irreducible and possibly minimum content of values with a well defined process and procedural mechanisms to hold government accountable. He further lists the core elements of constitutionalism as follows:

- i. The recognition and protection of fundamental rights and freedoms;
- ii. The separation of powers;
- iii. An independent judiciary;
- iv. The review of the constitutionality of laws;
- v. The control of the amendment of the constitution; and
- vi. Institutions supporting constitutional democracy and accountability.¹⁸

Louis Henkin on his part defines constitutionalism as constituting the following elements: (1) government according to the constitution; (2) separation of power; (3) sovereignty of the people and democratic government; (4) constitutional review; (5) independent judiciary; (6) limited government subject to a bill of individual rights; (7) controlling the police; (8) civilian

¹⁶ CM Fombad 'Strengthening constitutional order and upholding the rule of law in Central Africa: Revising the descent towards symbolic constitutionalism (2014) *African Human Rights Law Journal* (2014) 412-448, 416.

¹⁷ CM Fombad (n 16 above).

¹⁸ As above.

control of the military; and (9) no state power, or very limited and strictly circumscribed state power, to suspend the operation of some parts of, or the entire, constitution.¹⁹

No doubt, written constraints in the constitution containing the above core values are essential for constitutionalism, however, they are not constraining by themselves. This is because a leader who by his nature or orientation is a tyrant or a despot will not automatically become a democrat simply because the constitution makes provisions for the democratic governance principles. In order to guard against violations against the letter and spirit of the constitution, there needs to be a set of institutional arrangements that can promote both the letters and the spirit of the constitution. This is the point at which the entrenchment of the core elements of constitutionalism in the constitution becomes relevant and important. A constitution of such content possesses the potential and prospect of promoting constitutionalism and democratic governance.

Whether reflecting a descriptive or prescriptive focus, all treatments of the concept of constitutionalism intend to entrench the legitimacy of government in that they describe and prescribe both the source and the limits of governmental power. Functionally, constitutionalism shapes and regulates the socio-political lives in the society by ensuring that the fundamental principles which are embodied in the constitution are effectively observed by all authorities and citizens of a country. In this context, Bels²⁰ argues that constitutionalism shapes political lives in a variety of ways, constitutionalism shapes political events.

2.3 Constitutionalism and the Rule of Law

The philosophical basis for the rule of law is the necessity to insulate and protect the individual's civil rights and liberties from unjustified infraction either from the state or its agencies and functionaries, or even fellow citizens no matter how powerful or highly placed. Indeed, a society without the rule of law as a bulwark against the abuse of power is a negation of society itself. In other words, liberty and freewill should be the true basis of government and not coercion. Accordingly, the rule of law should be enthroned in every modern society

¹⁹ Quoted by K Kiruthi 'Constitutionalism' (2014), <http://article/constitutionalism-1699-1.html> (accessed 20 June 2017).

²⁰ H Bels 'A living constitution or fundamental law? American constitutionalism in his political perspective' (1998) 48-49.

otherwise, 'the rule of force usurps the vacant throne'²¹ and that will be tragic for man's freedom. As Aristotle puts it, the rule of law is preferable to that of any individual".²² This is understandable because the individual might decide to become a tyrant.

Edward Coke is said to be the originator of the concept of Rule of Law when he said that the king must be under God and law and thus vindicated the supremacy of law over the pretensions of the executives. In the same vein, John Locke²³ while espousing his social contract theory proposed the view that the rule of law was necessary to control the government. As history is full of man's struggle against tyranny and oppression or otherwise injustice, the notion of rule of law was formulated as a shield and a fortress against tyranny and oppression. The whole idea is to ensure justice according to law as opposed to the whims and caprices of men as the only insurance to peaceful and stable government. Hence, the Universal Declaration of Human Rights of 1948 where it was stated inter alia, 'it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human right should be protected by the Rule of Law'.²⁴

Conceptually, the rule of law is one of an open texture which can take on any garb. This means that it does not have just one meaning accepted by every person throughout the entire world. It rather lends itself to an extremely wide range of interpretations. According to Drewry,²⁵ rule of law has become part of the rhetoric of political debate. Ojo²⁶ opines that the rule of law has been one of the most used, misused and even abused constitutional concepts. It has been pressed to service and a ready tool in the hands of the democrat, the dictator and the tyrant. It is also a nebulous concept whose meaning varies from place to place. The rule of law is therefore a universal concept and not the monopoly of any system or tradition of government or civilization so that even military regimes lay claim to the rule of law as one of their basic principles.

²¹ "The Crisis in the Rule of Law", a Key Note Address at the 1989 Annual General Bar Association Conference in Lagos.

²² Aristotle, *Politics Vo.III*. P.16.

²³ In his *Treatise on Civil Government* (1690).

²⁴ Universal Declaration of Human Rights (1948)

²⁵ In his Book, *Law Justice and Politics*, Second Edition, Longman, (1981) p7.

²⁶ A Ojo *Constitutional Law and Military Rule in Nigeria*, Evans Brother (Nigeria Publishers) Ltd; 1987 p 230.

While the idea of the rule of law might not have a stable meaning or content, its one abiding principle is the regularity of law, the idea that man is governed by law and regulations and not by the caprices of the rulers.²⁷ In this formal sense, the concept of the rule of law is usually principally associated with the writings of the great constitutional lawyer, A.V. Dicey²⁸ who wrote from the background of his idea about the English Administrative Law. Dicey was concerned with the idea of equality before the law, with the idea of legality or of the universal subjection of all classes to one law administered by the ordinary courts. In particular, he wanted no distinction in law between the citizen and servants of the state, and viewed with dismay the prospect that English law might become contaminated by the systems of "Administrative Law" prevalent on the continent, which seemed to him to place government officials in a privileged legal position. According to Dicey, the rule of law as the supreme law of the land entails three distinct concepts namely:

1. That no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of the law established in the ordinary manner before the ordinary courts of the land. This excludes the use of wide, arbitrary and discretionary power by government officials;
2. That every man whatever be his rank or condition is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary courts. This brings out vividly the idea of legal equality before the law or the equal subjection of all men to the ordinary laws of the land as administered by the ordinary courts. The rule of law in this sense excluded the idea of any exemption of officials or anybody from the duty of obedience to the laws which govern other citizens or from the jurisdiction of the ordinary court; and
3. That the fundamental human right of every citizen is secured not by the guaranteed provisions of the constitution, but by the ordinary laws of the land.²⁹

²⁷ See Ojo, (n 22 above) 25.

²⁸ AV Dicey, *Introduction to the study of the Law of the Constitution* 10th Ed. Chapter 4.

²⁹ n 28 above.

The concept of the rule of law has also been defined in a formal sense to mean any ordered structure of norms set and enforced by an authority in a given community. In this sense, it is free from any particular ideological content and encompasses tyrannical as well as liberal humanitarian orders.³⁰ Commenting on the above definition, Aguda³¹ argues that Hitler's Germany, Mussolini's Italy, Idi Amin's Uganda, Bokassa's so-called Central African Empire, tyrannical as these were, with little or no regard to law and legality as generally accepted by liberal democratic states may be said to have been covered under the rule by law. This is because those regimes set up some form of structural norms whatever their content and got them enforced by bodies whose decisions were circumscribed or who were made directly responsible to the dictator who headed the whole politically organized society.

In this sense, we can equally say that the law which sanctioned the apartheid policy in South Africa must be obeyed as a valid law. However, we argue that such laws could not pass the test of the rule of law because they were not intended to promote social justice. Otherwise we shall be carrying the interpretation of the concept to an absurd limit of even defending unjust or oppressive laws. This argument is supported by Jones³² who asserts that the rule of law is a tradition embodying at least three indispensable elements - First, that every person whose interest will be affected by a judicial or administrative decision has the right to a "meaningful day in court", secondly that deciding officers shall be independent, in the full sense, from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influences of personal gain and partisan or popular bias; thirdly that the day-to-day decisions shall be reasoned and rationally justified in terms that take full account both of the demands of general principle and the demands of the particular situation.

Wade³³ in his own approach emphasized that every exercise of governmental power which affects the legal rights of the citizen must be justified in terms of having a strictly legal

³⁰ W Friedman *The State and the Rule of Law in a Mixed Economy* (1971); p.94.

³¹ TA Aguda in a lecture he delivered at the National Institute for Policy and Strategic Studies, Kuru on Friday; March 19, 1982.

³² HW Jones *The Rule of Law and the Welfare State*. In *Annals de la Faculte De Droit D'Instantul*, 1959 IX p. 245.

³³ Wade *Administrative Law* 4th Ed. See also Ojo on *Constitutional Law Military Rule in Nigeria*.

pedigree and that the court could invalidate any act not in order. The rule of law therefore provides a standard against which the laws and actions of a state may be judged in terms of its justness or otherwise as the main purpose of the law is to do justice, thus emphasizing the formalistic concept of the rule of law.

However, there is a dynamic concept of the rule of law which seeks to expand the meaning of the concept beyond the limits of legalism. This became necessary in that society is not static but dynamic. Accordingly, the concept should evolve with the evolutionary pattern of human development so as to take account of current or developing social circumstances including the educational, cultural and the material living conditions of the people in an advancing world.

Thus, the International Commission of jurists had at least on three occasions attempted to throw further light on the doctrine.³⁴ In 1955 in Athens, the Commission declared that the rule of law meant that the state like the governed must be bound by law; all governments must respect individual rights and provide effective means of enforcing such; that judges must adhere to the rule of law; and adjudicate without fear or favour. They must resist attempts from any quarter to jeopardize their independence in the performance of their functions or duties. Lawyers all over the world must guide the independence of their profession and uphold the rule of law in the practice of their profession in order to ensure democracy, legislature must be freely elected.

Again in 1959, there was another conference of the Commission in Delhi, India in which the meaning and scope of the rule of Law were re-examined. The outcome of the deliberations was an extended and enlarged meaning and scope of the concept. The Commission declared that rule of law is; recognized as a dynamic concept the expansion and fulfillment of which jurists are primarily responsible for and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society but also to establish social, economic, cultural and educational conditions under which his legitimate aspirations and dignity may be realized.

³⁴ *Journal of the International Commission of Jurists*, 1959, Vol. 2 No. 1: See also Ojo, *Constitutional Law and Military Rule in Nigeria*, (n 26 above) 242.

This was followed by yet another meeting in Lagos, Nigeria in 1961, at which the Commission arrived at a substantially similar meaning of the rule of law. Ojo argues³⁵ that the Delhi and Lagos meetings not only appropriated the juridical and classical meaning of the concept but gave it a new and expanded materialistic meaning, particularly in the context of developing countries of the third world. The rule of law can therefore be seen to have metamorphosed from its original formalistic conception to an admixture of the classical and the materialistic meaning, with greater emphasis on the later particularly in relation to the third world countries.

Be that as it may, the central essence of the doctrine of the rule of law is to ensure that the affairs of the state are conducted in accordance with pre-determined, and known rules made in accordance with the constitution, without the arbitrary will of some privileged individuals or classes, of general application and administered in the regular or ordinary court which is independent of executive discretion. Hence, it is not enough that the rule of law exists in theory. It must be observed by both the rulers and the ruled such that the wielders of power are consequently under obligation to provide the right political rules and ensure that there are no institutionalized obstacles to its concrete realization. The rule of law is thus a shield and a fortress against tyranny and oppression, and of course social injustice.

It must be noted that the concept of the rule of law embodies other related constitutional concepts notably: separation of powers, human rights and the independence of the judiciary. The existence of these concepts in any legal system is an indication of at least the formal prevalence of the rule of law in such a system, and without which its essence could not be realized. In effect these other constitutional concepts may be regarded as species or various ramifications of the rule of law doctrine. The rule of law therefore implies the existence of these other doctrines or constitutional concepts.

Elaborating on the concept, the Secretary-General of United Nations recently described the rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international

³⁵ n 26 above.

human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”³⁶

The rule of law is thus a cross-cutting issue which links the issues of peace and security, human rights and development which are critical for the realization of the aims and objectives of international organizations. The concept is therefore rightly embedded in the treaties establishing international organizations including the UN Charter, the European treaties and the Constitutive Act of the AU. Accordingly, the central place accorded the rule of law in social intercourse applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions so that they will be able to enjoy international recognition.³⁷

In view of the foregoing, it is arguable that the concept of constitutionalism and that of the rule of law to a very large extent conflate though they do not mean the same. This is based on the fact that the core elements of constitutionalism also feature amongst the principles associated with the rule of law though slightly narrower in scope in the case of the rule of law. No doubt a solid constitution and respect for the rule of law are important features that can provide the necessary support base for constitutionalism to exist, these without more may not necessarily tantamount to the existence of constitutionalism and democratic governance. Nevertheless, the rule of law proclaims constitutionalism while ‘constitutionalism is safeguarded by the rule of law and without rule of law there can be no constitutionalism’.³⁸ Therefore both concepts are not only related but are also mutually complementary.

³⁶ ‘What is the Rule of Law?’ (2015) <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (accessed 29 June 2017): see also the Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).

³⁷ The General Assembly at its 67th Session, held a High-level Meeting on the Rule of Law at the National and International Levels on 24 September 2012. The High Level Meeting concluded with the adoption by consensus of a Declaration in which Member States recognized the centrality of the rule of law and reaffirmed their commitment to the rule of law and elaborated on the efforts required to uphold different aspects of the rule of law. See <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> (n 36 above).

³⁸ See n 36 above.

2.4 Constitutionalism and Democratic Governance

For a better understanding of the democratic governance theory, it is considered apposite to commence with an attempt to explain the concepts of ‘democracy’ on the one hand and ‘governance’ on the other. With respect to the concept of democracy, it is worth emphasizing that it has been taken for granted that democracy is a universally accepted way of life but without a universally accepted definition. Accordingly, the concept has been variously defined and explained depending on one’s context, circumstance or ideological inclination. In all these, it is presented as a form of government in which the power to govern is derived from the people either by direct referendum (direct democracy) or by means of elected representatives of the people (representative democracy).

However, it has been popularly accepted that democracy as a concept can best be defined as “government of the people by the people and for the people”.³⁹ From the above definition, it is apparent that the epicenter of democracy is “the people”, to whom sovereignty belongs and from whom government should derive all its powers and authority to govern. Therefore, their participation in the democratic process is imperative, if they have to determine their political destiny by themselves. Thus, the hallmark of a true democracy is rule by the consent of the people, which must be determined by their affirmative votes in a free, fair and credible election in accordance with the constitution of a country, which in itself, must have been a product of a democratic process. To this extent, democracy is critical to the understanding and promotion of democratic governance.

The studies of Dahl⁴⁰ identified the existence of high level of civil liberties; political pluralism; and political participation that provide the choice for the electorate to select candidates in free and fair elections as a condition for a society to be regarded as democratic. According to Babawale⁴¹ ‘it is doubtful whether one can validly talk of democracy in the

³⁹ A. Lincoln, in his famous speech called *the Gettysburg Address a "monumental act"* (19 November 1863). available at: <<http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>>, accessed 5 May 2017.

⁴⁰ R A Dahl, *Democracy and its critics*. (New Haven: Yale University Press, 1989), p. 221.

⁴¹ T Babawale, *Nigeria in the crises of governance and development: A retrospective and prospective analyses of Patriarchy and constraints of democratic political space of women in Nigeria selected issues and events, education, labor and the economy*, (Lagos: Political and Administrative Resource Center, 2006), p. 35.

absence of participation, competition and the guarantee of civil liberties.’ Badru⁴² posits that democracy represents, first and foremost, an increase in citizens’ political equality and equity in terms of their popular participation in the society. He argues that democracy is a system of government that enables both the leaders and the citizens to be conscious of what is required, and accomplish it for the betterment of that society in terms of political, social and economic development. What this implies is that the citizens of a democratic society must therefore have the opportunity to participate in the electoral process of making deliberate choices as to who to vote into public offices without fear or favor; and anything short of that is to be regarded as undemocratic.

Oddih⁴³ states that democracy, as a system of government, promotes societal development because of its ability to give people the opportunity to be part of decision making processes, either directly or through their elected representatives. However, referring to the Nigerian situation (which in our view is not different from the situation in most African countries), he argues that democracy has brought anxious moments to Nigerians because “the struggle to win and control state power and use same for personal economic advantage of politicians lies at the root of all electoral frauds and malpractices in Nigeria”.⁴⁴ This implies that while democracy is good, its actual practice so far has made some people to begin to question its usefulness as catalyst for good governance and development particularly in a country where majority of people are poor in the midst of abundance, and individual liberty and rights are considered as privileges from those in governments rather than as stipulated in their national constitutions. We however argue that the problem is not with democracy but with the practitioners who are practicing anything but democracy, though they lay claim to it. At best what the majority of African countries are practicing amounts to a vulgarization of democracy or a mockery of same.

⁴² FA Badru ‘Patriarchy and constraints of democratic political space of women in Nigeria’ (2005) *Unilag Journal of Politics* 2 pp 77–101.

⁴³ M Oddih, *Electoral fraud and the democratic process: Lessons from the 2003 elections*, in A, Jega and O, Ibeanu, (Eds.), *Elections and the future of democracy in Nigeria*.(Abuja: Nigerian Political Science Association.), pp. 147–185.

⁴⁴ See Oddih (n 43 above) .

With regard to governance, it needs to be clearly stated that the concept like others in the social sciences, has generated exciting debates as to its true meaning. For Alkali,⁴⁵ governance can be conceptualized as the exercise of political power to manage public affairs. Thus, the term has evolved over the years to mean different things in different institutional contexts. According to the United Nations Development Program (UNDP)⁴⁶ governance is defined as the system of values, policies and institutions by which a society manages its economic, political and social affairs through interactions within and among the state, civil society and private sector. It is the way a society organizes itself to make and implement decisions—achieving mutual understanding, agreement and action. It comprises the mechanisms and processes adopted by citizens and groups to articulate their interests, to mediate their differences and exercise their legal rights and obligations. It is the rules, institutions and practices that set limits and provide incentives for individuals, organizations and firms.

It is however important to explain further that the term governance has various dimensions, including its social, political and economic ones. It operates at every level of human enterprise, be it the household, village, municipality, nation, region or globe. In a nutshell, governance can simply be defined as the process of decision-making and the process by which decisions are implemented (or not implemented) by those in authority. This is why the concept can be used in several contexts such as corporate governance, international governance, national governance and local governance. In this chapter, the term is generally used in the sense of the governance of nation states or regional or sub-regional organizations of nation states.⁴⁷ In this context, the Mo Ibrahim Foundation defines it as the provision of the political, social and economic public goods and services that a citizen has the right to expect from his or her state and that the state has the responsibility to deliver to its citizens.⁴⁸ We adopt the above definition and use the concept in the context of democratic governance.

⁴⁵ A Alkali, *Federalism and democratic governance*, In Saliu, H. A. (Ed.), *Nigeria underdemocratic rule*. (Ibadan: University Press, 1999–2003) pp 45–57.

⁴⁶ United Nations Development Programme (2004).

⁴⁷ United Nations Economic and Social Commission for Asia and the Pacific, available at: <www.unescap.org/sites/default/files/good_governance.pdf> accessed 20 September 2016.

⁴⁸ Mo Ibrahim Foundation, available at: <www.moibrahimfoundation.org> , accessed 20 November 2015.

Democratic governance, otherwise referred to as good governance is presented in this work as the key to development.⁴⁹ In this sense, it is simply defined as governance based on fundamental democratic principles that satisfy the developmental needs and aspirations of the members of the society. Democratic governance therefore emanates from a legitimate government that does not act arbitrarily but manages a country's economic and social resources in a transparent, accountable and responsive manner to achieve developmental goals.⁵⁰ It implies the democratic use of political, economic and administrative powers at all levels of government to deal appropriately with the problems facing a country. Democratic government is therefore a government that promotes participation and inclusivity and operates within constitutional constraints at all levels of governance, be it local, state, national or international. Thus, it provides a veritable platform for citizens' participation in governance and accountability of public officials as a foundation for sustainable development.

At this juncture, it is considered worthwhile to emphasize that the concept of democratic governance can be used interchangeably with the concept of "good governance" to describe the paradigm of an ideal democratic government, that is, a government that is democratic, capable or effective and accordingly able to deliver on its mandate of satisfying the needs of the people. Consequently, the word 'good' in governance connotes the proper exercise of authority, prudent management of resources and respect for the rule of law in accordance to laid-down principles, for the benefit of all in a society. Reflecting on the concept of good governance, Ekpe⁵¹ explains that it aims to create conducive climate for political and socio-economic development and to increase the efficiency and effectiveness of development program in a society. He points out that the concept of good governance is used to characterize the interplay of the best practices in the administration of a state or nation for sustainable development. The implication of this assertion is that no nation is likely to experience enhanced development without good governance in place.

⁴⁹ Democratic Governance-The Key to Development *The Concept of Democracy and Governance* <<https://cuvillier.de/public-file>> (accessed 2 December 2016).

⁵⁰ See the report of the United Nations Development Programme [UNDP], 2004.

⁵¹ AN Ekpe, *Effective management of socio-political conflicts in Akwa-Ibom State: Chief Godswill Akpabio's effort*, *The Public Administration* (Uyo Vol. 2, July-December), pp 63–70.

In the words of Babawale,⁵² good governance is ‘the exercise of political power to promote the public good and the welfare of the people.’ He posits that good governance is the absence of lack of accountability in government, corruption, and political repression, suffocation of civil society and denial of fundamental human rights. He further points out that the attributes of good governance in any society include: accountability, transparency in government procedures, high expectation of rational decisions, predictability in government behavior, openness in government transactions, free flow of information, respect for the rule of law and protection of civil liberties, and press freedom. In our view, sustainable development can only take place in a system where the above attributes obtain.

Therefore it is arguable that constitutionalism is the foundation of democracy having regard to the fact that the constitutions of states make provisions for the qualifications of the candidates for elective political office, the process of their election and their conduct in office as well as how they can be controlled. However, the caveat is that as Fombad⁵³ argues, sometimes democracy can be used to undermine constitutionalism. This is possible in circumstances where the ruling party uses its numerical voting power advantage in parliament to enact a law amending the constitution to achieve parochial political ambition,⁵⁴ or that is oppressive or violates a constitutional provision.⁵⁵ However, it can be tentatively concluded that ideally, constitutionalism promotes democratic governance while democratic governance promotes constitutionalism. This functional aspect of constitutionalism agrees with the idea of democratic governance and as such arguably an integral aspect of the concept of constitutionalism broadly interpreted. Therefore both concepts cannot be mutually exclusive but rather mutually reinforcing.

⁵² T Babawale, *Good governance, democracy and democratic best practices: Prescriptions for Nigeria*, (Lagos: Centre for Black and African Arts and Civilization Publications Monograph Series, 2007) pp 7-16.

⁵³ CM Fombad ‘Challenges to Constitutionalism and Constitutional Rights in Africa and the Enabling Role of Political Parties: Lessons and Perspectives from Southern Africa’ (2007) *The American Journal of Comparative Law*, Volume 55, Issue 1.

⁵⁴ For instance an attempt to achieve tenure elongation contrary to the provisions of the constitution was made in Nigeria in 2007 by the then Obasanjo’s government, which almost succeeded but for the effective mobilization of support against the move by the civil society leading to the party’s’ defeat in parliament..

⁵⁵ This will tantamount to tyranny of the majority whereas the idea of entrenching democracy is to avoid any form of tyranny by the rulers.

2.5 Constitutionalism in International Organizations

One of the most enduring criticisms of international organizations and their lawmaking processes is the perceived lack of democratic legitimacy with which institutions and their organs operate. For instance, there is a perceived democratic deficit in the AU system. Decisions are seen as not necessarily reflecting the democratic interests and views of the people of Africa. Generally, these criticisms are voiced louder in larger organizations since the more power the organization has the more the decisions it takes in important areas of policy. Therefore the question should be as to whether the supranational constitutional arrangement governing the functioning of a particular organization is a product of democratic deliberation and conforms to the observance of democratic constitutionalism in terms of incorporating fundamental norms, institutions, practices and procedures. Solutions proposed to these problems generally should include an elevated participation by non-state actors in law making processes of international organizations through direct election of representatives to the organs of these organizations and increased involvement of NGOs and other interest groups.

Traditionally, the concept of constitution and constitutionalism is embedded in the modern states. However, social interactions take place below and above the states. In today's world, International relations have been heightened by the forces of globalization and the convergence of global interests and challenges requiring collective salutary approaches. These interactions are normally carried out through the vehicle or instrumentality of international organizations formed in line with its aims and objectives. The interactions of these organizations must necessarily be guided by laws of fundamental importance to their existence and activities. It is against this background that our concept of constitution in the broad sense must include the document containing the fundamental laws of international organizations otherwise referred to as supranational constitutions. The United Nations Charter, the European Constitution and the Constitutive Act of the African Union, to mention but a few, can come within this genre.

The main essence of having a constitution in any body politic (be it domestic or international) is to promote constitutionalism and democratic governance culture which are necessary for the effective performance of its agents and the protection of the rights of its members. Thus,

there are two strands of constitutionalism; one emphasizes the existence of a number of universal core values such as human rights that permeate every level of the world legal order, the other rather focuses on the possibility of controlling international organizations governance through various provisions in their constituent treaties. Thus, international constitutionalism focuses on the establishment of vertical legal order and certain fundamental principles that represent and guarantee certain democratic values. In this respect, constitutionalization will, of course, *ipso facto* serve to close the democratic gap.

Thus, international organizations have recently increasingly become active players in the field of international law-making, most notably with respect to treaties and the interpretation of these and other norms by international adjudicatory bodies.⁵⁶ Therefore when certain contracting states come together to set up an international organization based on certain objectives of benefit to its members, they grant necessary powers with a certain level of discretion to the officials of the organization as a strategy to enable it perform certain functions in order to achieve set policy goals on their behalf. On the other hand the same constitution makes provisions to limit the abuse of such powers by the executive organs, member states usually opt for certain control mechanisms to guide their decision making processes and activities. Such measures, then, can be said to constitute a form of constitutionalism.

Functionally, constitutionalism shapes and regulates the socio-political lives in the society by ensuring that the fundamental principles which are embodied in the constitution are effectively observed by all authorities and citizens of a country. In this context, Bels⁵⁷ argues that constitutionalism shapes political lives as well as political events. This functional aspect of constitutionalism agrees with the idea of democratic governance and as such arguably an integral aspect of the concept of constitutionalism broadly interpreted. Thus, functionalism is a relevant and appropriate analytical tool in this study.

⁵⁶ J Wourters and P De Man 'International organizations as Law-Makers' (2009) *Working Paper No 21 March 2009* Leuven Centre for Global Governance Studies, p 31.

³⁰ H Bels 'A living constitution or fundamental law? American constitutionalism in his political perspective' (1998) P 48-49).

Against the above background, we adopt the functionalist approach to international constitutional analysis as an appropriate analytical framework which is predicated on the concept of supraconstitutionalism.⁵⁸ Supraconstitutionalism or international constitutionalism in this work is a term used to describe constitutionalism or the constitutionalization phenomenon at the international sphere. In functional terms it should be understood to refer to the norms which constrain or enable the production of international law or governance institutions. Supraconstitutionalism describes the idea or mechanism of allocating authorities to the international governance agencies and the limiting of such authorities. In this regard, the concept of supraconstitutionalism is employed for the purpose of making sense of the various international transformations taking place in the governance of various international organizations whose activities directly and indirectly impact greatly on the daily lives of individuals, bodies and state authorities who are parties thereto. In some cases the activities of these international institutions also impact on those who are not parties to the treaties establishing them especially in circumstances involving obligations *erga omnes*.⁵⁹

Thus, our functional approach to supraconstitutional analysis and supraconstitutionalization,⁶⁰ recognize the simultaneous existence of the domestic and transnational interactions requiring both the promotion of the core values of constitutionalism and the constitutionalization of international organizations. Supraconstitutionalization or international constitutionalization is used in this work not only to describe enabling or constraining of the production of public international law, but extends to the extent to which norms and institutions beyond the state transform domestic constitutional orders and constrain domestic law-making. On the other hand a supraconstitution can be analyzed in terms of general principles guiding the allocation and exercise of power, basic rules governing members' behavior, and fundamental rights of

⁵⁸ See generally: J Dunoff & J Trachtman 'Ruling the World? Constitutionalism, International Law and Global Governance' (2009) ejiltalk.org; see also G de Búrca 'Normativity of International Constitutionalism?' (2009) (accessed 20 August, 2016); and S Wood & S Clarkson NAFTA Chapter 11 as Supraconstitution CLPE Research paper 43/2009 Vol. 05. N. 08 (2009).

⁵⁹ Obligations *erga omnes* in international law are obligations owed by states to the international community as a whole, intended to protect and promote the basic values and common interests of all. These obligations are enforceable against all even without any special treaty obligation. Typical examples are the crime of genocide and other war crimes come within this class. See *ICJ Advisory Opinion on Reservations to the convention on the Prevention and Punishment of Crime of Genocide ICJ Reports 1951. 3*; *Nicaragua v United States of America, Merits ICJ Reports 1986, 14*; and *Portugal v. Australia, East Timor case, ICJ Reports 1995, 90*.

⁶⁰ See S Wood & S Clarkson 'NAFTA Chapter 11 as Supraconstitutionalism' 2009 *CLPE Research Paper* 43/2009 Vol. 5 No 8 (2009) p 3.

community members *vis a vis* governing authorities. It can also be analyzed in terms of the institutions that perform varying degrees of functions of the organization.

Supraconstitutionalization can therefore be explained as a process of transforming normative preferences into constitutional law at the international sphere or otherwise to provide with or make subject to a supranational constitution. It is the act or process of establishing a constitution over a state or organization. In public international law, it is an attempt to put international organization into a constitutional foundation by the adaption of constitutional principles of domestic constitution into the international arena, by the autonomization of the public international legal order in order to ensure the legitimacy and enforcement of international decisions on the states members. It is an attempt to translate to the international plane concepts and values that were traditionally reserved for domestic constitutions as a mechanism for controlling the exercise of public power.

In our context therefore, functionalism is an attempt to justify the claim of international organizations to such rights, privileges and authority as are necessary to effectively carry out their functions especially that of modulating constitutionalism at the level of states in conformity with the relevant international instruments which states have voluntarily adopted. It is against this backdrop that this study analyzes the prospects of the PAP effectively delivering on its mandate as a veritable institution through whose functions the AU can superimpose a supranational constitutional model legal order on member states' domestic constitutional orders, with the aim of promoting constitutionalism and democratic governance.

2.6 International Organizations' Legitimacy in Promoting States' Constitutionalism

The theory of international constitutionalism starts from the assumption that international organizations should be limited in their aspirations through effective control in conformity with a supraconstitution.⁶¹ This is necessary because the authorities delegated⁶² to international organizations can be likened to that in a principal-agency relationship which is

⁶¹ The concept of Supraconstitution has been used to refer to those international norms and institutions that form part of the assemblage of fundamental practices by which a national society is governed and from which domestic laws and policies-including constitutional norms are not permitted to derogate. See S Wood & S Clarkson *NAFTA Chapter 11 as Supraconstitution CLPE Research paper 43/2009* Vol.05. N. 08(2009) p. 3 digitalcommons.osgoode.yorku.ca (accessed 25 July 2016).

⁶² This can be rationalized by the doctrine of implied powers of international organizations which is a corollary to the theory of attributed powers of international organizations.

conditional upon the performance of certain functions for the members as defined under the constituent treaties and therefore requires adequate control to avoid the so called ‘agency losses’ or ‘costs’, incurred by ‘agency slack’.⁶³ Such control mechanisms enable member states to monitor to a certain extent the activities and decisions of the political appointees or civil servants who constitute the agents. In the same vein, international organizations establish international judicial organs with the mandate to monitor the decisions and actions of international agents to ensure compliance with approved standards and norms when matters are brought before them for adjudication. No doubt, the above are forms of control mechanisms on international organizations which constitute a form of supraconstitutionalism.

The fact that it cannot be disputed that international organizations can take decisions that are binding upon member states and that they can even exercise sovereign powers⁶⁴ warrants another form of supraconstitutionalism. In this context, supraconstitutionalism can be seen as an instrument through which international organizations can force or at least pressurize member states to change their domestic law in accordance with the judicial bodies’ interpretation of international law, thus creating a new, vertical legal order. In this way, international institutions can through its organs, promote constitutionalism in member states. For instance, in the case of the EU, member states current legislations, including their national constitutions conform to community law, which directly conferred certain rights on their citizens. Whether the founding parties to the treaty establishing the European community had the intention of granting such far-reaching powers to the agent they created at the time is highly uncertain.

The terminology of supraconstitutionalism can thus, be used to explain the contemporary manifestation of international law’s mandate as a modernizing and moderating factor on states’ constitutionalism and as one language with which to challenge the legitimacy and legality of governance arrangements in international organizations and therefore can be regarded as a positive development. In this work, we argue that supraconstitutionalism is an appropriate analytical framework that provides a useful tool for making sense of the various

⁶³ DG Haawkins, DJ Lake, DL Nielson and MJ Tierney Delegation under anarchy: States, international organizations, and principal-agency theory”, cited in J Wouters and P De Man International Organizations as Law-Makers.

⁶⁴ n 63 above.

international legal transformations taking place in the governance structures and procedures of international organizations whose activities have direct impact on the daily lives of the individuals, institutions and state officials who are parties to the constitutive treaties, and in some cases non- parties.

In light of the above, we argue further that the relevance and inevitability of the existence of supranational organizations as a factor impacting on the domestic legal order, giving rise to the notion of supraconstitutionalism cannot be denied. What is debatable is the legal basis of its modernizing mission in the domestic legal order which is commonly based on alleged supraconstitutionalization deficit and ideological bias. In response to the above criticisms, we submit that imperfection is inherent in every human institution be it global, national or local hence national governments are not free from such criticisms. Therefore criticisms based on the above cannot provide a justification for denying or degrading the primacy of international institutions and international constitutionalism as a modernizing or moderating factor on the excesses of the national constitutional orders. In fact, it can be argued that the establishment of supraconstitutional orders is informed by the desire of member states to find collective solutions to the inadequacies of national constitutional orders based on globally agreed normative standards and procedures that can provide the enabling environment for social development.

Thus, the world has changed and continues to change even more rapidly than expected especially with the phenomenon of globalization which has impacted tremendously on all aspects of social life. These changes and the relationships they engender have elevated international organizations to a dominant level of legal influence which has significantly eroded states legal authority as framed in their constitutions. Therefore states now enter into agreements (an exercise of international legal sovereignty) to create international institutions, some of which compromise the Westphalian sovereignty by establishing external authority structures for their functions. As was aptly explained by Walker,⁶⁵ constitutional law framed the legal authority of states understood as mutually exclusive sites of sovereign power- while international law was engaged in the relentless and relentlessly precarious business of framing

⁶⁵ Neil walker 'Reframing EU Constitutionalism' (2009) *Blog of the European Journal of International Law*: ejiltalk.org (accessed 15 July 2016).

legal authority between states (who were in many respect, in unequal or even imperial relation inter-se).⁶⁶

These changes have significant implications in global legal relations raising questions about the nature of and the basis of the legal authority governing transnational institutional governance architectures and their impact on national governance. In a democratic state, the constitution provides the institutional framework through which the citizens govern themselves. Against this background, it is obvious that primarily, loyalty and obligation lies to the state whose laws the citizens and the officials are bound to obey. This fundamental fact raises questions as to the legitimacy of international law and its enforceability domestically. It is in this context that it becomes logical to argue that constitutional law and constitutionalism are embedded in the modern states but when the state itself becomes disembedded from its dominant position in the global order,⁶⁷ the state should logically submit its authority to supranational organizations like the UN, the EU, and the AU in the context of Africa. It is in this connection that we present supraconstitutionalism (the new constitutionalism) as an answer to the decline of the old constitutionalism, thereby justifying the intervention of international organizations in the promotion of constitutionalism in their member states.

Under classical international law, the observance of the core principles of constitutionalism can be classified among those matters that come within the domestic jurisdiction of individual states which they have obligation to observe as provided for in their respective national constitutions. These principles have grown beyond the states as they fall within those matters which states subscribed to and pledged to observe by ratifying the relevant international instruments in that regard. Therefore, they have obligation to observe them in their states. International institutions cannot therefore stay aloof while the states violate them or completely ignore them to the detriment of their citizens. Therefore, international organizations have an obligation to take necessary action to promote their observance by states especially where such states have failed in their obligations under their own constitutions.

⁶⁶ n 65 above.

⁶⁷ n 65 above.

Thus, regional organizations have a justification for developing legal frameworks and policies to uphold fundamental constitutional values, including the rule of law, democracy and the protection of human rights. The justification for the direct external enforcement can be traced to three different concerns.⁶⁸ The first concern is that a regional organization should act to prevent or address a security crisis that has possible regional implications. Such crisis usually arises in a military coup d'état which can cause negative externalities, including humanitarian crises which can threaten the security of neighbouring states. Second, when negotiating a regional treaty states generally enshrine universal normative values or principles (sometimes protected under the constitutions of member states) to serve as a foundation of their organization and guide their conduct in realizing its objectives. Third, a regional intervention may be the only available option for upholding constitutionalism in a member state, particularly in circumstances in which the national constitutional order is overthrown or undermined to such extent that no other branch of government can hold the infringing power in check.⁶⁹

Based on the above concerns, Wiebusch argues that the involvement in national constitution enforcement can thus be viewed as efforts from a regional body to assist member states comply with their regional obligations and commitments.⁷⁰ This is particularly important in cases of multiple or systematic infringement or in cases where elected leaders themselves engineer constitutional crises, by manipulating elections or presidential term limits, or unconstitutionally removing elected leaders or appointing elected officials or members of the judiciary.⁷¹ Such an erosion of the constitutional order is less obvious than a fundamental breach in the form of a military coup, but perhaps just as disruptive. This is even more so, bearing in mind that the consequences of their non observance ultimately have spillover effects on the international community especially the immediate neighbors. This is a huge challenge for African leaders especially under the auspices of the African Union.

⁶⁸ M Wiebusch *The role of regional organizations in the protection of constitutionalism* International IDEA Discussion Paper 17/2016.

⁶⁹ n 68 above.

⁷⁰ n 68 above.

⁷¹ n 68 above.

In this study, we adopt a functional approach to international constitutional analysis which is predicated on the concept of supraconstitutionalism as an appropriate analytical framework. The functional approach explains the various international transformations taking place in the governance of various international organizations whose activities directly and indirectly impact greatly in the daily lives of individuals, bodies and state authorities who are parties thereto. In some cases this may include those who are not parties based on the *erga omnes* principle. Our functional approach to supra constitutional analysis applies across various issues and areas in varying degrees of supraconstitutionalization and recognizes its simultaneously domestic and transnational character and impacts.

It is against the background of the functional approach to the analysis of supranational organizations that this study investigates whether the AU as a supranational international organization in its constitutional arrangement manifests the fundamental principles of supraconstitutionalism that qualifies it to create the desired impact as a modulator of constitutionalism and democratic governance in Africa. Such arrangement if it exists presupposes that its executive organs are duly empowered with the legal bases to effectively promote constitutionalism and democratic governance in Africa, bearing in mind the maxim- *nemo dat quod non habet*.

This maxim means that one cannot give what he or she does not have. In other words, for the AU to seek to promote constitutionalism and the rule of law in member states of the AU it must be based on constitutional grounds and its pivotal organ like the PAP must also be democratic and empowered. In this connection, this work analyzes the prospects of the PAP as a supranational parliament to effectively promote the institutionalization of international standard legal order on AU member states' domestic constitutional orders. This is with the aim of promoting constitutionalism and democratic governance not only as an end in itself but also as means of achieving the speedy realization of the Africa's integration and development agenda, drawing from the experiences of other supranational parliaments.

2.7 Sovereignty and the Challenge of Supraconstitutionalism

Sovereignty as a concept can be defined as 'the absolute, supreme and ultimate dominion and authority of a political state subject to no higher power, expressed within its territory in full

self-government and in complete freedom from any outside influence'.⁷² Territorial sovereignty is one of the essential attributes of statehood implying that a state exists and operates within a territorial area over which it exercises supreme authority. Sovereignty is one of the characteristics or indicia of statehood without which nations cannot be accepted into the club of the global actors. However, as we argue in this work, membership of international organizations and their obligations thereby may constitute an obstacle to full political control of state activities and the rights of the citizens. The concept of territorial sovereignty therefore signifies that there is a territorial domain within which a state exercises exclusive jurisdiction over persons and property in relation to other states.

Max Huber, Arbitrator in the *Island of Palmers Arbitration* case described territorial sovereignty as signifying independence to a portion of the globe in 'the right to exercise therein, to the exclusion of any other state, the functions of a state'.⁷³ The question therefore arises as to what the functions of a state are. Thus the exercise of the functions of a state is hallmark of the existence of territorial sovereignty. These will include state activities showing conclusively that it exercises authority in that territory. State activities imply the exercise or enjoyment of some rights and the carrying out of some duties attributable to a sovereign state. Thus, a sovereign state has a number of rights, powers and privileges attributable to it under International law. Co-relative to these rights, powers and privileges are duties and obligations binding upon it.

Some of the rights, powers and privileges associated with sovereignty include: Power to exclusively control its domestic affairs; Powers to admit and expel aliens; Privileges of its diplomatic envoys in other countries; and Sole jurisdiction over crimes committed within its territory. The co-relative duties binding on a sovereign state are: Duty not to perform acts of sovereignty on the territory of another state; Duty to abstain from or prevent agents or subjects of that country from committing acts constituting violation of another state's independence or territorial sovereignty; and Duty not to intervene in the affairs of another state. This duty extends both to internal and external affairs.

⁷² 'What is sovereignty? Definition and meaning' www.businessdictionary.com/definition/sovereignty.html (accessed 12 July 2017).

⁷³ See *The United States of America v. Netherlands* see *Year book of the ILC*.

Accordingly, International relations are based on the principle of sovereign equality of all states. The United Nations organization recognized the fundamental importance of this principle hence it provides in Article 2 (1) of the Charter of the United Nations that the organization is based on the principle of the sovereign equality of all its members. Among others the Charter goes on to provide as follows: ‘Nothing contained in the present shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or settlement under the present charter’.⁷⁴ When therefore, we talk of domestic jurisdiction under international law we mean the totality of the foregoing as captured and protected under Article 2(1) and 2(7) of the United Nations Charter.

The principle of sovereignty is therefore of the most vital importance in the relationships with the subjects of international law.³ Going by the logic of sovereignty, a state is sovereign to the extent that it monopolizes the exercise of governmental authority at home, rejecting the right of foreign states or other external actors to impose their own laws from the outside or in any other manner interfere in its domestic political order. Sovereignty therefore means the exclusive legal authority of a government over its population and territory, independent of external authorities.⁷⁵

The implication of the above is that the application of international instruments meant to promote constitutionalism in states must necessarily derogate from the concept of domestic jurisdiction in its absolute context. However, this study argues that since regional organizations are created in accordance with international instruments and also concluded by the accredited representatives of member states, they are juridical persons before international law, once the concluded instrument(s) have been adopted by each member state.⁷⁶ Thus, once a state adopts an instrument, it has agreed to be bound and accordingly can no longer plead

⁷⁴ See art 2(7) of the UN Charter.

⁷⁵ It must be noted however that the principle of sovereignty cannot prejudice the application of enforcement powers under article 2 (7) of the UN charter.

⁷⁶ Examples of some of the regional organizations are: The European Convention of Human Rights, 1950, adopted by all members’ states 1953 plus the 8 protocol; European social Charter, 1961, covering economic and social rights; The American Convention on Human Rights, 1978; The Arab League, 1944; The O.A.U. 1963, which has created series of specialized commissions dealing with economics, health, defence and scientific matters; There is also a Liberation committee based in Dar-es-Salaam, created to assist various liberation organizations; The Banjul Charter on Human and Peoples Rights, 1981, adopted in Nigeria, 1984; The O.A.U. Convention covering the specific aspects of refugee problem in Africa, 1969.

the rule of equality and sovereignty of the state as a bar to international concern with regard to that instrument.

To this end, the UN Charter provides thus: Every state has the duty to fulfill in good faith the obligations assumed by it in accordance with the Charter of the United Nations; every state has the duty to fulfill in good faith its obligations under the generally recognized principles and rules of international law. Where obligations arising under international agreements are in conflict with the obligations of members of the United Nations under the Charter of the United Nations, the obligations under the charter shall prevail. It is further declared that the principle of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all states to be guided by these principles in their international conduct and to develop their mutual relations on the basis of their strict observance.⁷⁷ Therefore every treaty in force is binding upon the parties and must be performed by them in good faith.⁷⁸ This is a fundamental principle of international law which is predicated on the maxim, *pacta sunt servanda*.

Accordingly, under the Vienna Convention on the Law of Treaties, 'every state has a duty to carry out in good faith its obligation arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty'.⁷⁹ Furthermore, there is ample judicial and arbitral authorities for the rule that a state cannot rely upon the municipal law to avoid its international law obligation.⁸⁰ In the *Alabama Claims Arbitration*,⁸¹ the court held that a state which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfillment of the obligations undertaken. Against the above background, states like Nigeria have now incorporated the African Charter on Human and Peoples Rights into their state Human Rights law.

In 1936, in its advisory opinion on the *interpretation of the convention between Greece v. Bulgaria* respecting reciprocal emigration, the court said, 'it is generally accepted principle of

⁷⁷ See art 13 of the Draft Declaration on Rights and Duties of States (1949).

⁷⁸ See art 26 of the Vienna Convention on the Law of Treaties (1969).

⁷⁹ See the Vienna Convention on the Law of Treaties (1969), arts 13 and 27.

⁸⁰ DJ Harris Cases and Materials on International Law (2004) p 69 and pp. 828-829

⁸¹ See (1872) International Arbitration 495 at 656.

international law that in the relations between members which are parties to a treaty the provisions of municipal law cannot prevail over those of a treaty'. Also, in 1932 in its advisory opinion on the *Treatment of Polish National in Danzig*, the court held that a state cannot adduce as against another state its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Lastly, in the *Free Zones case, (France v Switzerland)*, the court held that it is certain that France cannot rely on her own legislation to limit the scope of her international obligation.

Thus, the complex nature of the contemporary international political system has provoked international relations scholars to argue that national sovereignty has been partially modified. Sovereignty as traditionally understood has become outmoded. Modern concept of sovereignty has been relocated from bounded state territories to the process of collective political identity and institution construction to incorporate new issues and actors which transcend traditional state-centered politics. While national boundaries may remain, sovereignty can be deconstructed and abstracted from its Westphalian limitations.⁸² The spread of globalization, the ever increasing international intercourse, the impact and overwhelming influence of international organizations and the response to pressing contemporary global challenges are forces that have made national sovereignty a conundrum.

Though nations do claim that they have absolute control over their domestic and external affairs especially control over their institutional activities and citizens, this claim is open to serious challenge considering the tremendous influence of multilateral organizations like the United Nations, European Union and African Union. The idea of absolute control over both external and internal affairs was conceived and accepted at a time in the 18th and 19th centuries when states were self sufficient units of relatively equal powers. They were capable of protecting themselves against internal and external sources of instability and change. Besides, they were states with clearly definable borders which globalization and the challenge of security are rapidly closing.

⁸² Jessica M Shadian
https://www.researchgate.net/publication/240701721_From_states_to_polities_Reconceptualizing_sovereignty_through_Inuit_governance (accessed 14 March 2017); see also RW Mansbach, et al *The Web of World Politics: Non State Actors in the Global System* (1976) New Jersey: Prentice Hall p 20.

It is accordingly becoming increasingly difficult to keep out unwanted foreign influences especially through ideas that flow from the internet to foreign states thereby bringing pressures to bear on traditional cultures. For many states, it is also difficult to avoid the intrusion of international organizations like the World Bank, International Monetary Fund, African Union, Southern African Development Community, United Nations Organization, to mention but a few. Though national sovereignty is still valued around the world, even in EU countries, which still retain sovereign rights in sensitive areas like foreign policy; the forces of globalization are constantly chipping away at its walls.⁸³

The implication of the above is that contemporary global system is shaped by a mixture of domestic and international factors that affect national governments at different historical periods. Europe provides a clear illustration of how sovereignty has changed in today's inter-dependent world. Since the 1950s, a growing number of European states have voluntarily relinquished some of their sovereign rights to determine their own economic policy and other policies that were formerly reserved to the exclusive competence of domestic authorities. In an effort to promote economic growth, environmental cooperation, security and other mutual interests, European governments have established integrated Europe-wide institutions and engaged in joint decision-making procedures, establishing what has been described as a system of pooled sovereignty.⁸⁴ These efforts culminated in the formation of the EU, which in 2007 included twenty seven countries.

The fact that nations agree to live harmoniously under an international system implies that international organization can interfere in their domestic affairs when it becomes obvious that certain elements that ensure international peace, have been tampered with in order to restore harmony. Thus, the idea of state's absolute control over her affairs is now obsolete under a globalized political system. However, this does not mean that nations are no longer in control of their affairs, rather, the presence and actions (collective actions) of the members of the international community have eroded the growing influence and control of states over matters essentially within their domestic jurisdiction.

⁸³ TJ Boersteker & C Weber *State Sovereignty as Social Contract* (1996), Cambridge: Cambridge University press p 104.

⁸⁴ R Miliband *The State in Capitalist Society* (1969) New York: Basic Books p85.

Furthermore, experience has shown that more often than not, state's sovereignty has been challenged by other global actors as evident from the coalition of some powers that invaded Iraq in 2003 and Israel's invasion of Lebanon in 2006. More so, issues like disarmament, terrorism, global warming, migration and other global issues which may give rise to treaties that may impose obligations on states as they are no longer the highest authority on such matters even when the activities are taking place within their borders call into question the validity of absolute national sovereignty.⁸⁵ Second, the development of norms concerning international protection of human rights, like the United Nations Universal Declaration of Human Right, 1948 and other humanitarian laws are seen to infringe sovereignty because they challenge the principles of non-intervention. That is, the right of states to govern their citizens free from outside interference. However, many states willingly ratify such treaties because of their understanding that the loss of sovereignty by ratifying them is minimal considering their maximum benefit to the international community as a whole.

Again, domestic affairs that have grown and created global impact affect the sovereignty of a state as other global actors weigh in on how to best handle the situation. For example, in 2011, the United Nations revoked Libya's abilities in areas such as arms embargo, freezing of assets and a ban on flights of Libyan aircraft. This was ostensibly in a bid to remove the Libyan ruler, Muammar Gaddafi, who, according to Barack Obama, only stayed in power to 'use mass violence against his own people'.⁸⁶ Similarly, in 2017 Economic Community of West African States (ECOWAS) member states intervened in the recent Gambian election dispute when the sitting President Yahya Jammeh who had conceded defeat to Adama Barrow reneged later and called for a fresh election. ECOWAS community chaired by Allen Johnson led a delegation to Gambia to ask Jammeh to handover.⁸⁷ When it became obvious that Jammeh was not yielding, the member states of ECOWAS deployed their troops under the umbrella of Economic Community of West African Monitoring Group (ECOMOG) and were ready to remove him by force.

⁸⁵ A James *Sovereign Statehood: The Basis International Society* (1986) London: Allen and Unwin p 26.

⁸⁶ Central New York News February 2011.

⁸⁷ <http://www.aljazeera.com/news/2016/12/african-leaders-head-gambia-mediation-talks-161212144241777.html> (accessed 10 February 2017)..

However, it is instructive to note that by article 2(4) of the UN Charter all nations shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of the United Nations. The Gambia's case can be interpreted to constitute a clear domestic political issue which going by the doctrine of sovereignty, West African nations were not supposed to send their troops for intervention.⁸⁸ The Gambian case and the role of ECOWAS member states during the political turmoil in Ivory Coast, Liberia, Equatorial Guinea, Burkina Faso, and others, show that with the necessary political will, regional organizations can effectively enforce constitutionalism in member states. It further shows that in this contemporary era of globalization, there is no longer any absolute national sovereignty especially when member states by treaty agree to collectively uphold common fundamental principles and norms.

The establishment of the New Partnership for Africa's Development (NEPAD), with its monitoring force – Africa's Peer Review Mechanism (APRM), symbolizes a shift from state's sovereignty to international sovereignty. On the other hand, pressure from the 'big powers' over the 'lesser powers' constitute an obstacle to state's sovereignty. For instance, national sovereignty has been severally violated by the stronger nations notably the United States and Russia to mention but a few. For example, in 2001, after the 9/11 attack, US stationed more than 50,000 soldiers all over the Middle East countries like Afghanistan, Iraq, Syria, Iran, Yemen etc., which the Obama's government reduced to ten thousand in 2014.

The joint military action that expelled Iraq from the territory of Kuwait in the 1990 Gulf War known as the 'Operation Desert Storm' undermined the concept of national sovereignty. Similarly, the US invasion of Iraq in 2003 which was carried out under the pretext of destroying the Iraq's Saddam Hussein weapons of mass destruction, when in actual sense there

⁸⁸ However, global reactions to the Gambian case is very instructive, the United Nations Security Council Resolution 2337 mandated ECOWAS member states to use political means to unseat Yahya Jammeh. Though it prescribed the use of political means first which by implication means that if such means fails, military action becomes inevitable. The international community also lent their support to ECOWAS. For instance, the United State Assistant Secretary of State for Public Affairs, John Kirby announced that the US was supportive of the ECOWAS intervention. United Kingdom's Secretary of State for Foreign and Commonwealth Affairs, Boris Johnson called on Jammeh to step down and praised "African organizations which are working to ensure that democratic wishes of the Gambia people will be respected".

were no such weapons, was a total contravention of the sovereignty of Iraq, judging from the Kellogg- Briand Treaty of 1928. The deployment of the US secret espionage – the Central Intelligence Agency (CIA) by the Obama’s administration to apprehend the notorious terrorist, Osama bin Laden, who had been taking refuge in Pakistan (another sovereign state), and the recent annexation of Crimea which is part of the Ukrainean territory by Russia all show that the big powers could at will violate the territorial integrity of the lesser powers and get away with it.

Again, the establishment of the European Court of Human Rights (ECHR), the African Court on Human and Peoples Rights (ECHPR) and the Court of Justice of the Economic Community of West African States (ECOWAS CCJ) and other regional courts has a direct effect on the sovereignty of its states members. For instance, the ECOWAS Court’s ruling on the cases between Nnamdi Kanu⁸⁹ and the Federal Government of Nigeria, and Sambo Dasuki⁹⁰ and Nigeria, illustrates the changing nature of the sovereignty of states over their citizens. Though the Nigerian government did not adhere to the court’s verdicts, however the court’s verdicts have been influencing public opinion.

The use of the International Criminal Court (ICC) to investigate and arrest some uncompromising African leaders alleged to have committed war crimes against their citizens derogate from national sovereignty. The Kenyan President and the deputy were recently under investigation by the ICC before the case was withdrawn for lack of evidence. There was the failed attempt by the US-led International Police under the directives of ICC to arrest President Omar Al Bashir of Sudan, during the AU summit in Durban, South Africa. These

⁸⁹ Mazi Nnamdi Kalu is the acclaimed leader of the Indigenous People of Biafra (IPOB) who is currently facing treason charges in the Nigerian Court. Kanu remained in custody despite the fact that he was granted bail. He approached the ECOWAS Community Court to enforce his fundamental rights against the Federal Republic of Nigeria. He is praying the court to declare that his continued detention in flagrant disobedience to several orders of courts of competent jurisdiction is in violation of the African Charter on Human and Peoples Rights and the Universal Declaration of Human Rights and the UN Charter. The preliminary objection put up by the Federal Government against the court’s jurisdiction to entertain the suit was dismissed by the court. However, the substantive matter is still pending for other procedural reasons.

⁹⁰ Dasuki was the Security Adviser under President Jonathan and he is facing corruption charges in the court. Dasuki’s case at the ECOWAS Court in Suit No ECW/CCJ/APP/01/16 is that there was no basis for his continued detention after he had been granted bail by three different courts where he was facing corruption charges which is in violation of his human rights, which the court granted. Though he remains in detention, at least the country submitted to the court’s jurisdiction and presented the defence of national security which did not fly.

actions were seen by African leaders as witch-hunting and an affront to the principle of sovereignty. It was also seen as a contravention of the law of diplomatic immunity as contained in the Vienna Convention on Diplomatic Relations, 1961. However, the position of African leaders on this issue remains debatable.

The special immunity bestowed on diplomatic missions by the law of diplomatic immunity, also plays out as a limitation to state's sovereignty over foreigners representing their various countries in a foreign land. For instance, the persons, archives and documents of ambassadors are inviolable under the international customary law. Furthermore, the agents of the receiving states may not enter them without the consent of the head of the mission. The receiving state is under obligation to take all appropriate steps to protect the premises of the mission from any intrusion or damage.⁹¹ They are exempted from customs duties on articles imported for their personal consumption. Sporadically, they use their embassies to carry out espionage against their host countries. These unintended practices indeed derogate from the principle of sovereignty.

Several UN General Secretaries have argued in favor of a move away from the norm of non-intervention. In 1991, the then UN Secretary General, Javier Perez de Cuellar stated that all nations had a responsibility to live up to the UN Charter requirements concerning human rights and democracy. Failure to do so, he indicated, could provoke UN intervention. Also, in 1992, the then UN Secretary General, Boutros Boutros-Ghali stated that the time of absolute and exclusive sovereignty has gone. Its theory was never matched by reality.⁹² There is the core area of warfare and control of the means of violence. On the one hand, states are no longer in exclusive control of the means of violence in their domestic jurisdiction. Sovereignty of states is constrained by their obligations under multilateral treaties to which they are parties by the principle of *pacta sunt servanda*. The Universal Declaration of Human Rights, the African Charter on Human and Peoples Rights (Banjul Charter), the Vienna Convention on the Law of Diplomatic Relations, and several UN Resolutions that were passed in the period of emergencies, are all obstacles to absolute national sovereignty.

⁹¹ See art 22 of the Vienna Convention on Diplomatic Relations, 1961.

⁹² G Helman & S Rtner 'Saving Failed States' (1992) *Foreign Affairs* p.3.

Though it is arguable that the idea of absolute state sovereignty has become outmoded, the traditional respect for state sovereignty remains a hallowed principle of international law though subject to the respect for international obligations. The point is that when a state ratifies or accedes to an international treaty, it is automatically obliged to meet its obligations in the treaty. In the case of human rights treaties, this will require the state to ensure that the rights in question are implemented in its domestic legal system based on the principle of subsidiarity.⁹³ Hence, international law does not compel states to authorize direct enforcement of obligations under multilateral treaties in domestic institutions or prescribe method by which states must implement such rights.⁹⁴ Rather, under the text of most multilateral treaties, domestic institutions have privacy and original responsibility to give effect to international standards and decisions and to provide effective or necessary remedy for violations in accordance with their domestic constitutions. Thus, the application of international law in states depends on whether a particular state can be categorized as either monist or dualist.

The monist approach posits a unitary concept of law whereby all laws both domestic and international are perceived as part of one integrated system. In a monist state, international law is generally regarded as being automatically incorporated into national law and its obligations are automatically treated as operable domestic law. In such states, treaties have the status of law in the domestic legal system without the need for any domestic enabling act or legislation. It must be noted however, that only about 16 states out of the 195 countries of the world today can be characterized as monist to more or less extent.⁹⁵ In Africa, only Egypt, Senegal and clearly South Africa can be characterized as monist out of 55 member states of the AU.⁹⁶ This demonstrates the unwillingness of states to subordinate their domestic legislative sovereignty to that of international law. This also implies that there is a direct or

⁹³ The principle of subsidiarity allows the primary responsibility for implementing rights rests with the state authorities of state members of an international treaty, as such international supervision or intervention remains subsidiary to state implementation mechanism or procedures. The principle is defined in Article 5 of the Treaty on European Union. It aims to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at EU level is justified in light of possibilities available at national, regional or local level. The international community can only step in when the state cannot or will not deal with the problem. See eur-lex.europa.eu/summary/glossary/subsidiary.html (accessed 20 December 2018).

⁹⁴ S Egan 'Introduction' *The United Nations Human Rights Treaty System: Law and Practice* (2011) Bloomsbury Professional 10.

⁹⁵ See David Sloss, *Domestic Application of Treaties* (2011) [http:// digitalcommons.law.scu.edu/facpubs/635](http://digitalcommons.law.scu.edu/facpubs/635) (accessed 12 January 2019).

⁹⁶ See Heyns and Vijoen *The Impact of the United Nations Human Rights Treaties on the Domestic Level* (Kluwer Law International 2002) p 7.

automatic incorporation international obligations into the domestic legal system and accordingly enforceable like any other source of domestic law.

In the case of dualist states, international law and domestic law are conceived as totally separate legal systems at different spheres regulating the rights and duties of individuals and issues at the different planes. As such, an international obligation can be incorporated into domestic law only through specific executive or legislative action in conformity with the domestic constitution, that is, it must pass through domestic filter and transformed into national law following the appropriate legal method such as constitutional amendment, legislative enactment or domestication.⁹⁷ The dualist approach is more common amongst states. This implies that in such states the application or enforcement of international obligation depends on the discretionary or voluntary actions of domestic authorities.

In any case, by the current global trend, the state centered conception of constitutionalism founded on the traditional Wesphalian concept of state sovereignty has become anachronistic in the contemporary world order. This point can be clearly appreciated against the background of globalization, liberalization and transnational challenges requiring international intervention (global or regional) in finding common solutions. These interventions involve entering into various international legal instruments which have the effect of limiting or constraining member states' sovereignty. In this connection, the member states of the AU have developed a number of normative legal instruments with the aim of implementing its agenda on constitutionalism and democratic governance in line with the provisions of the Constitutive Act.

Unfortunately, the powers of international institutions are limited to monitoring and supervising implementation and promotional activities through fact finding and review of periodic reports on implementation and issuing general comments, encouraging states to change their behavior through dialogue, confrontation and exposure by naming and shaming. Thus, most Africa's efforts in promoting constitutionalism are limited to monitoring, dialogue, condemnation, and moral persuasion except in very rare cases where they are compelled to adopt enforcement measures. Accordingly, African regional institutions are

⁹⁷ See Egan (n 94 above).

unable to effectively check the abuse of repressive government due to enforcement gap arising from weak domestic and transnational governance structures.

It must be pointed out however, that with the recent change in AU attitude from the principle of non-interference in the internal affairs of member states to that of non-indeference, especially in cases of unconstitutional changes of government the position now appears to be different.⁹⁸ The adoption of the African Charter on Democracy Elections and Governance⁹⁹ Charter which outlined a number of sanctions that the AU can apply in cases of unconstitutional changes of government¹⁰⁰ supports the above point. The Governance Charter clearly demonstrated the Union's non-tolerance stance on unconstitutional changes of government and identifies inter alia five illegal means of accessing or maintaining power as constituting an unconstitutional change of government which shall attract appropriate sanctions: a *putsch* or *coup d'etat* against a democratically elected government; any intervention by mercenaries to replace a democratically elected government; any replacement of a democratically elected government by armed dissidents or rebels; any refusal by an incumbent to relinquish power to the winning party/ candidate after free, fair and regular election; or any amendment or revision of the constitution or legal instruments which infringe principles of democratic change of government.¹⁰¹ These listed means are not exhaustive of what constitutes unconstitutional change of governments. The Peace and Security Council is the arm of the AU mandated to maintain constitutional order in line with relevant provisions relating to its establishment in its Protocol.¹⁰²

The most relevant point here is that the Governance Charter¹⁰³ stipulated the course of action that the AU may undertake against an illegal regime which includes where diplomatic initiatives have failed immediate suspension of the State Party from participation in the activities of the AU.¹⁰⁴ The suspended state party shall continue to fulfill its obligation to AU especially those relating to respect of human rights; AU shall maintain diplomatic contact and

⁹⁸ These principles and the attitude of the AU to them right from the era of the OAU to the AU are discussed in details in chapter 3 of this study.

⁹⁹ Herein referred to as the 'Governance Charter' is discussed in chapter 2, particularly at 3.4.3.

¹⁰⁰ See chapter 8 of the Governance Charter..

¹⁰¹ As above, see art 23.

¹⁰² As above, see art 24.

¹⁰³ See art 25.

¹⁰⁴ This is in line with art 30 of the Constitutive Act and 7(g) of the Protocol.

take any initiatives to restore democracy in that State Party; perpetrators of unconstitutional change of government shall not be allowed to participate in subsequent elections to restore democratic order or hold my political position and may also be tried before the competent court of the AU; also sanctions shall be imposed on any member state that is proven to have instigated or supported unconstitutional change of government in another state; other forms of sanctions including punitive economic measures may be applied by the Assembly; State Parties shall not harbour or give sanctuary to perpetrators, bring to justice perpetrators or take necessary steps to effect their extradition. The above provisions clearly address some of the scenarios that have played out on the African stage with the hope of curbing and discouraging future occurrences. In the light of the above, the study argues that in Africa, there are contemporary and progressive trends towards supraconstitutionalization. This shows that African countries are now making efforts towards strengthening their supranational governance institutions with the aim of effectively promoting constitutionalism and democratic governance in the continent.

2.8 The Role of Parliaments in Promoting Constitutionalism

This section discusses the role of parliaments in promoting constitutionalism and democratic governance with focus on supranational parliamentary institutions. It proceeds with a brief discussion on the meaning and traditional role of parliaments in general terms for a better understanding of the supranational dimension and the interaction between the domestic and the international.¹⁰⁵ Based on this background knowledge, prognostic analyses on the role of the PAP in promoting constitutionalism in member states of the AU can then be more critically undertaken.

Etymologically the term “Parliament” is derived from Anglo-Norman word *parlement*, from the word *parler* meaning 'to talk' or “to speak”. Broadly speaking, from its historical and medieval uses, the term parliaments included various kinds of deliberative, advisory, consultative, and judicial assemblies that represented the political society whether appointed

¹⁰⁵ This is important because governments exist at local, national and supranational levels. Accordingly, parliaments or other deliberative organs equally exist at these levels as part of the necessary democratic structures of governments. Through their traditional legislative, oversight and representative functions and powers, parliaments exert influence on policy making processes and execution, in order to ensure the effective realization of the objectives of governments.

or elected. The term has sometimes been used in a restrictive sense to describe the British parliamentary systems comprising the Sovereign, the House of Commons and the House of Lords. In contemporary usage, parliaments are strictly speaking the democratically elected body of representatives constituting one of the three main branches of government whether in a parliamentary or presidential system. In modern democracies the functions of parliaments are: to represent the people; to make laws; and to oversee the main constitutional functions of the other arms of the government. In democratic countries such as America, Britain, South Africa and Nigeria, to mention but a few, the legislature or members of Parliament are elected to represent the people¹⁰⁶ of the country for a legislative tenure.¹⁰⁷

As the legislative organ of government, the typical role of a Parliament is law-making which could be in the form of a new law or the amendment or repeal of an existing law. In modern democratic governments, the true test of democracy is the extent to which Parliament can ensure that government remains answerable to the people. Parliaments do this on behalf of the people by maintaining constant oversight (monitoring) of government's actions by exercising its constitutional powers to summon any person or institution to give evidence or produce documents, and to report to them for investigation or inquiry. Parliament also approves the budget and the supplementary budget and should therefore monitor its implementation to avoid misappropriation or waste.

This implies that in a constitutional democracy, beyond the classical role of law-making, the overseeing of government actions has become a popular role by which it effectively carries out its inherent function as the people's watch-dog, thereby upholding the supremacy of the constitution and the core elements of constitutionalism and democratic governance. In summation, parliaments carry out oversight functions for the following purposes: to detect and prevent abuse; to prevent illegal and unconstitutional conduct on the part of the government; to protect the rights and liberties of citizens; to hold the government answerable for how

¹⁰⁶ The parliamentarians in carrying out their functions represent and act as the voice of the people and are therefore accountable to the people whom they represent.

¹⁰⁷ In the United States of America and in Nigeria, a new parliament is elected and inaugurated every four years while in South Africa a new parliament is elected every five years. A parliament may consist of one House (unicameral legislature) or two (bicameral legislature), sitting differently in line with its own rules of procedure and sometimes jointly for joint business when necessary as the constitution provides.

taxpayers' money is spent; and to make government operations more transparent and increase public trust in the government.¹⁰⁸

It is instructive to note that the oversight role of parliaments or control on the activities of government is carried out in two ways. These are by scrutinizing the actions of the government or executive authorities *ex ante* and *ex post*. *Ex ante* oversight refers to all the actions the parliaments (its members, its committees) can take to see whether and to what extent the government plans are actually needed, useful, viable, efficient, effective, and economical. *Ex post* oversight refers to all the actions that a parliament can take to check whether and to what extent the government is implementing its policies, plans and programmes as they had been approved by the parliament.¹⁰⁹

Members of parliament carry out their functions by debating issues in the plenary or in committees of the House as the case may be. For this purpose they have freedom of speech and enjoy certain Privileges and Immunities of parliament subject only to the rules of the Houses, when they participate in committees or debates. As the “engine rooms” of parliament’s oversight and legislative work, parliaments carry out their functions through its Standing Committees, special committees and *Ad hoc* committees which scrutinize legislation, oversee government action, and interact with the public and eventually report to the committee of the whole house for final decision. Question time in parliament affords members of parliament the opportunity to question members of the Government on matters of service delivery, on behalf of their political parties or the electorate. The citizens can make their voice heard in Parliament by making a submission to influence the opinion of members of the committee who are discussing a particular piece of draft legislation before it becomes a

¹⁰⁸ Though the arrogation of the above responsibilities may appear to assume that the executive branch is responsible for all the bad governance developmental problems while the parliaments are virtuous institutions and therefore qualified to oversee and scrutinaize the activities of the executive arm and hold it accountable, this is not necessarily the case. Generally parliaments in Africa are not known to be free from corruption and unethical behaviours needed to promote good governance and also need to control themselves and their activities to merit the public trust.and the legitimacy to control executive excesses. The point however is that parliament’s oversight potential is crucial for democracy and good governance which are also imperative for development.

¹⁰⁹ Pelizzo, Riccardo and Stapenhurst, Rick (2007). The role of parliament in promoting good governance in Africa https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101133 (accessed 20 August 2018)

law or investigating a matter. The citizens also have the right to petition Parliament, as provided for in the Constitution in order to the redress a grievance as well as being engaged in public hearing on matters of public interest.

As the democratically elected representatives of the people parliaments as key state institutions in a democratic system of governance have a critical role to play in promoting democracy and good governance. In the performance of their key functions of legislation, representation and oversight parliaments can provide a platform for people's participation and active engagement in the development and implementation of laws, policies and practices that can promote democracy and good governance. Parliaments further facilitate citizens' involvement in the legislative and other government activities and processes. They also promote inter-governmental relations, ratify and oversee the implementation of international agreements. From the foregoing, it is obvious that a parliament plays a crucial role in gauging, collating and presenting the views and needs of the people, articulating their expectations and aspirations in determining the national development agenda.

In order for parliament to effectively undertake the above activities and thereby promote good governance, parliamentary control must be promoted by strong institutional designs. Therefore, parliament needs to be strengthened to increase its oversight potentials by giving it proper oversight tools to scrutinize the actions of the government or executive authorities.¹¹⁰ Thus, the existence of a strong, effective and efficient parliament is crucial for parliaments to deliver on their mandate and become responsive to the citizens' demands and aspirations, institutional capacity needs to be strengthened. Parliamentary effectiveness is compromised where the parliament is operating without an enabling firm legal structure, limited parliamentary independence or under overbearing executive organ predominance. Even where a parliament is not suffering from any constitutional or structural impediment, capacity deficit (human or technical), executive dependence and inadequate funding will invariably lead to parliamentary ineffectiveness and inefficiency. Thus, the challenge of capacity and its implication on parliamentary effectiveness is a major concern in many African parliaments.

¹¹⁰ As above

At this juncture, it is apposite to note that beyond the level of domestic or national parliaments, international parliamentary institutions have mushroomed since World War II¹¹¹ with increasing number and competences, and functions that enable them carry out parliamentary functions as explained above, to more or less extent. Today a number of international parliamentary institutions formally exist as parliamentary organs of international organizations with legal status (albeit to a limited degree in some cases) whose mandate enables them to promote constitutionalism and democratic governance both in the parent organizations and in their respective member states.

The European parliament is a leading regional parliamentary institution in this genre, whose mandate and functions effectively contribute in closing the gap of democracy deficit in Europe. The Pan African Parliament (PAP) is a parliamentary organ of the African Union (AU) patterned along that of the EU, though with limited powers.¹¹² The Parliamentary Assembly of the Council of Europe (PACE) is a consultative body of the Council of Europe and the parliamentary arm of the Council of Europe, whose mandate is similar to that of the PAP though more experienced.

Though it can be argued that the limited powers of the PAP renders it ineffective as a parliament in the restrictive sense of a legislative or law-making institution, this study analyses the representational role of the PAP, its powers and functions under the Protocol to the Treaty Establishing African Economic Community Relating to the Pan African Parliament and presents a counter argument. This is to the effect that the PAP can effectively carry out legislative functions by parliamentary activism. Thus, nothing stops the PAP from proposing model laws for the adoption of the Assembly of Heads of State and Government of the AU and from carrying out its representative role, oversight and other functions as already provided for under the Protocol.¹¹³

¹¹¹ Claudia Kissling *The Legal and Political Status of International Parliamentary Institutions* (2011) en.unpacampaign.org/files/2011ipi_en.pdf (accessed 28 February 2017).

¹¹² The Protocol to the Treaty Establishing African Economic Community Relating to the Pan African Parliament (the Protocol) in article 3(1) clearly states that the PAP shall exercise advisory and consultative powers only.

¹¹³ We shall return to this argument in chapter 4, on the role of the PAP.

In this connection, this study argues that law making process is not the exclusive preserve of a parliament even in the restrictive sense, nor does lack of clear legislative powers derogate from its status as a parliament. This argument is predicated on the fact that a parliament carries out other functions including representation and oversight activities as well. Even in classical parliaments like that of states the executive arm also participates in the process of law-making to more or less extent, depending on the provisions of the national constitutions.

Thus, by our definition a deliberative assembly without legislative mandate remains a parliament to all intent and purposes. In any event, the process of law-making involves the participation and impute of all critical stakeholders at various stages and in the final analyses what the legislature produces is only a bill which becomes law when it is assented to by the Chief Executive.¹¹⁴ Even in the EU system which has fully evolved, the law making process is not the exclusive preserve of the EP but rather a shared responsibility with the Council.

Therefore in exploring the prospect of PAP effectively carrying out its role as explained above, specifically giving it legislative mandate is important but improving its capacity is even more urgent for it to effectively promote constitutionalism and democratic governance in Africa even within its present powers. This is crucial for the AU to effectively respond to the growing public pressure for greater involvement, information, accountability and better service delivery to African citizens.¹¹⁵

2.9 Concluding Remarks

As already alluded to in this chapter, the existence of a constitution *per se* even in a written form is not necessarily synonymous with the existence of constitutionalism or democratic governance though this may be indicative of the prospects of its promotion. However, the existence of constitutionalism and democratic governance is more likely in a system where the constitution makes adequate and justiciable provisions guaranteeing the necessary democratic

¹¹⁴ In contemporary democratic systems like the US, Nigeria and South Africa the Congressional bills, the National Assembly bills and the National Legislature bills respectively require Presidential assent for them to become law and the president can veto such bills except in cases where the legislature overrides such veto in accordance with the constitution.

¹¹⁵ The Role of Parliament in Promoting Good Governance | United Nations Economic Commission for Africa: <https://www.uneca.org/publications/role-parliament-promoting-good-governance> (accessed 20 January 2017).

principles and values as well as sufficient limitation on the powers of the government. A constitution of such nature possesses the potential to close the gap between the letters of the constitution and the spirit thereby promoting constitutionalism and democratic governance in the country.

It must be noted however that though a constitution may no doubt possess the above potentials its realization is subject to the human factor or the necessary political will which the constitution is incapable of guaranteeing. In any event, the establishment of democratic constitution with strong democratic institutions especially parliaments, is a robust step forward towards the attainment of constitutionalism and democratic governance. This assumes that there is in existence, strong and effective democratic institutions to enforce compliance by reconciling the rights and freedoms of the governed with the rights of the government officials to govern effectively.

Thus, there is an increasing acceptance of the fact that democracy and good governance are not a luxury, but a fundamental requirement to achieve sustainable development.¹¹⁶ Legal institutions (including international institutions) have a pivotal role in promoting constitutionalism and democratic governance as a prerequisite for catalyzing social development. In the context of this work, parliaments as the democratically elected representatives of the people, have key functions of legislation, representation and oversight to perform on behalf of the citizens. In the context of the above traditional functions parliaments as the legitimate representatives of the people and as one of the key state institutions in a democratic system of governance have a pivotal role to play in the promotion of constitutionalism and a democratic way of life.

It is however instructive to emphasize that achieving good governance requires the existence of a strong, effective and efficient parliament. This is because parliament plays a crucial role in gauging, collating and presenting the views and needs of the people, articulating their expectations and aspirations in determining the national development agenda. Furthermore, as oversight body, parliament helps to identify problems and policy challenges that require

¹¹⁶ <https://www.uneca.org/publications/role-parliament-promoting-good-governance> (accessed 20 January 2017).

attention and assists in overcoming bureaucratic inertia.¹¹⁷ In view of this strategic position, parliaments deserve to be properly strengthened to play their critical role effectively. Regrettably, the capacity of the legislature to perform its functions efficiently and effectively is a major concern in many African countries. Thus, it has been observed that in Africa the parliament is the most underdeveloped amongst the three arms of government as it suffered from long years of authoritarian and military dictatorships, in which the parliament was either outlawed or completely muzzled out.¹¹⁸

Accordingly, the general perception is that parliaments in Africa are commonly seen to be ineffective, powerless, useless, often redundant, or just talk-shops¹¹⁹ and therefore do not possess the capacity to promote constitutionalism and democratic governance. This negative perception appears to be changing ‘with the resumption of multiparty elections in many countries and the inculcation of democratic values across the continent, giving rise to the revival of the belief in parliaments as potential agents of democratic change’¹²⁰. However, parliamentary effectiveness which is so crucial and central in the development and sustainability of capable states in Africa is in most part lacking¹²¹ and remains a threat to the realization of Africa’s vision.

Against this background, this study analyzes the contribution the role the PAP can play as the overarching continental parliament in promoting good governance and consolidating democracy in Africa. The study focuses on the representational role of the PAP by examining how effectively and efficiently it can respond to the growing public pressure for greater

¹¹⁷ The Role of parliaments in promoting good governance’ the Economic Commission for Africa (ECA) Research <http://www.svdaily.net/index.php/opinion/future/6562-parliamentarians-role-in-promoting-good-governance-11>(accessed 20 August 2017).

¹¹⁸ See the observation in the second edition of the African Governance Report (AGR-II- 2009).

¹¹⁹ LN Nijzink, Shaheen Mozaff ar and Elisabete Azevedo ‘Parliaments and the enhancement of democracy on the African Continent: an analysis of institutional capacity and public perceptions’ *Journal of Legislative Studies* 12 (3–4) (2006) 311–35; S Mpanyane ‘Transformation of the Pan-African Parliament: A part to Legislative Body?’ *ISS Paper 181* March 2009 <https://www.files.ethz.ch/isn/99267/PAPER181.pdf> P. 1(accessed 20 August 2017).

¹²⁰ S Mpanyane ‘Transformation of the Pan-African Parliament: A part to Legislative Body?’ (n 7 above): See also M Bratton and Nicolas van de Walle, *Democratic Experiments in Africa: Regime transitions in comparative perspectives*, Cambridge University Press, 1997, 61–89.

¹²¹ Usually associated with institutional weakness and dominance by strong executives which allows parliaments limited decision making roles especially in states where national parliaments are passive actors in governance.

involvement, information, accountability and better service delivery to African citizens despite its capacity challenges. It examines the different options the PAP can adopt to better engage the citizens so that they can be more involved in the decision making processes, policies and programmes of the AU, thereby responding positively to the expectations of the people of Africa.

The analyses of the theoretical bases for the promotion of constitutionalism and democratic governance in Africa may seem to have taken bearing from the US and common law constitutional models. However, this is not intended to ignore the reality of the existence of different legal families in Africa including the common law inheritors, Anglophone and Francophone Lusophone and Hispaphone states.¹²² It does not also ignore the reality of the existence of critical literatures on the common law and the US models *vis a vis* the suitability to the African autoctonous constitutional development. Indeed, nearly half of African states follow the French legal tradition and a few other states adhering to the kindred Portugues constitutional tradition.

Thus, the legal systems in these countries and their constitutional arrangements and procedures differ and are influenced and determined by indigenou traditional legal systems, religion, ideology, post-colonial parterns of executive power concentration and the inherited legal systems within which they were adopted and operate.¹²³ Hence, constitutions do not fall from the sky or written in a vacume but produced in a particular political contexts and social objectives.¹²⁴ The above factors make the prespect of the emergence of a common or distinctive African constitutional genre a far cry. While this study recognizes the above realities, it does not presume that the distinctive features of the different African legal traditions and their diverse influences warrant a detailed treatment having regard to its focus.

¹²² CM Fombad 'Introduction' (2016) *Separation of Powers in African Constitutionalism* Stellenbosch Handbooks in African Constitutional Law UK: Oxford University Press 2.

¹²³ As above.

¹²⁴ CM Fombad 'The Evolution of Modern African Constitutions A Retrospective Perspective' (2016) *Separation of Powers in African Constitutionalism* Stellenbosch Handbooks in African Constitutional Law UK: Oxford University Press 22.

In any case, the common challenge is how to constrain abuse of executive power and impunity thereby promoting constitutionalism and democratic governance. even with the variations in reformist models or approaches. In this connection, there is a converging trend towards internationalization or denationalization of constitutional law as a result of the phenomena of globalization, regionalization, liberalization and the wind of democratization blowing over the continent.¹²⁵ The internationalization processes generates common standards of principles of constitutionalism global or regional, which nations by international agreements accepted to promote in their states, variations in African constitutional genesis and legal traditions notwithstanding. Thus, as was aptly pointed out by Fombad, 'the modern African constitutionalism like those of other countries in the world are sediments of diverse historical processes shaped and reshaped by borrowings, limitations, and adaptations to meet changing circumstances'.¹²⁶ The theoretical analyses of constitutionalism in this work aims to lay the foundation for contextualizing the role of the PAP in promoting the AU agenda on constitutionalism in member states based on global and regional minimum standard of constitutionalism which states agree to copy with under various international legal instruments.

Against the above background, this study argues that constitutionalism can be promoted by states through interaction between international institutions by developing global standards of legal and democratic norms, interpretation of the norms, and internalization of the norms into the collective consciousness of international actors and domestic actors. We are not unmindful of the fact that State sovereignty and non- intervention are two founding and hallowed principles of international law which states guard jealously. Consequently, the employment of external forces or institutions to promote constitutionalism in states may be confronted by a claim to sovereignty by domestic authorities. We however, argue that unqualified adherence to the doctrine of sovereignty constitutes a challenge to international institutions' effectiveness in the promotion of constitutionalism and democratic governance in their member states.

¹²⁵ See Fombad (n 124 above) 43-45.

¹²⁶ As above 51.

Thus, the challenges of contemporary globalization and supraconstitutionalism necessarily constrain states' sovereignty and intergovernmentalist approach towards regional integration in favor of pooled sovereignty and supranationalism. In other words, salutary responses to pressure from non-state actors, as well as global and regional challenges necessitate inter-state cooperation and the reconciliation and relaxation of sovereignty. The above influences make the regional integration theory of neofunctionalism which lends support to the increasing role and power of the EP applicable to this study. Accordingly, AU member states must come out of their silo mentality under the umbrella of state sovereignty in favor pooled sovereignty by strengthening the AU governance institutions and its enforcement mechanisms especially the PAP. This is the Achilles heel in the efforts of the AU to promote its agenda on constitutionalism and democratic governance in Africa especially through the instrumentality of the PAP, which is the focus of this study.

Chapter Three

African Union Agenda on Constitutionalism and Democratic Governance for Africa

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3.1 Introduction

The main objectives of the Organization of African Unity (OAU) right from its formation were to eradicate colonialism and to combat racial discrimination.¹ The strengthening of unity and solidarity between African states had all along been recognized as imperative for the achievement of its objectives while the protection of the sovereignty and territorial integrity of member states remained the guiding principle. At that time, the acceleration of the process of socio-economic development and integration of the continent was not the primary concern of the organization. Accordingly, the imperative of promoting and protecting human rights, consolidating democratic institutions and culture, and promoting good governance and the rule of law as the necessary adjunct of sustainable development strategy was not the preoccupation of

¹ <http://www.africa-eu-partnership.org/en/newsroom/all-news/organisation-african-unity-oau-african-union-au-50-year-path-towards-african-unity> (accessed 30 August 2017).

African leaders. Rather the preservation and protection of their hard won independence, territorial integrity and the struggle against the remaining vestiges of colonialism and apartheid engaged their attention.

However, after the euphoria of the successful fight against colonialism and racial discrimination and transition to democratic governance came the reality of internal political conflicts, instability, unconstitutional changes of government, abuse of human rights, lack of progress and authoritarianism and impunity by the African leaders themselves. Therefore, there was the need for a paradigm shift of principle to that of collective responsibility in order to effectively deal with the above challenges especially to enable member states to collectively intervene in internal affairs of states in grave circumstances of human (and state) security violations. This requires the building of partnerships and multilateral relationships between governments and all segments of the civil society.

The collective responsibility paradigm was also intended to specifically deal with the challenge of constitutionalism and democratic governance in Africa which originally the OAU was not structured to promote under its Charter. It was therefore imperative to further strengthen the unity and solidarity of African peoples and restructure the organization to enable the continent to deal effectively with its contemporary challenges. Therefore, guided by their common vision of a united and strong Africa, the continent's leaders decided to transform the OAU into a new, more ambitious AU imbued with the necessary structures and mandates to enable it confront its contemporary internal and global challenges.

The formation of the AU to replace the OAU remains the most significant turning point in the effort of Africans to join the global trend towards the entrenchment of constitutionalism and democratic governance as the necessary adjunct of a successful and sustainable development agenda. Thus, in accordance with its agenda, the AU has over the years progressively developed and established various normative principles, institutions and mechanisms aimed at promoting constitutionalism and democratic governance in its member states. This is particularly significant based on the redefinition of the principles of the Union under the Constitutive Act, from the doctrine of non-interference in the internal affairs of its member states to that of non-

indifference, especially with the ‘rejection and condemnation of unconstitutional changes of government’.²

The progressive development of the AU agenda on constitutionalism and democratic governance in Africa through the AU legal instruments became crystallized in the AU adoption of the African Charter on Democracy, Elections and Governance.³ This Charter in our view constitutes the most comprehensive and bold attempt to institutionalize, promote and protect democratic ideals and good governance in Africa and therefore deserves special analyses. The AU normative frameworks, institutions and mechanisms all together constitute the ‘AU agenda on constitutionalism and democratic governance’.⁴

In this chapter, the imperative of the promotion of the AU agenda is treated not only as an end in itself but also as a means of achieving the other objectives of the AU. The development and pursuit of the AU agenda from the era of the OAU to the era of the AU is analyzed. The purpose is to assess the efforts being made by the AU in setting and implementing its agenda and explain the need for interface amongst the AU governance institutions, with particular focus on the pivotal role of the PAP.

Specifically, the following issues are treated under this chapter: The development of constitutionalism and democratic governance during the era of the OAU; The AU agenda on constitutionalism under the era of the AU; Constitutionalism and democratic governance through the AU Legal Instruments; The effectiveness of the AU in promoting its agenda on constitutionalism and democratic governance; and the interface between the PAP and the AU governance institutions in promoting the AU agenda. The chapter concludes by underscoring the pivotal role of PAP as the key organ to coordinate, harmonize and synergize with the other governance institutions for the successful implementation of the agenda.

3.2 Constitutionalism and Democratic Governance during the Era of the OAU

It is a notorious historical fact that before the formation of the OAU, the African continent had been subjected to slavery, colonialism and various forms of exploitation by European colonial

² See art 4(i), (m), (n), (o) &(p) of the Constitutive Act respectively.

³ In this work referred to as ‘the Governance Charter’.

⁴ In this chapter referred to as ‘the AU agenda’ or ‘the agenda’.

powers. During the colonial era, authoritarian rule anchored on force and coercion, rather than dialogue and consensus, and abysmal abuse of human rights of Africans were in vogue. The oppressive colonial system of governance was used at the time to subjugate Africans to the socio-economic and strategic-political interests of the European colonial powers. Even the countries that had gained independence were not economically independent and as such could not control their own destiny which was still tied to the apron strings of their colonial masters. It was the painful and dehumanizing condition to which Africans were subjected that inspired the spirit of pan-Africanism, making it necessary for all African states to unite and cooperate in order to effectively respond to contemporary socio-economic and global challenges.

Thus, the formation of the OAU was prompted by the desire to regain the dignity of Africans, to promote the welfare and well-being of the African peoples, to safeguard and consolidate the hard-won independence as well as the sovereignty and territorial integrity of member states, and to fight against neo-colonialism in all its forms.⁵ In pursuing this desire, the African leaders were persuaded by the fact that the Charter of the United Nations and the Universal Declaration of Human Rights provide a solid foundation for peaceful and positive cooperation among states.⁶ Against the above background, the leaders established the OAU with the following purposes:

- (a) To promote the unity and solidarity of the African States;
- (b) To coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa;
- (c) To defend their sovereignty, their territorial integrity and independence;
- (d) To eradicate all forms of colonialism from Africa; and
- (e) To promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights.⁷

In pursuit of the above purposes the parties solemnly affirmed and declared their adherence to the following principles:

1. The sovereign equality of all Member States.
2. Non-interference in the internal affairs of States.

⁵ See the preamble to the Charter of the OAU.

⁶ n 5 above.

⁷ See art 11 of the Protocol.

3. Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.
4. Peaceful settlement of disputes by negotiation, mediation conciliation or arbitration.
5. Unreserved condemnation, in all its forms, of political assassination as well as of subversive activities on the part neighboring states or any other states.
6. Absolute dedication to the total emancipation of the Africa: territories which are still dependent.
7. Affirmation of a policy of non-alignment with regard to all blocs.

From the foregoing, it is apparent that the preoccupation of the OAU leaders at the time was to defend the sovereignty and territorial integrity of African states and their inalienable right to self determination and independent existence, as well as the total emancipation of the African territories that were not yet independent. Judging the performance of the OAU based on the above, it can be argued that the OAU achieved its primary purposes following the total decolonization of Africa and the ultimate eradication of apartheid in South Africa. However, though the promotion of democratic governance, respect for the rule of law and human rights was mentioned as one of its purposes,⁸ this was not top on the organization's agenda.

With the achievement of decolonization and independence and freedom from colonial rule and domination, there were transitions from authoritarian rule to multi-party democratic governance in most African countries, especially in the 1980s and early 1990s.⁹ Expectations from the citizens were justifiably high as the people of Africa had hoped for strong, united and prosperous states in which the rule of law prevailed. Instead, after the euphoria and the optimism that greeted the strong wave of democratization, the people's hope remained unrealized due to a chain of related and mutually reinforcing factors including bad governance, impunity of the leaders and violent political conflicts. These factors rendered the achievement of the socio-economic development and integration of the continent impossible.

⁸ See art 11 (e) of the OAU Charter which provides for the promotion of international cooperation, having due regard to the Charter of the United Nations and the 'Universal Declaration of Human Rights'.⁸

⁹ J Appiah 'A Decade of the African Union and the Quest for Good Governance and Democracy in Africa: 2002-2012' (2015) *Constitutionalism, Democratic Governance and the African State* ed. Gebe Black Mask Ltd. Accra: p.93.

While the dark chapter of Africa's governance history was returning with its sad toll on the people's rights and their retarding socio-economic development, the OAU could not do much to rescue the continent due to its paralysis which rendered it too weak and incapable of addressing contemporary African problems.¹⁰ The point is not that the importance of democratic governance, peace, security, stability, cooperation and economic development was not recognized by the African leaders during the OAU era. Rather, our argument is simply that the Charter of the OAU did not prioritize the promotion of these principles by any defined collective and systematic approach or method. In other words, the major factor which militated against the promotion of human rights, good governance, cooperation and integration of African economies under the OAU era was the fact that the pursuit of these important goals was not based on any established regional normative legal instruments and frameworks. Hence the observance of these principles was at the discretion of national governments and political leaders, who were obsessed with promoting peer solidarity and national sovereignty.

The only issues of priority interest to the OAU were the principle of self-determination of colonized peoples and the struggle against apartheid in Southern Africa. Accordingly, the human rights situation within its independent member states remained a challenge. As such, authoritarian regimes persisted such as witnessed in Idi Amin's Uganda, Bokassa's Central African Republic, Samuel Doe's Liberia and culminating in the 1994 genocide in Rwanda, to mention but a few. Thus, during the era of the OAU the process of peace building, African cooperation and integration was not sufficiently people oriented and people centered as most African governments were preoccupied with the problem of political survival. As such they hardly paid attention to democratic and economic matters. Hence, during this era the importance of democratic governance, peace, security, stability, cooperation and economic development did not loom large. Besides, incessant crises and conflicts sapped the little resources at their disposal. As stated above, the overarching principles guiding the relationships between the African heads of state and government during the OAU era were 'the sovereign equality of all member states' and 'non-interference in the internal affairs of States'. Absolute adherence to these principles was not conducive to the realization of the African dream. Unfortunately, commitment of member states to observe these principles in their interactions was therefore the major factor

¹⁰ See Appiah, (n 9 above).

which militated against the promotion of human rights good governance, cooperation and integration of African economies under the OAU.

Against the background that the OAU operated on the bases of the principle of non-interference in the internal affairs of member states, the leaders were understandably preoccupied with protecting their newly hard won independence and territorial integrity than socio-economic development. Accordingly, they also did little to protect the rights and liberties of African citizens from their own political leaders hence the organization was described by critics as merely a club of heads of state and government who only paid lip service to the issues of good governance and human rights. In this connection, Fombad aptly observes that the OAU ‘in recent years had proven too weak, unresponsive and incapable of addressing African contemporary problems especially the abuses inflicted by the continent’s dictators on their people.’¹¹ Indeed the organization was more state-centered than people-centered and therefore was in need of transformation to enable it to meet with the prevailing African problems.

The point must however be made that the case of the OAU is not that of unmitigated failure. The OAU as a continental organization provided an effective forum that enabled all its member States to adopt coordinated positions on matters of common concern to the continent in international fora and defended the interests of Africa effectively.¹² Through the OAU Coordinating Committee for the Liberation of Africa, the Continent worked and spoke as one with undivided determination in forging an international consensus in support of the liberation struggle and the fight against apartheid.¹³ Though the OAU had substantially achieved the agenda it set for itself under the 1963 Charter the challenge of good governance remained. It therefore became due for transformation into a new Charter with a structure and mandate that could address the issue of good governance and global challenges.

¹¹ CM Fombad ‘The African Union, Democracy and Good Governance’ (2006) *AU, NEPAD AND APRM Democratization Efforts Explored* CURRENT AFRICAN ISSUES No. 32 ed. H Melber NORDISKA AFRIKAINSTITUTET UPPSALA 2006 p. 9.

¹² ‘AU in a Nutshell’ <https://au.int/en/history/oau-and-auit> (accessed 20 September 2017).

¹³ ‘AU in a Nutshell’ (n 12 above).

3.3 The AU Agenda on Constitutionalism and Democratic Governance

The efforts of the OAU to achieve its aim of a strong, united and economically and politically integrated continent could not be successful due to lack of the necessary transnational normative and institutional frameworks. Despite the adoption of the African Charter on Human and Peoples' Rights more than thirty six years ago, many African governments continue to disregard their legal obligations with the persistent violations of the Charter's provisions and extreme abuses of human rights including: arbitrary arrest and detention; torture; poverty, underdevelopment and economic inequality. A doctrinal shift from the OAU doctrine of non-interference in the internal affairs of member states to that of non indifference to violent political conflicts and human rights abuses in member states became necessary and urgent. Furthermore, with globalization and its socio-economic and political impacts, the needs and aspirations of Africa had to naturally change. Therefore, the focus had to also shift in order to achieve the desired acceleration of socio-economic development and integration of African economies.

However, the African leaders realized that the acceleration of the socio-economic development and integration of the continent could not be achieved without developing the enabling robust normative and institutional framework. This is a prerequisite for the promotion of constitutionalism, democratic governance, peace building and sustainable socio-economic development of the continent. This realization inspired the various OAU development initiatives which paved the way for the birth of the AU. In July 1999, the Assembly decided to convene an extraordinary session to expedite the process of economic and political integration in the continent. Thereafter, four Summits were held leading to the official launching of the African Union: The Sirte Extraordinary Session (1999) decided to establish an African Union; The Lome Summit (2000) adopted the Constitutive Act of the Union; The Lusaka Summit (2001) drew the roadmap for the implementation of the AU; and The Durban Summit (2002) launched the AU and convened the 1st Assembly of the Heads of States of the African Union.

It was the growing realization of the urgent need for greater efficiency and effectiveness of the organization to meet with the challenges of a fast globalizing and changing world that motivated the OAU summit in Sirte, Algiers on the 9th of September, with the theme, 'Strengthening OAU capacity to enable it to meet the challenges of the new millennium'. Accordingly, the Heads of State and Government of the OAU issued a Declaration (the Sirte Declaration) calling for the

establishment of an African Union, with a view, inter alia, to accelerating the process of integration in the continent to enable it play its rightful role in the global economy while addressing multifaceted social, economic and political problems compounded as they were by certain negative aspects of globalization.

The objectives of the AU shows remarkable differences from that of the OAU in that that of the AU are more ambitious and comprehensively designed to effectively address the new social, political and economic realities in Africa and the contemporary world. In particular, there is obvious emphasis on democratic governance as an important agenda for the AU. The emphasis on democratic governance is easily understandable against the background that democratic governance can trigger a virtuous cycle of development- as political freedom empowers people to press for the political system that can expand their social and economic opportunities.¹⁴

Accordingly this study recognizes the ineluctable linkage between democratic governance and sustainability of development and argues that at the heart of Africa's missed development opportunities in her previous efforts under the OAU lies the fundamental challenge of democratic governance deficit. It argues that weak governance and its associated political instability, insecurity, and lack of peace hinders development and socio-cultural harmony- which are key pre-conditions for state-building and national integration for AU's 54 Member States.

In other words, good governance underlies all successful development programs, and its positive impacts are felt in every sphere. On the other hand, weak governance militates against development programs. Against the above background, the Commission for Africa report concludes that weak governance has blighted the development policies of many parts of Africa to date.¹⁵ Weak governance include corruption and bureaucratic systems that are not open to security and therefore not answerable to the public and it includes a lack of accountability and weakness in mechanism to ensure that people's voices are heard and their rights upheld, such as parliaments, the media \and the justice systems. Furthermore, the emphasis on democratic governance is in recognition of its overarching importance as a principal enabler of good governance in general. Without the umbrella of democratic governance, the other

¹⁴ UNDP Human Development Report (2002).

¹⁵ See Commission for Africa, (2005) p154.

subcomponents or constitutive elements of good governance will become problematic, if not unattainable. Therefore good governance ensures the following:

that political representation is not merely symbolic, but substantive and sustainable; there are constitutionally guaranteed rights, there are open and credible competitive mechanisms for political representation, electoral laws that guarantee the rights of all social groups(including all gender and minorities) to fully participate and be adequately represented in all the organs and hierarchies of decision making; a decentralized political system which allows for local governance and decision making and transparency of the electoral process which ensures that citizens accept electoral outcomes, etc. This ensures peace and stability and minimizes the likelihood of conflict. It also ensures legitimacy as an important component of a capable state.¹⁶

Thus, it was the understanding amongst African leaders of the nexus between democracy, good governance and development that inspired them to make the promotion of constitutionalism and democratic governance the centerpiece of the Constitutive Act of the AU and the NEPAD framework respectively. Having identified good governance as imperative for Africa's renaissance and development, the focus now is on how to deepen it in Africa. The AU agenda on constitutionalism and democratic governance is therefore intended to expand the mandate of the continental organization and its organs to promote constitutionalism and democratic governance in member states as the necessary adjunct to the achievement of its developmental objectives.

Against the above background, the Heads of State and Government of member states of the OAU, 'Determined to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law; Further determined to take all necessary measures to strengthen our common institutions and provide them with the necessary powers and resources to enable them to discharge their respective mandates effectively',¹⁷ agreed to establish the AU. To this end, the AU was established with various objectives amongst which the relevant ones to this section include: to promote peace, security

¹⁶ n 14 above. Along the same line, the UNDP Report (2002) essentially reached the same conclusions.

¹⁷ See the preamble to the Constitutive Act of the African Union (2000/2001)', in this study referred to as 'the Constitutive Act'.

and stability on the continent¹⁸; to promote democratic principles and institutions, popular participation and good governance¹⁹; to promote and protect human and people's rights in accordance with the African Charter on Human and People's Rights and other relevant human rights instruments²⁰; and to promote sustainable development at the economic, social and cultural levels as well as the integration of African economies.²¹

One of the major challenges which confronted Africa before the birth of the AU was frequent 'unconstitutional changes of government' (UCG) which hamper peace building and development which the OAU was incapable of dealing with. In its desire to address the above challenge, the AU had to chart a new course under the Constitutive Act, by shifting from a tradition of 'non-interference' which was the norm under its mother OAU, to the norm of 'non-indifference'. Of particular significance is 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity as well as serious threat to legitimate order to restore peace and stability to the member state of the Union upon the recommendation of the Peace and Security Council'.²² The inclusion of the above principles in the Act marks a far reaching and significant departure from the predecessor.²³ These new and additional principles have been relied upon as the bases for the adoption of a number of AU declarations and decisions aimed at promoting or implementing shared democratic principles and values.

It is therefore evident that the AU has abandoned the old OAU doctrine of non-interference in the internal affairs of states and adopted a new and more proactive and progressive paradigm of non-indifference to human rights abuses within member states. This new doctrine gives the AU the power to intervene in its member states especially in cases of grave human rights abuses and aim to improve on their constitutional and governance structures. The doctrine challenges the concept of state sovereignty in Africa in its absolutist form. It encourages the concept of pooled or shared sovereignty in which states are supposed to subject their sovereignty to the AU legal

¹⁸ See art 4(f) of the Constitutive Act.

¹⁹ See n 18 above, art 4(g).

²⁰ See art 4(h).

²¹ See art 4(j).

²² See art 4(h).

²³ See the Charter of the OAU (1963).

instruments which they have ratified, in order to promote democratic governance and ensure that human rights are observed, protected and promoted as well.

To this end, the Act established the necessary common institutions or organs and provided them with the necessary powers to enable them discharge their respective mandates. These institutions consist of: the Assembly which is the supreme organ that determines common policies; the Executive Council which coordinates and makes decisions on common policies; the Pan-African Parliament which ensures the full participation of the African peoples in the development and economic integration of the continent; the Court of Justice for the interpretation the Union's legal instrument; the Commission which is the secretariat; the Peace and Security Council which makes decisions on prevention, management and resolution of conflicts; the Permanent Representatives Committee which assists in the preparation of the work of the Executive Council; the Specialized Technical Committees which assists the Executive Council in managing substantive and technical matters; the Economic and Social Council which is an advisory organ in respect of the activities of various social groups; and the Financial Institutions which consist of the African Central Bank, the African Monetary Fund, and the African Investment Bank;²⁴ and any other organs that the Assembly may decide to establish.²⁵

From the foregoing,²⁶ it is obvious that the AU has set an agenda on constitutionalism and democratic governance for itself thereby recognizing the pre-eminence of its promotion for the achievement of the overall objectives of the AU. With the transformation of the OAU into the AU, democratic governance and respect for human rights now occupy the centre-stage in the Union's agenda of pan-African unity, economic integration and prosperity. Thus, the AU has clear mandate to implement the tenets of constitutionalism and democratic governance as enshrined in the Act and other relevant instruments using the established institutions and mechanisms. Hence, the AU normative framework consists of various treaties, protocols, declarations and decisions aimed at promoting the AU agenda.

²⁴ See art 5(1) of the Constitutive Act as amended by the Protocol on Amendments of the Constitutive Act of the African Union.

²⁵ As above above, art 5(2).

²⁶ See particularly art 3, para (f), (g) & (h).

At this juncture, it is apposite to observe that the AU remains guided by some fundamental principles that guided the OAU including the principles of sovereign equality and independence among member states of the Union²⁷ and non interference by any member state in the internal affairs of another of states, among others. The good news however, is that under the Constitutive Act of the AU, the principles of the Union are defined to among others include: ‘promotion of gender equality’; ‘respect for democratic principles, human rights, the rule of law and good governance’; ‘promotion of social justice to ensure balanced economic development’; respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities’; and ‘rejection and condemnation of unconstitutional changes of government’.²⁸

3.4. AU Legal Instruments on Constitutionalism and Democratic Governance

As we have pointed out earlier,²⁹ regional organizations are increasingly involved in protecting and promoting constitutionalism and democratic governance at the national level. In this respect, regional organizations have developed normative frameworks and policies to uphold fundamental constitutional values, including the rule of law, democracy and the protection of human rights. This practice had been in operation in Africa right from the era of the OAU to the era of the AU. Thus, the AU agenda on constitutionalism and democratic governance was not simply an idea that originated with the establishment of the AU.

However, the Constitutive Act of the African Union is the basic legal instrument that constitutes the Union and binds all its member states. As the basic framework of governance in the AU it establishes the structure and the fundamental operational principles of the Union and enables the AU to inherit the existing structures and instruments developed during the era of OAU. From the preamble, objectives and principles set out in the Act, one can rightly conclude that the Constitutive Act is the basic legal instrument that sets the pace for the effective promotion of constitutionalism and democratic governance in Africa and commits member states to abide by its provisions.³⁰ Furthermore, the Act inspires and provides the legal bases for the production of

²⁷ See art 4(a).

²⁸ See art 4(i), (m), (n), (o)&(p) of the Constitutive Act respectively.

²⁹ n chapter 2 of this work at 2.5.

³⁰ See Fombad ‘The African Union, Democracy and Good Governance’ (n 11 above).

other AU legal instruments, declarations and mechanisms under the AU era that are aimed at promoting the AU agenda, some of which are highlighted hereunder.

In the context of the promotion of constitutionalism, it must be noted that constitutions and constitutionalism go hand-in-hand with human rights in the sense that most constitutions contain a list of rights, usually known as fundamental human rights. In this connection for instance, the OAU had adopted the African Charter on Human and Peoples' Rights which led to remarkable wide spread constitutional reforms to promote respect for human rights in Africa. In the context of the promotion of democratic governance, we argue that though the OAU has been described as an organization that had become notorious for its "see no evil, speak no evil"³¹ policy toward political conditions and developments within its member states, it had also duly identified unconstitutional changes of government as one of the major issues that pose a threat to stability and the development of democracy in Africa and accordingly adopted the policy against 'unconstitutional change of government' in July 1999.

The OAU's public disavowal of coups d'état represented a land mark progressive posture against unconstitutional changes of government notwithstanding the fact that a number of related issues remained unclearly defined. The Lome Declaration on the framework for an OAU Response to Unconstitutional Changes of governments in the year 2000 and the Solemn Declaration on the Conference on Security, Stability, Development and Cooperation, which established the fundamental principles for the promotion of democracy and good governance, demonstrated the OAU determination to promote constitutionalism and democratic governance in Africa.

The AU has so far developed a number of normative frameworks on democratic governance and human rights including the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights relating to the Rights of Women in Africa, the Protocol to the African Charter on Human and Peoples' Rights relating to the Establishment of the African Court on Human and Peoples' Rights, the African Youth Charter, the African Union Convention on Preventing and Combating Corruption and other Related Offences, the African Charter on Democracy, Elections and Governance and the African Union Convention on

³¹ C Welch 'The Organization of African Unity and the Promotion of Human Rights' (1991) *Journal of Modern African Studies* vol. 29 No. 4, p.537 at p.538.

the Assistance to Internally Displaced Persons (The Kampala Convention), the NEPAD Declaration on Democracy, Political and Corporate Governance and the establishment of the African Peer Review Mechanism (APRM). We note that not all AU legal instruments have binding force as that of treaties and protocols. In this connection, Fombad³² cautions that:

A distinction needs to be made between acts adopted as treaties and protocols (which are binding on the member states that have signed and ratified them) and other acts such as declarations, decisions, recommendations and resolutions (which though aimed at influencing the conduct of member states, are not necessarily legally binding).³³

The determination of AU to place the African citizen at the center of development and decision-making is evident in the 1990 OAU Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes taking place in the World which underscored Africa's resolve to take the initiative of determining its destiny and to address the challenges to peace, democracy and security. The Charter on Popular Participation and the Mechanism for Conflict Prevention, Management and Resolution of 1993 are practical expressions of the determination of the African leadership to find solutions to conflicts, and to promote peace, security and stability in Africa.

Thus, there are various constitutional reforms to achieve electoral democracy aimed at broadening political participation and peaceful transfer of power. In other words, though as explained above, the OAU did not focus its attention sufficiently on human rights situations in its member states, it did register some modest achievements in respect of developing some of the earliest normative constitutional and democratic frameworks and mechanisms which were inherited by the AU. To buttress the above point, some of the instruments and mechanisms developed under the OAU era to promote the observance of constitutionalism and human rights in member states which were inherited by the AU are hereunder highlighted among the AU legal instruments on constitutionalism and democratic governance.

³² CM Fombad 'The African Union and Democratization' (2012) *Routledge Handbook of Democratization*, ed Jeffrey Haynes: London and New York, 322.

³³ See Fombad, (n 32 above) p 323.

3.4.1 African Charter on Human and Peoples' Rights/African Court on Human and Peoples Rights

Before the transformation of the OAU into the AU, the OAU had adopted the African Charter on Human and Peoples' Rights³⁴ as far back as in 1981. The Charter sets out not only rights, but also duties of African people as it affects the rights of other persons and their respective countries.³⁵ The African Charter establishes the African Commission on Human and People's Rights, an institution mandated to promote and protect human rights on the continent. It entrenches the concept of 'peoples' rights' and recognizes and gives equal importance to the observance of civic and political rights as well as economic, social and cultural rights.

The African Court on Human and Peoples Rights was also established by the Protocol to the African Charter on Human and Peoples Rights as a continental court to ensure protection of human and people's rights in Africa. It complements and reinforces the functions of the African Commission on Human and People's Rights. Ideally, the African Human Rights Court is seen as being capable of transforming the culture of impunity into that of respect for human rights, and restoring confidence in the regional human rights system. At the domestic level, the court is also seen as having the capacity, through its advisory and contentious jurisdictions to contribute to the establishment of democracy, the rule of law, transparency, and respect for human rights in Africa.³⁶ It must be noted however, that the African Court on Human and Peoples' Rights established by the Protocol to the African Charter on Human and Peoples' Rights and the Court of Justice of the African Union established by the Constitutive Act of the African Union, were merged into a single Court and established as "The African Court of Justice and Human Rights" by the Protocol on the Statute of the African Court of Justice and Human Rights.³⁷

As we have earlier alluded to in this chapter, the establishment of the African Charter confirms that Africa under the OAU did recognize that there are certain democratic values including basic rights and freedoms within the context of international human rights standards, which all human

³⁴ Herein this study referred to as 'the African Charter'.

³⁵ <http://www.nigeriarights.gov.ng/AfricanCharter.php>(accessed 14 September 2017).

³⁶ K Olaniyan 'African Charter on Human and Peoples' Rights: From last to next 30 years'(2011)*in Law & Human RightsComments*<https://www.vanguardngr.com>(accessed 22 July 2017).

³⁷ The Protocol on the Statute of the African Court of Justice and Human Rights was adopted at the AU Summit in Sharm El-Sheikh, Egypt, on 1 July 2008.

beings are entitled to because of their humanity and therefore must be protected and promoted by African governments and their institutions. Despite its teething challenges, the African Charter provides a standard human rights architecture for African countries which has impacted positively on the development and observance of human rights in Africa. For instance, many African countries have adopted new constitutions with bill of rights, incorporating the model provided by the Charter. Furthermore, the Charter has also inspired a whole cluster of treaties, protocols and declarations bordering on civil and political rights, including the Governance Charter.

3.4.2 The New Partnership for Africa's Development/African Peer Review

For decades after the formation of the OAU the African continent has remained a theater of socio-economic and political crisis, resulting in underdevelopment and poverty. The situation became worsened by the new challenges of globalization which placed Africa at a disadvantaged position in the world equation. Incidentally, African leaders realized that peace, security, democracy and good governance are preconditions for investment and development, as well as the consequent reduction of poverty in the continent. The New Partnership for Africa's Development (NEPAD) is a strategic response following this realization. Thus, the NEPAD is an African centered strategic development initiative aimed at addressing African governance challenges in order to achieve sustainable socio-economic development and poverty reduction.

Contemporaneously with the establishment of the AU, NEPAD was launched in actualization of the initiative of certain influential African leaders as a “vision and strategic framework for Africa's renewal”. NEPAD includes a *Declaration on Democracy, Political, Economic and Corporate Governance* that commits African governments, among other things, “to promote and protect democracy and human rights in their respective countries and regions, by developing clear standards of accountability, transparency and participative governance at the national and sub-national levels.”

It was however realized that for the NEPAD process to achieve any reasonable measure of success, there ought to be a mechanism of review and appraisal. In recognition of this important imperative, paragraph 28 of the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance acknowledges the establishment of the African Peer Review Mechanism

(APRM) on the basis of voluntary accession. The APRM seeks to promote adherence to, and the fulfillment of the commitments contained in the Declaration. It must be acknowledged, however, that these important developments are not without criticism. As it stands today, only less than half of African governments have voluntarily agreed to submit to APRM, and participating states are expected to receive remedial support to address identified governance deficiencies. The mechanism spells out the institutions and processes that will guide future peer reviews, based on mutually agreed codes and standards of democracy, political, economic and corporate governance.

Undoubtedly, both NEPAD and the APRM are important developments, not only for democracy, governance and economic development, but also for the promotion and protection of human rights.³⁸ Thus, despite its criticisms, the NEPAD initiative is a positive development strategy which has the prospects of promoting democracy and good governance and socio-economic development in Africa, especially through the APRM which remains the key innovation of NEPAD. The APRM is designed as a voluntary, self-monitoring mechanism for assessing, through a technocratic review process, a participating government's progress in meeting the commitments, goals, and standards contained in the Declaration on Democracy, Political, Economic and Corporate Governance. Though the effectiveness of APRM remains challenged due to its voluntary membership³⁹ as well as lack of sanctions and non involvement of independent external reviewers, it remains helpful in the promotion of good governance in Africa through peer pressure amongst participating member states, while more member states can as well be encouraged to participate.

3.4.3 African Charter on Democracy, Elections and Governance

Besides the Constitutive Act, the most significant and radical of the AU legal instruments which aims to enthrone the culture of constitutionalism and democratic governance in its member states, is the African Charter on Democracy, Elections and Governance.⁴⁰ The Governance

³⁸ JC Mubangizi 'Some reflections on recent and current trends in the promotion and protection of human rights in Africa: The pains and the gains' (2006) 1 *AHRLJ* 146-165 <http://www.ahrlj.up.ac.za/mubangizi-jc> (accessed 20 July 2017).

³⁹ One criticism of the NEPAD/APRM is that they are not based on legally binding instrument and as such not all member states of the AU are participants. Participation is voluntary and the review mechanism only involves member states who have acceded to it.

⁴⁰ Herein this work referred to as 'the Governance Charter'.

Charter is a treaty of the AU developed and adopted pursuant to the AU agenda. The basis of the governance Charter and what it seeks to achieve are obvious from the preamble which emphasized on the significance of good governance, popular participation, the rule of law and human rights, the deepening and consolidation the rule of law, peace, security and to entrench in the Continent a political culture of change of power based on the holding of regular, free, fair and transparent elections.

From the preamble to the Governance Charter and the provisions thereof it can be rightly asserted that it is a major and comprehensive regional attempt to promote, protect and consolidate democracy⁴¹ in Africa in line with its agenda on constitutionalism. The Charter essentially institutionalizes and strengthens previous AU mechanisms and procedures.⁴² The fundamental principles of the Governance Charter are meant to guide member states in fulfilling their obligations to their citizens which include: respect for human rights and democratic principles; the separation of powers; political pluralism; holding regular, transparent, free and fair elections; and promoting a representative system of government.

Non-observance of the above democratic principles, the misuse of emergency powers, tenure elongation, impunity of the leaders, corruption and bad governance which were the root causes of unconstitutional changes of government were not sufficiently addressed under the OAU. In fact, these were the ostensible reasons readily adduced by usurpers as justification for resorting to violent measures in order to bring about change. Whether or not the Governance Charter sufficiently addressed these root causes remains arguable. Be that as it may, the Governance Charter effectively elaborates on the principles enshrined in the Constitutive Act which provides for the respect for democratic principles, human rights, the rule of law and good governance.⁴³

An important striking feature of the Governance Charter is its recognition of the convergence of democracy and human rights and the way it should play out in the democratization process. In this connection, the Governance Charter made provisions which clearly incorporate the two core principles of democracy. The first is the idea that the people are the rightful source of political

⁴¹ PJ Glen 'Institutionalizing Democracy in Africa: A Comment on the African Charter on Democracy, Elections and Governance' (2012) available at scholarship.law.georgetown.edu, (accessed 14 September 2017).

⁴² PJ Glenn 41 above.

⁴³ See art 3(g) and (h).

authority, reflected in their free choice of government that remains accountable to them and that their active participation in governance is a right. The second is the idea of political equality of all persons in terms of consideration of their views and interest in the formulation and delivery of public policy.⁴⁴ The recognition of the convergence of democracy and human rights by incorporating the above core principles emphasizes the importance the AU places on the need to control the authority and influence of government and how the people should be governed.

The principles of the Charter include a commitment to the supremacy of the constitution in the political organization of the state,⁴⁵ the requirement that access to (and the exercise of) power must be in accordance with the constitution,⁴⁶ adherence to the principles governing democratic elections in Africa⁴⁷ and the obligation for member states to take all appropriate measures to ensure constitutional rule.⁴⁸ By providing for adherence to the principles of democratic elections,⁴⁹ the Charter seeks to strengthen democratic governance institutions to promote good governance transparency, accountability and popular participation in governance through regular and credible elections, as well as to enhance the effectiveness of election observation missions.

Another striking and innovative feature of the Governance Charter is that it clearly defines what constitutes an unconstitutional change of government⁵⁰ and establishes the main tenets of the framework that guides AU interventions to uphold constitutionalism and democratic governance in member states in the event of an unconstitutional change of government. It went further to establish a set of common principles and guidelines for AU intervention, as well as the possible measures and sanctions that may follow in response to a violation of the constitutional order, with particular reference to the crucial role of the Peace and Security Council (PSC).⁵¹

⁴⁴ D Beetham 'Democratization and Human Rights Convergence and Divergence' *Routledge Handbook of Democratization*, ed Jeffrey Haynes: London and New York p 381.

⁴⁵ See art 10.

⁴⁶ See art 3.

⁴⁷ See art 17.

⁴⁸ See art 5.

⁴⁹ See generally art 17-22.

⁵⁰ See art 23.

⁵¹ See arts 24-26.

In this connection, Saungweme⁵² argues that one of the major weaknesses of the Governance Charter is that it essentially fails to make that vital connection between human rights violations and conflict as a main ingredient for instability in Africa and a root cause of unconstitutional changes of government. He went further to opine that if this link was expressly acknowledged in the Charter it would affirm that this is a Charter designed to protect people rather than regimes.⁵³ On the contrary, we however argue that considering various provisions of the Governance Charter the vital connection between human rights violations and as the main ingredients of instability in Africa was duly made and expressly acknowledged and taken care of in the Governance Charter.

For instances, the preamble commenced with reference to the point that the Governance Charter was ‘Inspired by the objectives and principles enshrined in the Constitutive Act of the African Union, particularly Articles 3 and 4, which emphasizes the significance of good governance, popular participation, the rule of law and human rights, while in stating the objectives, the Governance Charter commences with ‘to Promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights’. Furthermore, Article 3 states amongst others that State Parties shall implement this Charter in accordance with the principles of ‘Respect for human rights and democratic principles’, while Article 4 states that:

1. State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights.
2. State Parties shall recognize popular participation through universal suffrage as the inalienable right of the people.

Under Article 6, State Parties shall ensure that citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility, while by Article 7, State Parties shall take all necessary measures to strengthen the Organs of the Union that are mandated to promote and protect human rights and to fight impunity and endow them with the necessary resources. The above provisions⁵⁴ demonstrate quite clearly that the Governance

⁵² S Saungweme A Critical Look at the Charter on Democracy, Elections and Governance in Africa (2007) https://scholar.google.com/scholar?q=related:pXkgtxAGLfEJ:scholar.google.com/&hl=en&as_sdt=0,5 (accessed 20 December 2017).

⁵³ See Saungweme, (n 52 above) p 2.

⁵⁴ See art 7 of the Governance Charter.

Charter expressly acknowledged the link between human rights violations and conflicts in Africa thereby affirming that this is a Charter designed to protect people of Africa rather than their regimes. Our argument on this issue is succinctly strengthened by the observation of Fombad when he stated thus:

Apart from the Constitutive Act, this Charter is probably the most radical and potentially most far-reaching instrument adopted by the AU as part of its democratization project.....The Charter goes even further than all the previous AU agreements in its attempts to make certain aspects of democracy and good governance fundamental human rights. It contains detailed provisions that provide for the recognition and protection of democracy – rule of law and human rights; a culture of democracy and peace; democratic institutions; democratic elections; sanctions in cases of unconstitutional changes of government; political, economic and social governance – and detailed provisions that contain mechanisms for its application at individual state party, regional and continental level.⁵⁵

In the light of the foregoing, it cannot be overstressed that the vital connection between human rights violations and as the mean ingredients of instability in Africa was duly made under the Governance Charter.

In order to ensure the effective implementation of the provisions of the Governance charter, Article 49 requires that State Parties shall submit every two years, from the date the Charter comes into force, a report to the Commission on the legislative or other relevant measures taken with a view to giving effect to the principles and commitments of the Charter. It further requires that a copy of the report shall be submitted to the relevant organs of the Union for appropriate action within their respective mandates and that the Commission shall prepare and submit to the Assembly, through the Executive Council, a synthesized report on the implementation of the Charter while the Assembly shall take appropriate measures aimed at addressing issues raised in the report. However, since the Governance Charter came into force on February 15 2012, and almost six years thereafter, it is only the report from Togo that has been received. It is hoped that other countries will comply.

⁵⁵ Fombad ‘The African Union and Democratization’ (n 32 above) p 327.

Regarding the mechanism for application of the Governance Charter under Article 44, responsibility is given to the Commission especially: to develop benchmarks for implementation of the commitments and principles of the Charter and evaluate compliance by State parties; to promote the creation of favorable conditions for democratic governance; and to take the necessary measures to ensure that the Democracy and Electoral Assistance Unit and the Democracy and Electoral Assistance Fund provide the needed assistance and resources to State Parties in support of electoral processes.

At this juncture, it is apposite to emphasize the fact that before the Governance Charter was adopted, certain declarations had been adopted under the auspices of the OAU with a view to promoting democratic governance in Africa. This is with particular reference to the declaration on the framework for an AU response to unconstitutional changes of government,⁵⁶ AU declaration on the principles governing democratic elections in Africa⁵⁷ and AU guidelines on election observation and monitoring which defines the criteria for determining the nature, scope and modalities for AU electoral observation and monitoring. Indeed, what the Governance Charter did was to synthesize the previous instruments, radically elaborated and improved on them taking into account the prevailing democratization challenges in Africa and global standard. Attractive and ambitious as the provisions of the Governance Charter may appear the availability of the necessary fund for the implementation of same remains a serious challenge. This is because of the inability, unwillingness or delay on the part of most member states to fulfill their financial obligations to the union.

For instance, as the central coordinating structure for the implementation of this Charter the commission is mandated to assist State Parties in implementing the Charter; and to coordinate evaluation on implementation of the Charter with other key organs of the Union including the Pan-African Parliament, the Peace and Security Council, the African Human Rights Commission, the African Court of Justice and Human Rights, the Economic, Social and Cultural

⁵⁶ Adopted by the OAU during its Lome Summit in 2000 and inherited by the AU. The declaration defines a set of common values and principles for democratic governance to be adhered to by member states and what will amount to unconstitutional change of government.

⁵⁷ Adopted by the OAU during its last Summit in Durban (July 2002) inherited by the AU. The declaration contains elaborate provisions defining the rights and obligations that guide these democratic elections, the guidelines for the AU observing and monitoring elections and the role that the AU Commission will play.

Council, the Regional Economic Communities and appropriate national- level structures.⁵⁸ This is where the usual overlap and conflict associated with the mandate of AU numerous organs once more manifest themselves. Be that as it may, the PAP is expected to take initiative in this regard, in view of its wide mandate to promote constitutionalism and democratic governance in Africa.

The Governance Charter recognizes the pivotal role of parliaments in the effective implementation of the Charter provisions, hence it provides for the strengthening of the capacity of parliaments and legally recognized political parties to perform their core functions.⁵⁹ This is against the background that it is part of the core functions of the legislatures to ratify and domesticate the provisions of a treaty of this nature by making the relevant provisions part of their national constitutions and to oversee or monitor their implementation in exercise of their oversight powers.

However, it appears curious to observe that in making provisions on the application, implementation and mechanics of the governance Charter, state parties undertake to implement the necessary domestic legislation and regulation to fulfill the objectives, principles and commitments contained in the text.⁶⁰ The AUC is charged with the primary role of seeing that the Governance Charter is fully implemented and observed.⁶¹ The AUC is obligated to offer any necessary support to states in implementing the Charter's provisions.⁶² Violations of the Charter and what actions to be taken against violators is to be determined by the Assembly in coordination with the PSC⁶³ is responsible for determining what actions to be taken against those who violate the provisions of the Governance Charter. On the other hand there is no specific or direct responsibility given to the PAP in promoting the enforcement of the Governance Charter.

It must be noted however, that primarily it is the major function of the PAP to promote the programs and objectives of the AU and African Economic Community (AEC) in the constituencies of member states.⁶⁴ Noting also that the objective of the Governance charter is no

⁵⁸ See art 45 of the Governance Charter.

⁵⁹ See art 27 of the Governance Charter.

⁶⁰ As above art 44(1).

⁶¹ As above art 45.

⁶² As above art 44(a).

⁶³ As above art 46.

⁶⁴ International Democracy Watch, www.internationaldemocracywatch.org. (accessed 22 June 2018).

doubt to institutionalize and uphold constitutionalism and democratic governance in Africa. Certainly, the Governance Charter is one of such programs and policies of the AU and its promotion therefore comes within the objective of this research which is the role of the PAP in promoting constitutionalism and democratic governance in Africa. Therefore, it cannot be gainsaid that the PAP does not require to be assigned any specific responsibility under the Governance Charter in order to carry out its mandate in connection with therewith.

For instance, apart from its general promotional role in member states, the PAP can play the very important role of developing and proposing model laws aimed at harmonizing member states' laws on the principles of the Governance Charter for the approval of the Assembly thereby assisting states in their domestication. Harmonization of laws as a process by which member states of an international organization can be assisted to make changes in their national laws in order to produce uniformity in areas of common interest⁶⁵ can be undertaken by the PAP to enhance uniformity and propose minimum standard in the implementation of the Governance Charter.

From the foregoing, it can easily be gleaned that the Governance Charter aims to promote democratic culture, enhance adherence to the rule of law, and foster better political, economic and social governance. It cannot be gainsaid that at least, to the extent that Charter has unequivocally condemned unconstitutional changes of government in terms of Article 23 and promoted the ideals of democracy with an inclusive approach to political dialogue, one can suggest with caution that it does reflect a better understanding of African realities and the need for political transformation.⁶⁶ Therefore, there is no doubt that if the AU and its member states duly implement the provisions of the Charter, the enabling environment for all citizens to participate in the political process in a free and fair political environment would be provided, effective political representation made possible and the prospects of the successful implementation of the AU agenda on constitutionalism assured.

⁶⁵ Harmonization of Laws <www.oxfordreference.com/view/10.1093/oi/authority.20110803095921694> accessed 21 June 2018

⁶⁶ See Saungweme (n 52 above) p7.

3.4.4 The Peace and Security Council

The Peace and Security Council (PSC) is the standing organ of the AU for the prevention, management and resolution of conflicts.⁶⁷ It was established⁶⁸ to be a collective security and ‘early warning’ arrangement with the ability to facilitate timely and efficient responses to conflict and crisis situations. The PSC’s core functions are to conduct early warning and preventive diplomacy, facilitate peace-making, establish peace support operations and, in certain circumstances, recommend intervention in Member States to promote peace, security and stability. The PSC also works in support of peace-building and post-conflict reconstruction as well as humanitarian action and disaster management.

The peaceful resolution of conflicts is in particular is at the heart of the mandate of the PSC. This key institution can, further to authorization from the conference of heads of state, order military intervention in serious circumstances (war crimes, genocide, and crimes against humanity). This is the principle of ‘non-indifference’ which breaks with the principle of non-interference without exceptions set down in the OAU’s charter. The crucial role of this key institution in the case of unconstitutional change of government is clearly recognized and defined in the Governance Charter⁶⁹ including the imposition of sanctions and the lifting of such sanctions when constitutional order has been restored. As all important and pivotal as the role of the PSC is, especially in implementing the AU’s democracy and good governance agenda and conflict resolution,⁷⁰ it is curious and ironical that the PSC was not originally provided for in the Act. The anomaly was however corrected by the Assembly acting under Article 5 (2) of the Act which enables it to establish other organs.

3.4.6 African Charter on Values and Principles of Public Service Administration

The “African Charter on Values and Principles of Public Service Administration” (ACVPPSA) is one of the AU’s legal instruments aimed at achieving the good governance agenda of African states at the continental, regional and national levels. Though still in the process of ratification

⁶⁷ <http://au.int/en/organs/psc> (accessed 20 August 2017).

⁶⁸ The PSC's authority derives from art 5(f) of the Constitutive Act (as inserted by art 9 of the Protocol on Amendments to the Constitutive Act 2003) together with article 2 of the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union. Its key powers are provided for under art 7 of the Protocol.

⁶⁹ see arts 24 and 25 of the Governance Charter.

⁷⁰ See Fombad ‘The African Union, Democracy and Good Governance’ (n 11 above) p 29.

since its adoption in January 31, 2011 what is needed now is to ratify and operationalize the charter in the management of African institutions. It is a charter which has integrated all the various norms, values and principles contained in all previous instruments, charters, conventions and protocols in relation to achieving good public service governance for efficient public service delivery. It is grounded in Africa's Democracy and Governance Framework and Governance Architecture which has become the overarching pathway to Africa's development agenda based on Africa's "shared Values" hence sustainable development is grounded on values and norms of human co existence.

Though the various articles of the AU Charters cannot be adopted wholesale, given the realities of country variations and peculiarities, they however draw attention to the challenges of good governance and the need to address them based on African standards and prescriptions. The issue however, is not on the reality of the negative impact of the deficit of these values on the democratization process and social development or the need to adopt, domesticate and apply them in the management of African institutions, especially parliaments, but on how? In this connection, the PAP must be in the vanguard of this process and should provide a roadmap on how. It can hold technical workshops and consultations with regional and national parliaments on the ratification and demonstration of the Charters, but more importantly on how national governments can be mobilized and encouraged to incorporate, adopt or adapt the Charter in managing their respective governance challenges. This will invariably depend on each country's constitutional developmental stage, but the common ground is that these democratic governance values adopted by the AU have the potential to provide the enabling environment for the achievement sustainable peace and development in member states.

3.5 The effectiveness of the AU in Enhancing its Agenda on Constitutionalism

After the five decades of the creation of the OAU and 15 years of the creation of the AU, Africa has succeeded in developing expansive normative and institutional framework to promote its agenda on constitutionalism and democratic governance in various ways. This is evident from the various legal instruments and institutional frameworks some of which have been highlighted above. Of particular significance is the clear mandate of the AU under the Constitutive Act to promote the principles of democracy, rule of law, human rights and good governance in Africa, as elaborated and made clearer under the Governance Charter.

The plethora of AU's democratic governance framework and instruments clearly indicate that the organization has taken positive steps aimed at inculcating a culture of democracy and human rights in Africa. It can be argued therefore that these are positive steps that can help to arrest - and even reverse - the faltering democratic transitions and growing threats of authoritarian resurgence in Africa.⁷¹ However, the extent to which these measures have and can create the desired impact remains questionable considering the existing gap between norm-setting and norm-implementation in the AU.

In other words, the implementation of AU decisions, declarations, resolutions and recommendations that contain democratic principles and ideals can help to promote the AU agenda on constitutionalism and democratic governance, but this cannot be achieved without legal enforcement. In this regard, skepticism exists against the background that it is the very corrupt dictators who are responsible for the democratic backsliding and destruction of the African economies that are expected to enforce and promote these values that are contrary to the very basis of their power.⁷²

Hence, 'the history of Africa is littered with failed institutions and initiatives, and numerous broken promises'⁷³ due to inherent formidable challenges which must be overcome for the desired progress to be made. For instance, the Union faces a lot of challenges that militates against the achievement of the desired target especially lack of commitment and institutional support from member states. This challenge was more succinctly captured by Fombad when he stated thus:

The AU's democracy and good governance agenda has depended on its implementation on a PSC, which in many instances has been composed of authoritarian states that have in many respects made a mockery of democracy and good governance and regularly violate the human rights of their citizens, it is no surprise that it has not played the lead role that it was supposed to play. But perhaps more worrying for the future is the fact that the AU agenda depends on

⁷¹ See Fombad, 'The African Union and Democratization' (n 32 above) p322.

⁷² The point is that the principles of good governance as set out in the agenda run counter to the interest of those African leaders whose interest is to perpetuate their autocratic and corrupt reign and would not therefore be willing to promote principles that will negatively affect that interest.

⁷³ See Fombad 'The African Union and Democratization' (n 32above) p328.

some notorious leaders such as Paul Diya of Cameroon, Mugabe of Zimbabwe, Gaddafi of Libya, Mswati III of Swaziland and Hosni Mubarak of Egypt, who cannot do more than pay lip service to democracy and many of whom have contrived to rule for life.⁷⁴

Unfortunately, the responsibility to ensure the success of the democracy and good governance agenda is that of the crop of leaders who make up the membership of the leadership of the AU including the head of states and government in general and in particular those of them who are members of the PSC. There is therefore the urgent need to give new momentum to the agenda through stakeholders' engagement especially by raising the consciousness the civil society groups as a watch dog against the abuse of office by the notorious African leaders. The point is that the various well meaning stakeholders like the PAP and the civil society can bring pressure to bear on the African leaders to mend their democratic ways or hold them accountable for failures.⁷⁵

In any event, these instruments if ratified and domesticated can provide a basis for judging the actions of the recalcitrant African leaders and upon which they can be held accountable by their own people whether while in power or even after leaving office. This can be achieved in various subtle ways including the good will and commitment of good leaders who support change, as well as pressure through constructive opposition by political parties, peer pressure, public opinion or civil society pressure against those leaders that are bent on resisting change. In this connection, PAP as an institution which is envisioned as a common platform for African peoples and their grassroots organizations to be more involved in discussions and decisions on the problems and challenges facing the continent has a leading role to play acting within its oversight powers.

The promotion of the agenda can be achieved in the spirit of pan-Africanism and African renaissance which deserves to be rekindled and promoted as well. It is about freeing up potential and mobilizing energy, which will enable the continent to realize its ambition as an emerging global power which can only be possible with the implementation of the AU agenda. However, it

⁷⁴ Fombad 'The African Union and Democratization' (n 32 above) pp 328-329.

⁷⁵ This is in the context of the African leaders failing in their responsibility to ensure the implementation of the agenda as set out in the various AU treaties which they have ratified.

cannot be denied that remarkable progress has been made in that the AU has also shown more commitment in the implementation of the outlawing of unconstitutional changes of government by establishing an enforcement mechanism. However, the unclear and ambiguous concept of popular uprising remains a challenge calling for an acceptable standard definition in order to avoid double standard in dealing with mass protests against bad governance.

Though it cannot be denied that the AU is faced with daunting challenges in prosecuting the agenda, it has made laudable efforts to develop shared values and to produce normative instruments. However, these efforts have not appreciably yielded the desired results because of the wide gap that exists between the setting of these norms and their implementation. This is because most of these normative instruments are not ratified or suffer undue delay in achieving the required ratification from member states. This is arguably due to the challenge of sovereignty. Even in cases where they have been ratified, domestication and implementation constitute further serious challenges. This confirms the impression that ownership gap exists and implies that the AU must invent imaginative ways of addressing the challenge.

The Constitutive Act of the African Union and the Protocol to the Treaty Establishing the PAP represent a compromise between the conflicting pulls of sovereignty and supra-nationalism which must be supported in order to make progress. Thus, the PAP is a key organ that must be strengthened to execute its mandate if the African union is to make the expected difference in implementing the agenda.

Although the AU lacks the power to specify and enforce uniform standards of constitutional and democratic practice as a precondition for membership as the EU does, its stated commitment to democracy and constitutionalism as new norms for the African region is a significant and modest step forward. As the world community has begun to look increasingly to the AU for initiative and leadership in promoting “African solutions for Africa's problems,” the AU stance on specific political developments in its member states is likely to be accorded substantial deference and support by influential international actors.⁷⁶ In fact, the AU, acting in conjunction with the sub-

⁷⁶ This has been demonstrated, for example, in the cases of the Central African Republic (2003), Togo (2005), Mauritania (2005), Comoros (2007), Guinea (2008), Madagascar (2009), Niger (2010), Mali (2012), Guinea-Bissau (2012) and Egypt (2014) in the context of coups, and in post-electoral conflicts in Kenya (2007) and Côte d’Ivoire (2010).

regional Economic Community of West African States (ECOWAS), was influential in reversing a de facto coup in Togo in 2005 and also played an important role, again with its sub-regional partners, in the recent restoration of civil authority to the failed states of Liberia and Sierra Leone. The AU, the RECs and the national governments must therefore synergize in various aspects for more effective implementation of the AU agenda.

It must be noted however, that in the few decades of undertaking governance reforms by African states at the national, regional and continental levels, the need to develop a capable state (peaceful and stable) has become the focus and fulcrum of Africa's developmental discourse and agenda. On the other hand, parliaments are crucial in enhancing state capability, accountability and responsiveness. Unfortunately, the role of many African parliaments in this regard has been generally ineffective due to lack of capacity and lack of judicial independence. Thus, the protection of the independence of the judiciary and the establishment of effective parliaments to ensure accountability has not been of interest to African leaders who stand to benefit from the status quo.

There is therefore the need to strengthen the capacities of African parliaments at the national, sub regional and continental levels to perform their respective constitutional mandates effectively. Hence, parliamentary effectiveness under-girded by effective institutions and mechanisms is crucial and central in the development and sustainability of good governance. Parliaments can help to achieve this by exercising their powers to legislate and to oversee the activities of the executive, and by representing the citizens.

3.6 The Interface between the PAP and the AU Governance Institutions in Promoting AU Agenda

It cannot be over stressed that the interface amongst the AU governance institutions is essential for the achievement of the AU agenda. Based on this fact, the Assembly of Heads of State and Government⁷⁷ of the member states of the AU decided on the 'Establishment of the Pan-African Governance Architecture' with the aim of promoting interactions between stakeholders who work on promoting good governance and strengthening democracy in Africa, in addition to

⁷⁷ In this study referred to as 'the Assembly'.

translating the objectives of the legal and policy pronouncements in the AU Shared Values, democracy, human rights, elections and humanitarian assistance. The African Governance Architecture (AGA) was established in order to give effect to the decision of the Assembly. Accordingly, the Platform envisions the harmonization of the AU shared values instruments and the coordination of joint initiatives in governance and democracy.

For the purpose of clarity, ‘Shared Values are the norms, principles and practices acquired or developed throughout African history, and which are embedded at the individual, societal, regional, continental and global levels’.⁷⁸ They reflect the principles and values which Africans themselves have lent their consent to as *sine qua non* for the successful implementation of their development agenda. In an attempt to find common solutions to common African problems, the AU have identified and harmonized a number of such values and adopted them as part of AU legal instruments, as bases of collective actions aimed at addressing the social, economic and political challenges faced individually and collectively by AU member States.⁷⁹ Some of these values are reflected in the AU legal instruments adopted to promote its agenda on constitutionalism and democratic governance. These instruments incorporate the values of human rights, democracy, rule of law, accountability, amongst others.

The AGA is structured around a normative framework that is set up by the AU Shared Values. AGA is based on the objectives and principles that are defined in the various AU Shared Values instruments that AU member states have signed and ratified and thus committed to implement. These values are defined in the following instruments: the Constitutive Act of the African Union; African Charter on Democracy, Elections and Governance; African Charter on Human and People’s Rights; OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; African Charter on the Rights and Welfare of the Child; Protocol to the African Charter establishing the African Court on Human and Peoples’ Rights; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa; African Charter on Values and Principles of Public Service and Administration; African; Protocol on the Statute of the African Court of Justice & Human Rights; African Union Convention on Preventing and Combating

⁷⁸ ‘AU: Statement by the African Union, on the recently concluded Year of Shared Values’ 24 January 2013: <http://www.polity.org.za/article/au-statement-by-the-african-union-on-the-recently-concluded-year-of-shared-values-24012013-2013-01-24> (accessed 19 August 2017).

⁷⁹ See Abdullahi (n 77 above).

Corruption; African Youth Charter; Algiers Declaration on Unconstitutional Changes; Lomé Declaration on Unconstitutional Changes of Government; OAU/AU Declaration on Principles Governing Democratic Elections; Conference (CSSDCA) Memorandum of Understanding; African Union Post-Conflict and Reconstruction Policy Framework; New Partnership for Africa's Development (NEPAD); Declaration on Democracy, Political, Economic & Corporate Governance; New Partnership for Africa's Development (NEPAD) Declaration on Democracy, Political, Economic & Corporate Governance; Memorandum of Understanding on the African Peer Review Mechanism (APRM); Kigali Declaration on Human Rights in Africa; Solemn Declaration on Gender Equality in Africa; Declaration on the Theme of the 2012 Summit "Towards Greater Unity and Integration through Shared Values".⁸⁰ The above instruments come within the policies and programs of the AU which the PAP is mandated to popularize and promote.

The AGA platform members are: African Union Peace and Security Council (AU PSC); African Union Commission (AUC); Regional Economic Communities (RECs); African Commission on Human and Peoples' Rights (ACHPR); African Union Commission on International Law (AUCIL); Pan-African Parliament (PAP); African Union Commission on International Law (AUCIL); African Peer Review Mechanism (APRM); Economic, Social and Cultural Council (ECOSOCC); AU Advisory Board on Corruption (AUABC); African Committee of Experts on the Rights and Welfare of the Child (ACERWC); New Partnership for Africa's Development (NEPAD)-Planning and Coordination Agency; and African Court on Human and Peoples' Rights (AfCHPR).

Acting within its broad mandate⁸¹ the PAP is also in a position to ensure massive participation of stakeholders, particularly civil society organizations, in the implementation of AU agenda by deepening citizen engagements in their popularization and promotional activities. Accordingly PAP and the AGA should be able to develop mechanisms to fast-track the ratification, domestication and implementation of AGA/AU-legal instruments especially the PAP Protocol, the Governance Charter, African Charter on Values and Principles of Public Service

⁸⁰ It is the Declaration on the Theme of the 2012 Summit "Towards Greater Unity and Integration through Shared Values" that establishes AGA and commits the African Union towards implementing and affirming its Shared Values.

⁸¹ See art 11 of the Protocol.

Administration and the Protocol to the African Charter on the Human and people's Rights on the Rights of Women – the Maputo Protocol amongst others, in order to attain the underlying objectives. However, as in the case of the implementation of other AU laudable programs, lack of the necessary fund and human resources requirements remain daunting challenges.

3.7 Concluding Remarks

Obviously all the positive developments in the promotion of AU agenda on constitutionalism and democratic governance in Africa through AU legal instruments and mechanisms could not have been possibly discussed exhaustively in this chapter. What we have attempted here is to highlight some of the watershed developments in the AU initiatives in this direction. As we have pointed out earlier, it is on record that the African Charter on Human and Peoples Rights was adopted right from the era of the OAU. This is a land mark achievement of the African leaders in their effort to institutionalize respect for human rights in Africa.

The outlawing of unconstitutional changes of government and the establishment of the PSC, also the brain child of the OAU were bold initiatives aimed at promoting constitutionalism in Africa. The New Partnership for Africa's Development (NEPAD), which was adopted as a program of the AU at the Lusaka Summit (2001), a very important institution for the promotion of good governance in Africa was the brain child of the OAU. However, the adoption of the Constitutive Act of the African Union, also the brain child of the OAU, is the climax of the expression of the determination of the African leaders to promote constitutionalism and democratic governance in Africa. The foregoing clearly demonstrates that the OAU was not necessarily insensitive and unresponsive to the challenges of constitutionalism and democratic governance in Africa though it was not proactive and robust in dealing with the challenges.

No doubt, pragmatic and radical steps have been taken by African leaders especially since the AU era to radically transform Africa's democratic governance architecture with the aim of improving on Africa's faltering socio-economic and political score card. The momentum started gathering with the adoption of the Constitutive Act followed by subsequent AU shared value instruments and crystallized in the adoption of the Governance Charter. Though not a perfect document, the Governance Charter possesses the potential to address effectively the continent's democratization challenges and impact positively on her political and socio-economic

development, if duly implemented. The Governance Charter's clear condemnation and elaboration of the concept of unconstitutional changes of government in terms of Article 23, the prescription of punishment for perpetrators (though prosecution of perpetrators may pose serious challenges) and the clear provisions for standard legitimate and inclusive democratization processes can promote the sustenance of democracy in Africa. The contemplation of legal and judicial action against individuals who incite or effectuate an unconstitutional change in government and advancing the relationship and interdependence of democracy and human rights to democratic governance and development is a bold and commendable move.

On paper, the above instruments particularly the Governance Charter possess the potential to promote the AU democracy and good governance agenda. However, in terms of implementation there are reasons for misgivings especially by those who may see it as an ingenious pragmatic device or decorative blueprint drawn up by desperate dictators in order to attract foreign aids and investments from an otherwise apathetic international community due to AU credibility deficit.⁸² Generally, enforceability and compliance with the principles of the Charter will no doubt pose a challenge, as the mechanism provided for the implementation will be practically difficult due to inherent capacity challenges and the financial implications.

On the other hand, as we have stated earlier, the APRM which could have been in a vantage position to play an effective role cannot do so effectively because it is acceded to on a voluntary basis and not concerned with sanctions. It is therefore suggested that the APRM process and mechanism can be of greater assistance if it is made compulsory for all AU member states and sanctions attached for non compliance. The snag however, is that the AU will further be confronted with the usual challenges of administrative capacity and cost of implementation.

Thus, the AU vision to 'build an Africa that is integrated, prosperous and at peace, led by its citizens and constituting a dynamic force on the world stage' cannot be realized unless its agenda on constitutionalism and democratic governance is pursued with the commitment and vigor that it requires. Therefore, the 'Africa We Want' will depend largely on the importance attached to

⁸² See Fombad 'The African Union and Democratization' (n 32 above) p 322.

the promotion, protection and observance of human and peoples' rights on the continent.⁸³ Furthermore, for AU to be effective, and to achieve its goal, it must integrate and mainstream democratic governance, respect for constitutionalism and the rule of law and respect for human and peoples' rights at all levels of governance in its member states.⁸⁴

Examined from another dimension, it is worth noting that one of the implications of globalization is the creation of the awareness on the part of the African people about the benefits of democratic rights being enjoyed by their counterparts in modern societies, particularly the youths through easy communications with the outside world especially through the net. It is therefore also important to factor the dynamic concept of the rule of law in the advancement of the African human rights agenda by moving beyond civil liberties and political rights to also give equal attention to socio-economic and cultural rights such as the right to food, the right to clean water and sanitation, the right to clothing, the right to health, the right to education, the right to housing, the right to clean environment and so on.⁸⁵

On the other hand, the spread of globalization and its uneven impact has a huge implication on the successful entrenchment of the culture of the rule of law and human rights in Africa. The inability or failure of political leaders to fulfill their electoral promises especially by dealing with the challenges of globalization is largely responsible for the current state of democratic recession, the rise of ultra-nationalist populism and authoritarian backsliding manifesting globally especially in some parts of Asia, Europe and North America, and so on. It is therefore arguable as already being predicted by some scholars,⁸⁶ that we are entering a period of de-

⁸³ AL Abdullahi 'Democracy, Human Rights and Governance in Africa: Trends, Challenges and Prospects' Statement delivered at the 5th High Level Dialogue at Arusha, United Republic of Tanzania on November 23, 2016 <https://au.int/en/speeches/statement-he-dr-aisha-l-abdullahi-commissioner-political-affairs-african-union-commission-1>.

⁸⁴ See Abdullahi, (n 83 above).

⁸⁵ As above.

⁸⁶ JD Martz 'Toward the reconstruction of democracy' (1997) *Studies in Comparative International Development* vol. 32 issue 2 <https://link.springer.com/article/10.1007/BF02687326> (accessed 20 December 2017); R Stefan and Y Mounk 'The Danger of Deconsolidation' (2016) *Journal of Democracy* (accessed 20 December 2017); R Stefan and Y Mounk 'The Signs of Deconsolidation' (2017) https://www.google.com/search?q=deconstruction+and+deconsolidation+of+liberal+democracy+and+populis m&ie=utf-8&oe=utf-8&client=firefox-b-ab&gfe_rd=cr&dcr=0&ei=1IN1Wp6hBpGp8wfC94DoCw (accessed 20 December 2017).

consolidation and deconstruction of liberal democracy as increasingly popular faith in democracy seems to be waning.⁸⁷

The African continent is not immune from the current declining faith in democracy and democratic institutions accompanied by the rising specter of populism. Rather the dangers of populism and its appeal to racism, xenophobia, religious intolerance and patriarchy is being witnessed more in Africa due to the uneven impact of globalization which manifests more in its adverse socio-economic, cultural and political impacts, thereby threatening the rule of law and human rights in Africa.⁸⁸ Therefore, the entrenchment of constitutionalism and democratic governance is more urgently required in Africa where problems of inequality, poverty, unemployment, corruption, political exclusion and marginalization are more deep rooted and intense than in any other part of the world. By adopting its various legal instruments on constitutionalism and democratic governance, the AU and African leaders have obviously recognized and accepted that democracy and good political governance constitute a prerequisite for successful political stability and economic recovery on the continent.

However, it is not enough to aggregate and adopt shared values legal instruments with the aim of promoting the AU agenda on constitutionalism and democratic governance in Africa, it is equally imperative that such instruments are ratified, domesticated and implemented to be able to achieve the desired result. In this regard, the role of African parliaments⁸⁹ is crucial. The mandates of the African parliaments put them in a strategic position to facilitate the ratification, domestication and implementation of these instruments in their various jurisdictions in accordance with the national or regional constitutional laws as the case may be. This can be achieved by exercising their law making powers, performing their representative role and carrying out their oversight functions which enables them to monitor the exercise of the responsibilities of the executives with regard to the implementation of these instruments.

⁸⁷ AL Abdullahi 'Democracy, Human Rights and Governance in Africa: Trends, Challenges and Prospects' (n 82 above).

⁸⁸ The recent Arab spring and the consequent unconstitutional changes of government in most parts of North Africa, xenophobia in South Africa, political instability in some countries and terrorism especially in parts of West Africa are cases in point.

⁸⁹ African parliaments in this context include PAP, regional parliaments and national parliaments.

In this connection, it is suggested that the PAP must play a central role as it stands out as the lead parliament that can initiate measures that would strengthen the national and regional parliaments in playing their roles more effectively, particularly in the area of monitoring and overseeing the activities of the executive in implementing the AU shared values instruments. This requires the PAP as the lead actor⁹⁰ amongst the AGA platform members not only to promote the policies and programs of the AU but also to harmonize and coordinate the activities of the Regional Economic Communities and the parliamentary fora of Africa. In this regard, it can also develop a monitoring and evaluation framework for national and regional parliaments to adopt in measuring the performance of their various governments in ensuring the implementation of AU shared values instruments subject to local variations. The political parties also have an influential role to play in motivating and bringing pressure to bear on the government to carry out its responsibility in this regard. However, all these require adequate funding which should not mostly depend on external support as it has always been the case with most of the AU programs.

⁹⁰ This is based on its broad mandate under Art 11 of the Protocol particularly paragraphs (6) and (7) the protocol. More so as the PAP is was during the inaugural meeting of the AGA and AGP, 9-10 December in Kigali, Rwanda, appointed the Chairperson of the African Governance Platform for the year 2016-2017.

Chapter Four

Appraisal of the Role of the PAP in Promoting Constitutionalism and Democratic Governance in Africa

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4.1 Introduction

As we pointed out earlier,¹ beyond the level of domestic or national parliaments, international parliamentary institutions have mushroomed since World War II with increasing number. These institutions are endowed with powers and functions that enable them carry out their parliamentary functions to more or less extent as defined in their founding treaties. Today a number of international parliamentary institutions are legally established as legislative bodies of international organizations with mandate to promote constitutionalism andand democratic governance both in the parent organizations and in their respective member states.

¹ See chapter 2 of this study.

The PAP is a regional legislative body in this genre, with various powers and functions aimed at popularizing and promoting the programs and policies of the AU which in the context of this work include the promotion of constitutionalism and democratic governance in Africa. Thus, the PAP is the legislative organ of the AU with mandate to promote the AU agenda on constitutionalism and democratic governance. In this regard, this chapter analyses the powers and functions of the PAP with a view to determining how effectively the institution is carrying out its mandate under the Protocol and the prospects of more effective performance.

Against the above background, the chapter appraises the legal status of the PAP as a legislature *vis a vis* its mandate of the promotion of constitutionalism and democratic governance in Africa. In this regard, the effectiveness or otherwise of the PAP in promoting constitutionalism and democratic governance in Africa is analyzed bearing in mind the vision of the AU in establishing the PAP and the rationale for its limited mandate. Furthermore, the powers and functions will be examined, showing clearly that in spite of its limited mandate the PAP has successfully carried out a number of activities aimed at promoting constitutionalism and democratic governance in Africa. This is not to deny the negative impact of its limited powers and functions when compared with those of national parliaments and more evolved regional parliaments.

Specifically, the chapter interrogates the legislative status of the PAP, the vision for its establishment, powers and functions, the rationale for the limited mandate of the PAP, the assessment of the activities it has carried out so far and those it can effectively carry out within its powers and functions under the present protocol. The chapter concludes that despite its limited mandate the PAP is not a mere talk shop, but possesses the attributes of a classical parliament that has been undertaking activities within its mandate. There is however room for improvement in undertaking its activities more effectively especially in promoting its agenda on constitutionalism and democratic governance as well as the AU integration agenda.

4.2 The Vision for the Establishment of the PAP

The visionary founders of the AU understood from the very beginning that the parliamentary dimension of the AU governance architecture is a *sine qua non* for the effective realization of the aims and objectives it has set for itself. This is even particularly critical in the promotion of its agenda on constitutionalism and democratic governance and African

continental integration. The establishment of the PAP is therefore informed by the understanding of African leaders that the people of Africa need to be represented and fully involved in the programs and policies of the AU for their effective implementation. This vision is clearly expressed in Article 17 of the Constitutive Act which provides that: ‘In order to ensure the full participation of African peoples in the development and economic integration of the continent, a Pan-African Parliament shall be established’.

The PAP was therefore foreseen as the institution that can represent the people of Africa and their grassroots organizations as well as constitute a common platform for the people of Africa to articulate their views on the challenges facing the continent. The establishment of the PAP was a clear demonstration of determination and commitment of the African leaders to realize the ideals of pan-Africanism and African renaissance. Enamored by the vision of the AU in establishing the PAP and guided by its mandate and set of objectives in the Protocol, the PAP formulated a strategic plan for itself, informed by its own vision, mission, mandate and core values as well as the development challenges facing the continent.² The PAP envisions a continental institution harnessing ‘One Africa one voice’.

The PAP’s vision has a long term horizon and envisions a Pan African Parliamentary institution that will provide a common platform for African peoples to fully participate in the decision making processes of the AU for the political and socio-economic development and integration of the African continent. This is to be promoted through the harmonization and coordination of national and regional policies and laws in order to promote a sense of unity and common destiny among the peoples of Africa. Based on the foregoing, the PAP proposed six strategic objectives as follows:

- To strengthen its legislative parliamentary functions;
- To provide a platform to mainstream African voices and those in diaspora into the AU policy making process;
- To promote human rights, democracy, and good governance in Africa;
- To promote peace, security and stability;
- To promote integration and development in Africa; and

² PAP Strategic Plan 2014-2017 adopted January 2014, available at the PAP Documentation Unit.

To strengthen the institutional capacities of the PAP³

It is clear that the PAP's vision and strategic objectives are in tandem with the AU vision in establishing the institution, particularly with regard to its agenda on constitutionalism and democratic governance. However the question is whether the parliament has been effectively delivering on its mandate, to what extent and how it can be more effective. We argue that despite its challenges, P A P has not only recorded appreciable accomplishments and growth but has also acquired global influence and prominence.⁴Indeed the parliament has emerged as an indispensable institution in strengthening Africa's democratic institutions, democratic culture, good governance, transparency and rule of law in Africa. Thus, the vision of the African leaders in establishing the PAP is being realized despite its teething challenges.

Furthermore, the PAP's 2018-2023 strategic plan is closely aligned to the AU Agenda 2063. PAP will advance and reinforce assistance to the AU member states, RECs, national and regional parliaments and the AUC to effectively advance and implement the flagship projects and other priority areas of Agenda 2063 by using the PAP's oversight, advisory, consultative functions and eventually its legislative functions. There are also other unfinished businesses from the previous plan the new plan focuses on which include: strengthening parliamentary legislative functions of the PAP, capacity to develop and advocate model laws, human rights, governance and democracy initiatives; PAP's full legislative powers; rule of law, reliable public institutions, free and fair elections, etc.

4.3 Interrogating the Parliamentary Status of the PAP

In interrogating the parliamentary status of the PAP, we note that various academics and commentators on the role of the PAP have expressed the view that the institution is a mere 'talk shop', a name described as 'befitting of an institution that undertakes workshops, seminars and conferences largely for the benefit of the parliamentarians'.⁵ The role of the institution has been

³ n 2 above.

⁴ See 4.6 of this chapter on the 'Assessment of the Activities of the Pan African Parliament and its Potentials under the Present Protocol'.

⁵ BR Dinokopila 'The role of the Pan-African parliament in the promotion of human rights in Africa' (2016) LLD Thesis, University of Pretoria, Pretoria. These views have also been expressed in page 71 above.

undermined to the extent of asking whether it ‘will ever be a real continental legislature - or will it remain forever a glorified talk shop?’⁶

Unfortunately comments by some members of the PAP themselves tend to be in agreement with the above opinion. For instance, only recently at the 2017 October session, some members of the PAP expressed their frustrations regarding the slow pace of the ratification of the PAP revised Protocol and having struggled to make their voices heard, were prompted to ask themselves: ‘What are we for?’ ‘Every time we're here, we obsess over the same things. If we are not making laws, then what's the point of being here?’⁷ Similar comment was made by Hon Floyd Shivambu, a parliamentarian from South Africa when he said thus: ‘This forum is not a parliament it is just a discussion platform that does not have any legislative powers. This institution is still wobbly’, ‘As it is, it is a waste of resources.’ More significantly, the president of the PAP himself observed that without the power to take concrete action, the parliament is doomed to continue as a talking shop.⁸ These types of comments, especially coming from the members of the PAP themselves casts doubt as to their faith and capacity to effectively deliver on their mandate under the extant Protocol.

However, we argue that to all intents and purposes, PAP is a continental parliament and not a mere talk shop. What is indeed required is for the parliament to clearly understand the enormity of its powers under the Protocol and how it can imaginatively exploit its potentials to achieve its objectives. In order to buttress our argument that indeed the PAP is a parliament, it is considered apposite to first examine the legal bases for its existence and authority to carry out parliamentary functions and thereafter examine whether indeed the functions of the PAP fall within the traditional role of a classical parliament. The authority of the PAP to exist and function as a parliament can be ascertained by examining the provisions of the relevant sections of the following source documents, namely: the Constitutive Act of the African Union; the Protocol to

⁶ <https://issafrika.org/iss-today/will-the-pan-african-parliament-ever-be-worthy-of-its-name> Will the Pan African Parliament ever be worthy of its name? (accessed 14 June 2017); W Zambara ‘Pan African Parliament must stop its ‘talk-shop’ and get down to real business’ (2009), Cape Times No. 119 <http://www.ccr.org.za/index.php/media-release/in-the-media/newspaper-articles/item/273-pr-119> (accessed 14 June 2017); see also Dinokopila (n 6 above).

⁷ Hon Corneille Padonou of Benin said to his fellow parliamentarians at the plenary during the 2017 October session. See <https://www.news24.com/Africa/News/pan-african-parliament-in-grip-of-existential-crisis-20171017> (accessed 20 December 2017).

⁸ Hon Nkodo Dang, the current president/speaker of the PAP See <https://www.news24.com/Africa/News/pan-african-parliament-in-grip-of-existential-crisis-20171017> (accessed 14 June 2017).

the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament; and the Rules of Procedure of the Pan-African Parliament.

The basic source document authorizing the establishment of the PAP is the Constitutive Act of the African Union (the Act) which provides in Article 17 as follows:

1. In order to ensure the full participation of African peoples in the development and economic integration of the continent, a Pan-African Parliament shall be established.
2. The composition, powers, functions and organization of the Pan-African Parliament shall be defined in a protocol relating thereto.

Pursuant to Article 17,⁹ the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament (the Protocol) formally established the PAP. The Protocol therefore constitutes the instrument which established the PAP and defined its composition, powers, functions and organization accordingly. Moreover, as we have earlier argued,¹⁰ the term parliament includes various kinds of deliberative, advisory, consultative, and judicial assemblies that represented the political society whether appointed or elected. To this extent and without more, nobody can deny the fact that the PAP is a parliament.

On whether the PAP performs the traditional functions of a classical parliament, this can be determined by considering the role parliaments play in modern democratic societies *vis a vis* that of the PAP and drawing inferences from that. To begin with, in contemporary usage parliaments are strictly speaking, the democratically elected body of representatives constituting one of the three main branches of government whose traditional role is to represent the people; to make laws; and to oversee the main constitutional functions of the other arms of the government. The plank of the argument of those who opine that the PAP is not a parliament in the strict sense of the use of the term is the apparent lack of authority to make laws like in the case of classical parliaments. This is based on the restriction of the PAP to advisory and consultative powers only.¹¹

⁹ The Act provides that ‘the powers and functions of the Pan-African Parliament shall be defined in a Protocol’

¹⁰ See chapter two of this study.

¹¹ See art 2(3) of the Protocol.

On the above score, we argue that this apparent restriction to advisory and consultative role cannot be interpreted to mean that the PAP cannot carry out legislative functions. This simply means that the PAP on its own cannot in the interim make laws that can have binding effect on the Union, hence the attribution of legislative competence will be in phases as may be determined by the Assembly. Our argument is fortified by the clear provision that ‘the ultimate aim of the parliament shall be to evolve into an institution with full legislative powers...’¹². This provision in our view assumes that the PAP to all intents and purposes is a parliament though with limited legislative powers *ad interim*.¹³In any case, it must be borne in mind that the law making process is not the exclusive preserve of the legislature rather it involves the role of some other authorities in one form or the other and at one stage or the other.¹⁴

It is instructive to note that there are various forms of law and law making processes which include rule making. In this connection, reference is made to the provisions of Article 11 of the Protocol on the powers and functions of the PAP (particularly paragraph 8 thereof) which empowers the parliament to adopt its own Rules of Procedure without restriction. Thus, Article (8) gives wide powers to the PAP in exercising its oversight and investigative, consultative and advisory functions to adopt any rule which it deems necessary to achieve its objectives as set out in Article 3 of the Protocol and to exercise its powers as set out in Article 11 of the Protocol. This in our view constitutes a form of law making power by the PAP, albeit in the form of rules of procedure.

Undoubtedly, the PAP cannot be equated to a fully developed parliament due to its special circumstance as an evolving continental parliamentary institution and as such does not possess all the attributes of a well developed supranational parliament like the EP. However, in modern constitutional democracies, beyond the classical role of law-making the oversight of executive actions has become a popular role by which parliaments effectively carry out their inherent function as the people’s watch-dog against the abuse of office. By way of its oversight function, the legislature takes steps to ensure that the principle of the supremacy of the constitution and the

¹² n 10 above.

¹³ The legal maxim which states that ‘equity sees that as done what ought to be done’ supports this argument.

¹⁴ For instance, in some national constitutions the chief executive can propose government bills to be debated and passed by the parliament. He can also sign bills into law or even veto a bill subject however to the power of the parliament to override such veto. In international organizations like the European Union, the European Parliament shares this role with the Council.

core elements of constitutionalism and democratic governance are adhered to. Members of parliament carry out oversight functions by investigating, requesting for documents and reports, debating issues in the plenary or in committees of the House as the case may be and making their findings available to the appropriate agency for necessary action. It is clear from the provisions of Article 11 of the Protocol that the PAP has the power of parliamentary oversight, power to investigate, as well as consultative and advisory functions.

Some commentators on the role of the PAP are of the opinion that the oversight powers of the PAP end up as a talk shop in view of its limited mandate as merely advisory and consultative, hence the result of the oversight functions usually ends up in making recommendations. In our considered view, this opinion, with respect, wrongly assumes that it is within the powers of parliaments to implement its recommendations. This is because even in classical parliamentary institutions their role does not include the execution of laws or implementation of recommendations made by them. This comes within the traditional role of the executive arm of government. Even in classical parliaments the oversight powers of the legislature are meant to expose corruption, inefficiency or waste and not designed to enable the legislature usurp the general investigative functions of the executive or the adjudicatory function of the judiciary.¹⁵

Therefore the oversight role of the PAP is not materially different from that of classical state parliaments with the exception that the state executive is accountable to the state parliament, which usually has the power to pass a vote of no confidence on the executive in appropriate circumstances, and can also invoke its impeachment powers to remove the executive in accordance with the state constitution. Considering the powers and functions of the PAP particularly as provided for in Article 11 (1) (2) and (5), it can be argued that its oversight role is very clear and not materially different from that of classical parliaments and cannot be undermined for the reason only that its recommendations may not be implemented as expected.

With regard to the representative role of a parliament, it is instructive to note that Article 17 (1) of the Protocol states that the PAP is established in order to ensure the full participation of African peoples in the development and economic integration of the continent. Furthermore, the preamble to the protocol states that the establishment of the PAP is informed by a vision to

¹⁵ See *Senate of National Assembly v Tony Momoh (1983) 4 NCCR 269*.

provide a common platform for African peoples and their grassroots organizations to be more involved in discussions and decision making on the problems and challenges facing the continent. Accordingly, one of the strategic objectives of the PAP is to provide a platform to mainstream African voices and those in the diaspora into the AU policy making process. Based on the above, the representative role of the PAP cannot equally be disputed. In the final analysis, we conclude that to all intents and purposes and to more or less extent the PAP is a parliament and that it carries out the traditional functions of a classical parliament albeit, with limited legislative powers.

4.4 Rationale for the Limited Mandate of the PAP

In defining the powers and functions of the PAP, Article 11 of the Protocol states that ‘the Pan-African Parliament shall be vested with legislative powers to be defined by the Assembly. However, during the first term of its existence, the Pan-African Parliament shall exercise advisory and consultative powers only’. The above provision more than any other in the Protocol has generated a lot of debate which centres on the questions as to the extent of the powers and functions of the PAP and whether the PAP is indeed a parliament in the classical sense. The perceived ineffectiveness of the PAP (especially in influencing the direction of the AU governance through its recommendations) though arguable, has been attributed to this limitation. Though these questions have earlier been addressed,¹⁶ the rationale for the limited mandate of the PAP remains puzzling and calls for examination in order to understand the circumstances warranting the imposition of the limitation. This examination is approached from two considerations, that is, the political perspective and the institutional capacity perspective.

In examining the political dimension, the African political and economic environment is taken into consideration. This is with a view to assessing whether the current political climate is conducive for the establishment of a supranational legislative institution with full continent wide legislative powers. In this connection, the impact of the plural character of the African continent in terms of its diverse cultures, religion, language and other primordial ethnic differences must first be recognized. These diversities pose serious challenge which is difficult to overcome and therefore requires a strategic but gradual process to manage. The effective harmonization and management of these differences must precede the adoption of any collective initiative no matter

¹⁶ See 4.2 above.

how positive. Politically, it must be noted that African states have achieved decolonization and are still struggling to come to terms with the challenges of self governance and are at different stages of democratization and development, not to talk of the fragility of many of the states due to internal crises.

The skepticism as a result of Africa's past experience of colonial economic exploitation and political domination have negative impact on the willingness of African states to concede power to a supranational parliamentary institution to legislate for the whole continent. This is because the new independent African states are rather preoccupied with the preservation of their hard-worn independence and territorial integrity. On the other hand, as an important element of international political engineering, the convergence of values remains the internal logic of supranationalism.¹⁷ In other words, without a set of common democratic values that support integration, supranationalism cannot be achieved. However, the AU is currently embarking on the gradual process of consolidation and bridge building for continental integration and at the same time struggling to overcome the reluctance of member states to ratify the AU shared values instruments.

With regard to the institutional capacity dimension, the point is that in determining whether to arrogate full legislative powers to a supranational parliament, the preparedness of the institution to take up the mammoth task of law-making and the responsibilities required in terms of specialization, research and knowledge competencies is critical.¹⁸ Therefore, the question is whether at its formative stage and considering the stage of AU early experience in regionalism a supranational parliament with full legislative powers can be ideal in the face of the attendant huge capacity and competency challenges. The argument is that with limited capacity in technical, research and human resources a supranational parliament will find it challenging to effectively undertake full legislative activities.

The AU leaders understood the above challenges hence they opted for limited legislative powers for the PAP in the interim, allowing it to evolve into a parliament with full legislative powers with time. This was a compromise option between the demand for a supranational regional

¹⁷ O Nzewi 'Influence and Legitimacy in African Regional Assemblies: the Case of the Pan-African Parliaments Search for Legislative Powers' (2014) *Journal of Asian and African Studies* Vol. 49(4) 488–507 p 489.

¹⁸ See Nzewi (n 17 above).

parliament with full legislative powers and the complications of the sovereignty concerns of member states as well as the capacity challenges in the AU governance system. Thus, member states may fear that ceding legislative powers to PAP will amount to subjecting the law making powers of national parliaments to that of a regional parliament, thereby compromising the legislative sovereignty of the former.

In addition, the PAP is to operate in a competitive environment with existing regional parliamentary assemblies and national parliaments as well, each of which is struggling for political space to assert its influence on the activities of the executives. The evolution of the PAP into a parliament with full legislative powers was therefore linked to the gradual process of the African continental integration agenda. The PAP is therefore expected to grow with the growth and strengthen with the strength of the AU both of which are young institutions in supranational governance experimentation.

However, in their wisdom, the Protocol empowers the PAP to determine its own Rules of Procedure thereby giving it a level of responsibility for its own institutional growth. The Rules of Procedures acts as both a control and coordinating instrument for the PAP in undertaking its activities. The optimal exploitation of the Rules of Procedure has the potential to promote an internal shared vision and mechanism that will enable the PAP to build its own capacity, grow and strengthen inter-institutional relationships as well as to build on its complementary roles and the other non-legislative functions.¹⁹ This implies that the PAP is expected to develop its capacity to deliver on its mandate to acquire credibility and legitimacy that are necessary for it to deserve incremental attribution of legislative powers. Thus, the question is whether at this stage in its development the realities on ground justify the granting of the request the PAP for increased legislative powers. This question will be subsequently addressed based on what the PAP has been doing to achieve its objectives within the limit of its powers and functions under the Protocol.

4.5 Objectives, Powers and Functions of the PAP

The Constitutive Act and the preamble to the PAP's Protocol give a clear indication of what the African leaders intend to achieve by establishing the PAP. Thus, Article 17 of the Constitutive

¹⁹ See Nzewi (n 18 above).

Act of the AU states that the PAP was established ‘in order to ensure full participation of African peoples in the development and economic integration of the continent’. On the other hand, the preamble to the Protocol states that the establishment of the PAP is informed by a vision to provide a common platform for African peoples and their grassroots organizations to be more involved in discussions and decision making on the problems and challenges facing the continent.

More specifically, Article 3 of the PAP Protocol sets out nine objectives of the PAP and reflecting the motivation of the African leaders of which continental integration, the promotion of AU agenda on constitutionalism and democratic governance and the facilitation of the effective implementation of the policies and objectives of the then OAU/AEC and ultimately those of the AU are prominent. In specific terms, Article 3 of the Protocol provides that the objectives of the PAP shall be to:

1. Facilitate the effective implementation of the policies and objectives of the OAU/AEC and, ultimately, of the African Union;
2. Promote the principles of human rights and democracy in Africa;
3. Encourage good governance, transparency and accountability in Member States;
4. Familiarize the peoples of Africa with the objectives and policies aimed at integrating the African Continent within the framework of the establishment of the African Union;
5. Promote peace, security and stability;
6. Contribute to a more prosperous future for the peoples of Africa by promoting collective self-reliance and economic recovery;
7. Facilitate co-operation and development in Africa;
8. Strengthen Continental solidarity and build a sense of common destiny among the peoples of Africa;
9. Facilitate cooperation among Regional Economic Communities and their Parliamentary fora.

The powers and functions of the PAP are as provided for in Article 11 of the Protocol which states that the PAP shall be vested with legislative powers to be defined by the Assembly.

However, during the first term of its existence, the PAP shall exercise advisory and consultative powers only. In this regard, it may:

1. Examine, discuss or express an opinion on any matter, either on its own initiative or at the request of the Assembly or other policy organs and make any recommendations it may deem fit relating to, inter alia, matters pertaining to respect of human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law.
2. Discuss its budget and the budget of the Community and make recommendations thereon prior to its approval by the Assembly.
3. Work towards the harmonization or co-ordination of the laws of Member States.
4. Make recommendations aimed at contributing to the attainment of the objectives of the OAU/AEC and draw attention to the challenges facing the integration process in Africa as well as the strategies for dealing with them.
5. Request officials of the OAU/AEC to attend its sessions, produce documents, or assist in the discharge of its duties.
6. Promote the programmes and objectives of the OAU/AEC, in the constituencies of the Member States.
7. Promote the coordination and harmonization of policies, measures, programmes and activities of the Regional Economic Communities and the parliamentary fora of Africa.
8. Adopt its Rules of Procedure, elect its own President and propose to the Council and the Assembly the size and nature of the support staff of the Pan-African Parliament.
9. Perform such other functions as it deems appropriate to achieve the objectives set out in Article 3 of this Protocol.

The power to discuss its budget and the budget of the Community and make recommendations thereon prior to its approval by the Assembly²⁰ is a very important oversight power which allows it to debate the budget and make necessary input by way of recommendation to the policy organs before the budget of the Community is approved. This is a strong oversight power which enables

²⁰ See art 11(2) of the Protocol.

the parliament to scrutinize the budget, though in its advisory and consultative capacity only as it has no power to ensure that its recommendation is taken into consideration before the approval. The Protocol empowers the PAP to request officials of the OAU/AEC to attend its sessions, produce documents or assist in the discharge of its duties.²¹This is another important oversight power which authorizes the parliament to invite the officials to be present at its sessions and avail the parliamentarians the opportunity to ask questions or seek clarification on matters under their discussion. This enables the members to carry out informed debate on the issues before passing their resolutions and making recommendations thereby enhancing the effective exercise of its oversight, investigative, consultative and advisory powers and functions.

Pursuant to its powers under Article 11 (8) of the Protocol, the PAP adopted its Rules of Procedure confirming and elaborating on its powers and functions with a view to operationalizing its consultative and advisory powers which are already detailed in the Protocol. For instance, Rule 4 of the Rules of procedure provides that in its consultative and advisory role and in accordance with the provisions of Article 3, 11 and 18 of the Protocol, parliament shall carry out the functions therein provided for. The Article substantially repeats the provisions of Article 3 of the Protocol dealing with the objectives of the PAP, Article 11 which deals with the functions and powers of the PAP and Article 18 which deals with the relationship between the PAP and the parliaments of Regional Economic Communities (RECs) and National parliaments or other deliberative organs.

Rule 5 makes provisions for the powers of Parliament in the discharge of its functions as provided for in Article 4 as follows:

Powers of Parliament

In discharge of its functions provided in Rule 4, Parliament shall have powers to:

- (a) Oversee the development and implementation of policies and programmes of the Union;
- (b) Organise debate on the objectives, policies, aims, programmes and activities of Regional Economic Communities, on all matters relating to the proper functioning of organs and the life of the African Union.

²¹ As above art 11(5).

- (c) Examine, discuss or express an opinion or give advice on its own initiative or at the request of any of the Organs of the African Union, a Regional Economic Community or the Legislative Body of any Member State;
- (d) Make recommendations and take resolutions on any matters relating to the African Union and its organs, Regional Economic Communities and their respective organs, Member States and their organs and institutions;
- (e) Issue invitations to the representatives of the Organs of the African Union, Regional Economic Communities and their organs, Member States and their organs and institutions to furnish explanations in plenary on issues affecting or likely to affect the life of the African Union;
- (f) Exercise all other powers as are incidental or auxiliary to the discharge of its functions.

Further to the above, the Rules of Procedure made some important provisions authorizing the parliament to carry out its oversight and investigative functions on the activities of the AU in its advisory and consultative role. For instance, Rule 73 provides that all decisions of the Assembly and the Executive Council and programmes of organs of the African Union shall be submitted to Parliament while Rule 74 provides that the President may, after consulting the Bureau, invite the Chairperson of the Assembly, the Chairperson of the Executive Council, or the Chairperson of the Commission, to make a statement to Parliament after each meeting of the Assembly, or of the Council, explaining the main decisions taken and that that statement shall be followed by a debate by Members.

Rule 75 made provisions requiring that Annual reports and other reports of organs of the Union shall be submitted to parliament to enable it realize the objectives of the parliament in terms of Article 3. The said Rule provides as follows:

- 1) Annual reports and other reports of Organs of the Union shall be submitted to Parliament in order to enable Parliament make contributions in terms of Article 3 of the Protocol.
- 2) Annual reports and other reports of Organs of the Union shall be referred to the appropriate Permanent Committees which will deliberate upon them and submit reports with recommendations to Parliament.

- 3) The reports submitted to Parliament shall be debated by Parliament which will pass resolutions on them for consideration by the Executive Council.

The power of the PAP under the above Rule is very important considering the fact that the parliament can only act with information gathered from the relevant authorities for the effective performance of its oversight, advisory and consultative role. In other words, the Annual reports and other reports of the organs are the material sources of information upon which the parliament can base its recommendation in advisory and consultative manner. This power is consistent with the provision of Article 3(u) of the Statutes of the Commission of the African Union which requires the Commission to prepare and submit an Annual Report on the activities of the Commission to the Assembly, the Executive Council and the PAP. This no doubt implies that the organs of the AU are subjected to the oversight powers of the PAP albeit in its consultative and advisory capacity only.²² In the light of the powers and functions of the PAP as outlined above, the question arises as to whether the PAP has been undertaking its activities effectively especially as they relate to the promotion of constitutionalism and democratic governance.

4.6 Assessment of the Activities of the PAP and its Potentials under the Protocol

The assessment of the activities of the PAP in the promotion of the AU agenda on constitutionalism since its inauguration²³ is important with a view to determining whether the vision for its establishment is being realized and how this can be done more effectively. The role of the PAP is to be evaluated on the bases of its mandate under the present protocol, the role it has so far played and whether it has lived up to expectation. Furthermore, it is also important to examine the challenges the PAP has been facing *vis a vis* its position and influence amongst the other AU governance institutions and how these can be addressed. In analyzing the issues it is important to bear in mind that the PAP is a relatively young parliamentary institution in a learning process and whose capacity is being progressively strengthened for optimum performance.

With the above in mind, we argue that since its establishment and inauguration in 2004 the PAP has undertaken several commendable activities pursuant to its powers and functions under the

²² This means that whatever emerges from the PAP by way of report or recommendations from the PAP remains advisory and the PAP has no power to enforce the implementation or hold the organs accountable.

²³ The PAP was inaugurated on 18 March 2004.

PAP Protocol. The Parliament has been consistently holding two ordinary sessions and committee works in between each session. It is during these sessions and committee works that the parliament debates motions and discuss matters tabled before it as approved by the Bureau. Following these debates, the parliament has passed resolutions and made recommendations on a number of issues aimed at promoting the AU programmes and policies within the limit of its objectives, powers and functions thereby making positive contribution to the realization of the AU agenda, though there is still need for improvement. The activities of the parliament in this regard are analyzed in this chapter as itemized hereunder.

4.6.1 Oversight Functions

It cannot be gainsaid that parliamentary oversight of the activities of the executive is a major parliamentary function in any modern democratic political organization whether national, regional or global. The oversight activities of the PAP in this regard are therefore important in the assessment of its role as a parliament and its potentials to perform more effectively within the framework of its powers and functions under the Protocol. For the purpose of a discussion on this issue, the relevant powers of the PAP are those provided for in the Protocol²⁴ with particular reference to those matters pertaining to respect for human rights, the consolidation of democratic institutions and the culture of democracy, as well as the promotion of good governance and the rule of law.

Empowered by its mandate under the Protocol and its rules of procedure as highlighted above, the PAP has made significant efforts in deepening democratic governance, sustaining Africa's democratic ideals and promoting the principles of human rights, transparency and accountability in member states of the AU. Though Viljoen²⁵ expresses the view that the PAP serves mainly as an ineffectual 'talk shop', he however acknowledges that the PAP has passed a number of resolutions and recommendations aimed at the attainment of the AU's objectives by invoking its power to examine 'any matter' and to make any recommendations aimed at the attainment of AU's objectives.²⁶

²⁴ These are as provided for in art 11 of the Protocol.

²⁵ F Viljoen *International Human Rights in Africa* (2012)
<https://books.google.co.za/books?isbn=0199645582> (accessed 20 October 2017)

²⁶ See Viljoen (n 25 above p 175).

With specific reference to the oversight powers of the PAP over AU organs and institutions to promote good governance, transparency and accountability, the Protocol empowers the PAP to oversee the AU budget preparation before its approval. Pursuant to the above, the parliament annually requests the chairperson of the AUC to attend the parliament's sessions to present the draft budget of the AU for discussion. This request is in conformity with the provision one under the Protocol which authorizes the PAP 'to discuss the AU budget and the budget of the Community and make recommendations thereon prior to its approval by the Assembly of the African Union'.²⁷ This provision enables the PAP to play its role as the representative of the people of Africa to ensure the judicious spending of the peoples' wealth. The challenge however, is that there is no mechanism provided in the AU governance architecture for the PAP to monitor and ensure that its input and recommendations are reflected in the approved budget, thereby questioning the effectiveness of the whole exercise.

As part of its oversight functions, the PAP receives reports on the status of the implementation of the assessment missions in the countries that have undergone an APRM review.²⁸ This is in compliance with the APRM base document which provides that six months after each country review report (CRR) has been considered by the Heads of State and Government of the participating member countries, it should be formally and publicly tabled in key regional and sub-regional structures such as the Pan-African Parliament'.²⁹ By necessary implication, the report will not only be tabled, but will be debated by the PAP MPs before adoption.³⁰

In fact, this practice has become a regular feature during PAP sessions. Such reports are debated by the parliamentarians and recommendations adopted *vis a vis* the position of the Parliament on the issues therein raised for possible adoption in the future to improve on the governance record of the countries reviewed.³¹ Through such debates the country representatives in the parliament

²⁷ See art 11(2) of the Protocol & Rule 75 of the PAP Rules of Procedure.

²⁸ See for instance, the report of the work of the Pan-African Parliament for the period January to December 2007, Addis Ababa, Ethiopia, 28-29 January 2008, PAP/S/RPT/72/08, 9.

²⁹ See para 25 APRM Base Document 2001.

³⁰ BR Dinokopila 'The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration' (2013) 2 AHRLJ 302-323 <http://www.ahrlj.up.ac.za/dinkopila-br> (accessed 20 December 2017).

³¹ The PAP has, for example, received Malawi's APRM report. In the case of Ghana, Rwanda and Kenya, it is indicated that 'the PAP, upon extensive deliberations, exhorted African leaders to accede to the APRM review and implement its findings'.

is afforded the opportunity to make an input when the reports are debated at the national level.³² It is the practice of the PAP to routinely invite the APRM and the other AU governance institutions to attend its sessions and to present the reports of their activities before the parliament.³³

In the same vein, the chairperson of the PSC routinely attends the PAP sessions and presents reports to the plenary on the prevailing security situation in Africa and the activities of the council in response to such situations. For instance, Sierra Leone's Ambassador to the Federal Democratic Republic of Ethiopia and Permanent Representative to the African Union, Mr. Osman Keh Kamara, made a presentation on behalf of the African Union Peace and Security Council (PSC) at the 3rd Ordinary Session of the 4th Parliament of the Pan-African Parliament which took place on Thursday 13th October, 2016 in Sharm-el Sheikh, Egypt.³⁴ These reports are debated and recommendations made where necessary on how to more effectively address some of the security challenges.

In connection with the oversight functions of the PAP, it is instructive to recall that the leaders of 27 European and 54 African States as well as the Presidents of the continental Institutions launched the Joint Africa-EU Strategy (JAES) at the Africa-EU Summit in Lisbon in 2007, setting out the intention of both continents to move beyond a donor/recipient relationship towards long-term cooperation on jointly identified, mutual and complementary interests.³⁵ The heads of state and government of the EU and Africa, the President of the European Council, the President of the European Commission, the President of the AU and the Chairperson of the AUC, met in Brussels on 2-3 April 2014, on the theme of "Investing in People, Prosperity and Peace", committed to enhance Africa-EU cooperation adopted the implementation framework for the 2014-2017 period and further agreed that the implementation of the Joint Strategy shall focus on the following priority areas. These are: Peace and Security; Democracy, Good Governance

³² See Dinokopila (n 30 above).

³³ For instance, at the Second Session of the Fourth Parliament held from Tuesday, 3rd to Friday 13th May, 2016 at the precincts of PAP at Midrand in Johannesburg, South Africa the APRM Country Reports, African Governance and the Ibrahim Index of African Governance were presented and debated.

³⁴ <http://cocorioko.net/ambassador-kamara-addresses-the-pan-african-parliament-on-behalf-of-the-african-union-peace-and-security-council/>.

³⁵ https://ec.europa.eu/europeaid/regions/africa/continental-cooperation/joint-africa-eu-strategy_en (accessed 20 December 2017).

and Human Rights; Human development; Sustainable and inclusive development and growth and continental integration; and Global and emerging issues.

The relevant point here is that the PAP and the EP, national and regional parliaments, as well as the civil societies on both continents should be fully involved in decision-making at their respective levels in order to ensure that there is proper transparency and accountability to all citizens involved in the process.³⁶In particular, the role of the PAP and the EP is to carry out joint monitoring and evaluation on the implementation of the JAES. The two parliaments also issued joint declaration which they present to the summit of the heads of state and government of two unions to guide their discussions.³⁷ This is a significant joint oversight function over the activities of the executive organs of the two unions. At this juncture we note that there is a memorandum of understanding guiding the collaboration and cooperation between the two parliaments.³⁸

4.6.2 Fact Finding Missions

In performing its oversight functions, members of the PAP have played a critical role in promoting peace and security in Africa by participating in fact finding missions in countries with underlying security and human rights challenges. Several fact-finding missions to a number of countries have been undertaken by the PAP, with reports of such missions tabled before the PAP, debated, resolutions passed and recommendations made to the appropriate AU executive organs. The PAP through this process has interacted with relevant stakeholders on the ground and issued reports, resolutions and recommendations to the plenary on conflict situations in a number of African countries. For instance, concerned about the violence in the war torn Darfur region of Sudan, the devastating effects of human security and human rights violations, PAP sent a fact finding mission in 2004 to assess the situation. The PAP Darfur report was debated at the plenary and appropriate resolution on the crises was passed with recommendations to the AU policy organs as part of its annual activity report. The recommendation contained in the report of the

³⁶ <http://www.africa-eu-partnership.org/en/documents/joint-africa-eu-strategy-roadmap-2014-2017> (accessed 20 December 2017).

³⁷ http://www.africa-eu-partnership.org/sites/default/files/userfiles/final_en.pdf (accessed 20 December 2017).

³⁸ A delegation of the EP attended the PAP May session and had a bilateral meeting with the Bureau on how to strengthen their relationship and concluded negotiation on strategies for their joint oversight role in the implementation of the JAES and called for the acceleration of the ratification of the Revised Protocol. See the PAP Activity Report for the 2017 May Session.

PAP was particularly useful in the proactive intervention of the AU in Darfur with a view to resolving the crises.

In 2005 also the PAP acting under rule 5(1)(a) of its Rules of Procedure passed a resolution to undertake a peace mission to Cote d'Ivoire and the Democratic Republic of Congo (DRC). The other countries where the PAP has undertaken peace missions include Central African Republic, Mauritania, Libya, Tunisia, Sierra Leone, Liberia and Saharawi Arab Democratic Republic. The PAP recommendations following these missions assisted the AU in appreciating the realistic humanitarian dimensions of the conflicts and have further resulted in assisting the AU in adopting better informed measures for the resolution of these conflicts. In respect of the crises in Saharawi Arab Democratic Republic,³⁹ the PAP collected information from members of the Government, state organs, national political groups and civil society organizations on the issue of the decolonization of the Western Sahara that informed PAP's recommendations on the need to free this last African colony from the illegal Moroccan occupation. The same thing applied to the Mali situation where the PAP called for an urgent multinational military intervention to restore order, the urgent organization of an inclusive national dialogue between all Malian socio-political strata based on a true policy of reconciliation and the establishment of a government of national unity.

In furtherance of the promotion of human rights principles, good governance and democracy in Africa, the PAP resolved to send a fact-finding mission to the Republic of South Sudan in order to understand the political, peace, security and humanitarian situation in the country. The mission afforded the parliament the opportunity of an independent assessment of the current situation of South Sudan for an informed debate and afforded the PAP to understand the current status of the country, determined and express the will of the people of South Sudan.

4.6.3 Election Observation Missions

It cannot be overstressed that the entrenchment of the culture of constitutional change of government must be based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies. This can be

³⁹ The mission took place from 11–16 July 2011. See the PAP Activity Report for the October 2011 session (available at the PAP Documentation Unit).

promoted by carrying out election observation missions, particularly as they are an important contributory factor in ensuring the regularity, transparency and credibility of elections. Against this background and in exercise of its oversight powers, the PAP regularly engages in election observation missions (EOM) as a means of achieving one of its objectives of promoting constitutionalism and democratic governance in Africa. The report of the election observation team is usually presented to the parliament for debate following which resolutions and recommendations are submitted to the AU for necessary action.

For instance, against the backdrop of the political crisis and controversy in Zimbabwe and subsequent to the outcome of the harmonized elections held in the Republic of Zimbabwe on Saturday, March 29 2008 that failed to produce an outright winner, the PAP resolved to send an election observation to the Presidential run-off elections rescheduled for June 27 2008. This was with a view to assessing whether the elections met the guidelines set out in the OAU/AU Declaration on Principles Governing Elections in Africa and whether they were conducted in accordance with the country's constitutional provisions. PAP's objective and evidence-based report on the run-off that the opposition had actually won and its recommendations thereof received global acclaim. Notwithstanding that, it did not go down well with the Zimbabwe's government and the leadership of the AU.

Thereafter AU decided on joint EOM with the PAP to avoid conflicting reports and to manage cost as against the normal practice of independent EOM by the PAP.⁴⁰ This practice has remained a challenge to the PAP which has been uncomfortable with the whole administrative arrangements. Consequently the PAP passed a resolution on the holding of Autonomous EOM which among other things resolved to call for the institution of autonomous election observation missions.⁴¹ At the 31st ordinary session of the Executive Council, the Council deliberated on the PAP's activity report and decided that EOM organized in member states should remain a joint AU activity organized by the AUC in collaboration with the PAP and be governed by the relevant financial and administrative regulations.⁴²

⁴⁰ See the Executive Council Decision: EX.Cl/Dec.534 (XVI) adopted during the 16th Ordinary Session in February 01, 2010.

⁴¹ PAP.4/PLN/RES/06/MAY.17.

⁴² See EX.CL/Dec. 979 (xxx1), 31st Ordinary Session of the Executive Council, 27 June to 01 July 2017, Addis Ababa.

Accordingly, within the framework of joint election observation missions of the AU, the PAP continues to maintain collaborative engagement with the AUC and members of the Parliament are deployed to election observation missions to various parts of Africa. Thus, the PAP has participated in EOM in many African countries including the following: Burkina Faso, Côte d'Ivoire, Tanzania, Comoros, Niger, Benin, Capo Verde, Republic of Congo, Djibouti, Chad and Equatorial Guinea, Angola, Ghana, Senegal, Gambia, Congo, Libya, Burkina Faso, Sierra Leone, Djibouti, Equatorial Guinea and Cape Verde, Nigeria, Ghana, D.R Congo, the Gambia, Kenya, to mention but a few. This process has established a good foundation for sustaining Africa's democratic ideals by formulating independent positions and making recommendations that contribute to the strengthening of democracy and stable governance on the continent. Through the above activities, the PAP promoted conflict resolution in troubled parts of Africa, peaceful, free fair and credible elections in Africa, in line with the Governance Charter.

4.6.4 Committee Work

Parliamentary committees are indispensable organs for the effective performance of the role of parliaments. In fact, committees constitute the engine hub of parliamentary activities. Thus, the oversight powers granted to the PAP under the Protocol and indeed the general activities of the parliament cannot be effectively exercised without functional committees. This is the principle which formed the bases for the provision in Article 11 (8) of the Protocol which empowers the PAP to adopt its own Rules of Procedure. This implies that the PAP is authorized to adopt any rule which it deems necessary to attain its objectives as set out in Article 3 of the Protocol and to exercise its powers as set out in Article 11 of the Protocol. Pursuant to the authority under Article 11 (8), the PAP adopted its Rules of Procedure. The PAP for the purpose of carrying out the business of the parliament established parliamentary committees in terms of Rule 22 of the Rules of Procedure.

In terms of the procedure of the committees, Rule 23 confers on the Committees the power to receive evidence, call witnesses and require the production of papers and documents. This Rule also provides for the presentation of reports to the parliament for debate. The modalities are as outlined in Rule 24 in order to allow Committees to perform their functions effectively. Rule

25⁴³ provides that the president of the PAP shall on the advice of the Bureau⁴⁴ determine the general business to be handled by the committees and that Committees shall handle business that is ordinarily handled by the corresponding Specialised Technical Committee responsible to the Executive Council in accordance with Article 14 of the Constitutive Act. Rule 26 makes provisions for specific functional domain for each of the specified Committees to assist the Parliament to oversee particular areas or departments.

The functional terms of reference of the committees are wide enough to deal with the corresponding specialised technical committees of the AUC. One significant and proactive measure taken by the PAP was to adopt a resolution to align its committees with that of the AUC in order to enhance effectiveness cooperation, synergy and facilitation of its oversight functions. The specialized technical committees are subjected to the PAP's, consultative and advisory powers of the PAP and its relevant committees. The committees and the subject areas of their intervention are as indicated in the table below⁴⁵ as follows:

	PAP COMMITTEES	THE AU COMMISSIONS COUNTERPART	INTERVENTION DOMAIN
1.	Committee on Cooperation, International Relations and Conflict Resolution	Peace and Security	Conflict prevention, management and resolution, and combating terrorism
2.	Committee on Justice and Human Rights	Political Affairs	Human rights, democracy, good governance, electoral institutions, civil society organizations, humanitarian affairs, refugees, returnees and internally displaced persons
3.	Committee on Transport, Industry, Communications, Energy, Science and Technology.	Infrastructure and Energy	Energy, transport, communications, infrastructure
4.	Committee on Health, Labor	Social Affairs	Health, children, drug control,

⁴³ The resolution was adopted on 18 October 2012. See the PAP Activity Report of May 2013 (available at the PAP Documentation Unit).

⁴⁴ The 'Bureau' means the Bureau of the PAP and it is composed by the president and vice presidents of the PAP: See art 1 of the Protocol on definitions.

⁴⁵ See the paper presented to the PAP on 'The Consultative and Advisory powers of the Pan-African Parliament and its Permanent Committees vis a vis the Functions of the AU Commission and its Departments' by Herlu Smith, available at the Documentation Unit of the PAP, Midrand, South Africa.

	PAP COMMITTEES	THE AU COMMISSIONS COUNTERPART	INTERVENTION DOMAIN
	and Social Affairs		population, migration, labor and employment, sports
5.	Committee on Education, Culture, Tourism and Human Resources	Human Resources, Science and Technology	Education, information technology communication, youth, human resources, science and culture
6.	Committee on Trade, Customs and Immigration Matters	Trade and Industry	Trade, industry, customs and immigration matters
7.	Committee on Rural Economy, Agriculture, Natural Resources and Environment.	Rural Economy and Agriculture	Rural economy, agriculture and food security, livestock, environment, water and natural resources and desertification
8.	Committee on Monetary and Financial Affairs	Economic Affairs	Economic integration, monetary affairs, private sector development, investment and resource mobilization
9.	Committee on Gender, Family, Youth and People with Disability		
10.	Committee on Rules, Privileges and Discipline		

For the purpose of its activities, the Committees are empowered to request for reports and may call for the production of papers and documents from relevant AU Officials regarding the subject matter of the investigation or oversight. The committees then debate and consider the evidence, papers and documents to make their findings, adopt their recommendations and submit their reports to Parliament for presentation and debate at the plenary. These are debated at the plenary and if adopted are communicated to the Assembly for consideration, adoption and possible implementation.⁴⁶

In this connection, the study notes that one major weakness of the PAP is the inability of the parliament to monitor or ensure the enforcement of the implementation of its recommendations due to the limitation of its mandate to consultative and advisory powers only. Thus, ‘it is one thing to churn out resolutions, it amounts to waste of funds and time if the resolutions are not

⁴⁶ Rule 76 of the Rules of Procedure provides that the President shall present to the Assembly the resolutions and reports of Parliament.

considered for implementation by the people or authorities the resolutions are targeted at'.⁴⁷ This is understandable in that resolutions and recommendations by their very nature have no binding force. As such, it cannot be guaranteed that the resolutions and recommendations taken by the PAP on critical issues such as peace and security on the continent and presented to the policy-making organs of the AU are considered for implementation.⁴⁸ Nevertheless, in a number of instances, PAP resolutions and recommendations are known to have impacted on the decisions and actions of the AU policy organs.⁴⁹

Inadequate funding from the AU annual budget is another major problem which compels PAP to continue to depend on support from, and collaboration with, outside service providers, a situation that may create dependency or, at worst, the potential for external influence in the design and execution of its programs.⁵⁰ The power and responsibility of PAP under Article 11 (2) of the Protocol to 'discuss its budget and the budget of the Community and make recommendations thereon' does not afford the institution enough scope to influence budgetary allocations by questioning any reduction or denial of its proposals. Hence the policy organs responsible for the approval of the budget are not under any legal obligation to act on or even consider the recommendations of the PAP. Thus, 'without control over its own budget, the PAP clearly remains powerless and subservient to the institutions that make the final decision on budgetary allocations'.⁵¹

The funding challenge of the PAP is compounded by the notorious fact that most member states default or unduly delay in fulfilling their financial obligations to the AU. As a result the AU finds it difficult to generate enough money to finance its programmes, by necessary implication the PAP experiences poor funding from the AU since its budget forms an integral part of the budget of the AU. This impedes on the execution of the policies and programs of the AU and ultimately on the allocation of funds to the PAP for its activities. Though the PAP could explore

⁴⁷ S Mpanyane 'Transformation of the Pan-African Parliament: A part to Legislative Body?' (2009) *ISS Paper 181* March 2009 <https://www.files.ethz.ch/isn/99267/PAPER181.pdf> P 1 (accessed 20 August 2017).

⁴⁸ See Mpanyane (n 47 above).

⁴⁹ For instance, the recommendations of the PAP following its fact finding missions are known to have substantially informed the decisions of the decisions and actions of the AU in the cases of the Saharawi Arab Democratic Republic, the situation in Mali and the situation in South Sudan.

⁵⁰ See Mpanyane (n 47 above).

⁵¹ n 47 above.

other sources of funding independent of the AU in order to execute its programs, this is however not permitted under the Protocol and its hand is tied by the AU financial rules

Despite the existence of the above institutional weaknesses, the study argues that the PAP has enough room within the provisions of the Protocol to manoeuvre and more effectively carry out its oversight functions. For instance, Article 11 of the PAP Protocol provides that the PAP ‘can examine, discuss or express an opinion on any matter; make any recommendations it may deem fit; request officials to attend its sessions, produce reports or assist it; or perform such other functions as it deems appropriate to advance the objectives of the Protocol. However, the above powers have not been fully utilized by the PAP. In this connection, it is submitted that these provisions can be creatively exploited as leverage by the PAP to define its own role in clearer terms in its Rules of Procedure to enable it oversee the development and implementation of the AU agenda. However, there is not much evidence showing that the PAP has sufficiently taken advantage of such wide powers to assert its authority and establish its influence in the AU. Nzewi captures the above point more aptly when he states thus:

while the PAP has attempted to perform some of these roles, it has not fully exploited all avenues and platforms to test and improve these competencies in terms of executive oversight. In other words, ‘rather than supplicate for legislative powers it has little capacity or level of responsibility to leverage on to increase its influence and legitimacy in the African Union’.⁵²

The point Nzewi is making is that a closer look at Article 11 of the PAP Protocol clearly reveals that there is enough scope for the institution to proactively manoeuvre and assume certain important functions and responsibilities. In other words, the PAP can innovatively expand its formally recognized powers and determine its own agenda on how it could play a role in finding solution to a number of challenging issues facing the continent particularly in the areas of peace, security and democratic governance.⁵³ It can also carry out both formal and informal activities and also on its own initiative propose model laws aimed at harmonizing member states’ laws. This is particularly important with regard to those AU legal instruments aimed at promoting the

⁵² See Nzewi (n 17 above)

⁵³ As above.

AU agenda which can be proposed for consideration and possible adoption by the Assembly without waiting for enhanced powers.

However, this study argues that while the potentials do exist for the PAP to undertake the above formal and informal activities to make itself relevant in the AU system and also promote the agenda, nothing stops the PAP to aspire for clear legislative and oversight powers. If it is possible to empower the PAP to carry out certain activities by making provisions for them under the Protocol, there is no wisdom for member states being hesitant to do so, even if only to give the PAP the legitimacy and confidence to deliver rather than looking for obscure authority to act.

4.6.5 Citizens' Participation

The founders of the AU understood clearly that the institutionalization of good governance in Africa without the participation of the people as its necessary adjunct cannot be sustainable. Conscious of this fact as we have stated earlier⁵⁴ the PAP was established in order to ensure the full participation of African peoples in the development and economic integration of the continent.⁵⁵ The PAP was therefore foreseen as the institution that can represent the people of Africa and their grassroots organizations as well as constitute a common platform for the people of Africa to articulate their views on the challenges facing the continent.⁵⁶ It is also one of the mandates of the PAP to familiarize the peoples of Africa with the objectives, policies and programmes of the AU.

Against this backdrop, the role of the 'civil society' which in recent times has been defined to include non-governmental organizations (NGOs) (both local and international) becomes critical. These organizations have developed to the extent of being recognized as important actors in the promotion of good governance. They have been wielding so much influence in determining the future of constitutionalism and democratic governance by constituting themselves into a watch dog against the abuse of political powers by political office holders. Sometimes they constitute themselves into whistle blowers in cases of corruption by public officials. They constitute themselves as election monitors in order to expose election rigging or fraud and also shown tremendous commitment towards the promotion of human rights and press freedom in Africa.

⁵⁴ See paragraph 4.2 above on the vision for the establishment of the PAP.

⁵⁵ See art 17(1) of the Protocol.

⁵⁶ See art 3(4).

Thus, despite the criticisms against these organizations,⁵⁷ their activities can go a long way towards promoting democratic values, rule of law and good governance in Africa which fall within the mandate of the PAP. A vibrant and vigilant civil society working in close collaboration with the PAP can complement the effort of the parliament in carrying out its constitutionalism and democratic governance agenda. However, beyond the recognition of the need for participation of the people in governance, neither the PAP's Protocol nor its Rules of Procedure made provision for the organized participation of civil society in its activities by establishing a forum for regular engagement with the group.

The absence of a formalized forum for interaction and collaboration has not however prevented the Parliament from engaging civil society organizations in its programs and activities albeit in workshops and conferences organized by the PAP or when a particular NGO gets the PAP involved in its own activities. It has therefore been suggested,⁵⁸ that it is imperative that the Parliament should move towards creating better synergies with members of civil society and as such, the creation of a forum where the Parliament and civil society can consult each other consistently will certainly improve the promotion and protection of human rights in Africa.⁵⁹ In other words there is need for the PAP to establish an institutional framework for collaboration with credible civil society groups for effective mutual support in promoting the agenda.

The PAP's Strategic Plan⁶⁰ clearly earmarks co-operation with civil society and trade unions as one of the measures that will be adopted to ensure that the peoples' voices are heard and represented in carrying out the programs and policies of the AU especially its democratic governance agenda cannot be overstressed. In this regard, it must be pointed out that 'thirty-five African and international civil society organizations working in over forty African countries

⁵⁷ Governments are known to be skeptical of the commitment of these organizations to the promotion of human rights and press freedom in Africa and normally accuse them of serving anti government interest in favor of the inordinate interest of their external funders.

⁵⁸ BR Dinokopila 'The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration'(2013) 2 AHRLJ 302-323 <http://www.ahrlj.up.ac.za/dinkopila-br> (accessed 20 December 2017).

⁵⁹ See Dinokopila (n 58 above).

⁶⁰ 2014 to 2017

participated in the first Consultative Dialogue with the Pan-African Parliament'.⁶¹ The dialogue recommended that the Parliament should invite more members of civil society to its sessions, publicize its activities, encourage civil society to participate in the work of the various permanent committees of the Parliament and have more joint activities.⁶²

This buy-in is more than necessary and will most certainly improve the work of the PAP and assist in taking the PAP to the people particularly when it collaborates with the civil society in election observation missions, fact-finding missions, as well as in monitoring the progress of member states in the ratification domestication and implementation of AU constitutionalism and good governance instruments. The PAP should therefore develop a normative framework within which it is to co-operate with civil society. Furthermore, the PAP should reach out and invite members of civil society to participate, to jointly co-ordinate activities and to publicize its work. As a common platform for African peoples and their grass-roots organizations to be more involved in discussions and decision-making on the problems and challenges facing the continent the PAP has not left out the African youth in its activities. Hence the PAP has established a youth caucus which serves as the link between the aspirations of the continent's young men and women thereby reducing the existing gap between the youth and their representatives in the parliament. The youth caucus collaborates with the youth ensures that the aspirations of young people are factored into the policies and programs of the AU as well as to provide greater space for youth participation in governance processes.

In facilitation of the achievement of the above objective, the PAP provided an office for the African Youth Council within the precincts of the PAP secretariat in Midrand, Johannesburg South Africa and signed a memorandum of understanding for mutual relationship and collaboration in youth activities. Pursuant to the above, the PAP organized and hosted a dialogue on youths in collaboration with the Pan-African Youth Council (PAYC).⁶³ The event brought hundreds of young people together to provide an opportunity for the PAP to interact with African Youth. It also provided an opportunity to reflect on its role in decision making and to agree on a

⁶¹ Submission from Civil Society Organizations to the Pan-African Parliament on the Proposal for Continental Government 14 May 2007, Gallagher Estate, Midrand, South Africa, http://www.afrimap.org/english/images/research_pdf/CSO_Sub_mission_PAP_May_2007.pdf (accessed 19 August 2017)

⁶² <http://www.southernafricatrust.org/docs/PAP%20Dialogue-dft5.pdf> (accessed 19 August 2017)

⁶³ Dialogue on Youth, 17th March 2014, Midrand.

common youth position on key issues affecting their interest including: employment, economic growth, peace building and good governance in Africa.

In a bid to provide a platform for women's involvement in the programs and policies of the AU the PAP established the Women's Caucus.⁶⁴ This was aimed at enabling the PAP to protect the rights and interests of African women by ensuring the monitoring of the ratification, domestication and implementation of women's human rights instruments. It was also to facilitate a cross- Committee oversight responsibility regarding women's rights and gender issues. Through the activities of the caucus, the PAP has been promoting gender equality and affirmative action for women across Africa by instituting an annual women's conference with focus on gender equality, maternal health, child mortality and numerous other gender issues.

The activity of the PAP in this regard is informed by the recognition of the incredible potential of Africa's women to lead and be involved in core decision making. For instance, the PAP facilitated a high-level dialogue on dimensions and challenges relating to gender-based issues including: women's leadership and participation in decision-making; achieving social and economic empowerment of women; addressing maternal health (including issues of women's sexual and reproductive rights); and promoting peace and security of women, including addressing all forms of violence against women. The dialogue was aimed at contributing to the advocacy campaign and encouraging member states, national parliaments and civil society to ensure women are included in politics and decision-making.⁶⁵

Although Africa's past history is replete with examples of marginalization and exclusion of women, there is now some progress in Africa's women participation in politics. The PAP has been part of the process of highlighting the importance of constructive engagement of women in Africa's development agenda and the need to promote gender equality and the protection of the rights of the vulnerable members of the society. It is worthy to note that in order to teach by example, in the PAP, 2 out of the 5 Bureau members are women. The PAP was also

⁶⁴ The women's caucus was formed following a resolution of the association of the PAP women parliamentarians on Saturday 20 October 2007 at the 8th Ordinary Session of PAP and adopted at the plenary.

⁶⁵ The Women's Dialogue was held on 14th March 2014 at the precincts of the PAP in MIdrand, on the theme, "Ten years of existence of the Pan African Parliament: Reflections on its Role".

instrumental in ensuring that the Revised Protocol provides that out of the 5 persons to be elected to the PAP as national representatives, 2 or 3 members must come from either gender.⁶⁶

4.7 Promotion of Constitutionalism and Democratic Governance by the PAP

Pursuant to Article 18 of the Protocol which requires the PAP to work closely with Parliaments of Regional Economic Communities and National Parliaments or other deliberative bodies of member states, the PAP instituted an ‘Annual Speakers Conference’. Through this conference, the PAP has strengthened its relationship with regional and national parliaments. The objectives of the conference are to sensitize the speakers of national and regional parliaments on AU decisions especially the legal instruments and the need to achieve their speedy ratification, domestication and implementation by member states. Many of these instruments relate to governance, democracy and human rights and provide a solid foundation for peace and security on the continent. The forum also considers the report of the PAP on its activities and on the state of integration in the continent.

The 8th in the series of the conference held in Midrand, South Africa from 4th to 5th August, 2016. The Conference brought together Speakers and Secretary’s General/Clerks of national and regional parliaments to discuss the dynamics relating to the ratification of African Union (AU) treaties in particular the Revised Protocol establishing the Pan African Parliament (Malabo Protocol). The theme of the conference, ‘From Adoption to Ratification of the African Union Treaties, in Particular the New Protocol of the Pan-African Parliament: What are the Advantages for Africa’, is particularly significant in view of the drive for the ratification of the Revised Protocol.

The focus of the conference was on how ratification of those treaties could be brought into the core of the priorities of national parliaments, the obstacles to the speedy ratification of AU treaties and benefits that member states could gain from the ratification of AU treaties. It reviewed the progress made by the parliaments in pushing for the ratification, domestication and implementation of AU treaties, particularly the Revised Protocol and suggested measures to accelerate ratification. The speakers were made to realize that ratification is not synonymous with ceding national sovereignty and concluded that it was very important for national

⁶⁶ This is discussed under 5.3 in this study dealing with the changes introduced by the Revised Protocol.

Parliaments to accelerate the ratification of the Revised Protocol. This is necessary to ensure that the ideals of African continental integration are achieved through the harmonization of AU instruments and policies.⁶⁷

It is apposite to note that the acceleration of the ratification, domestication and implementation of the AU instruments fall within the PAP's mandate to facilitate the effective implementation of the policies and objectives of the AU and ipso facto part of its promotional mandate. Against this background, the AU specifically called upon the PAP to take up this responsibility.⁶⁸ The PAP responded by initiating a campaign dubbed '11 before 2011' to raise awareness on the ratification of the African Charter on Democracy, Elections and Governance (ACDEG) by the end of 2011. This campaign was carried out in conjunction with the Political Affairs Department of the AUC through several regional consultative meetings⁶⁹ and within one year the required additional ratifications were obtained leading to the coming into force of the ACDEG in 2012. Now the focus is on the African Union shared values legal instruments including the Charter on Values and Principles of Public Service, the African Union Convention on Preventing and Combating Corruption and the revised PAP Protocol.

The power of the PAP to promote the harmonization and co-ordination of the AU programs obviously includes the activities of NEPAD and the APRM. This implies that it is necessary for the PAP to participate in the activities of the APRM in one form or the other. Accordingly, the PAP maintains a good working relationship with NEPAD as co-members of the AGA platform. The good relationship is enhanced by the fact that the two sister institutions are located within a few kilometers in Midrand, South Africa. Apart from this, there is a memorandum of

⁶⁷ On the side lines of the conference of speakers of the African national and regional parliaments it was agreed among others that the inter-regional Parliamentary meetings should be organised on a rotational basis. The meeting also recommended that the PAP, EALA, ECOWAS, SADC-PF, and CEMAC as regional Parliaments need to synergize in the pursuit of the ratification of the Revised Protocol and the promotion of integration agenda.

⁶⁸ See the decisions of the AU, particularly those taken during the Assembly of Heads of State and Government at Sharm el Sheikh as well as the Executive Council's Decision EX.CL/DEC. 526(XVI) which called on the PAP to assist in advocacy and in the sensitisation of Member States so as to accelerate the process of signing/ratification/accession to the OAU/AU Treaties.

⁶⁹ The PAP organizes annual Regional Consultative Meetings hosted by any willing member state from each region whose turn it is to host in conjunction with the PAP and supported by funding partners for the promotion of the ratification, domestication and implementation of the AU legal instruments especially the revised PAP Protocol. During such meetings stakeholders including government officials and civil society groups are sensitized on the need to support the programs and policies of the AU especially with respect to the AU shared values instruments.

understanding signed by the PAP and NEPAD which governs their interaction and cooperation. The two institutions participate in workshops and dialogues facilitated by partners in order to enhance their performance.⁷⁰

In conjunction with UNDP, the PAP hosted several high-level Africa wide consultative meeting to chart the path for the post 2015 Millennium Development Agenda. There were also several consultative meetings with the academia and intellectuals, finance experts, civil society, women and youth groups in this regard. The outcome of these meetings became known as the African position on the post 2015 Millennium Development Agenda and was mainstreamed into the report of the high level consultative group of eminent persons to the United Nations. There was a clear resolve by all stakeholders that the post2015 Millennium Development Agenda must be people centered and proffer home grown solutions for Africa's problems that is, a bottom-up approach taking into cognizance the needs of the rural communities. PAP plans to produce an annual index/barometer to track the implementation of the MDGs by member states.

PAP has also been promoting the policies and programs in so many other areas such as health. For instance, on the sidelines of the 19th Summit of Heads of State of the African Union in Addis Ababa, Ethiopia, PAP signed a Memorandum of Understanding with the Joint United Nations Program on HIV/AIDS (UNAIDS) calling for strategic partnership to advance sustainable responses to HIV as well as address key human rights challenges in Africa. Through this partnership, UNAIDS and the PAP have carried out workshops and are working with legislators from across Africa by empowering them with up-to-date knowledge and information on the HIV epidemic. These legislators will become high-level advocates for the HIV response by ensuring national and regional accountability, implementing non-discrimination laws and encouraging governments to commit the necessary resources for the fight against HIV/AIDS.

Recently also, the PAP and UNAIDS, in collaboration with the Department of Social Affairs of the African Union held a joint High Level Parliamentary Meeting on "Achieving Health Targets and Leaving No One Behind".⁷¹ The meeting focused, among other things, on the renewal of

⁷⁰ The report of the work of the PAP for the period January to June 2009 records that the Parliament has a 'good working relationship with NEPAD and the APRM and that the 'last NEPAD-PAP dialogue meeting held in April 2009.

⁷¹ The meeting held from 5 to 6 October 2017, at the PAP Headquarters in Midrand, South Africa.

health commitments in Africa and proposed bold actions to fast track the HIV/AIDS response and the shared responsibility. The panelists unpacked various themes related to health issues and HIV/AIDS on the continent. The report was presented to the Ordinary Session of the Parliament and shared with national and regional parliamentary bodies.

4.8 Promotion of Constitutionalism and Democratic Governance by Model Law Making

The law making process of international organizations is essentially by the adoption of treaties which become binding upon due ratification in accordance with the requirements of the treaty. Sometimes the law making power of an international organization is shared between the parliament and the executive organ in accordance with the constituent treaty. This is the practice in the EU where law making power for the Union is shared between the EP and the European Council. In some other cases, law making powers of an international organization may be given directly to the organization's parliamentary institution⁷² or agent by treaty or by way of implied powers. This implies that the principals⁷³ when setting up an international organization as an agent may deliberately grant the latter a law making role to more or less extent or certain level of discretion to make rules thought to be a strategy for achieving set objectives of the organization.⁷⁴

However, in the case of the PAP, though the intention of the principals is for the institution to evolve into a parliament with full legislative powers, its powers under the extant Protocol are limited to advisory and consultative role. Nevertheless, the Protocol allows the institution a good deal of discretion to adopt Rules of Procedure to enable it effectively carry out the various functions and powers given to it under the Protocol. This in our view, is a law making process which is justified based on the functionalist theory. Further to the above, we argue that nothing stops the PAP from developing and adopting model laws that it deems necessary for the effective realization of its objectives and that of the AU, for possible adoption by the Assembly.

At this juncture, it is apposite to explain the true nature and purpose of model law for proper understanding of its essence and the power of the PAP to develop model laws for the promotion of the AU agenda on constitutionalism and democratic governance. A model law is a proposed set of laws relating to a particular subject or area that states may opt to adopt or not, in whole or

⁷² As in the case of the EALA and the ECOWAS Parliament.

⁷³ The word 'principals' in this context is used to describe member states of international organizations.

⁷⁴ See chapter 6 on the law making powers of regional parliamentary institutions examined in this study.

in part. Unlike treaties which are binding on the state parties upon ratification, as the word ‘model’ suggests, a model law is a non-binding document crafted specifically as a tool to guide law makers in translating obligations emanating from international treaties into detailed national legislation. It imposes no obligation whatsoever on states and needs not be adopted by states in its exact form, but could be adjusted to suit the legal and other realities or peculiarities of each state. If a model law is adopted by a state, it then becomes part and parcel of the body of that state’s statutory laws. Arguably, a model law by its nature can be developed by a non typical legislative organ or without any specific legal mandate or authority.

Thus, a model law is typically a detailed set of provisions embodying the international, regional or sub-regional standards on a particular subject, developed for the purpose of facilitating the adoption of national legislations. This means that the purpose of proposing model law is to attempt the harmonization of states' laws on a particular subject, that is, to achieve uniformity in its form and content. Therefore it is the responsibility of state parties seeking to adopt a model law to determine the nature and scope of adjustments that may be required with regard to the form and content based on the provisions of its constitution and the structure of its own legal system.

The idea of harmonization though not new, is unclear and a process whose exact outcome can never be predetermined especially in Africa where there are diverse legal systems operating within the countries.⁷⁵ Fombad considers the literature on the subject as well as the practice of many agencies involved in the harmonization of international business law and concludes that the concept can be said to involve a broad and flexible process that is designed to modernize the law in a manner that will reduce or, where possible and desirable, eliminate differences in national laws. For instance, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 is designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration.⁷⁶

⁷⁵ CM ‘Fombad Legal Harmonization within PAP’ Paper presented to the PAP.

⁷⁶ <https://www.jus.uio.no/lm/un.arbitration.model.law.1985/7.html> (accessed 20 May 2018).

The harmonization of laws is particularly imperative for Africa being a continent bedeviled with diverse legal framework regulating business laws in the different African countries arising from colonial heritage some of which are outdated, thereby constituting huge legal obstacles to intra-African trade. Yet Africa remains the continent where the least progress has been made in the harmonization of international commercial law.⁷⁷ The harmonization of international business laws will invariably reduce the costs of doing business which are increased by the diversity in legal rules in the different countries. It will also make it easier for the continent to deal with the rest of the world with one voice and make it difficult for foreign partners to exploit Africa's weakness in a globalized world and the differences in the legal systems to underpay for the goods and services they obtain from Africa.

The practice of developing model laws under the auspices of the AU has been in existence even before the inauguration of the PAP. For instance, the role of OHADA member states in AU business integration stands out as a significant step in the right direction. OHADA is a system of business laws and implementing institutions adopted by sixteen West and Central African nations. OHADA is the French acronym for "Organisation pour l'Harmonisation en Afrique du Droit des Affaires", which translates into English as "Organisation for the Harmonization of Business Law in Africa". It was created on October 17, 1993 in Port Louis, Mauritius. The OHADA Treaty is made up today of 16 African states. Initially fourteen African countries signed the treaty, with two countries (Comoros and Guinea) subsequently adhering to the treaty and a third (the Democratic Republic of Congo) due to adhere shortly. The Treaty is open to all states, whether or not members of the Organisation of African Unity.⁷⁸

The OHADA organization is one of the outstanding projects on the harmonization of laws in Africa in search for a solution for the challenges posed by Africa's economic underdevelopment and marginalization in the global economy through the harmonization of business laws in Africa. The OHADA legal harmonization experiment was foreseen as a way of removing the impediments created by the colonial legacies of legal pluralism as a result of the balkanization of Africa into different legal regimes thereby making business transactions difficult and unattractive

⁷⁷ See Fombad, 'Legal Harmonization within PAP' (n 72 above).

⁷⁸ <https://africanlii.org/catalog/68>

to foreign investors. Overall, the idea is to facilitate business investment and improve on the economic development of member states.⁷⁹

There is also the model law on Access to Information for Africa was developed to provide detailed and practical content to the legislative obligations of member states to the African Charter with respect to the right of access to information, while leaving the specific form in which such laws will be adopted to individual States.⁸⁰ Other examples of some model laws adopted in Africa includes: the African Union Model Law on Biosafety in Technology 2000⁸¹; the African Union Model Law on the Rights of Local Communities, Farmers, Breeders and Access 2000⁸²; and the on-going development of a ‘Draft African Model Law on Counter-Terrorism’.⁸³ These model laws show that there is a growing recognition in Africa of the importance of using model laws to shape the development of national legislation in conformity with generally accepted regional standards.

In particular, the PAP has been active in proposing model laws which member states can adopt for effective implementation of the AU agenda.⁸⁴ Some of these actions are evident in the following instances: the PAP has partnered with NEPAD and developed a model law on the Drugs and Pharmaceutical sector in Africa, namely ‘Model law on Medical Products Regulation and Harmonization in Africa’; recently, the PAP adopted a resolution on the development of a ‘Model Police Law for Africa and Model Mutual Assistance Treaties for Police Cooperation in Africa’⁸⁵; ‘the African Union Model Law on the Protection of Cultural Property and various other Charters and conventions aimed at effectively protecting cultural property and heritage in

⁷⁹ B Fagbayibo ‘Towards the harmonisation of laws in Africa: is OHADA the way to go?’ Comparative and International Law Journal of Southern Africa - <https://journals.co.za/content/cilsa/42/3/EJC24694>

⁸⁰ See ‘Model Law on Access to Information for Africa Prepared by the African Commission on Human and Peoples’ Rights http://www.achpr.org/files/news/2013/04/d84/model_law.pdf (accessed 21 May 2018).

⁸¹ <http://www.au.int/en/dp/hrst/sites/default/files/2001-OAUModelLawSafety-Biotechnology.pdf>, (accessed 20 May 2018).

⁸² <http://www.farmersrights.org/pdf/africa/AU/AU-model%20law00.pdf>. (accessed 20 May 2018).

⁸³ <http://www.africaunion.org/root/au/Conferences/2010/december/counterterrorism/Communiqu%C3%A9%20Terrorism%20eng.pdf> (accessed 20 May 2018).

⁸⁴ These efforts are indicated and explained in 4.8 above.

⁸⁵ PAP.4/PLN/RES/02/MAY.17. The resolution on the development of a ‘Model Police Law for Africa and Model Mutual Assistance Treaties for Police Cooperation in Africa’ mandated the PAP Committee on Human Rights and Justice, with the technical support of its partners at the African Policing Civilian Oversight Forum, to develop a Model Police Law for Africa and a Model Treaty for Mutual Legal Assistance for police co-operation in Africa for consideration by the Plenary for debate and adoption.

times of war and armed conflicts’;⁸⁶ and are currently developing draft model law on free movement of people in Africa and the African passport in conjunction with the AUC.⁸⁷ The foregoing shows clearly that the PAP has been active in proposing model laws which member states can adopt for effective implementation of the AU agenda.

Thus, based on African common position on certain issues, a model law for African Union will provide a framework for the guidance of member states in formulating or updating their local legislations. This process will serve to bring national legislations in conformity with the regional standards, taking into account national interests, levels of development, contexts and peculiarities. The process will also assist the national governments to understand their obligations to their country and how they can address them through their national parliaments. The foregoing demonstrates that the PAP is indeed quite active in the development of model laws to promote the AU agenda on constitutionalism.

4.9 Promotion of the AU Integration Agenda

The role of the PAP in promoting the AU integration agenda deserves special analysis in view of the strategic importance of integration in catalyzing the realization of the African developmental aspirations. To begin with, it is instructive to note that there is neither a clear definition of integration nor consensus on its substantive content and form, let alone agreement on paradigms that should inform it.⁸⁸ However, in the context of this work integration (regional or continental) can be seen as a mechanism by which states that have certain common historical, socio-economic, political and security challenges and interests can come together and cooperate with a view to developing their economic potentials and thereby fast track social development. Thus,

⁸⁶ This was in line with the Executive Council Decision EX.CL/974(XXIX) on the development of the African Union Model Law on the Protection of Cultural Property and various other Charters and conventions aimed at effectively protecting cultural property and heritage in times of war and armed conflicts the PAP also resolved to devise ways and means for the full protection and preservation of cultural property and heritage and accordingly prepared model Law as a guide for AU member states.

⁸⁷ The PAP passed a resolution on the free movement of people in Africa and the African passport which among others undertook to popularize and demystify of the concept of “African Passport”, set up a mechanism for monitoring progress on free movement of persons, right of residence and to development and draft model law on free movement of people in Africa and the African passport in conjunction with the AUC This is contained in the Activity Report for the 2016 October Session, available at the PAP Documentation Unit.

⁸⁸ M Chingono and S Nakana The challenges of regional integration in Southern Africa (2008) http://www.academicjournals.org/article/article1381823504_Chingono%20and%20Nakana%20pdf.pdf (accessed 19 August 2017).

regionalism as an instrument of socio-economic development makes good economic sense as it will lead to a bigger market for both primary and finished products consequent upon the integration of national economies. It will also engender greater progress in the political, economic and security condition of the integrating states.

Given the permissive and competitive nature of international relations in a globalized world the scope and effectiveness of a state's participation in the political and economic sphere is a function of its capacity. However, disparities exist between the more developed and the less developed countries of the world in terms of global resource which puts them in advantageous position in the competition for economic development. The need therefore arises for states bound together by geography and common history of exploitation underdevelopment, impoverishment, disabilities or sublime capacities *vis-à-vis* the global resource pool to come together either for the purpose of enhancing their potentials. These potentials are in the area of competitiveness in the global race for economic development of individual member states or as a bulwark against the predatory instincts of more endowed states.

Thus, there is a general acceptance that regional integration arrangement is a viable strategy that can help in the maintenance of peace and security necessary for development. This is particularly necessary in Africa where we have similarities, disparities and differences in relation to natural endowments. This is because many African countries share common resources such as rivers, water resources for hydro-electric generation, rich minerals and oil deposits, rich man power, but without resources and infrastructure and technology, quality academic institutions for research and capacity development, as well as common problems like low agricultural productivity and ravaging diseases like HIV/AIDS.

No doubt, regional integration has been recognized world over as a tool that can be used for the economic, political and social development of countries, hence countries in various regions of the world are engaging in regional integration arrangements. This is due to their immense benefits in stimulating development. Accordingly, regional cooperative initiatives have emerged with a view to impacting on the economic fortunes of integrated regions. It was the significant successes recorded in more advanced integrated regions as evidenced by increases in intra-regional trade and resultant increases in economic growth and development in regional

organizations like the European Union (EU) and the Association of South East Asian Nations (ASEAN) that largely encouraged Africa to embrace the idea of regional integration.

From a global perspective, African states are not strong enough to survive in the world market on their own and being militarily weak, cannot defend themselves effectively and would have to belong to a regional group in order to increase their clout and ensure their security.⁸⁹ Thus, by pooling their resources and exploiting their comparative advantages, integrated countries can devise common solutions and use their resources more efficiently to achieve better outcomes.⁹⁰ Integration of African states is therefore necessary as a veritable means of fostering inclusive and sustainable development in Africa that can address concerns around poverty alleviation, health care, food security and access to essential services. This is why the AU has long 'identified economic cooperation and integration as the engine to propel African development'.⁹¹ This explains why the demand for integration remains in the front burner of socio-economic and political discussion in the AU. Hence integration is foreseen as a viable means of addressing the challenges of globalization and the changing global economic and political environment in which Africa stands in a marginal and disadvantaged position.

The above explains why the post independence African leaders had long recognized the importance of regional economic cooperation and integration as a means for accelerating and consolidating economic and social development.⁹² Hence, African governments embraced the idea of regional integration, initially mainly for political reasons and later as a development strategy to rise above the challenges of small markets, many landlocked African states and to benefit from economies of scale in production and trade.⁹³

Against this background, African States have entered into a number of regional integration agreements and currently there is no country in Africa that is not a member of at least one

⁸⁹ See Chingono (n 86 above).

⁹⁰ See UNECA 2004.

⁹¹ Ginkelet a Integration Africa: Perspective on Regional Integration and Development (2003) United Nations University, USA P 1.

⁹² N Lebale et al, Economic Development in Africa Report: Strengthening Regional Economic Integration for Africa's Development (2009) UNCTAD, Geneva iosrjournals.org/iosr-jhss/papers/vol19-issues12/ver.iv (Dec. 2014) pp103-115 (accessed 21 May 2017).

⁹³ TV Itai and C Hakuna Challenges and Opportunities for Regional Integration in Africa: The case of SADC (2014) www.iosrjournals.org p 103 (accessed 21 May 2017).

regional economic group.⁹⁴ Currently, there are regional integration arrangements existing in Africa including: the East African Community (EAC) Economic Community of West African States (ECOWAS) for states in West Africa; Economic Community of Central African States (ECCAS) for states in Central Africa; and the Southern African Development Community (SADC) and the Common Market for Eastern and Southern Africa (COMESA) for Southern and Eastern Africa. Though in Africa, ECOWAS, EAC, COMESA and SADC have played a crucial role in enhancing the political, social and economic development of their Member States, the impact has not been felt as in the case of the European and Asian RECs.

Beyond integration arrangements at regional levels, attempts have also been made to integrate at the continental level in order to achieve economic cooperation among African countries.⁹⁵ Indeed, it is the aspiration of African leaders to integrate Africa that gave impetus to the adoption of the Lagos Plan of Action (LPA) which was an initiative of the OAU adopted in 1991 and aimed at increasing Africa's self-sufficiency and reducing dependency on the western countries. The treaty emphasized African solidarity, self-reliance and an endogenous development strategy through industrialization and envisaged the development of an African Economic Community by 2028. The major contribution of the LPA framework for industrialization includes the division of the economic space of Africa into regional integration areas for the establishment of building blocks of a united African economy. The foregoing shows that the issue of continental integration as an accepted development strategy has remained on the African agenda right from when the African countries gained independence.

Having identified economic cooperation and integration as the engine to propel African development and regional economic communities as pillars for continental integration and development,⁹⁶ it becomes crucial to analyze the challenges and prospects presented by the AU integration agenda. This is necessary to identify the appropriate action to achieve the desired result. Hence the integration process involves the use of different forms of integration arrangements to more or less degrees including: the establishment of free trade areas, customs

⁹⁴ Alemayehu and Haile Regional Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA (2002), University of London and University of Oxford.

⁹⁵ n 89 above.

⁹⁶ See Chingono (n 83 above).

union, common market and economic union which would necessitate the establishment of common legal rules.

Against the above background, the role of the PAP becomes relevant particularly in view of one of its mandates ‘to make recommendations aimed at contributing to the attainment of the objectives of the OAU/AEC and draw attention to the challenges facing the integration process in Africa as well as the strategies for dealing with them’⁹⁷ and ‘to promote the coordination and harmonization of policies, measures, programmes and activities of the RECs and the parliamentary fora of Africa’⁹⁸. The above provisions show clearly that in establishing the AU, the African leaders foresaw that the PAP has a critical role to play in realizing the integration agenda especially in the area of governance, coordination and harmonization of the integration process amongst stakeholders.

In this connection, it is noteworthy that the treaty establishing AEC provides the modalities for the implementation of the integration project.⁹⁹ Under the AEC treaty this was to be achieved in stages and the PAP was conceived as a necessary institution to be established at the sixth stage, whose membership would be determined by universal suffrage, though the treaty did not elaborate on the form or the nature of the envisaged parliament. Rather, it provided that the PAP’s powers, composition, organization and functions were to be set out under the Protocol to be adopted at a later stage.¹⁰⁰ With the adoption of the Protocol, the PAP has the mandate of promoting the strengthening of the existing regional economic communities, the harmonization and co-ordination of policies among existing regional and future sub-regional or regional economic communities, and the harmonization of national policies.¹⁰¹

The relevance of the role of the PAP in the implementation of the integration agenda is understandable given the role of law as a superstructure (particularly international law) in setting standards for inter-state intercourse. Therefore, regionalism cannot but derive potency from international law. In other words, international organization as an association of states established on the basis of a treaty to achieve specific objectives requires good governance to

⁹⁷ See art 11(4) of the Protocol.

⁹⁸ As above art 11(7).

⁹⁹ See art 4(1) AEC Treaty.

¹⁰⁰ See art 14(2); see also art 17 of the Constitutive Act.

¹⁰¹ See art 4(2) of the Protocol.

regulate the interdependent relations in the absence of an overarching global political authority. Global and regional governance is therefore absolutely necessary to deal with many global and regional issues which have a bearing on shared political and economic development. Thus, if member states are to benefit from regional integration, they must align with the rules, principles and norms of regional economic governance for effective international co-operation and interaction to take place.

In light of the above, the PAP is rightly foreseen as a necessary part of the institutional framework for the strengthening and facilitation of the process of actualization of the African political and economic integration agenda. Hence the PAP has as one of its powers and functions, ‘to make recommendations aimed at contributing to the attainment of the objectives of the OAU/AEC and draw attention to the challenges facing the integration process in Africa as well as the strategies for dealing with them’.¹⁰² This provision empowers the PAP to develop a continental institutional regulatory frameworks and mechanisms that can propel integration leveraging on the existing RECs as building blocks. The PAP can do this by formulating model laws for coordination and cooperation strategies for adoption by the Assembly.

In view of the prevailing immigration challenges in African continent, which continues to hinder or slow down the attainment of African political integration and economic development, the PAP hosted a workshop on ‘The Role of the Pan-African Parliament in Promoting the Free Movement of People and the African Passport’ was organized on 8th March 2017 in Midrand, South Africa.¹⁰³ Topics pertaining to the theme of the workshop addressed the status of immigration on the African Continent, status of African immigration to the other Continents, challenges affecting the free movement of people on the African Continent, Immigration and human resource development/transfer of knowledge, and African Union Instruments on the free movement of people and the African passport. This is a progressive step towards the identification of the challenges of the integration process and the appropriate measures that could address them.

Furthermore, the PAP has the mandate of promoting and popularizing the integration agenda in

¹⁰² n 94 above.

¹⁰³ See the PAP Activity Report of the Bureau presented to the plenary during the May Session Ref:PAP.4/PLN/02/SP/MAY.17: Available at the PAP Documentation Unit.

the constituencies of the member states¹⁰⁴ as one of the major policies and programs of the AU. In this connection, the PAP has been very instrumental in facilitating cooperation among the RECs and their parliaments by organizing on annual basis regional meetings on issues of integration, harmonization and ratification and domestication of AU legal instruments. Accordingly, the PAP has established organic linkages with all regional parliamentary bodies such as EALA, ECOWAS, CEMAC, SADC-PF and Arab Transitional Parliament. In many cases members of the PAP also sit in the regional parliaments and this has made it possible to ensure that synergy is achieved in the agenda of integration, harmonization of laws, discussions and resolutions. PAP has made significant efforts to ensure that regional policy making processes feed in to the continental agenda and more particularly as it relates to AU legal instruments. The PAP has also established an inter-organ forum which meets annually to consider the processes of integration on the continent in line with the Protocol which requires cooperation between the PAP and other AU organs including the AUC, the PSC and the ECOSOC.

4.10 Concluding Remarks

The founders of the AU in their wisdom established the PAP as a major and strategic component of the governance reforms and development agenda under the AU for more coordinated and effective implementation of the AU policies and programs especially the constitutionalism and governance instruments. The PAP was also envisioned as a catalyst for the familiarization of the peoples of Africa with the objectives and policies aimed at integrating the African Continent within the framework of the establishment of the African Union, strengthen continental solidarity and facilitate cooperation among RECs and their Parliamentary fora.¹⁰⁵ In this regard interface between the PAP and the other AU governance institutions in promoting the policies and programs of the AU particularly its agenda on constitutionalism and democratic governance in Africa becomes crucial.

However, the AU's political and economic integration agenda cannot be realized without rekindling the spirit of Pan-Africanism in order to achieve unity, solidarity, cohesion and cooperation among peoples of Africa and African states. In this context, the commitment to regional integration can be seen as 'part and parcel of the broader aspiration of continental

¹⁰⁴ See art 11(6).

¹⁰⁵ See art 3(9) of the Protocol.

integration, which takes its roots from the Pan-African movement of shared values, collective self-reliance in development and political independence'. In this regard, the LPA's architecture envisaged a continent of regional integration arrangements forming the building blocks for the achievement of the target of a united states of Africa.

Sadly, the African integration progress has been very slow, largely because of the fear on the part of some member states that integration might undermine their sovereignty. However, without the full involvement and participation of African governments and peoples, the vision of a people's union will not be realized. Regional cooperation and interaction is therefore required to support that the continental arrangements aimed at achieving the objectives of an economically and politically integrated African continent. This requires serious advocacy and proper communication with countries to make them understand that there is no conflict of sovereign authority, rather integration will make the continent politically and economically stronger.

For African integration agenda to succeed, AU member states should be prepared to give up part of their national sovereignty by adopting regional policies aimed at liberalizing free movement of people, capital and labor without the need for visas. In this connection, the PAP could play a pivotal role in catalyzing informed dialogue with relevant segments of the African peoples for their support at both regional and national levels.¹⁰⁶

The assessment of the role of the PAP in promoting the AU objectives shows that the parliament has so far performed creditably within the limit of its powers and capacity and that there is prospect that PAP could perform more effectively with improved capacity. Thus, the PAP can through the effective undertaking of its oversight and promotional activities accelerate the achievement of the AU development and integration objectives especially its constitutionalism and democratic governance agenda. PAP has been able to accomplish so much within the short period of its existence even within the confines of its limited mandate. One can only imagine the potential legislative accomplishment that could be realized in the next decade, especially if PAP's aspiration for the arrogation of legislative powers is approved.

¹⁰⁶ This was part of the submissions of the civil society organizations to the PAP in a consultative Dialogue with the PAP on 9 May 2007 in Midrand South Africa <http://www.pambazuka.org/pan-africanism/submission-civil-society-organisations-pan-african-parliament> (accessed 19 August 2017).

Chapter Five

The Revised Protocol and the Transformation of the PAP: Possible Implications

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5.1 Introduction

The vision for the establishment of the PAP is historically linked to the institutionalization of pan-Africanism and as a necessary adjunct of the African Economic Community which only materialized with the eventual transformation of the OAU into the AU.¹ The establishment of the AU and the establishment of the PAP as one of its organs are to ensure the full participation of African peoples and their grassroots organizations in the programs and policies of the AU with respect to the development and economic integration of Africa. It was envisaged² by the African leaders that the PAP will evolve into a full legislative organ so that it will effectively undertake its legislative activities leading to the harmonization of laws in Africa thereby strengthening the shared determination for continental solidarity and integration.

We have argued earlier³ that an assessment of the role of the PAP from inception to the present stage shows that despite its obvious challenges it has so far performed creditably within the limit

¹ This was pursuant to the Constitutive Act which established the PAP as one of the AU organs.

² This was provided for in Articles 2 (1) and 25 of the Protocol.

³ See chapter 4 of this thesis.

of its powers under the Protocol and its institutional capacity. We have also noted that in terms of influencing the decision-making processes at the AU it could not make serious impact because its powers are advisory and recommendatory only. In other words the governance arrangement under the current Protocol did not establish any mechanism for ensuring the implementation of its decisions and recommendations to the AU policy organs. Against this background, the review of the Protocol became necessary in order to enable the PAP play more effective role as a parliament.

The review of the PAP Protocol was anticipated under the extant Protocol which provides in Article 25 of the Protocol that five years after its entry into force, a conference of the state parties shall be held to review the operation and the effectiveness of the Protocol. This is with a view to ensuring that the objectives and purposes of the Protocol are being realized and that the Protocol meets the evolving needs of the African Continent. This provision implies that the review aims to determine whether the Protocol as it currently stands has the potential to aid the PAP to carry out its mandate effectively in view of PAPs experience so far. The second point is that the outcome of the assessment will then enable member states to determine the areas requiring improvement.

In light of the provision of Article 25, the thesis argues that the target of the review is the Protocol and not necessarily the PAP, though an assessment of the performance of the PAP during the period under review is unavoidable. This is because the PAP is the primary beneficiary of the outcome of the review. Again, the review is to take into consideration the evolving needs of the Continent and reveal the challenges the parliament has been encountering in the discharge of its duties. The outcome of the review is also expected to determine how the challenges revealed can be addressed. In effect, this chapter explains the justification for the review of the Protocol, the transformation process, the changes in the Revised Protocol, the possible implications of its operationalization and how the challenges could be addressed.

5.2 The Transformation Process of the PAP

In order to properly understand the transformation process of the PAP an introductory background of the establishment of the PAP and its governance architecture is considered apposite. The PAP Protocol was adopted,⁴ following the Assembly of the OAU Extra Ordinary

⁴ This was on 2 March 2001.

Session Declaration at Sirte Lybya. The Assembly called upon the Secretary-General of the OAU ‘to cause to be elaborated a Protocol for the establishment of the Pan African Parliament’ as one of the eleven organs of the AU as provided for in Article 17 of the Constitutive Act of the African Union⁵. The Protocol became operational on 14 December 2003 upon obtaining the required number of ratifications from member states. The PAP was inaugurated on 15 March 2004 on which date it became operational. The composition, powers, functions and organization of the PAP was defined in the Protocol and elaborated in the PAP’s Rules of Procedure which was adopted on 21 September 2004 and amended on 10 October 2011.⁶

The clear understanding of the composition and governance structure of the PAP under the extant Protocol is instructive in order to appreciate the value addition *vis a vis* the changes introduced under the Revised Protocol. The membership of the PAP is drawn from AU member states that have ratified the Protocol. The PAP parliamentarian is elected or designated by their respective national parliaments or any other deliberative organ of member states, from among the members of the parliaments or deliberative organ.⁷ After the election or designation of a person as a member of the PAP the national parliament or any other deliberative organ of the member state shall notify the Clerk of Parliament of the new members.

The term of office of the member begins to run once he or she has taken the oath of office or made a solemn declaration during a plenary session of the PAP.⁸ The person so elected or designated must *ab-initio* be a member of his or her national parliament or other deliberative organ and his or term of office as a Pan African parliamentarian is tied to his membership of his or her national parliament or deliberative organ. There is no uniform process of election or designation of members to the PAP. It depends on the provisions of the national constitution or the procedures of the deliberative organ.

The Protocol provides that ‘the Pan-African Parliament shall be vested with legislative powers to be defined by the Assembly. However, during the first term of its existence, the Pan-African

⁵ ‘Otherwise in this study referred to as ‘the Constitutive Act’ or ‘the Act’.

⁶ Art 11(8) of the PAP Protocol authorizes the PAP to adopt its Rules of Procedure.

⁷ See Rule 7 (1) of the Rules of Procedure of the Pan African Parliament which was adopted on 21 September 2004 and amended on 10 October 2011.

⁸ See Rule 6 (1).

Parliament shall exercise advisory and consultative powers only'.⁹With regard to the governance structure of the PAP, this is constituted as follows: The 'Plenary' is the highest policy making and deliberative organ, composed of up to a maximum of five members representing each member country; The 'Bureau' of the Pan African Parliament is composed of a President and four Vice Presidents,¹⁰ each from the five regions of Africa, elected from among the PAP members for a term of three (3) years.¹¹ Members of the Bureau are the Presiding Officers of the parliament responsible for the management and administration of the affairs of the PAP; The 'Permanent Committees' assist the parliament in carrying out its parliamentary functions as defined in the Protocol and the Rules of Procedure; the 'Regional Caucuses' represent each of the five regions of Africa (Southern, Eastern, Western, Central and North) and are responsible for nominating members of parliament to committees as well as leadership positions; and the 'Secretariat' headed by the Clerk (assisted by two Deputy Clerks) which is responsible for implementing decisions and programs of the PAP.

The foregoing represents a brief highlight of the governance structure of the PAP and the limit of its powers and functions. This was however considered inadequate by the parliamentarians for the PAP to effectively realize its vision in the light of the challenges experienced in the last few years of its existence as well as the evolving needs of the continent as well as the contemporary global challenges. The basic problem is the limitation of the powers and functions of the PAP to advisory and consultative role only, which limits its capacity to influence decisions at the AU and also to effectively deliver on its mandate.

There is also the challenge arising from the fact that the PAP membership is drawn from the national parliaments,¹² thereby making them members of two parliaments and therefore less effective. The problem is that Members of the PAP only attend sessions for two weeks two times a year (May and October sessions respectively and committee work in between. Obviously the time is not enough to deal meaningfully with the volume of the challenges facing the continent,

⁹ See art 2(3)(i) of the Protocol.

¹⁰ See art 2(4).

¹¹ See Rule 16 (10), Rules of Procedure.

¹² Membership of both the national parliaments or other deliberative bodies and the PAP necessarily gives rise to divided loyalty and lack of concentration on the work of the PAP.

requiring parliamentary attention. Thus, as envisaged in Articles 2 (1) and 25 of the Protocol,¹³ the commencement of the transformation¹⁴ of the Protocol became due and urgent.

Going by the provisions of the said Article 2(3) the Protocol, it is clear that the African leaders in adopting the Protocol intend to have a classical parliament.¹⁵ It was however envisaged that this would be achieved in phases, beginning with its first term of existence during which it will only have consultative and advisory powers, leaving the Assembly with the power to progressively decide on the attribution of full legislative powers. Thus, Article 2 (3) of the Protocol provides that ‘the ultimate aim of the Pan African Parliament shall be to evolve into an institution with full legislative power whose members are elected by universal adult suffrage’.

By the end of its first term, the general perception is that the PAP has failed to make any appreciable impact in the AU decision-making processes as its recommendations were not seriously considered important in decision-making by the AU.¹⁶ The argument is that the failure of the first and second parliaments to exert influence in AU decision-making is not a reflection of the limitations of the founding protocol. Rather a reflection of the PAP’s inability to fully exploit its powers of consultation as well as non-legislative opportunities within the protocol in strengthening its influence and legitimacy in the AU.¹⁷

However, as earlier alluded to, the perceived unimpressive performance of the PAP¹⁸ has been attributed to its limited powers under the present Protocol. This is because the Protocol gives only consultative and advisory responsibilities to the PAP. The argument by the PAP members is that the attribution of legislative competence to the PAP will give legitimacy to its

¹³ The provisions of Articles 2 (1) and 25 of the PAP Protocol are discussed hereunder.

¹⁴ The concept of the ‘transformation of the PAP’ is used in this chapter to mean the process of revising or amending the PAP Protocol in order to make the necessary provisions to endow the PAP with enhanced legislative powers and functions as well as the necessary organizational and administrative capacity to enable it to more effectively deliver on its mandate.

¹⁵ That is, a parliament with full legislative powers.

¹⁶ O Nzewi ‘Rapid or Incremental Change? Assigning greater legislative powers to the Pan African Parliament (2010) *Centre for Policy Studies Research Report No. 123: S Mpanyane Transformation of the Pan-African Parliament: A path to a legislative body?* (2009) ISS Paper 181, March 2009. See also the views expressed by scholars and other commentators on this issue referred to in chapter four of this work, particularly at 4.3.

¹⁷ See Nzewi, (n 16 above).

¹⁸ This is however debatable hence there is a contrary view which claims that the PAP has so far performed creditably.

pronouncements, thereby increasing its influence in AU decision-making processes.¹⁹ Further to the above, the review is justified pursuant to the ultimate goal of the PAP to evolve into an institution, whose members are elected by universal adult suffrage as provided for in Article 2 (3) of the Protocol. This is coupled with the provision of Article 25 of the Protocol which provides for a review of the operations and effectiveness of the protocol as well as the system of representation in the PAP.

As provided for in the said Article 25 the review became due after five years of the entry into force of the Protocol taking into consideration the evolving needs of the continent. Though the Protocol entered into force in 2004 the review was not triggered until 9 years after. The review process was commenced in June 2009 with the commissioning of the study and elaboration of a draft Protocol, preliminary brainstorming and consultations, validation workshops, as well as meetings of Government Experts and Ministers of Justice/Attorneys General respectively that also considered the draft.

The Executive Council considered the draft during the AU summit in July 2012 and approved the draft with the exception of the provisions of Article 8.1 (a) and Article 8.2 relating to the legislative and oversight powers. For the avoidance of doubt, the draft Article 8 (1) provides that: ‘The Pan African Parliament shall be the legislative organ of the AU and shall exercise legislative powers to be defined by the Assembly;

- a) The Assembly shall have the power to determine the subjects/areas on which the Pan African Parliament may legislate or propose model draft laws;
- b) The Pan African Parliament may also make proposals on the subjects/areas on which it may draft model laws to the Assembly for its consideration and approval’.

The draft Article 8 (2) provides that:

‘In addition to being the legislative organ of the AU, the Pan African Parliament shall have consultative and oversight powers to:

- (a) Receive and consider annual reports on the activities of all the other organs of the AU, including audit reports and any other reports referred to it by Council and make recommendations thereon to Council’

¹⁹ See Nzewi (n 16 above).

At the 2013 January summit, the Assembly decided that more in-depth consultations should be undertaken with respect to the said Articles 8.1 (a) and 8. 2. Between June 2013 and June 2014, extensive consultations were undertaken with various stakeholders leading to the recommendation of the Standing Technical Committee on Justice and Legal Affairs for its adoption by the Assembly. At the AU Malabo Summit on 27 June 2014 the Assembly considered the draft Protocol to the Constitutive Act of the African Union Relating to the Pan-African Parliament (the ‘Revised Protocol’) and adopted same without reservation.

The Revised Protocol is expected to come into force 30 days after the deposit of the instruments of ratification by a simple majority (28) of the member states with the Chairperson of the African Union Commission.²⁰ Upon entry into force the Revised Protocol will then replace the Protocol to the Treaty Establishing the African Economic Community Relating to the Pan African Parliament. At this juncture it is considered apposite to briefly highlight some of the important changes introduced in the Revised Protocol.

5.3 Changes Introduced by the Revised Protocol and their Possible Implications

The Revised Protocol made far reaching changes to the PAP Protocol aimed at improving on the effectiveness of its operations in order to realize its vision and to meet with the evolving needs of the continent. The most important changes introduced by the Revised Protocol include: the declaration of the PAP as the legislative organ of the AU thereby leaving no body in doubt of its status and mandate as a parliament with legislative powers in real or concrete terms; the conferment of additional powers and function; new organs; and a different system of constituting the membership of the PAP, to mention but a few. These changes are briefly discussed below.

On the necessity for increased powers and functions for the PAP, it cannot be gainsaid that this was indeed the main reason for the request for transformation. This has been significantly achieved as can be seen from the Article 8 of the Revised Protocol which states that the parliament shall be the legislative organ of the African Union and shall be able to propose draft model laws on the subjects/areas determined by the Assembly of the AU or proposed by the parliament on its own initiative and approved by the Assembly.

²⁰ Art 23 of the Revised Protocol.

The provisions of Article 8 imply that there are two means by which the PAP may propose model laws under the Revised Protocol. The first is as may be determined by the Assembly and referred to the PAP for necessary action. The second is as may be initiated by the PAP and proposed to the Assembly for approval to develop same. In this case, it would appear from the wordings of the Article that the subjects/areas on which the PAP intends to propose model laws will have to be first proposed to the Assembly for approval before it can validly embark on the process of developing the content and framework.

The implication of the above interpretation is that the PAP cannot develop a model law on its own initiative without the prior approval of the Assembly. This position is consistent with the doctrine of ‘plain meaning’ which states that in interpreting a statute the words of the text should be given the ordinary meaning. If the makers of the Revised Protocol intended that the PAP could on its own initiate or embark on the process of proposing model laws without the prior approval by the Assembly, the clause, ‘make proposals on the subjects/areas on which to recommend’ would not have been inserted in the text. In other words what requires consideration and approval by the Assembly is the proposal to embark on model law making in the subjects/areas and not an already adopted model law by the PAP. The initial objection to the proposed draft Article 8 (1) and 8 (2) as stated above supports the view that for the time being the African leaders intend to be in full control of the model law making powers of the PAP.

However, it is arguable that going by the nature and purpose of model law making,²¹ the above interpretation will have the effect of constraining the model law making powers of the PAP which it is always at liberty to exercise and indeed has been exercising without any specific authorization. As we have argued earlier model laws are by their nature not binding but merely provides standard or sample to assist member states to adopt in order to update their laws to conform to regional benchmark which they can voluntarily adopt or not whose purpose is to harmonize member state laws on a particular subject area.

We have also demonstrated that the idea of ‘harmonization or coordination of laws of member states’²² through model law making is not new in the AU²³ and that the PAP currently undertakes

²¹ These were explained in chapter 4 under the section on Changes Introduced by the Revised Protocol.

²² This is one of the functions of the PAP as provided for in Article 11 (3) of the Protocol.

model law making activities within its mandate under the extant Protocol. Perhaps what is new is that the power to propose draft model laws has been specifically provided for the PAP under the Revised Protocol, albeit in a manner that appears to have subjected the activity under the firm control of the Assembly. The control of model law making by the PAP under the Revised Protocol notwithstanding, there is a significant increase in the mandate and powers of the PAP. At least the parliament is no longer limited to functioning as a consultative and advisory body but now as a legislative organ of the AU with enhanced legislative powers and functions.

However, the legislative powers and functions of the PAP remains limited to model law making in the subjects/areas to be determined by the Assembly or initiated by the PAP subject to the prior approval of the Assembly. Arguably, the subjection of the model law making powers of the PAP to the prior approval of the Assembly in our view amounts to unnecessarily constraining the powers which the parliament currently exercises under the Protocol. Therefore, it is also arguable that not much progress has been made beyond the mere statement that the PAP has power to propose model laws.

Be that as it may, it is apposite to emphasize that model law making will be of immense assistance to state parties to assist them in domesticating and implementing the AU norms and principles. This is because to adopt and ratify the various AU legal instruments aimed at promoting the agenda, especially as epitomized in the Governance Charter is necessary as a first step to develop benchmarks. On the other hand, the professional experience in developing the text for the purpose of implementation of these norms and principles which some member states may not possess is another step. Thus, based on benchmarks determined from the text of the treaties, PAP can develop model laws which member states can be encouraged to adopt in the implementation of the Governance Charter, thereby facilitating the harmonization of policies and laws of state parties in that regard.

At this juncture, it is apposite to note that the Revised Protocol introduced a provision which enables the parliament to get involved in AU law making. In this connection, Article 8 (2) (h) provides that the PAP shall receive, consider and submit opinions on draft legal instruments,

²³ The experience of the work of OHADA in this respect deserves to be acknowledged. See the discussion on OHADA at section 4.8 above.

treaties and other international agreements as may be referred to it by the Council or Assembly. This provision is no doubt a significant improvement on the involvement of the PAP in AU law making which is not the case under the Protocol. However, this study argues that the provision does not confer any real power on the PAP to participate in AU legislation in that the clause ‘receive, consider and submit opinion’ will make sense only when it is requested to do so. The Assembly or the Council may decide not to or ignore to refer any legal instrument or treaty to the PAP for its consideration. This is because the Council or the Assembly is neither under any obligation to refer any draft treaty, legal instrument or agreement to the PAP for its opinion, nor under any obligation to consider such opinion when given.

One of the greatest challenges confronting the PAP is lack of continuity as a result of the membership structure. Since members of the parliament are elected or designated from their respective national parliaments, it then implies that whenever they lose elections at home, they automatically cease to be members of the PAP. Currently, this is what happens in practice pursuant to Rule 8 (1) (e) and (f) of the Rules of Procedure which provides that the seat of a member shall become vacant if he or she: (e) ‘ceases to be a member of the national parliament or other deliberative organ’; (f) ‘is recalled by the National Parliament or other deliberative organ when the member of Parliament loses his or her seat at the National Parliament’. Consequently, with periodic parliamentary elections in Africa resulting in high turnover of members of national parliaments, the tenure of members of the PAP is equally affected giving rise to lack of continuity. With lack of continuity comes the difficulty of maintaining institutional memory among members which is necessary for the vibrancy of the Parliament and for long term planning as well.

The legitimacy and authority of any representative body, and in particular a parliament, depends on the process through which its membership is constituted, as to whether it is by the electoral or appointment process.²⁴ With the Revised Protocol, the process of constituting PAP membership has now been made a bit more democratic. Unlike the position under the extant Protocol where members of the PAP are appointed or designated from among the members of the national

²⁴ B Karuombe ‘The role of parliament in regional integration – the missing link’ <http://www.paulroos.co.za/wp-content/blogs.dir/12/files/2011/uploads/MRI2008Chapter9Karuombe.pdf> (accessed 10 February 2018).

parliaments or other deliberative organs of member states, under the Revised Protocol the members of the PAP will now be elected by the national parliament or other deliberative organ from outside the membership of the national parliament.²⁵

In other words, with the Revised Protocol membership of the PAP will no longer depend on a person's membership of his or her national parliament or deliberative organ of a member state. However, a member of a national parliament or other deliberative body is eligible to contest an election as a member of the PAP but if elected he or she shall resign from the national parliament or other deliberative body.²⁶ This implies that members of the PAP will emerge from outside the membership of the national parliaments or other deliberative organs of member states which will only act as electoral colleges for the purpose of electing members of the PAP.²⁷ It must be noted however, that the power of the national parliament or other deliberative organ to determine the procedure for the conduct of election of members of the PAP is an interim measure pending the development of a code of election into the PAP by direct universal suffrage.²⁸

This study recognizes that there are opposing scholarly opinions on the issue of direct elections based on proportional representation based on population size. In favor of smaller states, this may jeopardize their effective participation as they would not feel the encouragement to support such rule by the majority at the AU level especially at this stage when efforts are being made to galvanize the unity and cooperation of member states. The study however, argues that the need to balance the interest of both the bigger and smaller states remains important. This can be achieved by adopting less strict proportional representation in a structured manner that takes account of both population figure by the allocation of additional number for smaller states than what corresponds to their actual population and size in order to compensate for their small number. In any event, the ECOWAS example on proportional representation based on population and size has been working perfectly well and it is submitted that this can also work for in the case of the PAP.

²⁵ See art 5(1) of the Revised Protocol.

²⁶ See art 5(6).

²⁷ See art (1)(a).

²⁸ See art 5(3).

As envisaged in the Protocol,²⁹ the Revised Protocol has clearly reiterated the resolve of the African leaders to adopt the universal adult suffrage in the constitution of the membership of the PAP in future. Desirable as it may be, its implementation will not only be costly but will face challenges of defining the constituencies of each of the five members of the PAP in each member state and the management of the electoral process itself. Furthermore, the Revised Protocol did not state when the said code will be developed and whose responsibility it is to do so as well as when it will have effect. Furthermore, will the development of the code automatically imply an amendment of Article 5 (1) (a) to the effect that the Revised Protocol approves the election of members of the PAP by universal adult suffrage? Obviously, a lacuna exists here and there is an apparent conflict between Article 5 (1)³⁰ (a) and 5 (3)³¹ of the Protocol. Therefore, it is submitted that this is an area where the PAP can take the initiative to develop a standard procedure for the election of PAP members for adoption by the Assembly and which ultimately will be uniformly applied by member states.

Apart from the fact that the innovation is a step forward towards democratizing the process of election of the members of the PAP the process will make the parliamentarians the true representatives of the people and largely guarantees their undivided loyalty to the African course, such that they will concentrate on the work of the continental parliament. In other words, members of the PAP will function as full time parliamentarians thereby allowing members enough time to concentrate on finding solutions to the problems and challenges facing the continent rather than remaining burdened with divided loyalty between their national parliaments and the continental parliament.

Nevertheless, we argue that even with the coming into effect of the Revised Protocol we will still remain far from the ultimate destination. This is because to guarantee legitimacy and true independence, it is the citizens themselves who should elect those to represent them at the PAP by universal adult suffrage. Constituting an existing institution into an electoral college to elect representatives on behalf of the citizens and without their authority or mandate derogates from

²⁹ See art 25.

³⁰ This Article makes provision constituting members of the national parliament or other deliberative organ into an electoral college for the purpose of the election of members of the PAP.

³¹ This Article makes provision for election of members of the PAP by universal adult suffrage, a system whose code is yet to be developed.

their democratic rights and therefore falls short of the ideal of election by direct universal adult suffrage and accordingly bound to face credibility challenge.

The Revised Protocol now provides that out of the five members of the PAP at least two shall be women³²thereby promoting gender equality and women's participation in politics. As it is under the extant Protocol, the representation of each state party must reflect the diversity of political opinions in each national parliament or other deliberativebody taking into account the number of membersfrom each political party represented in the national parliament.³³ This implies that national opposition parties will still be represented in the PAP under the Revised Protocol. Furthermore, under the Revised Protocol, the qualifications for election to the PAP shall be the same as for a national parliament or other deliberative body. However, membership of the PAP shall not be compatible with the exercise of executive or judicial functions in a state party or a permanent office in the AU, a REC or other international organization.³⁴

The concept of incompatibility introduced in Article 2 (b) creates an ambiguity as to whether persons occupying any of the mentioned positions are automatically disqualified from contesting election for the membership of the PAP or whether such persons are entitled to contest but thereafter resign their positions upon being elected. Further still assuming that such persons are qualified to contest for the membership of the PAP, will they be expected to first resign their positions before contesting for election into the PAP membership? The above are obscure issues that need to be resolved. We however argue that persons occupying any of the mentioned offices should not without more be denied the right to contest for election to the membership of the PAP. Rather, as clearly provided in the case of a person who is a member of parliament or deliberative organ of a member state the candidate should be required to resign his office only upon being elected. The above argument is not only fair but also in conformity with democratic principles and ideals which the whole process intends to promote.

³² Unlike the position under the extant Protocol and the Rules of Procedure which was definite about the number of the female members of the Bureau as two in number, the revised Protocol has made it possible for female members of the Bureau to be not less than two but could be up to a maximum of three.

³³ See art 5(b) of the Revised Protocol.

³⁴ See art 2(b).

Article 5(1) (d) of the Revised Protocol provides that the election of the president of the PAP shall be presided over by the chairperson of the Assembly. This is a welcome development that will guarantee fairness and the integrity of the election of the president. This is unlike the position under the Protocol which makes it an internal affair of the parliament, superintended by the incumbent president. Again, Article 12 of the Revised Protocol has made it clear that the election of the Bureau should be on a rotational basis which was not so provided for under the Protocol. This provision will no doubt prevent possible dispute and polarization of PAP membership into regional lines at the election of new presidents. Furthermore, members of the PAP including the Bureau will now be paid allowances, but by their respective state.³⁵This will encourage the members of the parliament to be more dedicated in their duties.

Article 13 of the Revised Protocol provides for the appointment of a Secretary General and two Deputies by the parliament on recommendation of the Bureau, but the Secretary General appoints staff after consultation with the Bureau. Article 12 also provides for certain duties that must be performed by the Secretary General who in the Revised Protocol is the Accounting Officer.³⁶This is not the case under the Protocol and this sometimes gives rise to conflict between the clerk and the president. The nomenclature of the Clerk and the Deputy Clerks has now been changed to Secretary General and Deputy Secretaries General as opposed to Clerk and Deputy Clerks under the Protocol.³⁷

The powers and functions of the parliament especially the power to carry out oversight and liaison duties under the Revised Protocol have been made more explicit and considerably increased. For instance, the Revised Protocol specifically provides that: the parliament shall receive and consider reports of other organs of the AU as may be referred to it by the Council or the Assembly, including audit and other reports and make recommendations thereon,³⁸ as well as the power of the parliament to carry out fact-finding, inquiry missions or observer missions.³⁹ However, the legislative function of budget control remains with the policy organs. Hence the

³⁵ See art 10.

³⁶ See art 10.

³⁷ See art 13.

³⁸ See art 8 (2)(a).

³⁹ See art 8(3).

current power of the PAP to merely debate and discuss its own budget and the budget of the Union and make recommendations thereon remains the case.⁴⁰

The oversight powers of the PAP on the other AU organs of the AU have been increased considerably under the Revised Protocol. In this connection, Article 20 of the Revised Protocol places a duty on the chairperson of the Assembly to deliver a speech on the state of the AU at each inaugural Session of a new term of the PAP. The chairperson of the Commission is also mandated at least once during the term of each Parliament, to present the Activity Report of the Commission to the PAP. The PAP shall receive and consider the activity reports of the other organs of the AU, except the Assembly, the Council and the Court, which must be forwarded annually to the Parliament.

It must be noted however, that although the powers and oversight functions of the PAP have been enhanced, these have no force of law. For instance, though Article 8 (2) (a) empowers the PAP to receive and consider reports of other organs of the AU including audit reports, it is not obligatory on the organs to submit such reports to the PAP rather, it is ‘as may be referred to it by the Council or the Assembly’. The same applies to the power of the PAP to request the attendance of the officials of the Union at its sessions to offer assistance to the Parliament in the discharge of its duties.⁴¹ There is nothing in the Revised Protocol making it obligatory on the organ concerned to grant such request and the PAP has no power to enforce the attendance to its session. By necessary implication, the effectiveness of the PAP in carrying out these oversight powers will invariably depend on the cooperation of the officials concerned.

One significant additional power given to the PAP under the Revised Protocol is the power to receive, consider and submit opinions on draft legal instruments, treaties and other international agreements as may be referred to it by the Council or Assembly.⁴² Under the estant Protocol, the PAP has no formal business with AU draft legal instruments, treaties and international agreements. By this provision the process will become more democratic and recognize the position of the PAP as the representative of the people through which they can make their input in the decision making processes of the AU. However, in line with our argument above, this

⁴⁰ See art 8 (3)(b).

⁴¹ See art 8(2)(f).

⁴² See art 8(3)(h).

provision did not make the PAP a co-legislator hence the input of the PAP is only possible ‘as may be referred to it by the Council or the Assembly’.⁴³ Furthermore, to what extent the opinion of the PAP can be considered in reaching the final decision remains questionable hence the PAP has no power to monitor and ensure that its opinion or recommendation is indeed considered.

The power given to the PAP to engage the Diaspora in finding solution to the problems and challenges facing the continent is also significant. All these additional responsibilities would require serious and meticulous planning in terms of effective management of the process. The same applies to the authority of the parliament to engage in fund raising which is an important new provision that can be exploited to enable the PAP raise fund for its programs.⁴⁴ The foregoing though not exhaustive of all the changes in the Revised Protocol highlights the most significant ones, showing clearly that the responsibilities of the PAP indeed increased considerably.

In view of the above, it cannot be gainsaid that without Rules of Procedure a parliament cannot function. This implies that when the Revised Protocol comes into force, the Rules of Procedure made pursuant to the extant Protocol becomes outdated and therefore out of tune with the innovations introduced in the Revised Protocol. This is because the Revised Protocol cannot be implemented without the Rules of Procedure equally revised to reflect the changes in the Revised Protocol. Hence, the parliament may adopt and amend its own Rules of Procedure including the procedure for giving effect to its mandate under Article 8.⁴⁵

In view of the foregoing, the PAP now has a challenge to develop a policy framework or procedure for developing draft model laws and recommending same to the Assembly for consideration and possible adoption. This will no doubt necessitate the formalization of the relationship between the parliament and the policy organs in order to facilitate communication amongst them. This is an enormous task for the PAP especially its Committee on Rules,

⁴³ This means that the Council or the Assembly can only refer any draft instrument to the PAP at its pleasure and therefore may decide not to do so and the PAP has no legal bases to request for such.

⁴⁴ One of the major challenges of the PAP in undertaking its activities has remained poor funding. The AU has proved unable to sufficiently provide for the PAP in its annual budget because many of member states continue to remain in arrears in paying their contributions.

⁴⁵ art 11 of the Revised Protocol.

Privilege and Discipline which has a pivotal role to play in working out the details for consideration and adoption by the plenary.

It must be noted however that the adoption of the Revised Protocol and the changes introduced therein will be of no consequence unless it comes into force. This implies that the Revised Protocol must secure the required number of ratifications by member states for it to become operational. Unfortunately, based on AU frustrating past record of ratifications of her legal instruments, this is not going to be an easy task. This therefore calls for a robust and intensive lobbying of member states by the PAP with the support and collaboration of other stakeholders in order to obtain the required number of ratifications for the Revised Protocol to come into force as soon as possible.

5.4 The Challenge of Ratification of the Revised Protocol

As we have alluded to above, the Revised Protocol requires the requisite number of ratifications from member states of the AU to come into force.⁴⁶ It is instructive to note that as at May 25 2018 only 9 out of the 55 member states have ratified the Revised Protocol.⁴⁷ At the 8th Annual Conference of Speakers which held in Midrand, South Africa with the theme “Adoption of the African Union Treaties in particular the new Protocol of the PAP” the Prime Minister of Lesotho, Rt Hon Bethel Pakalita Mosisili in his opening speech called for popular participation and engagement of citizens in the processes. The Prime Minister stated thus:

It is absolutely critical that we carry our people along. It cannot and must not be a leaders’ or a Governments’ issue alone. Our people must fully comprehend, accept and own the process. The need for concerted education on the matter cannot be overemphasized. This is so as to avoid a repeat of what happened in Europe – Brexit.⁴⁸

At this rate, nobody is in a position to know when the required number of ratifications will be achieved. Accordingly, the date on which the Revised Protocol will enter into force remains

⁴⁶ A minimum of twenty eight member states must ratify the Revised Protocol for it to come into effect.

⁴⁷ <http://www.bing.com/search?q=update+on+the+ratification+status+of+AU+legal+instruments&src=IE-TopResult&FORM=IETRO2&conversationid=&pc=EUPP> (accessed 15 August 2018).

⁴⁸ Rt. Hon Bethel Pakalita Mosisili <https://www.eac.int/press-releases/524-873-770-african-speakers-lobby-for-stronger-continental-assembly-want-au-member-states-to-ratify-malabo-protocol> (accessed 18 July 2018).

uncertain and as well, outside the control of any body. Unfortunately the record of the trend on the ratifications of AU legal instruments by member states is a sad one. The trend shows apparent unwillingness on the part of member states to ratify their own treaties or implement their decisions, thereby leaving a wide gap between norm setting and norm implementation. This is evident from the available report on the ‘Trends on Ratification of AU instruments as of June 2014.’⁴⁹

The poor state of the ratification of the Revised Protocol goes to show that the adoption of the Revised Protocol is not the end of the matter. The adoption rather marks the beginning of the next huge challenge, that is, the need for further advocacy for the ratification of the Revised Protocol by member states so that it enters into force. Worried about the slow pace of ratification, the Executive Council called upon the PAP in close collaboration with the commission to identify and address the challenges delaying the ratification of the PAP protocol in member states within the framework of the existing follow up mechanisms.⁵⁰

1. The poor state of ratifications of AU legal instruments has been blamed on a number of factors including the following:
2. Lack of adequate coordination and mechanism to localize continental decisions;
3. Lack of clear structured processes for both ratification and implementation of AU instruments in most countries;
4. Lack of established government mechanism to monitor, implementation and track progress towards realization objectives of protocols;
5. Government’s not allocating adequate budgets for the implementation of the provisions of the protocols;
6. Lack of coordination of roles, responsibilities, processes either are not clear, are fragmented or need more capacity and resources to work effectively; and

⁴⁹ J Ncube ‘Facilitating the realization of the African Union Agenda by accelerating the domestication of the African Union instruments and frameworks at the National level’. Paper presented at the 6th Annual Conference of speakers of African Parliaments 13-14 August 2014 Midrand, South Africa. The report indicates that: 48 protocols have been adopted by the African Union; 6 African AU Member States have ratified 10 or less of the instruments; 29 (54%) au Member States have ratified 20 or less of the instruments; 38 (70% AU Member States have ratified 24 or less of the instruments; and 16 (30%) AU Member States have ratified 25 or more of the instruments.

⁵⁰ EX.CL/Dec. 979 (xxx1), 31st Ordinary Session of the Executive Council, held on 27 June t- 01 July 2017, Addis Ababa.

7. The fact that stakeholders, relevant line ministries, national parliaments, judiciary and civil society are not connected around the protocols⁵¹

Generally speaking, both the executive and the legislature are at one stage or the other involved in the ratification and domestication of international legal instruments. However the executive plays the leading role in the process which may require special legislative procedure depending on the provisions of the national constitution. This implies that the governments of the AU member states' are the custodians of the processes and mechanisms for the ratification and domestication of AU legal instruments. Accordingly, these activities fall within the jurisdiction of national governments and as such their willingness to cooperate and get these legal instruments ratified must be cultivated, otherwise they will not come into force. It is therefore important that concerted efforts should be made to achieve the required number of ratifications for the Revised Protocol as soon as possible.

One of the major causes of the challenges of ratification is the fact that in most cases it is the executive arm of the government that represents the state at the AU summits where the AU legal instruments are normally adopted. Unfortunately, the executives hardly carry the parliamentarians along in negotiating these instruments or even brief them on decisions and commitments they make on behalf of the states. Sometimes, the parliaments are not briefed on the decisions reached at the summit and where necessary present a bill to parliament to carry out a consequential legislative action aimed at ratifying the instrument. Apparently there is no ministry or department of government responsible for following up on AU affairs and where they exist they appear ineffective.

Even in cases where parliaments have a constitutional role to play in ratifying or domesticating treaties this role sometimes become mere rubber stamping of the executive policy on the subject matter rather than based on a critical parliamentary debate. This is because of the usual executive dominance associated with the African governance structure. In the same vein the citizens and the stakeholders are unaware of the existence of such instruments and how they affect their rights as citizens. As such the people do not see themselves as having a stake in their operationalization and therefore would not press for their ratification and implementation by their governments.

⁵¹ n 31 p 11.

Presently, there are no AU systematic structures and mechanisms in place to track and periodically report on the progress of the ratification and implementation of AU legal instruments. At the end of every summit serious commitment to the implementation of the policies and programs are made without meeting such commitments. As a result, the wide gap between norm setting and norm implementation in the AU which militates against the realization of the AU agenda on constitutionalism and democratic governance continues to exist. The implication is that one of the challenges is attributable to ignorance on the part of the stakeholders regarding their stake in promoting the implementation programs and policies of the AU. This is part of the challenges the ratification of the Revised Protocol is likely to face and therefore requires vigorous advocacy to overcome.

5.5 The Role of National and Regional Parliaments in the Ratification Drive

As their nomenclatures suggest, the underlying objective of the establishment of the RECs is to accelerate the achievement of economic development of the regions. However some of them have gone beyond this underlying objective to include in their programs, critical issues like peace and security and the promotion of democracy and good governance. Some of these RECs have also established parliamentary organs with powers to oversee their activities and promote the objectives of the communities. As part of their oversight and promotional responsibilities the parliaments of RECs and the national parliaments or other deliberative bodies of member states can promote the accelerated ratification of the Revised Protocol through their oversight activities.

This point is easily understandable considering the fact that these parliaments are closer to the governments and people of their regions or states as the case may be than the PAP. As such, they are in a better position to influence decision making in their constituencies. More importantly, these parliaments have constitutional role to play in the ratification of international treaties in accordance with their respective constitutions. For instance, under the constitution of Nigeria, no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.⁵² Against this background, the PAP must take up the task of sensitizing and motivating the executives to

⁵² See s 12 of the Constitution of the Federal Republic of Nigeria, 1999.

initiate the process of ratification of the Revised Protocol by tabling same before the national parliaments as required by the constitution in such cases.

In this connection, the reality of the challenge of sovereignty as a factor militating against the ratification of the Revised Protocol and indeed constituting a real threat towards African efforts at supranationalism must be appreciated. This challenge has a historical background dating back to the formation of the OAU which was conceived as a highly intergovernmental system with decision-making centralized at the highest level of the Assembly of the Heads of State and Government. The point is that the early integration efforts in Africa were based on ‘nationalist’ strategies which focused on co-operation with the sole aim of solving political problems for emerging African states⁵³ As a result, the principle of non-interference and sovereignty became entrenched and continues to dictate the character of the African integration space till date.⁵⁴ Accordingly, the AU remains a highly intergovernmental system, highly concerned about sovereignty and is reluctant to cede power to a supranational institution like the PAP.

The implication of the above is that the sovereignty conundrum is a challenge that the PAP must confront in the ratification campaign and this requires a diplomatic approach in view of its sensitive and deep rooted nature. The PAP must make efforts to disabuse member states of the fear that conferring legislative competence to the PAP may subordinate the legislative sovereignty of national parliaments to that of the PAP. The PAP can achieve this by leveraging on its powers under the Rules of Procedure to convene annual consultative fora with the Parliaments of these RECs and the national Parliaments or other deliberative organs to discuss matters of common interest.

The point is that PAP is meant to provide a platform for the regional and national parliaments to sit and discuss on how to popularize the AU agenda and encourage member states to ratify and domesticate the relevant treaties. In the above sense, the possible areas for collaboration between

⁵³ See O Nzewi ‘The Role of the Pan African Parliament in African Regionalism: Institutional Perspectives and Lessons for Africa’. Germany: VDM Publishing: O Nzewi ‘Influence and Legitimacy in African Regional Parliamentary Assemblies: The Case of the Pan-African Parliament’s Search for Legislative Powers’ *Journal of Asian and African Studies* 49.(4) 493
<https://www.google.com/search?q=Influence+and+legitimacy+by+O+Nzewi&ie=utf-8&oe=utf-8&client=firefox-b-ab> (accessed 15 July 2017).

⁵⁴ See Nzewi, (n 51 above).

the PAP and other institutions are vast and should be nurtured.⁵⁵ This type of collaborative platform will enable the PAP to advocate for the protection and promotion of constitutionalism, human rights and democratic governance at the domestic level. Furthermore, the PAP will benefit from the expertise and experience to be offered by these institutions to improve on its promotional efforts.

Thus, through collaborative relationship with the RECs and national parliaments the PAP can effectively push for their support in accelerating the ratification of the Revised Protocol. This will entail in-depth consultations and advocacy by the PAP to enlighten members of these parliaments on the limitations of the powers of the PAP. For instance it needs to be explained that the power of the PAP to propose model laws is subject to the prior authority of the Assembly and that in any case such model laws will not have any binding effect on member states without their voluntary domestication of same in accordance with the national constitutions and processes. Rather, member states stand to benefit from the purpose of model law making which is to achieve the harmonization of laws of member states on specific subjects of common interest.

The justification for the revision of the Protocol and what the African peoples stand to benefit from it must be properly explained. For instance, member states need to be enlightened on how the provisions of the Revised Protocol will enable the PAP effectively oversee the activities of the organs of the AU to ensure transparency and accountability in the management of the resources of the African peoples whom the PAP represents. It is also important for members to be enlightened on how the increased powers and functions of the PAP under the Revised Protocol can enhance its effectiveness in promoting the AU agenda on constitutionalism and democratic governance as well as the African integration.

5.6 The Role of other Stakeholders and the challenge for the PAP

Apart from the RECs and national parliaments, there are other stakeholders in the successful implementation of AU agenda on constitutionalism and democratic governance whose input may

⁵⁵ BR Dinokopila 'The Pan-African Parliament and African Union human rights actors, civil society and national human rights institutions: The importance of collaboration' AHRLJ Volume 13 No 2 2013
<http://www.ahrlj.up.ac.za/dinkopila-br>.

have an impact in the acceleration of the ratification of the Revised Protocol in particular and other AU shared values legal instruments in general. These stakeholders include: the AU organs (including members of the AGA platform); member states government officials; NGOs; CSOs; other grassroots organizations; the media; and international development partners and institutions. The effective galvanization of the support of these stakeholders by the PAP can significantly contribute to the promotion of the ratification of the Revised Protocol.

The PAP has memorandum of understanding for cooperation and collaboration with some of these organizations and international institutions especially in the promotion of constitutionalism and good governance. For instances: the Africa Capacity Building Foundation (ACBF) through an agreement with the AUC supports the advocacy campaigns and capacity building for the PAP; the European Commission (EC) to support capacity building efforts of the PAP through provision of resources for staff of the PAP in the finance unit and in addition supports the advocacy campaign and monitoring and evaluation at the PAP; the Deutsche Gesellschaft fuer Internationale Zusammenarbeit (GIZ) supported the recruitment process of the PAP and currently supports the AGA program in which the PAP spearheads the advocacy for the ratification and domestication of AU legal instruments; the Open Society Initiative of Southern Africa- OSISA partners with the Pan African Parliament to develop the Sustainable Development Goal Barometer to track the implementation of the SDGs; and EP has a cooperation agreement with the PAP on the joint monitoring of the implementation of the JAES and support for the capacity development of the PAP.

These stakeholders can in various ways support the PAP in the advocacy for the ratification of the Revised Protocol. The collaboration and support of these organizations and institutions could be by way of funding support for advocacy missions, capacity building or the creation of awareness on the role of the PAP and how the Revised Protocol can make it more effective. In other words, African citizens who are the object of the AU development agenda deserve to be made aware of the programs and policies of the AU, what they stand to benefit with the effective implementation of these programs and the critical role of the PAP in this regard. This awareness will propel them to bring pressure to bear on the regional and national institutions to take necessary measures to ensure the ratification of the Revised Protocol amongst other AU legal instruments and to hold these institutions accountable for their inaction.

5.7 Capacity Challenges for the PAP under the Revised Protocol

The transformation of the PAP by the Revised Protocol has no doubt raised the legal status of the PAP as a supranational legislative organ by the unambiguous provision that the PAP is the legislative organ of the AU with power to propose model laws.⁵⁶ The Revised Protocol has also substantially increased the oversight powers and functions of the PAP over the organs of the AU⁵⁷ with the exception of the Assembly, the Council and the Court,⁵⁸ in clear and unambiguous terms. The argument of the PAP in support of transformation is that the limited legislative and oversight powers of the PAP to advisory and consultative capacity only has been responsible for its perceived inability to exert any serious influence in the decision processes of the AU.⁵⁹ Going by the logic of this argument, the expectation is that with its legislative mandate and additional oversight powers under the Revised Protocol the PAP will be more effective in the promotion of constitutionalism and democratic governance in both the AU system and in member states.

However, we argue that the legitimization of the PAP as the legislative organ of the AU and enhanced oversight powers *per se* is not a silver bullet that can deal with all the challenges of the PAP in realizing its objectives. As we have earlier alluded to, the Protocol *ab-initio* did not forbid the PAP from carrying out legislative functions. What the Protocol did was simply to allow the PAP to do so in advisory and consultative capacity only. Thus, implying that in carrying out its legislative and oversight functions, it could not bind the policy organs with its recommendations until it acquires full legislative powers with time.⁶⁰ In line with this submission, we can go further to argue that even with the Revised Protocol nothing so dramatic has been achieved in concrete terms for two reasons.

⁵⁶ See art 8(1).

⁵⁷ See art 8(2)(a) and (f).

⁵⁸ See art 20.

⁵⁹ This has remained the recurrent lamentation of the Pan African parliamentarians during each session. In other words, that its lack of influence in the AU governance is as a result of its lack of legislative powers under the Protocol arrangement which gives only consultative and advisory responsibilities to the PAP. However, it has been argued as well that the inability of the PAP to exert influence in AU decision-making is not a reflection of the limitations of the founding protocol, but rather a reflection of the PAP's inability to fully exploit its advisory and consultative powers as well as non-legislative opportunities within the protocol in strengthening its influence and legitimacy in the African Union (AU). The above arguments have already been analyzed under 5.1 above.

⁶⁰ See art 2(3) of the Protocol.

Firstly, the power of the PAP to propose model laws whether on its own initiative or on the request of the Assembly remains recommendatory and subject to the consideration and approval or otherwise of the Assembly. Thus, Article 8 (1) provides as follows:

1. The Pan African Parliament shall be the legislative organ of the African Union.

In this regard,

- (a) The Assembly shall determine the subjects/areas on which the Pan African Parliament may propose draft model laws;
- (b) The Pan African Parliament may on its own make proposals on the subjects/areason which it may submit or recommend draft model laws to the Assembly for its consideration and approval.

Secondly, the enhanced oversight functions of the PAP ends up in recommendations to the organs as there is nothing in the Revised Protocol giving the PAP power to monitor and ensure the implementation of its decisions or recommendations which is the case under the Protocol. It still boils down to the PAP exploring imaginative ways of asserting its influence in the AU system by exploiting its powers under the Protocol especially by utilizing the latitude which has been provided for the parliament to make its own Rules of Procedure, emboldened with the newly acquired democratic legitimacy as elected representatives of the peoples of Africa.

Be that as it may, the fact remains that the increased responsibility of the PAP under the Revised Protocol comes with increased challenges which may not have been anticipated. This is obvious considering the fact that the PAP is yet to grapple with its existing capacity challenges under the current Protocol. These challenges for PAP are in the areas of transitional arrangements, administrative structure, funding and visibility. These challenges must be properly addressed to enable the PAP take advantage of the prospects of effective promotion of AU agenda on constitutionalism and democratic governance under the Revised Protocol. The reality of these challenges and the possible ways of addressing them are briefly discussed hereunder.

5.7.1 Transitional Challenges

We have argued earlier⁶¹ that the convergence of values is the internal logic of supranationalism which the AU is in the process of crystallizing with the adoption of its shared values instruments. This implies that the principle of democracy is of integral value in ensuring the growth of regional governance, promoted by parliamentary institutions like the PAP. For the PAP to effectively promote constitutionalism and democratic governance in Africa its members must be democratically elected so as to enhance their democratic legitimacy to promote democratic values. Accordingly, the Revised Protocol provides for the election of the members of the PAP from outside its membership⁶² and ultimately by universal adult suffrage.⁶³ This provision enhances the PAP legitimacy to promote democratic governance in the AU governance structure and in member states as well.

It cannot be overstressed that experience and institutional memory are very important for the work of a parliament. It follows that the more the number of experienced members in the legislature the greater the output of the parliament or legislative assembly. In relation to the PAP, the process of constituting its membership under the Protocol enables parliament to benefit from the experiences of members in their national parliaments. On the other hand, under the Revised Protocol the membership of the PAP will be constituted by entirely newly elected parliamentarians many of whom may not have had any parliamentary experience.

Based on the above, it is arguable that the advantage of the process of having experienced members who are designated from the membership of the national parliaments or other deliberative organs of member states would be lost under the new process of direct election. In this connection, the only transitional provision of note is that the term of office of a member shall terminate within a period not exceeding one year of the entry into force of the Revised Protocol.⁶⁴ This means that one year after the coming into effect of the Revised Protocol, all the existing members of the PAP would have been replaced by entirely new membership.⁶⁵

⁶¹ See chapter 4 above.

⁶² See art 5(1)(a).

⁶³ See art 5(3).

⁶⁴ See art 27 of the Revised Protocol.

⁶⁵ Note however that this conclusion is subject to the possibility of any member of the PAP or national parliament or other deliberative organ returning as a newly elected member under the Revised Protocol.

Though there is the likelihood of the loss of experienced PAP parliamentarians and institutional memory as a result of the election of new members of the PAP under the Revised Protocol, this can be cured by the internal development of the new parliamentarians. This can be achieved by taking advantage of the provision in the Revised Protocol which allows the PAP to determine its Rules of Procedure which gives it a level of responsibility for its own institutional democratic development. Therefore the PAP can adopt Rules of Procedure that will provide for mechanisms to facilitate the functions of the parliament, build its own capacity, grow and strengthen inter-institutional relationships and carry out other non-legislative functions.

5.7.2 Administrative Challenges

In addressing the administrative challenges that are bound to confront the PAP under the Revised Protocol, it must be borne in mind that the transformation of the PAP, the acquisition of legislative legitimacy and increased oversight powers can potentially enhance the prospects of the PAP to effectively promote constitutionalism and democratic governance in Africa. However, this cannot be realized without the concomitant supportive administrative structure. In other words, the acquisition of power is one thing the effective utilization of the power to achieve the purpose is another.

A modern day parliament must be provided with adequate and conducive working environment equipped with adequate office space and infrastructure with a state of the art information technology unit that can effectively support the work of the parliament. The South African Government has been doing its best to facilitate the work of the parliament in line with the host country agreement. However, our finding is that the current premises of the PAP at Gallagher Estate in Midrand, South Africa is under lease to the Government of South Africa and is meant to be a temporary site. Most of the equipments are now outdated and hardly withstands the demand of the secretariat talk less of members of parliament during sessions and committee meetings. The study reveals that though a permanent site has been designated by the South African Government years ago, work is yet to be commenced.

The question is whether the PAP as presently constituted is duly equipped or prepared administratively to effectively undertake the far reaching powers and functions under the

Revised Protocol based on the existing number and capacity of the existing staff to support the work of the parliamentarians? In this connection, it is instructive to note that the PAP as an institution had operated without an approved structure for the secretariat since its inception until about 6 years ago. The advocacy by the Bureau of the PAP supported by the secretariat to ensure that the PAP is endowed with a structure that will enhance its operational capacity and equip it with the institutional competence and standards obtainable in comparable supranational parliaments became successful only in June, 2012. The structure as approved though inadequate⁶⁶ presented the parliament with the opportunity to redefine the nature of its human resource capability. Up till October 2017, the PAP is still in search of competent professional staff at the management level and is yet to conclude the recruitment process which has remained controversial.⁶⁷

Unfortunately, the PAP remains understaffed and continues to be supported by temporary staff being paid with funds from development partners. The point is that the legislative, oversight, consultative and advisory role of the PAP is a complex, tedious and time-consuming process. It is therefore important that the PAP should proactively identify possible administrative stumbling blocks in achieving the desired outcomes of the powers and functions provided for in the Revised Protocol and accordingly build the necessary capacities to operate effectively. Thus, the PAP can effectively exercise its functions and powers only when the parliamentarians are supported by strong administrative structures and professional and efficient staff. Against this background, Article 8 (2) (e) of the Revised Protocol authorizes the PAP to make proposals to the Council on the structure of the secretariat of the parliament taking into account its needs. How adequately the Council will respond to such proposal remains to be seen in view of the past PAP experiences with the AU with regard to its funding requests.

5.7.3 Funding Challenges

It cannot be overstressed that the work of parliaments whether national or supranational is complex, enormous and expensive. In the case of the PAP it is obvious from the foregoing that it is bound to confront human capacity and administrative challenges which will involve heavy

⁶⁶ Out of the 94 positions proposed, 74 were recommended by the sub-committee of the PRC on Structures and thus were subsequently approved by the Executive Council.

⁶⁷ Executive Council Decision EX. CL/720 (XXI) iii: see also the PAP Activity Report presented at the 2017 October Session, available at the Documentation Unit of the PAP.

financial burden. In this regard, it is instructive to note that the PAP has in the few years of its existence experienced institutional challenges such as minimal funding and deficiencies in human resource capability.

The funding challenge of the PAP in executing its mandate is understandable considering the fact that the budget of the PAP constitutes an integral part of the annual budget of the AU.⁶⁸ The annual budget of the PAP is normally drawn up 'in accordance with the financial rules of the AU and approved by the Assembly until the Pan-African Parliament starts to exercise legislative powers'.⁶⁹ The practice is that PAP prepares a draft budget proposal and presents to the Permanent Representative Council (PRC) and takes part in the discussion only to explain or defend its proposal. Even when the draft budget is presented to the PAP for discussion, the recommendations of the PAP following its debate may make no difference as it is ultimately approved by the policy organs with or without reference to the input of the PAP.

Thus, the AU budgetary system does not allow the PAP to independently prepare its work plan in keeping with its strategic priorities. The position of the AU budgetary system did not change under the Revised Protocol.⁷⁰ This implies that the PAP is bound to continue to suffer from institutional incapacity which will result from the lack of independent financial resources and the lack of control over its own budget thereby rendering the parliament too weak to effectively deliver on its mandate. This is a major challenge for the PAP which has hitherto remained poorly funded with very little means of financing its activities and like the AU has most of the time depended on partners to fund most of its activities with the approval of the AU.

Be that as it may, one of the challenges that the PAP is bound to face is that of financial accountability. It is important that the PAP itself is bound to live up to the expectation of the citizens by maintaining probity in the management of the institutions fund. An institution whose mandate includes the overseeing the effectiveness of other AU institutions in executing their mandates as well as examining their audit reports cannot afford to be associated with allegations of corruption and wasteful expenditures. Such allegations will no doubt have a number of

⁶⁸ See art 15(1) of the Protocol.

⁶⁹ See art 15(2).

⁷⁰ See art 16 of the Revised Protocol.

damaging consequences including the possibility of foreign donors reviewing their financial contributions in support of the institution's programs and the danger that bad publicity could dent the PAP's efforts to secure more meaningful legislative powers.⁷¹ Therefore the internal financial control system must be strengthened to prevent leakages and ensure transparency and accountability in the management of PAP's fund.

However, the need to build the capacities of the parliamentarians through training in order to get them acquainted with parliamentary practices and procedures remains imperative, since it is apparent that some of the members will be elected without experience on parliamentary duties. This is recommended in order to close the gap that will exist as a result of the loss of experienced members in parliament. Equally, the quantitative and qualitative weaknesses of the permanent staff of the secretariat particularly in the realm of assistance to permanent committees, translation and Hansard, research, library and documentation, to state but a few examples must be addressed, more so with the increased responsibilities under the Revised Protocol.

Thus, we cannot talk about the promotion of peace, security and good governance without talking about the necessary funding. This has remained the bane of the AU in implementing its policies and programs. The current financial structure of the AU, where partners cover more than 60% of the budget raises questions about how African member states are expected to have ownership over their security and have the capacity to implement African solution to African problems while at the same time remaining reliant on external donors. This does not augur well for parliamentary effectiveness more so with increased responsibilities which demands increased funding. Accordingly, key resources and tools must be put in place to build the capacities of the existing staff and additional ones (especially committee clerks) that can effectively support the increased parliamentary functions. This is a serious challenge which must be seriously addressed if the PAP is to cope with its additional functions and powers under the Revised Protocol.

⁷¹ Babatunde Fagbayibo 'Why the Pan-African Parliament must clean up its act if it wants to survive' The Conversation May 24, 2018 <https://theconversation.com/why-the-pan-african-parliament-must-clean-up-its-act-if-it-wants-to-survive-97095>.

5.7.4 The Challenge of Visibility

In carrying out oversight on the AU organs the PAP is expected to investigate issues and raise queries for explanation through its committees in order to ensure accountability, transparency, responsiveness and sustainability of good governance. For this to be effective good communication flow between the PAP and the AU organs and institutions must be established. For the PAP, this has been the bane hence the AU governance institutions are yet to understand the essence of some of the investigations being carried out by PAP committees in furtherance of its oversight functions and the responsibility of the organs and institutions to implement PAP recommendations. So far, no such formalized mechanism exists to monitor and ensure the implementation of PAP resolutions beyond the submission of activity reports to the AU summits annually. We therefore submit that until a clearly defined communication system between the PAP and the AU governance institutions is established with obligation on the part of the institutions to implement the recommendations of the PAP as a result of its oversight duties, the expected impact of the PAP in the AU governance will remain a far cry.

On the other hand, for any organ to make impact on any body politic or for its impact to be appreciated, the existence and role of such organ must be known to the stakeholders. The Protocol states that the establishment of the PAP is informed by the African peoples and their grassroots organizations to be more involved in decision making processes of the African Union. Paradoxically most Africans know little to nothing about the existence of the PAP and what it stands for. Surprisingly, even amongst the elites (including the intelligentsia and the politicians) in Midrand, Johannesburg South Africa which is the seat of the PAP, the existence of the PAP is unknown and the negligible minority who might know never give a second thought as to what it stands for.

With this level of poor visibility in South Africa which is the seat of the PAP, obviously the situation must be worse in the rest of the African continent. It is not right that an institution which is established to represent the interest of the people of Africa in addressing the problems and challenges facing the continent is not in the front and centre of the day to day public discourse in Africa. The poor visibility of the PAP can be linked with lack of loyalty and

accountability to the people. Commenting on the issue of accountability to the people, Fagbayibo⁷² states thus:

Two factors affect this – firstly, the issue of the direct election of PAP members. Its representatives are national legislators chosen by their respective countries. This means that members don't necessarily owe any allegiance to citizens. They're answerable only to national parliaments or governments. The other factor affecting accountability is that, since representatives can't make binding laws and aren't directly elected by citizens, they are not obligated to render an explanation of their stewardship to civil society.

Good communication flow between the people and their representatives in any government or body politic is crucial for effective representation. In other words, a continuous and effective system of communication and feedback among members of an organization and the people whose interest it serves or represents is a fundamental necessity for the effective performance and growth of that organization. In our context, we argue that poor communication link between the PAP and the African citizenry who it represents is also a factor affecting poor visibility and impact of the PAP. Therefore, the African people need to be made to know of the existence of the PAP and its role under the Protocol and the essence of its enhanced oversight powers and functions under the Revised Protocol.

As we have pointed out above, the very negligible few who have knowledge of the existence of the PAP do not have proper understanding of its role. It is therefore recommended that the PAP should put in place a unit/liaison office at national and regional levels to serve as reference point for information flow and communication on the work and activities of the PAP and as an operational base to ensure the sensitization of the stakeholders on the activities of the PAP. It is further suggested that the PAP could in agreement with national parliaments or other deliberative organs set aside a day annually during normal sessions for PAP delegations to deliberate with parliamentarians on the work of the PAP and the areas where support is required from parliaments of member states. This type of interaction will afford the PAP an opportunity to advocate for the ratification and domestication of AU legal instruments, especially the ratification of the Revised Protocol and also enhance the visibility of the PAP in member states.

⁷² See Fagbayibo, (n 6 above).

It will be recalled that in early May 2007, PAP held a Consultative Dialogue with African Civil Society at Gallagher Estate in Midrand, sponsored by Southern African Trust which states its mission as “influencing policies to end poverty”. This project was consistent with PAP’s mandate under the Protocol and imbedded in the philosophy that the PAP should be people responsible. The agenda included discussion of current debates regarding civil society engagement with the PAP and other pan African institutions to promote socio-economic integration. There is need to develop a structured approach to civil society engagement with the PAP where issues like the ratification of the AU legal instruments including the Revised Protocol can be discussed and promoted.

5.8 Concluding Remarks

As we have earlier demonstrated, under the Revised Protocol the PAP has been designated as the legislative organ of the African Union with a clear mandate to propose draft model laws for adoption by the Assembly though with the prior approval of the Assembly itself. By this gesture, African leaders have to some extent demonstrated their commitment to the realization of the ideals of the African Economic Community especially the promotion of its good governance component. This is in recognition of the fact that the promotion of good governance is imperative for the effective implementation of the AU agenda and that the PAP deserves enhanced powers to drive the process.

The urgent issue now is the ratification of the Revised Protocol which is necessary to make it operational. When it becomes operational it will give impetus to the development of transnational policy frameworks based on AU Shared Values and on those AU policies and practices whose benefits transcend national boundaries within the continent through model laws proposed by the PAP. These could be in the areas such as intra-African trade, trans-border movement of people and goods. In this way, the PAP can indeed become the voice of the voiceless peoples of Africa on challenges of continental integration and shared development amongst all Africans as envisioned by the founders.

The coming into effect of the Revised Protocol will potentially address the argument of the protagonists of PAP transformation that because of lack of legislative powers and its weak

influence in the decision making processes in the AU governance architecture. With the operationalization of the Revised Protocol, the PAP will be more effective than it is currently and will also occupy important position in the policy making process of the continent. We have however argued in this study that the mere transformation of the PAP from a consultative and advisory body to an institution with legislative competence without a defined and structured institutional means of ensuring the implementation of its recommendations to the AU may not make the anticipated difference.

As we have noted above, the transformation of the PAP from a consultative and advisory organ of the African Union to an institution with legislative functions in clearly defined areas is envisaged under Article 2(3) of the Treaty Establishing the African Economic Community signed in Abuja in 1991. The treaty provides that the ultimate aim of the PAP shall be to evolve into an institution with full legislative powers. Therefore, the adoption of the Revised Protocol is in keeping with this aim which nevertheless remains a work in progress as full legislative powers remains to be attained in the future as the PAP matures. Now that the Revised Protocol of the PAP⁷³ has been adopted without reservation by the Assembly, ratification by member states remains a challenge.

The member states who are opposed to the transformation of the PAP from advisory and consultative body to a legislative one argue that to confer legislative powers to the PAP amounts to subjecting the law making powers of the state legislatures to that of a continental parliament. They are therefore afraid that the transformation will erode the law-making sovereignty of member states. The reality of these concerns by some member states cannot be denied.⁷⁴ It is

⁷³ The amendments in the Revised Protocol arguably remains tokenistic as it did not clearly and adequately address the powers of the PAP in a number of areas we have already highlighted in this study.

⁷⁴ Some statements credited to two members of the PAP confirm the reality of these concerns and explains the reluctance of member states in ratifying the Revised Protocol. For instance, Hon. Ogenga Latigo, a Ugandan MP was quoted as saying that ‘In our own countries, parliaments are suppressed. Can you imagine a parliament that doesn’t belong to you legislating for you? It will not happen in Africa,’ while Chief Fortune Charumbira, a Zimbabwean MP and head of his country’s Chiefs’ Council, agreed with Latigo that African presidents were unwilling to cede legislative authority to a “foreign parliament” and also suggested amending the Malabo Protocol “so it takes everybody on board”, available at https://www.dailymaverick.co.za/article/2017-10-19-iss-today-does-africa-really-want-a-continental-parliament/#.WxBNtzko_IU (accessed 25 May 2018).

however submitted that these concerns are based on the misconception that the attribution of legislative powers to the PAP implies that the PAP would thereby have the authority to make laws for member states.

However, these concerns are in our view misconceived considering the fact that the AU treaties are negotiated by the AU member states and can only have the force of law after adoption by the Assembly, and subsequent ratification by member states. This means that it will not be possible for the PAP to by pass the Assembly and member states to make laws binding on the continent. In the case of model laws by the PAP, the subjects/areas on which the PAP can propose model laws will be determined by the Assembly and in a case where the PAP initiates the subjects/areas on which it may propose model laws these must be approved by the Assembly.

In any case, as we have earlier explained, model laws have no automatic binding force or application in member states. Therefore, without specific adoption and domestication in accordance with the legislative processes as provided for in national constitutions model laws proposed by the PAP cannot have any effect in a member states. This clearly implies that the legislative sovereignty of states remains intact and cannot in any way be undermined or diminished by the attribution of legislative competence to the PAP. Therefore, the fear of the sovereignty conundrum by member states is unwarranted.

In this connection, it is also instructive to note that the ultimate aim of the adoption of model laws is to harmonize the laws of member states so as to bring them into conformity with accepted regional standards. This is intended to facilitate the implementation of the AU agenda and not to subordinate regional or national legislative sovereignty that of a supranational parliament like the PAP. Thus, it is necessary that the PAP should enlighten national and regional parliaments on the benefits of having AU legal instruments ratified, especially the Revised Protocol and to allay their fears over their sovereignty concerns. To this effect, the PAP should consider establishing a formal mechanism for country delegation of PAP and possibly attend their sessions and present their case directly at those levels.

The PAP will also need to enlighten these states that a transformed PAP will harmoniously co-

exist with national and regional parliaments in a manner that will not derogate from, or erode on their powers or national sovereignty. Furthermore, a transformed PAP with legislative powers will be a strong pillar of support to national and regional Parliaments across the continent and will provide an indispensable political attribute integral to the realization of Africa's collective and shared objectives of promoting democratic principles, continental integration and popular participation.

It is also important that the PAP should explain to member states how the Revised Protocol can add value to governance in member states, especially by the adoption of model laws which the states can domesticate to improve on their governance records in particular sectors not adequately covered under the existing national laws. The PAP with enhanced legislative powers and functions can also provide opinions on draft legal instruments, treaties and other international agreements for consideration by AU policy organs before their adoption. Furthermore, it can undertake the following activities: maintain oversight over the activities of the AU organs to ensure accountability and good governance; fact-finding or inquiry and observer missions to ensure the recommendation of unbiased, objective and effective measures to address the security and governance challenges facing the continent; and the maintenance of closer and harmonious working relationship with regional and national parliaments and other deliberative bodies of member states, as well as other stakeholders to ensure effective implementation of the AU agenda.

The ratification and the coming into effect of the Revised Protocol will also enable the PAP to propose model laws that can be adopted to enable Africa to begin the process of building strong democratic institutions that would deepen democracy, good governance, transparency and accountability which are the prerequisites for development peace and stability. This will be a step forward towards providing the required institutional framework for achieving Agenda 2063 and the much desired economic integration of the African continent.

Thus, the efforts by African leaders to entrench the culture of democracy and good governance in Africa as epitomized in the African Charter on Democracy, Elections and Governance make the transformation of the PAP imperative in order to give it the required parliamentary legitimacy and powers to effectively oversee their implementation. As a people-centered institution,

it will promote vibrant civil society and public participation in dealing with issues bordering on unconstitutional changes of governments, incessant political conflicts and other African problems. In other words, a transformed PAP will no doubt be more emboldened to take the lead and collaborate with the other AU AGA platform members,⁷⁵ as well as parliaments and partners to develop legislative frameworks⁷⁶ that can assist member states to enact national laws to effectively address the myriad of common challenges that continue to militate against Africa's development strategies.

⁷⁵ It is instructive to note that under Article 45 (c) of the Governance Charter the AGA platform members have been given the mandate to 'coordinate evaluation on implementation of the Charter with other key organs of the Union including the Pan-African Parliament, the Peace and Security Council, the African Human Rights Commission, the African Court of Justice and Human Rights, the Economic, Social and Cultural Council, the Regional Economic Communities and appropriate national- level structures'. Here, the pivotal role of the PAP as the leader of the platform and within the context of its oversight mandate becomes critical.

⁷⁶ The PAP can do this by developing model laws as determined or approved by the Assembly, which member states can adopt subject to their local contexts.

Chapter Six

The Role of other Regional Parliaments in Promoting Constitutionalism and Democratic Governance in Member States: Lessons for the PAP

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6.1 Introduction

The fact that parliaments at all levels of governance are necessary institutions for the promotion of constitutionalism and democratic governance cannot be overstressed. Through their traditional legislative, oversight and representative functions and powers parliaments to more or less extent exert influence on policy making processes and execution in order to ensure the effective realization of the purposes or objectives of governments. At the supranational level, various regional organizations have established supranational parliamentary institutions whose powers and functions in promoting constitutionalism and democratic governance in member states are derived from the legal instruments setting them up while some evolved over time and became institutionalized.

This chapter analyzes the functions and powers of other comparable supranational parliaments with a view to identifying areas from where the PAP can possibly learn from their experiences in the promotion of constitutionalism and democratic governance in their member states. In this connection, the role of the Parliamentary Assembly of the Council of Europe (PACE)¹ and the EP in promoting constitutionalism in Europe and the role of relevant sub regional parliaments in Africa particularly, the East African Legislative Assembly (EALA) and the ECOWAS Parliament in promoting constitutionalism in their member states are examined.

The chapter explains that though the PACE is a consultative body of the Council of Europe without legislative powers, it has been proactive and effective in promoting constitutionalism and human rights in Europe. It is argued that some of the supranational parliaments acquired legislative competence immediately upon establishment while some others gradually and incrementally evolved into parliaments with legislative powers. It however concludes that though the powers of the PAP could evolve, there are certain legislative powers and functions being carried out by some of the above comparable parliamentary institutions especially the EP, the EALA and the ECOWAS Parliament which the PAP can adopt to enhance its effectiveness and facilitate the process of regional integration without reinventing the wheel.

¹ In this chapter otherwise referred to as 'the assembly'.

6.2 The Parliamentary Assembly of the Council of Europe

The Parliamentary Assembly of the Council of Europe (PACE)² is the parliamentary arm of the Council of Europe dedicated to upholding human rights, democracy and the rule of law. PACE is one of the two statutory bodies of the Council of Europe, along with the Committee of Ministers, the executive body representing governments, with which it holds an ongoing dialogue.

6.2.1 Establishment, Membership and System of Operation

PACE is said to be one of the oldest international assemblies in Europe and it held its first session in Strasbourg on 10 August 1949.³ It is constituted by 324 delegates (plus 324 substitutes), who are elected members of parliament in their respective countries.⁴ Unlike in the PAP, each national delegation of the assembly comprises between two and eighteen representatives, depending on the country's population, and must reflect the balance of political forces in the respective national parliament.⁵

PACE parliamentarians are organized in the following five political groups representing various ideological loyalties: the Socialist Group (SOC); the Group of the European People's Party (EPP/CD); the Alliance of Liberals and Democrats for Europe (ALDE); the European Democrat Group (EDG); and the Group of the Unified European Left (UEL)⁶

The assembly is required⁷ to meet in ordinary session at least once annually though in practice it convenes on average four times each year. The members of the assembly work in accordance with its Rules of Procedure in the following eight permanent committees: Committee on Political Affairs and Democracy; Committee on Legal Affairs and Human Rights; Committee on Social Affairs, Health and Sustainable Development; Committee on Migration, Refugees and Displaced Persons; Committee on Culture, Science, Education and Media; Committee on Equality and

² Sometimes in this chapter referred to as 'the assembly'.

³ <https://www.coe.int/en/web/tbilisi/the-coe> (accessed 20 November 2018).

⁴ art 26 of the Statute of the Council of Europe.

⁵ <https://www.coe.int/en/web/tbilisi/parliamentaryassembly>(accessed 20 November 2017).

⁶ n 5 above.

⁷ See art 32 of the Council of Europe.

Non-Discrimination; Monitoring Committee; and Committee on Rules of Procedure, Immunities and Institutional Affairs.⁸

The assembly adopts three types of texts: Recommendations (which require a two-thirds majority vote) to the Committee of Ministers⁹; Resolutions (which express its own view point on a simple majority vote)¹⁰; and Opinions (again on a simple majority vote, for example on membership applications, draft treaties and other texts by the Committee of Ministers).

6.2.2 Supervisory, Oversight Powers and Functions

PACE has no legislative powers. Like the PAP in the AU, PACE is the deliberative organ of the Council of Europe. It debates matters within its competence under this Statute and present its conclusions in the form of recommendations to the Committee of Ministers. Though PACE has no legislative powers, it carries out far-reaching supervisory and oversight functions in the Council of Europe. The assembly generally meets at Strasbourg in the Palace of Europe for week-long plenary sessions while the nine permanent committees of the assembly meet all year long to prepare reports and draft resolutions in their respective fields of expertise.

The parliamentarians of PACE during sessions discuss Europe's most pressing socio-political questions. Within the framework of its debates, the assembly can adopt three different types of texts including: recommendations on contain proposals addressed to the Committee of Ministers, the implementation of which is within the competence of governments; resolutions which embody decisions by the Assembly on questions, which it is empowered to put into effect, or expressions of view, for which it alone is responsible; and opinions on questions put to it by the Committee of Ministers, such as the admission of new member States to the Council of Europe, draft conventions, or the budget of the Organisation. Furthermore, the assembly is responsible for the election of the Secretary General of the Council of Europe, its Human Rights Commissioner and the judges at the European Court of Human Rights. Comparatively, the PAP has no such power *vis-a-vis* the AU.

⁸ n 3 above.

⁹ See art 22.

¹⁰ See art 29.

6.2.3 Relationship with Member States and the Citizens

PACE sets its own agenda, but its debates and reports are primarily focused on defending human rights, promoting democracy, protecting minorities and upholding the rule of law.¹¹ In this connection, it can be said that PACE has similar mandate with the PAP. The difference is that unlike in the case of the PAP, PACE can hold governments of member states to account on human rights issues, pressing states to maintain democratic standards, proposing fresh ideas and generating the momentum for reform.¹² The texts adopted by PACE – recommendations, resolutions and opinions – serve as guidelines for the Committee of Ministers, national governments, parliaments and political parties. Eventually, through legislation and practice, these texts influence and improve Europeans' lives.

Like the PAP in the AU, PACE is a consultative body of the Council of Europe. It does not have the power to make binding laws for member states. However, it speaks on behalf of 820 million Europeans and has the power to: demand action from the 47 Council of Europe governments, who – acting through the organization's executive body – must jointly reply; probe human rights violations in any of the member states; question Prime Ministers and Heads of State on any subject; send parliamentarians to observe elections and mediate over crises; set the terms on which states may join the Council of Europe, through its power of veto; inspire, propose and help to shape new national laws; request legal evaluations of the laws and constitutions of member states; sanction a member state by recommending its exclusion or suspension.¹³

6.2.4 Appraisal

Though PACE is a consultative body of the Council of Europe the institution is commonly referred to as the Council of Europe's "engine".¹⁴ In fact, the assembly sees itself as 'Europe's democratic conscience' and 'a melting pot of ideas'.¹⁵

¹¹ See arts 1 and 3 of the 'Statute of the Council of Europe' London, 5.V.1949.

¹² PACE can achieve this by exercising its power to probe human rights violations in member states, requesting legal evaluations of the laws constitutions of member states and making recommendations to the Council of Ministers for the suspension or expulsion of a recalcitrant member state from the Council membership as well as its own power to suspend a member from membership of PACE.

¹³ <https://www.coe.int/en/web/tbilisi/parliamentaryassembly> (accessed on 20 November 2017).

¹⁴ <http://www.europewatchdog.info/en/structure/parliamentary-assembly/> (accessed 20 November 2018).

¹⁵ European Sources Online Information Guide Council of Europe, http://aei.pitt.edu/74889/1acCouncil_Europe.pdf (accessed 13 November 2018).

This is because many of the organization's important instruments were conceived by the Assembly. In terms of concrete achievements, PACE has to its credit achieved the following: ending the death penalty in Europe by requiring new members to stop all executions; making possible, and shaping, the European Convention on Human Rights; high-profile reports exposing violations of human rights in Council of Europe member states; assisting former Soviet countries to embrace democracy after 1989; inspiring and helping to shape many progressive new national laws; helping member states to overcome conflict or reach consensus on divisive political or social issues; to mention but a few.

Though PACE is not a parliament with legislative mandate, it remains an influential institution in Europe that must be consulted on all international treaties drawn up by the Council of Europe. It elects the judges of the European Court of Human Rights and the Commissioner for Human Rights, as well as the Secretary General and Deputy Secretary General of the Council of Europe and its own Secretary General. The recommendations, resolutions and opinions of PACE can serve as guidelines for the Committee of Ministers, national governments, parliaments and political parties. It is therefore arguable that ultimately the resultant legislation and practice arising from these texts influence and improve on the Europeans' lives. Thus, notwithstanding its status as a mere consultative assembly, it has been able to carve out a niche for itself as a very influential organization whose resolutions and recommendations are respected and taken into consideration in decision making in the Council of Europe and their governments.

6.3 The European Parliament

The EP is the parliamentary organ of the EU just as the PAP is the parliamentary organ of the AU. The EP is presented as a typical older parliamentary institution of a regional organization which the PAP could learn from its long experience and upon which it could model itself taking into consideration African peculiarities and circumstances.

6.3.1 Establishment, Membership and System of Operation

The EP was first established as ‘the Assembly’, an organ of the European Coal and Steel Community (ECSC)¹⁶ by the Treaty Establishing the ECSC. It was formally launched in 1958 after the ‘constituent meeting’ of the European Parliament Assembly. At that time, it was only an advisory and consultative body like the present PAP without legislative powers. Initially, the EP was composed of 142 members representing the six founding members¹⁷ of the European Coal and Steel Community (ECSC) delegated by their national parliaments. Membership of the EP increased with the expansion of the ECSC, which started to take place in 1973. In 2008, the membership of the EP had increased to 27 member states and 785 members, representing a total population of 495 million.

The first direct elections to the EP were held in June 1979, 21 years after the parliament’s creation. Since then, elections have been held across the 27 member states every five years to the EP membership. This implies that prior to the Single European Act (SEA), EP members were already elected directly, giving more weight to its status as the voice of the people of Europe. This can be compared to the PAP which is only 14 years old today and therefore a relatively younger institution whose membership is composed of 5 parliamentarians who are designated (not elected) from among the members of the national parliaments or deliberative bodies of member states.

The modern EP was formally established by the Treaties of Rome¹⁸ to replace the Assembly. The next constitutive document of the EP is the Treaty on European Union (also known as the Maastricht Treaty).¹⁹ The latest relevant constitutive instrument on the establishment of the EP is the Treaty of Lisbon which amended the Treaty on the European Union and the Treaty Establishing the European Community (the Lisbon Treaty).²⁰ Specifically the EP was established under Article 13 of the Lisbon Treaty among the other organs of the EP.

¹⁶ Treaty of Paris, signed in April 1951 and which entered into force in 1952.

¹⁷ The founding member states were Germany, France, Italy, the Netherlands, Belgium and Luxembourg, who, in 1951, established the European Coal and Steel Community (ECSC) based on the Treaty of Paris. The ECSC was the predecessor of the European Economic Community (EEC) and later the European Union.

¹⁸ These are the Treaties Establishing the European Economic Community (EEC) and the European Atomic Energy Community (EAEC).

¹⁹ The Treaty on European Union was signed on 7 February 1992 and it entered into force on 1 November 1993

²⁰ The Lisbon Treaty was signed in Lisbon on 13 December 2007 and it entered into force on 1 December 2009

6.3.2 Legislative, Oversight Powers and Functions

It is instructive to note that the original EP was a classical consultative body intended to follow only *consultative* or *advisory* procedure and whose opinions were non-binding and were mostly ignored by the Council. It neither had power of control over the budget of the EU, nor could it influence legislative outcomes.²¹ However, the EP has recently been conferred with legislative, supervisory and even litigation powers which were gradually developed through its own practice and through successive treaty amendments. Thus, the EP has come a long way from being a purely consultative assembly to become co-legislator with the Council of the European Union (the Council). The development of the legislative powers of the EP can be said to have passed through three stages, namely, consultation, co-operation and co-decision.

It is worth noting that like the present PAP which occupied a marginal position in the decision making processes within the AU, the EP before its transformation played a marginal role in the EU governance processes. The EP was conferred with more powers, principally under the *cooperation* and *assent* procedures. This was 29 years after the EP was established, but the acquisition of legislative powers was gradual and incremental over a period of time and not overnight. In fact, it was in 1987 that the EP's powers were considerably enhanced, and from then the EP continued to gradually and incrementally gain real legislative powers through successive treaties.²²

The legislative powers of the EP evolved through the successive treaties until it became entrusted with a key role and power in law-making within the EU which it presently shares equally with the Council of the EU, particularly in the areas of budget and law making. Under the cooperation procedure,²³ the EP was entitled to a second reading of European Commission proposals. The commission was required to examine and take into account any amendments made by the EP; only a unanimous council resolution could overturn a rejection of any decision or proposal by the parliament.

²¹ See the report of the *Audit of the African Union*, (December 2007).

²² The first of these treaties was the Maastricht Treaty, which came into force in 1993, and then through the Amsterdam Treaty of 1999.

²³ That is before the Assent Procedure was introduced.

Under the assent procedure, the rejection of a bill by the parliament could not be overturned, thereby significantly enhancing the EP's role within the EU. The Maastricht Treaty of 1991 further enhanced the position and powers of the EP within the EU by granting the parliament co-decision powers with the Council, meaning that both the Council and the EP have 'equal legislative rights'. According to Hage and Kaeding, the reasoning behind the co-decision procedure was to increase the legitimacy of EU decision making. In addition, under the co-decision procedure there was the Reconciliation Committee composed of representatives from the two institutions. The joint text is then endorsed by the two representatives during the third reading thereby enabling the EP to have more control and involvement in the legislative process.

Furthermore, the Amsterdam Treaty, which came into force in 1999, significantly introduced changes to the co-decision procedure of the EP which further increased the EP's influence. The Amsterdam Treaty not only extended the co-decision procedure, but also simplified it by providing for adoption of legislation at first reading if the Council and EP agree. If the parliament votes to reject the common position of the Reconciliation Committee, the legislation fails. The third reading, whereby the Council could re-propose its common position after conciliation failed (the so-called 'take-it-or-leave-it'), was dropped; and if conciliation does not produce an agreement, the proposal fails. The effect of this change implies 'a balanced set of veto powers' between the Council and the EP.

Thus, the Council and the EP share responsibility for the adoption or failure of any proposed legislation. This joint responsibility is provided for in the Lisbon Treaty thus:

The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions. It shall exercise functions of political control and consultation as laid down in the Treaties. It shall elect the President of the Commission.²⁴

This provision clearly shows that the EP has progressed from holding little more than consultative powers to wielding significant legislative powers in a wide range of areas (but not in

²⁴ See art 14 of the Lisbon Treaty.

foreign affairs) and has gradually and incrementally gained in importance and relevance within EU governance structures.

The EP exercises democratic oversight and major supervisory powers over all Community activities especially the European Commission and the Presidency of the Council. It has power to dismiss the Commission which needs to submit regular reports, annual legislative programs and reports on the implementation of the budget and monitors the work of the Council of Ministers. It also confirms nominations put forward by the Council for positions of President of the European Commission and High Representative of the Union for Foreign Affairs and Security Policy. The Presidency of the Council needs to report to EP on its priorities and progress.

It must be noted that the oversight powers of the EP which was originally applied to the activities of the Commission was extended to the Council and the bodies responsible for foreign and security policy. To facilitate this supervision, the EP can set up temporary committees of inquiry. This important supervisory mandate has not only been a longstanding practice, but has also acquired a treaty base. The European Parliament has set up committees of inquiries on several occasions to oversee the activities of the European Commission (EC). For instance, in 1998, concerned about mismanagement of expenditures by the Commission (the executive body of the EU), the EP decided not to endorse the 1997 report of the Court of Auditors. Instead, it set up an independent *ad hoc* 'Committee of Experts' to investigate irregularities in the report. The Committee produced a devastating report, exposing mismanagement, corruption and fraud. Accordingly, the European Parliament made it clear that it would be using its power of dismissal against the Commission. Following this threat, the entire Commission (including its President, Jacques Santer) resigned, pre-empting the vote of censor by the European Parliament which could have otherwise brought about the same result.²⁵ The events of March 1999 showed that the European Parliament, securing the removal of its executive, was coming of age as the principal organ of democratic control over the other institutions of the EU.

²⁵ This incident which took place in the EU for the first time in March 1999 demonstrates the extent of the oversight powers of the EP in promoting good governance in the EU governance.

As part of its oversight powers in the EU, the EP elects the President of the Commission,²⁶ approves the appointment of the Commission and has the power to dismiss it. It also appoints the following: the president and vice-president of the European Central Bank which presents its annual report to Parliament in a plenary session; the European Ombudsman who investigates complaints about maladministration in the institutions and bodies of the European Union; and consults on the appointments for the Court of Auditors.

The preparation and approval of the EU budget is a joint business between the EP and the Council of the EU.²⁷ In other words, the EP and the Council of the European Union together constitute the EU's budgetary authority, which decides each year on its expenditures and revenues. The process is that the EU Commission drafts the budget and sends it each April to the Council of Ministers and the Parliament. The draft is debated by the EP and, if necessary, it proposes changes. The draft is then sent back to the Council which can propose changes and send it back to the EP for a second reading so that it can then adopt or reject it.

In the case of "compulsory expenditures", related to international agreements and agriculture, it is the Council that has the last word. In the case of "non-compulsory expenditures", Parliament decides in close collaboration with the Council. These include areas such as rural development, infrastructure and research. Parliament also monitors how the EU's executive, the European Commission, implements the budget.²⁸ This is unlike the case of the PAP which merely discusses the budget as already prepared without getting involved in determining its eventual outcome or monitoring its implementation.

6.3.3 Relationship with Member States and the Citizens

There is a progressive recognition of the right of the EP to institute litigation against the other institutions of the EU and to respond to litigation that may be brought against it before the European Court of Justice. Though in the case of the PAP the Protocol gave it the mandate to promote human rights in member states, it is silent on the question of whether it could institute proceedings at the African Court of Justice, as well as to the African Court on Human and

²⁶ See art 14 of the Lisbon Treaty.

²⁷ See art 14 of the 2010 Lisbon Treaty provides that 'The European Parliament shall, jointly with the Council, exercise legislative and budgetary functions'.

Peoples' Rights. In other words, the Protocol did not clearly state whether the PAP has any *locus standi* before these two regional courts. For instance, it is the right of EP to institute legal proceedings before the Court of Justice in cases of violation of the Treaty by another Institution. It also has the right to intervene in order to support one of the parties to the proceedings in cases before the Court as it did in the celebrated case of *Isoglucose*.²⁹ In this case, the European Court declared a Council regulation invalid because it was in breach of its obligation to consult Parliament.

In areas where the Parliament is to be consulted by the Council of Ministers, the latter could not simply adopt the legal act in question in the absence of an opinion from the former.³⁰ In an action for failure to act, Parliament may institute proceedings against an Institution before the Court for violation of the Treaty.³¹ Under the Treaty of Amsterdam the Parliament could bring an action to annul an act of another institution only for the purpose of protecting its prerogatives.³² It is finally now able to seek a prior opinion from the Court of Justice on the compatibility of an international agreement with the Treaty.³³

One remarkable difference between the level of supranationality in the EP and that of the PAP is the fact that the EU laws are directly enforceable in the EU member states having ceded part of their legislative sovereignty to the EP. The implication is that member states are bound by the laws of the EU as well as the judgments of the European court. In the case of *Costa v ENEL*, the court made it abundantly clear that membership of the EU certainly affects the sovereignty of state as the EU laws remain supreme and superior to national laws.³⁴ The court held that by creating a community of unlimited duration, having its own institution, its own personality, its own legal capacity of representation at the international plane and, more particularly and more particularly real powers stemming from a limitation of sovereignty or a transfer of powers from

²⁸ <http://www.dw.com/en/what-are-the-powers-of-the-european-parliament/a-4295011> (accessed 10 May 2018).

²⁹ *SA Roquette Frères v Council of the European Communities. Isoglucose - Production quotas*. Case 138/79. European Court Reports 1980 -03333, ECLI identifier: ECIEU:C:1980:249. Available at: <https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A61980QJ0179>, (accessed August 10 2017).

³⁰ *Isoglucose's case* (n 29 above).

³¹ A Teasdale and T Bainbridge, *The Penguin Companion to European Union*. (Penguin Books limited 2012) <http://penguincompaniontoeu.com/additional-entries/jglucose-coc/>. (accessed August 10 2017).

³² Türk, A.H. *Judicial Review in EU Law 2010* (Edward Elgar Publishing Limited 2009) 43. <https://books.google.com.ng/books?isbn=1848447493> (accessed August 10 2017).

³³ art 300 of the Treaty Establishing the European Community.

the states to community, the member states have limited their sovereign rights and have thus created a body of law which binds both their nationals and themselves.³⁵

The transfer by states from their domestic legal system to the community legal system of the rights and obligations arising under the treaty carries with it a permanent limitation of their sovereign rights.³⁶ Accordingly, every European citizen has the right to petition the EP to seek remedies to specific problems which is not the case under the PAP Protocol. Depending on the circumstances, the EP may forward the petitions to the EC, the Council or to the appropriate national authorities, requesting their further action or opinion. This gives the EP a strong footing in determining the legal framework of the EU and to effectively promote constitutionalism in Europe.

In summary, the human rights-related activities of the European Parliament can be said to be threefold. The first is *deliberation*, in which the European Parliament adopts several texts, mostly in the form of annual resolutions, on human rights. The second is *monitoring*, in which the European Parliament exercises vigilance on what its rules of procedures describe as ‘topical and urgent subjects of major importance’. On several occasions, the European Parliament has adopted passionate and strongly worded resolutions that condemned specific cases of grave violations, which contributed towards the practical and effective implementation of individual and collective freedoms. The third is *supervision*, in which the European Parliament is asked for its opinion on agreements between the Community and third countries. This empowers the European Parliament to exercise, if necessary, a genuine right of veto to reject the proposed agreement on human rights grounds. It has actually been able to ensure the release of political prisoners by refusing to subscribe to a series of financial protocols signed with third countries on the ground of human rights protection.

6.3.4 Appraisal

The EP has fully established itself as an important arm of the EU playing a crucial role in promoting and protecting constitutionalism and good governance in Europe by establishing not

³⁴ *Costa v ENEL* (1964).

³⁵ M Koskeniemi *International Law Aspects of the European Union* (Kluwer Law International Publishers 1998). 163 <https://books.google.com.ng/books?isbn=9041104887> (accessed 23 April 201).

only the necessary checks and balances, but also developing norms and standards for institutions of democracy and governance. As we have stated earlier, the EP has the power to approve the appointment of the Commission President and, through a vote of censure it may force the College of Commissioners to resign. The EP also participates in EU foreign policy by exercising powers of assent over any international treaty the EU signs.

Thus, the EP has in various ways achieved results in influencing member states and the European Community to alter their legislations and to enable citizens through petitions seeking redress for injuries arising from member states violations of their rights protected under EU human rights laws. By this right to litigation, the EP can effectively promote constitutionalism not only in the EP but also in Europe as a whole. Indeed, the involvement of the EP in the EU legislative process and the scrutiny over the EU constitutionalizes the EU thereby giving it democratic legitimacy.

It must be noted however that the powers of the EP have not yet been extended to cover the whole of legislation and of the budget of the Community. There are still important policy areas, such as taxation and the annual farm price review, in which the role of the European Parliament is limited to simply giving an opinion, and the Council is free to pursue its own decision, even if agreement is not reached with the European Parliament. In other words, the European Parliament has not fully assumed the powers of the ‘federal house of the people’.

In contrast, the functions and powers of the PAP do not include the power to participate in AU legislative activities, appointment of the AU executives or censor their activities. The PAP does not have the right to receive complaints from citizens, whereas the right of citizens of member states to petition the EP on issues of alleged human rights violations that directly and personally concern them is guaranteed. Though the PAP has oversight powers to request and examine the reports and documents from the other organs of the AU, it has no supervisory mandate that would enable it to effectively ensure proper checks and balances among the different institutions of the AU.

³⁶ S Hall Nationality, Migration Rights, and Citizenship of the Union (MartinusNijhoff Publishers 21<https://books.google.com.ng/books?isbn=0792334000> (accessed 23 April 2017).

Furthermore, in the case of the PAP, there is currently no formal institutional mechanism that links the PAP processes and the processes taking place at both the AU and national levels. There is no follow-up mechanism to ensure that the decisions or advice from the PAP are taken into consideration by the AU governing institutions and organs. Against this background, in analyzing the transformation of the PAP, it is imperative to look at the evolution of the EP and the critical steps that led to its present status as the EU parliamentary organ with legislative powers.

6.4 The East African Legislative Assembly

The East African Legislative Assembly (EALA) is the parliamentary organ of the East African Community (EAC).³⁷ Though a relatively younger institution when compared with the EP, it however stands out as having significant legislative powers³⁸ when compared with the other regional parliaments in Africa that are supposed to anchor and facilitate the process of regional integration.

6.4.1 Establishment, Membership and System of Operation

The EALA was established in 1999 following the ‘Treaty for the Establishment of the East African Community’ and was inaugurated on 29 November 2001. The 52 EALA members as constituted currently are elected from the legislative assemblies of the five member states of the EAC: Kenya, Tanzania, Uganda, Burundi and Rwanda for a five year term. To this effect, the National Assembly of each partner state shall elect nine members of the Assembly,³⁹ who shall represent as much as feasible, the various political parties represented in the National Assembly, shades of opinion, gender and other special interest groups in the partner state, in accordance with such procedure as the National Assembly of each partner state may determine. This indirect electoral process is quite unlike that of the EP and more like that of the PAP under the Protocol except that the members are elected from outside the membership of the national parliaments.

³⁷ Established under art 9 of the Treaty for the Establishment of the East African Community, signed 30 November 1999 and it entered into force on 7th July 2000.

³⁸ See art 49 of the Treaty for the Establishment of the EAC.

³⁹ Not being members of the National Assembly.

The EALA holds its proceedings once a year and such meetings are presided over by the Speaker. The speaker is elected from among the representatives for a five year term on a rotational basis. The EALA representatives hold office for five years and are eligible for re-election once for a further term of five years. Decisions in the Assembly are guided by a majority vote of the representatives present and voting. Once a Bill has been enacted by the Assembly and assented to by the Heads of State or Government, it becomes an Act of the Community.⁴⁰

6.4.2 Legislative, Oversight Powers and Functions

Right from the inception, the treaty establishing the EALA gave it the legislative function of the EAC by stating clearly that the Assembly shall be the legislative organ of the Community.⁴¹ It however shares its legislative powers with the Council of Ministers like in the EP. In particular, the Treaty for the establishment of the East African Community provides thus: ‘The enactment of legislation of the Community shall be effected by means of Bills passed by the Assembly and assented to by Heads of State, and every Bill that has been duly passed and amended shall be styled an Act of the Community’⁴².

The above provision raises the question as to the exact legal implication *vis-a-vis* whether an Act of the Community automatically becomes an integral part of national law or whether it needs to be domesticated to be enforceable in the member state. In this connection, inspiration can be drawn from the provisions of Article 8 (2) of the treaty which provides thus:
each Partner State shall, within twelve months from the date of signing this Treaty, secure the enactment and the effective implementation of such legislation as is necessary to give effect to this Treaty, and in particular -

- (a) to confer upon the Community the legal capacity and personality required for the performance of its functions; and
- (b) to confer upon the legislation, regulations and directives of the Community and its institutions as provided for in this Treaty, the force of law within its territory.

⁴⁰ <http://www.eala.org/assembly/the-east-african-legislative-assembly> (accessed 13 February 2018).

⁴¹ See n 38 above, art 49.

⁴² See n 38 above, art 62(1).

By the above provision, it can be construed that an Act of the Community will invariably require domestication to have the force of law in a member state in accordance with the national constitution. In our view, this conclusion is consistent with the phrase, 'to confer' contained in the text which simply means to officially give.

The legislative powers of the EALA is very instructive and relevant to this study as it goes to show that an African regional organization appreciates the necessity of a parliamentary institution with law making mandate. Bills are normally introduced by any member and/or members of the Assembly. In exercise of its legislative powers, the EALA has passed numerous pieces of legislation such as the East African Legislative Assembly (Powers and Privileges) Act, 2004, the East African Community Customs Management Act, 2004, and the Community Emblems Act, 2004.

The powers of the EALA include approving the budget of the EAC, considering annual reports, audit reports and any other reports referred to it by the Council of Ministers, and discussing all matters related to the EAC, and making any recommendation it deems necessary. Furthermore, the EALA exercises oversight powers over all the work of the EAC according to its Rules of Procedure. Its activities are carried out through its seven standing committees, which are responsible for specific areas (Accounts; House Business; Regional Affairs and Conflict Resolution; General Purpose; Agriculture, Tourism and Natural Resources; Legal, Rules and Privileges; and Communication, Trade and Investments). The general responsibilities of the standing committees include examining, discussing and making recommendations on all bills before the assembly, initiating any bills within their respective mandates, assessing and evaluating the activities of the EAC, and examining the EAC's recurrent and capital budget estimates, among other things.

It has however been observed that the power to discuss and approve the budget does not necessarily entitle the legislative body to draw up, initiate or revise the said budget and the Heads of state still retain a right of veto and can approve the budget, despite the EALA's rejection of it. Thus, it is possible that even with such powers, a legislative assembly may potentially become nothing more than a mere rubber stamp for decisions made by executive

bodies.⁴³ However unlike in the case of the powers of the PAP to also discuss the budget of the Union before approval, the EALA at least approves the budget of the EAC irrespective of the veto powers of the Heads of state, which is a significant power

6.4.3 Relationship with Member States and the Citizens

The EALA maintains a working relationship with member states especially through liaison with the ‘National Assemblies of the Partner States on matters relating to the Community’.⁴⁴ There is, however, a democratic gap between the legislative assembly and the people due to the indirect electoral process to the membership of the EALA. This undermines the principle of popular participation in that it denies the people their right to cast their vote for their preferred candidates. In order to close this democratic gap, the EALA pursues what it calls “taking the Assembly to the people through tours, of the partner states by the EALA representatives”.

6.4.4 Appraisal

Though as we have pointed out earlier, its membership is not directly elected just as it is in the case of the PAP, by comparison, the EALA has significant and far-reaching powers and responsibilities. However, like the PAP, the EALA has its own challenges, including formulation of institutional review, financial accountability of member states, poor funding and other institutional challenges.⁴⁵ Nevertheless, the powers and responsibilities of EALA without more qualify it for special consideration in making a case for the transformation of the PAP into a parliament that can exercise legislative powers and functions for the AU.

In this respect, reference may be made by way of analogy, to the legislative competence of the EALA, which is the legislative organ of a much younger international body than the African Union. Thus, the EALA, as in the case of national legislative assemblies, is the law-making organ of EAC. As the legislative organ of the Community, the EALA is responsible for, among other things, approving the budgets of the EAC; debating audit reports; performing an oversight

⁴³ This point was made during the Roundtable Discussion on the topic, ‘Interface between Regional Parliamentary Assemblies and the Pan-African Parliament’ organized by the SADC Parliamentary Forum in collaboration with the Friedrich Ebert Stiftung, Lusaka, 8–9 August 2005.

⁴⁴ See n 38 above.

⁴⁵ ‘EALA’s in-tray: It’s going to be a tough road’ <http://www.theeastafrican.co.ke/rwanda/News/Tough-road-for-EALA--in-tray/1433218-4011524-x16rrkz/index.html> (accessed 17 February 2018).

function; and initiating Bills in the Assembly. This is in line with the vision of the East African Legislative Assembly which is to be ‘An effective and independent Regional Parliament’.⁴⁶ The essence of the analogy here is to make the point that learning from the experience of an African regional parliament the PAP should be conferred with legislative powers in order to give it the impetus to more effectively promote constitutionalism and democratic governance in Africa.

6.5 The ECOWAS Parliament

The ECOWAS Parliament, also known as the Community Parliament was originally established as a forum for dialogue, consultation and consensus for representatives of the people of West Africa with the aim of promoting integration. Like its PAP counterpart, it did not initially possess legislative powers and accordingly faced similar challenges to that of the PAP. However, the parliament has struggled hard enough to recently merit the conferment of legislative competence. With the enhancement of its status and powers as the legislative organ of the ECOWAS Community the ECOWAS Parliament qualifies as a relevant institution for consideration in this study.

6.5.1 Establishment, Membership and System of Operation

The ECOWAS Parliament was established under the Protocol relating to the Parliament which was signed in Abuja on 6th August, 1994 and it entered into force in 14th March, 2002. Though the parliament was established as a forum for dialogue, consultation and consensus for representatives of the people of West Africa with the aim of promoting integration,⁴⁷ it was empowered to consider a number of issues of concern to the Community. These are issues concerning human rights and freedoms of citizens and may also be consulted on matters relating to public health policies and issues relating to the review of the ECOWAS Treaty, citizenship and social integration on which it may make recommendations to the appropriate institutions and/or organs of the Community. As an advisory parliament like the PAP, it adopts resolutions which are forwarded to the decision-making bodies of the ECOWAS Community.

The Parliament is composed of 115 seats of which each of the 15 member states has a guaranteed minimum of five seats. The remaining seats are shared on the basis of population. Based on this

⁴⁶ <http://www.eala.org/assembly/the-east-african-legislative-assembly> (accessed 17 February 2018).

⁴⁷ See arts 6 and 13 of the ECOWAS Revised Treaty of 1993.

sharing method, Nigeria has 35 seats, Ghana 8 seats, Cote d'Ivoire 7 seats, while Burkina Faso, Guinea, Mali, Niger and Senegal have 6 seats each. The others – Benin, Cape Verde, The Gambia, Guinea Bissau, Liberia, Sierra Leone and Togo have 5 seats each. Members are to be elected by direct universal suffrage by citizens of Member States. However, as at present its members are not directly elected. The Protocol forbids any Member of Parliament, while in office from being a member of government, the constitutional council, the supreme court of a Member State; or a member of Courts and Tribunals of a Member State; a judge, lawyer or registrar in the Community Court of Justice and the Court of Arbitration.

Pending when Members of Parliament are thus elected, the National Assemblies of the member states or their equivalent institutions or organs are empowered to elect members from among themselves. The duration of the transitional period is subject to the approval of the Authority of Heads of States and Government. The parliament holds two ordinary sessions every year, each of which may not exceed three months. However, as of now, the sessions are limited to two weeks each. The parliament conducts its business in accordance with its Rules of Procedures (which determines all matters not provided for in the Protocol).⁴⁸

6.5.2 Legislative, Oversight Powers and Functions

Upon establishment, the ECOWAS Parliament functioned in an advisory capacity only. This means that it did not have specific binding decision-making powers. The Parliament was however empowered to consider and make recommendations on issues concerning human rights and fundamental freedoms of citizens; interconnection of energy networks; interconnection of communication links between Member States; interconnection of telecommunications systems; increased cooperation in the area of radio, television and other intra and inter-Community media links; as well as development of national communication systems.

The ECOWAS Parliament may also be consulted on matters relating to public health policies for the Community; common educational policy through harmonization of existing systems and specialization of existing universities; adjustment of education within the Community to international standards; youth and sports; scientific and technological research; and Community

⁴⁸ https://www.google.com/search?q=ECOWAS+Parliament&ie=utf-8&oe=utf-8&client=firefox-b-ab&gfe_rd=cr&dcr=0&ei=QyK3WvbvAomp8wfkYKWwCA (accessed 17 February 2018).

policy on environment. Other areas for consideration include any issues affecting the Community, especially as they relate to the review of the ECOWAS Treaty, citizenship and social integration. On these issues, the Parliament may make recommendations to the appropriate institutions and/or organs of the Community.

As we have stated above, though the ECOWAS Parliament was established in 2000, it existed only as a mere advisory body until recently. Following the sustained advocacy by the ECOWAS Parliament for the enhancement of its powers and functions,⁴⁹ the ECOWAS Supplementary Act was adopted by the 46th Ordinary Session of the ECOWAS Authority of Heads of the State and Government in Abuja in December 2014. At the 50th Ordinary Session of the Authority of Heads of State and Government in Abuja, the ECOWAS Supplementary Act A/SA/1/12/16 was endorsed in December 2016. The Supplementary Act⁵⁰ now bestows on the Community Parliament enhanced competences, such that it can now be involved in the enactment of all Community Acts,⁵¹ adoption of the Community Budget,⁵² oversight functions⁵³ and other legislative activities.

Of particular significance in relation to the legislative powers of the PAP under the Revised Protocol is Article 7 (f) of the Supplementary Act which provides that the ECOWAS Parliament may in collaboration with the Council and the Commission propose model and uniform laws to the community. This is significant because the provision recognizes the necessity for model laws as a means by which regional parliaments can assist the community to harmonize their laws to enhance the integration process.

The provision on model law making under the Supplementary Act allows the ECOWAS Parliament the latitude to propose model laws for the Community without any form of approval whatsoever from the ECOWAS heads of state and government. This demonstrates a clear understanding of the whole essence of model law making which is to propose a model to assist

⁴⁹ The enhancement of the powers of the ECOWAS parliament was the result of a collaborative efforts between the leadership of the parliament, multidisciplinary group of experts who met in Accra, Ghana and fashioned out a roadmap with which an advocacy committee of the parliament engaged with the governments and peoples of the Community on the achievements of the Community Parliament and the need to enhance its powers.

⁵⁰ See Supplementary Act A/SA/1/12/16 Relating to the Enhancement of the Powers of the ECOWAS Parliament.

⁵¹ See n 16 above, art 7 (a).

⁵² See art 7(b).

⁵³ See art 7(c).

states in updating their laws in accordance with accepted regional standards and to achieve harmony. In contrast, the power of the PAP to propose model laws under the Revised Protocol was made subject to the approval of the Assembly. Comparatively, the power to propose model laws under the Supplementary Act is more progressive and in consonance with the nature and purpose of model law-making than as provided for under the Revised Protocol. It is expected that when implemented, the ECOWAS Supplementary Act will enhance the capacity of the parliament to execute its mandate more effectively.

6.5.3 Relationship with Member States and the Citizens

The ECOWAS Parliament though hitherto functioning as a deliberative and advisory body has over the years proved to be a veritable institution that could support the acceleration of the achievement of the objectives of the ECOWAS. It has been playing supportive role in the peaceful resolution of regional crises. For instance it helped in the resolution of the Gambian crisis and the ongoing efforts to resolving the renewed tensions in Guinea-Bissau, the security challenges in Mali and armed insurgency in North East Nigeria and other parts of the region. The above are achieved through its discussions and recommendations on urgent matters affecting democracy, health and youth in the region. The ECOWAS Parliament has also been able to reinforce its legitimacy and enhance its powers and consolidate its position as a dependable institution amongst the other Community Institutions.

The ECOWAS Supplementary Act will not only enhance the competence of the Parliament, but will also constitute the ideal framework for efficient collaboration between the Parliament and all other ECOWAS institutions. Furthermore, the full implementation of the Supplementary Act will enhance transparency and accountability in the ECOWAS governance institutions. This will no doubt result in greater feeling of ownership among member states, of Community policies and programs. In this circumstance, the ultimate aim of achieving regional integration of West Africa will be accelerated.⁵⁴

⁵⁴ This submission is in consonance with the views expressed the President of the ECOWAS Commission, H.E. Marcel Alain de Souza and Mr. Edward Singhatey, the Commission's President, at the First Ordinary Session of the Fourth Legislature of the ECOWAS Parliament opens in Abuja, on 10 May 2017, <http://parl.ecowas.int/en/speaker-cisse-lo-commends-buhari-for-the-release-of-82-chiboks-girls/> (accessed 18 March 2018).

6.5.4 Appraisal

The enhancement of the powers of the Community Parliament is in tandem with the fundamental principles of democracy, international best practices, the ECOWAS Revised Treaty, and the New Article 13 of the Supplementary Protocol.⁵⁵ This will make ECOWAS more people oriented and focused especially towards the promotion of constitutionalism and human rights and the actualization of regional integration.

6.6 Lessons for the PAP

In determining the possible lessons for the PAP from the EP experience **experience**, the relevant integration theories underlying the evolution of the EP supranationalism need to be explained. This will enable us to understand where the PAP falls in and to what extent the EU experience can be applied to the PAP. The relevant theories for consideration are that of intergovernmentalism and neofunctionalism. The theory of intergovernmentalism is a model which portrays nation states as the major or leading actors in the EU integration process who by agreement bring their national interests to the supranational level. The intergovernmentality approach supports the contention that member states are ruling the EU based on domestic driven decisions on areas of common interest to member states through their national governments as independent decision makers because of their legal sovereignty and political legitimacy.⁵⁶ These decisions are not necessarily based on influence or pressure of powerful interest groups of non-state actors in both local the supranational level to integrate but rather based on cooperation.

On the other hand, the neofunctionalist theory sees the non-state actors as important elements in international politics. In other words, the theory is based on the assumption that the states are not the sole actors in international stage and its influence will gradually decrease. As an integration theory, neofunctionalism seeks to explain the reason and process of states cooperation to solve

⁵⁵ I Omipidan 'Ecowas Parliament: As Ekweremadu Exits Amid Accolades'
<http://www.opinionnigeria.com/ecowas-parliament-as-ekweremadu-exits-amid-accolades-by-ismail-omipidan/#sthash.PoOAu4WX.tnP2BBE3.dpbs> (accessed on 10 May 2017).

⁵⁶ Jan Pêt Khorto 'Neofunctionalism and Intergovernmentalism: Explaining the development of European Parliament'.
http://www.academia.edu/7296391/Neofunctionalism_and_Intergovernmentalism_Explaining_the_development_of_European_Parliament: see also Cini, M. (2013) 'Intergovernmentalism' In M. Cini, & N. P. Borrigan, European Union Politics (pp. 71-83) Oxford: Oxford University Press: Bache, Ian, George, Stephen and Bulmer, Simon (2011) "*Politics in the European Union*"; 3rd ed. Oxford University Press.

common problems and gradually giving up on national sovereignty. The neofunctionalist model is applied to explain the growing level of European integration and the role of supranational bodies in the process. It argues that when countries agree to cooperate in a given sector this cooperation creates incentives to cooperate in other similar and/or related areas by the concept of 'spillover' as the most important part which refers to the mechanism by which integration in one area creates the conditions and incentives for integration in another related policy area.⁵⁷ The theory shows some similarities with the development of the EP, that is, the increasing role and power of the EP that is able to withstand that of member states dominant influence in international decision-making processes as some of these powers have been transferred to the EP by the process of emerging supranationalism as regional integration progresses.

Based on the above theories, the level of development of the EP supranationalism arguably tend to support the neofunctionalist theory while that of the PAP remains characterized by the baggage of highly African intergovernmentalist approach to AU integration. This is why African integration, unlike the experience of EU integration has shown no notable gradual ceding of powers to AU institutions, even with the rhetorical allusions to such. This is due to the high premium African states attach to sovereignty while still emphasizing unity which remains at arm's length. It is therefore arguable that African leaders are not yet ready for deep integration.⁵⁸

The justification for the above argument can easily be gleaned from the attitude of the AU in its attempt to empower its institutions (particularly the PAP) to effectively carry out their mandates or the level of willingness of member states to delegate supranational powers to the PAP. This unwillingness or reluctance is demonstrated in the challenge of the ratification of the Revised Protocol which from a study undertaken by the African Centre for Parliamentary Affairs indicates that the delay in ratification is partly related to fears on the part of member states that the enhanced powers of the PAP could infringe on their sovereignty.⁵⁹ This is easily

⁵⁷ Jan Pêth Khorto (n 56 above): Haas, EB (1968) *The Uniting of Europe: Political, Social, and Economic Forces 1950-1957*. Calif. , Stanford: Stanford University Press: Bache, Ian, George, Stephen and Bulmer, Simon (2011) "*Politics in the European Union*"; 3rd ed. Oxford University Press.

⁵⁸ Kyambalesa and Hounnikpo (2006) describe a regional integration continuum ranging from 'shallow integration' (preferential trade agreements, free trade area, customs union and common market) to 'deep integration' (economic union, monetary union, political union) .

⁵⁹ See the ACEPA: 'Assessment of the implications of the revised protocol of the Pan-African Parliament', final report, December 2015. See also Valérie RAMET BRIEFING 'The Pan-African Parliament: getting ready for

understandable given the AU's emphasis on sovereignty and its traditional inter-governmental character as explained above.

Therefore, the extent to which the PAP can acquire the necessary mandate to carry out similar activities to that of the EP remains a huge challenge considering the intergovernmental character of the AU integration process which constrains PAP's transformation. This implies that PAP's successful transformation hinges on the preparedness of the AU leaders to accelerate the integration agenda by relaxing the AU intergovernmental character. The implication of this is that for PAP to be ceded reasonable legislative powers, member states must be ready for the gradual ceding of sovereignty in favor of deeper integration. This gradual ceding of sovereignty is imperative to pave the way for PAP to acquire meaningful legislative competence. Otherwise, the likelihood of PAP being transformed into a full legislative body as envisioned by the Protocol may be difficult to achieve in the nearest future.

Against the above background, it is apposite to emphasize that PAP is different from EP in three crucial respects: possession of legislative powers, oversight powers over the executive organs and direct election of members of the parliament. Thus, the most important and major characteristics of the EP in contrast with that of the PAP are first, the EP possesses legislative powers and its members are elected by universal suffrage. Second, it plays an important role within the EU governance structure and has equal weighting with the Council with regard to budgetary processes and EU laws. Nzewi while considering the PAP's proposed transformation aptly summarizes the position as follows:

The EP has two vital characteristics that the PAP should ideally develop: it possesses legislative powers and its members are elected by universal suffrage. Furthermore, it plays an important role within the EU governance processes and it has equal weighting with the Council of the European Union (the Council) with regard to budget and laws. The EP also has the power to approve the appointment of

the 2017 AU-EU.

Summit' [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/570486/EXPO_BRI\(2017\)570486_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/570486/EXPO_BRI(2017)570486_EN.pdf) (accessed 14 February 2018).

the Commission President and, through a vote of censure it may force the College of Commissioners to resign. The EP also participates in EU foreign policy by exercising powers of assent over any international treaty the EU signs.⁶⁰

However, considering the fact that the PAP is patterned along the line of the EP integration agenda with certain objectives in common, the EP provides by far the best example of a comparative supranational legislative body from which the PAP could learn and upon which it could model itself. This position is without prejudice to the low level of African integration explained above with the theories of neofunctionalism and intergovernmentalism which must be taken into account.

On the other hand, the PAP lacks meaningful legislative powers and this is a matter of major concern to the PAP parliamentarians. This is coupled with the fact that the members of the PAP are appointed from among their national parliamentarians and not elected. The PAP does not play any significant role in the AU governance and its influence is not felt by the policy organs. The EP also has the power to approve the appointment of the Commission President and, through a vote of censure it may force the College of Commissioners to resign. The EP also participates in EU foreign policy by exercising powers of assent over any international treaty the EU signs. These are vital characteristic features of the EP which the PAP lacks and should possibly develop, bearing in mind that they were acquired over a long period of time and by a sustained effort.

Thus, looking at the evolution of the EP from advisory and consultative body to a legislative body, as well as the critical steps that led to its present position, it is arguable that the EP provides by far the best example of a comparative supranational legislative body from which the PAP could learn and upon which it could model itself in certain areas. However, it must be reiterated that the original EP (then named the Assembly), was a classical consultative body

⁶⁰ O Nzewi 'The Role of the Pan African Parliament in African Regionalism: Institutional Perspectives and Lessons for Africa'. Germany: VDM Publishing; O Nzewi 'Influence and Legitimacy in African Regional Parliamentary Assemblies: The Case of the Pan-African Parliament's Search for Legislative Powers' *Journal of Asian and African Studies* 49.(4) 493 <https://www.google.com/search?q=Influence+and+legitimacy+by+O+Nzewi&ie=utf-8&oe=utf-8&client=firefox-b-ab> (accessed 15 July 2017).

intended to follow only *consultative* or *advisory* procedure and whose opinions were non-binding and mostly ignored by the Council. It took the EP approximately 29 years (until 1987) to acquire any significant extra powers, 21 years for its members to start being elected directly, and 41 years to reach the milestone of being a full legislative body. It is therefore obvious that the PAP is still in its embryonic stage struggling hard to build its institutional capacities to be able to effectively play its limited role under the Protocol.

The PAP is not therefore expected to attain the same level of legislative competence which the EP currently enjoys in the EU, but to gradually build its capacity to carry out enhanced legislative powers to be gained incrementally. The PAP can achieve this by fully utilizing its existing powers under the Protocol which we consider wide enough to enable it prove its mettle as a veritable institution that deserves enhanced powers. In this connection, pending the enhancement of its powers, the PAP can learn from the experience of the PACE which though a consultative parliament with human rights mandate in Europe like the PAP in Africa, wields so much influence in decision making in the Council of Europe hence it has grown to be regarded as the ‘Council of Europe’s engine’. However, it must be noted that though without the legislative powers like the EP, the PACE has power to make the following important appointments: the judges of the European Court of Human Rights⁶¹; the European Commissioner for Human Rights⁶²; and the Secretary General and Deputy Secretary General of the Council of Europe.⁶³

On the issue of democratic legitimacy which is necessary for members of any parliament to be the true representatives of the people, the PAP can learn from the experience of the EP which adopted direct elections to the membership of the EP as far back as in June 1979, even before it acquired any legislative competence. In the case of the PAP, the Protocol provides that the term of office as member of PAP shall run concurrently with his or her term in the National Parliament or other deliberative organ.⁶⁴ This method of electing the parliamentarians to the PAP has its advantages as well as its drawbacks. On the bright side, it will reduce huge cost and numerous logistical problems that a continent-wide electoral

⁶¹ See art 22 of the ECHR.

⁶² See art 9 CM Resolution (99)50).

⁶³ See Regulation 1 of the Regulations governing the positions.

⁶⁴ See art 5(1) of the Protocol.

process could entail. On the dark side, it will allow some members to serve for longer periods than others, depending on the constitutional arrangements in each member state.

Africa is still infected with all kinds of governments-pseudo-democratic, oligarchic, authoritarian, totalitarian, paternalistic, hierarchical and monarchical. It is, thus, doubtful if the arrangement under the PAP protocol will bring harmony in view of these different constitutional and non-constitutional structures. It will also ensure that all eligible citizens of member states have the opportunity to aspire for membership of the PAP thereby widening the scope of the people's choice of candidates. In this connection, it must be noted that one of the innovations in the Revised Protocol is on the issue of election into the membership of the PAP which can only be operational upon due ratification.

However, though the Revised Protocol provides for the election of members from outside the national parliament or other deliberative organ of member states, it does not specifically provide that the election shall be based on universal adult suffrage. Rather, it provides that it is the national parliament or other deliberative organ that will elect the members under a procedure that will be determined by the national parliament or deliberative organ. This implies that even with the Revised Protocol coming into effect, the problem of direct election of the members of the PAP will remain unsettled. Accordingly, the issue of democratic legitimacy of the parliament remains an unsettled question that will necessitate an amendment of the Revised Protocol.

The issue of fair and balanced representation in the composition of the PAP membership needs to be addressed learning from the practice in the EP and ECOWAS parliament respectively which gives some recognition to the differences in the relative population sizes of the various member states. On the other hand, the Protocol provides for equal representation of member states, that is, 5 parliamentarians for each state regardless of the size or population of the countries.⁶⁵ This system of representation was maintained under the Revised Protocol 'until the Assembly decides otherwise'.⁶⁶ We argue that the adoption of proportional representation like in

⁶⁵ See art 4 of the Protocol.

⁶⁶ See art 4 of the Revised Protocol.

the case of the EP and ECOWAS is not only fair but ideal in order to strengthen the PAP as a people centered institution rather than state centered.

On the status of the PAP as a legislative organ of the AU with powers to participate in legislation or at least empowered to propose model laws, it is submitted that this is generally recognized as an important and traditional role of modern regional parliaments. In this connection, the legislative power of the EALA and that of ECOWAS Parliament are weightier than what is provided for the PAP under Articles 8(1)(a) and 8(2) of the Revised Protocol. Hence the EALA can on its own initiate Bills under the Treaty while under the Supplementary Act, the ECOWAS Parliament participates in the making of all laws of the ECOWAS Community and can jointly with the Council and the Commission propose model laws without the authority of Heads of state and Government.⁶⁷

In contrast the PAP is not authorized to even propose model laws under the Revised Protocol without approval by the Assembly talk less of participating in AU legislation. It must be reiterated that the inability of a parliament to exercise full legislative powers derogates from its legitimacy as a parliament. Unfortunately, African leaders have not shown any intention to empower the institution. The 2014 PAP Protocol which gave the parliament only powers to propose model laws with its approval has not in any meaningful way enhanced the law making powers of the PAP. Commenting on this provision in the Revised Protocol, Fagbayibo opines that ‘This position makes it nothing more than an expensive talk-shop, where no binding rules or regulations can be enacted’.⁶⁸

Though the PAP does not have appointive powers like the PACE, it can assert itself by assuming and playing a significant role in the promotion and protection of human rights and democracy on the continent. The PAP can achieve this by exploiting its available oversight powers under the Protocol as well as its Rules of Procedure to engage in fact finding missions on situations in

⁶⁷ The law-making powers of the ECOWAS Parliament has not been exercised as no community Act has been passed since the adoption of the Supplementary Act which empowered the Parliament to participate in making all laws of the Community.

⁶⁸ B Fagbayibo ‘Why the Pan-African Parliament must clean up its act if it wants to survive’ The Conversation May 24, 2018 <https://theconversation.com/why-the-pan-african-parliament-must-clean-up-its-act-if-it-wants-to-survive-97095> (accessed 20 June 2018).

member states and thereafter issue resolutions as well as reports on human rights and governance challenges on the continent. In this way, it could bring serious human rights abuses on the continent to the attention of member states as well as the AU policy organs, thereby influencing them to take appropriate action that would improve the situation.

6.7 Concluding Remarks

It cannot be overstressed that democratically elected parliament is the only true representatives and voice of the people and accountability to the people through their representatives is the basic plank of a democratic system. Therefore the parliament as an important arm of the state has a crucial role to play in promoting and protecting democracy and good governance. The parliament achieves this by carrying out not only the necessary checks and balances in government but also developing norms and standards for institutions of democracy and governance.

By extension, parliaments at the regional level have similar roles to play in the governance of regional institutions and their member states. The EP role in the EU and in promoting constitutionalism and democratic governance in Europe as a whole demonstrates this point. In Africa, there is an increasing appreciation of the role parliaments can play in promoting democracy and good governance. This is also evident from the role supranational parliamentary institutions like the EALA and ECOWAS Parliament have been empowered to play in their respective regions as earlier explained.

In the light of the powers and functions of the other comparable supranational parliamentary institutions in promoting constitutionalism and democratic governance in their respective regions as explained above, it can be argued that the PAP is yet to be fully empowered to attain its full potentials as a regional parliament which is not unconnected with the level of AU integration. The PAP therefore needs to be progressively transformed in terms of enhancing its legislative and oversight competences as well as to provide and strengthen the required institutional capacities to make it more effective and bring it in line with the global trend.

At this juncture, it must be noted that the ultimate aim of member states in establishing the PAP is for it to evolve into an institution with full legislative powers,⁶⁹ which is to be realized following reviews at intervals.⁷⁰ It must be noted also that the Revised Protocol which though inadequate but to some extent enhanced the functions and powers of the PAP is yet to be duly ratified. Against the above background, until such a time the ultimate aim of the PAP is realized, the PAP could in the interim improve on its relevance in the AU by exploiting its power to adopt its own Rules of Procedure to enable it achieve its purposes under the Protocol.

⁶⁹ See art 2(3) of the Protocol.

⁷⁰ As provided for in art 25.

Chapter Seven

Conclusion

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7.1 Introduction

The study set out to examine the importance of the promotion of constitutionalism and democratic governance as a fundamental requirement for the achievement of sustainable development especially in Africa. The increasing role of regional organizations (particularly through their parliaments) in this regard was underscored. Primarily, the study focused on the effectiveness of the role of the PAP in promoting the AU agenda on constitutionalism and democratic governance in Africa.¹ The focus on the role of the PAP became necessary following the general perception that though PAP was established with the objective of promoting the AU agenda, this is not being realized as expected.

The perceived ineffectiveness of the PAP has been differently explained.² First, the PAP was conceived as a weak institution in that it is established as a parliament without legislative powers and therefore a toothless bull dog. As alluded to in chapter 1 and fully discussed in chapter 4 of this study, the Protocol provides that during the first term of its existence, the PAP shall exercise

¹ The AU agenda on constitutionalism and democratic governance, in this chapter referred to as 'the AU agenda' or 'the agenda' was fully discussed as a topic in chapter 2 of this study.

² These were discussed in chapter 4. However this thesis disagrees with the argument that the PAP is ineffective though not as effective as it should be. The role the PAP has played so far in promoting constitutionalism and democratic governance in Africa especially through fact finding missions, election observation missions,

advisory and consultative powers only.³ The contrary explanation is that despite its limited powers and functions to advisory and consultative role, the PAP possesses the potential under the Protocol to carry out oversight functions and make recommendations on issues that can promote the AU agenda which it has not exploited. On the other hand, the Revised Protocol which declared the PAP as the legislative organ of the AU⁴ with enhanced powers has not been ratified as required by the Protocol.⁵ Again, the possible structural and administrative capacity implications of its eventual operationalization have not been studied. The foregoing were identified as problems that if not properly studied and addressed may negatively impact on the capacity of the PAP to effectively deliver on its mandate of promoting the AU agenda.

Approached from two scenarios, the study first examined the role of the PAP in promoting the agenda based on its powers under the Protocol it also examined the factors militating against its effectiveness and how these can be addressed. It further examined the contention that there are sufficient avenues under the Protocol for the PAP to effectively undertake its promotional activities. This is with a view to determining imaginative ways within its available powers and functions under the Protocol by which PAP can effectively promote the agenda, despite its limited powers.

Second, the study analyzed the transformation process of the PAP from a parliament whose powers and functions are limited to advisory and consultative roles only to a parliament with enhanced legislative and oversight powers. This analysis is informed by the existence of two opposing schools on PAP's quest for legislative powers. One school argues in support for PAP's quest for legislative powers to effectively execute its mandate while the other is of the opinion that PAP does not need legislative powers to effectively execute its mandate. Be that as it may, the challenge of the ratification of the Revised Protocol and the possible legal and institutional capacity implications of its operationalization were discussed with a view to identifying possible solutions.

resolutions and recommendations on various issues bordering on peace and security in Africa, to mention but a few as disclosed in chapter 4 support our argument that the PAP is not a mere talk shop.

³ art 11 of the Protocol

⁴ The legislative mandate of the PAP is provided for in art 8(1) of the revised protocol.

⁵ See art 23 of the revised Protocol provides that the Protocol shall enter into force thirty (30) days after the deposit of the instruments of ratification with the Chairperson of the Commission by a simple majority of the Member States.

In furtherance of the above, the study examined the role of other comparable supranational parliaments with similar agenda with a view to looking out for what the PAP can learn from their experiences. The emerging recommendations are presented under the following headings: proposal for the amendment of the Protocol; proposal for non-legislative options; and proposal for PAP's visibility, civil society and citizens' engagement.

7.2 Summary of Key Findings

Chapter 1 of the study is the general introduction which aims to highlight the main issues addressed in this research and the approach adopted. It highlighted one of the major problems facing Africa today, which is, how to uphold and promote the AU agenda which by available records remains in ominous and steady decline. It is argued that the deficit of constitutionalism and democratic governance is substantially the underlying cause of Africa's fragility and development challenges. In other words, most African states are fragile as a result of deficit of good governance which is associated with institutional weakness, impunity and lack of political legitimacy. These are identified as the challenges which expose African states to the risk of instability and violent conflicts resulting in disruptive shocks.

Based on the above, the study argued that until African countries come to grips with their fragility challenges Africa's development agenda cannot be achieved. This is because capable states and institutions constitute the fulcrum for the successful implementation of any developmental agenda and this must also be undergirded by constitutionalism and democratic governance norms. As the people's representative and watchdog against the abuse of executive powers capable and effective parliaments occupy a unique and strategic position to promote democratic values and norms.

In this connection, the chapter described the PAP as the key institution of the AU established by the Constitutive Act to promote the agenda amongst its other objectives. The effectiveness of the PAP in promoting the agenda is the central issue in this research. Some of the problems that negatively impact on the capacity of the PAP to effectively deliver on its mandate of promoting the AU agenda are highlighted. The relevant issues outlined in the chapter for discussion in the succeeding chapters include: the AU agenda on constitutionalism and democratic governance;

what the PAP is currently doing and what it can creatively do within its mandate to promote the AU agenda; the transformation process of the PAP, the challenge of the ratification of the Revised Protocol and the possible implications; and what PAP can benefit from a trans-regional comparative analysis, particularly from the experience of the other supranational parliaments to determine what can be recommended for the PAP to make it more effective.

Chapter 2 set out to analyze the theoretical bases for the international organizations' role in promoting states' constitutionalism and democratic governance. This is necessary to prepare the ground for the proper understanding of the succeeding discussions on the relevant issues highlighted in chapter 1 above. To this end, the relevant concepts are laid out and their nexus with the relevant issues discussed. The emphasis is on the argument that the global trend is towards the increasing involvement of regional organizations in promoting the twin principles of constitutionalism and democratic governance which is key to development.

The chapter explained that states' constitutionalism can be promoted through the activities of international institutions by developing global standards of legal and democratic norms, interpretation of the norms, and internalization of the norms into the collective consciousness of international and domestic actors. It further explained that supranational parliaments are most strategically positioned to enhance member states' capability by promoting the observance of democratic governance principles through their legislative and oversight powers and functions. The point was also made that the role of supranational parliaments in moderating state' constitutionalism can be justified on the bases of the theories of functionalism and supraconstitutionalism.⁶

The study however noted⁷ that the employment of external forces or institutions to promote constitutionalism in states may be confronted by a claim to sovereignty by domestic authorities. In other words, that unqualified adherence to the Westphalian sovereignty under classical international law constitutes a challenge to international institutions' effective promotion of constitutionalism and democratic governance in states. Nevertheless, the study demonstrated that

⁶ As discussed in 6.6 of chapter 6, the justification for the direct external enforcement can be traced to three different concerns: to address or prevent security crises that may have possible regional implications; to enforce the observance of norms adopted and ratified by states I ;and to uphold constitutionalism in member states especially in circumstances of unconstitutional change of governments see. M Wiebusch *The role of regional organizations in the protection of constitutionalism* International IDEA Discussion Paper 17/2016.

it has now become the global trend for various regional organizations to establish supranational parliamentary institutions whose powers and functions are derived from the founding or constituent treaties and legal instruments. In the same vein, the wave of regional integration ushered in the establishment of regional parliaments or regional parliamentary assemblies as institutions to uphold good governance, accountability and transparency in member states.

Unfortunately, the general perception is that parliaments in Africa are commonly seen to be ineffective, powerless, useless, often redundant, or just talk-shops⁸ and therefore do not possess the capacity to promote constitutionalism and democratic governance. However, this negative perception appears to be changing ‘with the resumption of multiparty elections in many countries and the inculcation of democratic values across the continent, giving rise to the revival of the belief in parliaments as potential agents of democratic change’⁹. The chapter concluded that parliamentary effectiveness which is so crucial and central in the development and sustainability of capable states in Africa is in most part still lacking¹⁰ and remains a threat to the realization of Africa’s vision and this is the achilles’ heel of the PAP in promoting the AU agenda.

Chapter 3 of the study set out to examine the AU agenda on constitutionalism and democratic governance. It traced the development and pursuit of the AU agenda from the era of the OAU to the era of the AU. The purpose is to assess the efforts being made by the AU in setting and implementing the agenda and to explain the need for interface amongst the AU governance institutions, with particular focus on the pivotal role of the PAP.

The chapter demonstrated that the formation of the AU under the Constitutive Act to replace the OAU remains the most significant turning point in the effort of Africans to join the global trend towards the entrenchment of constitutionalism and democratic governance as a necessary adjunct

⁷ As discussed in 6.6.

⁸ LN Nijzink, Shaheen Mozaff ar and Elisabete Azevedo ‘Parliaments and the enhancement of democracy on the African Continent: an analysis of institutional capacity and public perceptions’ *Journal of Legislative Studies* 12 (3–4) (2006) 311–35; S Mpanyane ‘Transformation of the Pan-African Parliament: A part to Legislative Body?’ *ISS Paper 181* March 2009 <https://www.files.ethz.ch/isn/99267/PAPER181.pdf> P. 1 (accessed 20 August 2017)

⁹ S Mpanyane ‘Transformation of the Pan-African Parliament: A part to Legislative Body?’ (n 7 above): See also M Bratton and Nicolas van de Walle, *Democratic Experiments in Africa: Regime transitions in comparative perspectives*, Cambridge University Press, 1997, 61–89.

¹⁰ Usually associated with institutional weakness and dominance by strong executives which allows parliaments limited decision making roles especially in states where national parliaments are passive actors in governance.

of a successful and sustainable development agenda. It traced the progressive development of the AU agenda on constitutionalism and democratic governance in Africa right from the era of the OAU, crystallizing in the AU adoption of the African Charter on Democracy, Elections and Governance. The Governance Charter was explained as the most comprehensive and bold attempt by the AU to institutionalize, promote and protect democratic ideals and good governance in Africa. The provisions of the Governance Charter and the various other AU normative frameworks, institutions and mechanisms,¹¹ were all together explained as constituting the ‘AU agenda on constitutionalism and democratic governance’.

The chapter concluded that the establishment of these democratic values and frameworks clearly confirms the resolve and commitment of the AU to reverse the trend of the declining constitutionalism and democratic governance in Africa. This also illustrates the fact that the AU recognized that democratic governance is pivotal in addressing the issues of poverty alleviation and underdevelopment as a whole and that they are in fact mutually re-enforcing.¹² Ultimately, the chapter brought to the fore the vision of the AU in establishing the PAP as its pivotal organ amongst the other AGA platform members to promote the agenda.

Relying on the theoretical foundation laid in chapter 2 and the background to the development of the AU agenda as explained in chapter 3 respectively above, the study in chapter 4 proceeded to examine the central issue, that is, the effectiveness of the role of the PAP in promoting the AU agenda. Specifically, the chapter sought to interrogate the legislative status of the PAP, the vision for its establishment, powers and functions, the rationale for the limited mandate of the PAP, the assessment of the activities it has carried out so far, its challenges and how it can effectively carry out its powers and functions under the present protocol to promote the AU agenda.

The chapter demonstrated that the PAP as the major AU governance institution with the mandate to promote the AU agenda is not endowed with the necessary legal and administrative capacity to effectively play its role. This is because the Protocol confers little or no authority to the PAP

¹¹ A number of other instruments, declarations and decisions constituting the AU agenda on constitutionalism and democratic governance are discussed in chapter 3 particularly at 3.3-3.4.

in terms of legislative functions hence its powers are limited to consultative and advisory role only. The PAP is also shown to be challenged by institutional weaknesses which militate against its effectiveness. Inherently, the PAP as established under the present Protocol remains a weak institution having no clear power to legislate or play any role in AU law-making. Therefore it could not in any significant measure influence governance at the AU or promote the AU agenda as effectively as it should in member states.

Furthermore, it is also the finding that the PAP has not developed the proper infrastructure, administrative structure and professional support base needed to function effectively due to inadequate funding. As such, it cannot competently address the issue of human resources deficit by the recruitment of skilled or professional personnel and support staff needed to facilitate parliamentary work (such as adequate research support, qualified committee clerks and procedural officers). The study for instance, disclosed that the PAP's secretariat cannot boast of even 10% of the required number of the committee clerks to support its ten committees and as a result compelled to source committee clerks from external service providers with all the risk involved. Though the PAP could explore other sources of funding independent of the AU in order to execute its programs, this is however not permitted under the Protocol and its hand is tied by the AU financial rules. The authority of the PAP to raise fund has now provided for under the Revised Protocol,¹³ but it has not yet become operational in that the Revised Protocol has not been ratified.¹⁴

The finding is that the challenge of inadequate funding compels PAP to continue to depend on support from, and collaboration with, outside service providers thereby putting the parliament in a situation of dependency. The power and responsibility of PAP under Article 11 (2) of the Protocol to 'discuss its budget and the budget of the Community and make recommendations thereon' does not afford the institution enough scope to influence budgetary allocations by questioning any reduction or denial of its proposals. Hence the policy organs responsible for the approval of the budget are not under any legal obligation to act on or even consider the

¹² OAU, Declaration of the Assembly of Heads of State and Government of the OAU on the Political and Social-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, OAU Doc. AHG/Decl.1(XXXVI) (1990) para 10.

¹³ See art 8(4)(a).

recommendations of the PAP. This implies that the PAP is not in a position to influence the final decision on its budgetary allocations. In the light of the above, the study argued that the above situation impedes on the execution of the policies and programs of the AU. Therefore the PAP deserves to be further strengthened with enhanced legislative powers and institutional capacity to perform its functions more effectively.

The chapter further found that lack of democratic legitimacy is a factor capable of undermining the strength, legitimacy and integrity needed by PAP to effectively execute its mandate. This is because of the current process whereby members of the PAP are designated from among the members of their respective national parliaments or deliberative organs of member states. The process is not only undemocratic but also potentially compromises the independence of members, making them to pursue national interests or agenda instead of that of the people of Africa whom they represent. Furthermore, the process leads to high turnover of members which is witnessed in the PAP for various reasons.¹⁵ This system has negative implications on the stability of the membership and retention of institutional memory.

On the other hand, the study analyzed the powers and functions of the PAP under the Protocol and demonstrated that it possesses the potential to promote the agenda. For instance, the chapter examined the oversight powers of the PAP under Article 11 of the Protocol including the powers to: discuss or express an opinion on any matter and make any recommendations as it may deem fit; request officials to attend its sessions and produce reports to assist it in the performance of its duties; and to perform such other functions as it deems appropriate to advance the objectives of the Protocol. The clear mandate of the PAP to facilitate the effective implementation of the policies and objectives of the AU especially to promote principles of human rights and democracy in Africa, as well as to encourage good governance, transparency and accountability in member states was also examined.

Based on the above, it argued that PAP has legal bases to undertake both formal and informal activities aimed at executing its mandate. For instance, it can on its own initiative develop and propose model laws aimed at harmonizing member states' laws. This is particularly important

¹⁴ The detailed discussion on this issue is contained in chapter 5 above.

¹⁵ These are discussed in 4.5.

with regard to model laws relating to those AU legal instruments aimed at promoting the AU agenda. Model laws on such areas can be proposed for consideration and possible adoption by the Assembly without waiting for enhanced powers. The study found that the PAP is yet to fully exploit or leverage on these available powers under the Protocol to creatively undertake its promotional activities, especially by taking advantage of its wide powers to adopt its Rules of Procedure which will enable it to oversee the execution of the AU agenda.¹⁶

Assessed within the framework of its limited powers under the Protocol, it is contended that the scorecard of the PAP during its 14 years of existence shows that it has managed to make some modest achievements in promoting the agenda despite its inherent legal and institutional weaknesses. However, the chapter concluded that while pursuing the transformation process the PAP (acting within its available powers and functions under the Protocol) can in the interim develop innovative ways by which it can undertake further oversight, consultative and advisory activities that will enable it create more impact on the AU governance as well as promote the agenda in member states.

Chapter 5 focused on the second scenario which borders on the transformation process of the PAP from a parliament whose powers and functions are limited to advisory and consultative roles only to a parliament with enhanced legislative powers. It examined the justification for the review of the Protocol in order to transform the PAP, the transformation process, the changes introduced in the Revised Protocol, the challenges of its ratification and the possible legal and institutional capacity challenges of its operationalization and how they could be addressed.

The chapter explained that the Revised Protocol was adopted by the Assembly at the Malabo Summit as far back as in June 2014 and that it has not yet become operative because of the challenge of ratification. It was demonstrated that the Revised Protocol to some extent enhanced the status, powers and functions of the PAP¹⁷ to make it more effective it has not become

¹⁶ The detailed discussion on the oversight powers of the PAP and how it can effectively utilize the wide powers it possesses in its Rules of Procedure to establish committees and collaborate with other stakeholders to achieve its objectives are contained in 4.6 of chapter 4.

¹⁷ See 5.3 for the changes introduced by the Revised Protocol the most significant of which is the declaration of PAP as the legislative organ of the AU with power to propose model laws, election of PAP members and additional oversight powers.

operational. The study identified the challenge of sovereignty as a major factor militating against the ratification of the Revised Protocol and that it constitutes a real threat towards African efforts at supranationalism.

The study in justification of the above assertion explained that the challenge of the ratification of the Revised Protocol has a historical background dating back to the period of formation of the OAU. The OAU was conceived as a highly intergovernmental system with decision-making centralized at the highest level of the Assembly of the Heads of State and Government. As a result, the principle of non-interference and concern for state sovereignty became entrenched and continues to dictate the character of the African integration space till date. Accordingly the AU remained highly intergovernmental despite the reforms¹⁸ introduced in the AU by the Constitutive Act to accommodate more AU interventions especially in order to address serious challenges of peace and security. It was further argued that this background also explains the rationale for constraining the powers and functions of the PAP under the Protocol and the apparent reluctance of member states to cede reasonable legislative power to a supranational institution like the PAP.

Further on the Revised Protocol, the study in chapter 5 revealed a number of legal, institutional and administrative capacity challenges that the PAP needs to address. For instance, Article 5 (1) (a) which provides that members of the PAP shall be elected by the national parliament or other deliberative organ of member states from outside its membership was shown to be in conflict with Article 5 (6) which provides that a member of national parliament or other deliberative organ is eligible to contest an election to the PAP. Meanwhile, the principle of equal representation of member states in the parliament is retained by the Revised Protocol.¹⁹

Equally, it was demonstrated that Article 8 (1) (b) of the Revised Protocol which gives power to the PAP to propose model laws is ambiguous. The ambiguity is with regard to whether the PAP must obtain prior authorization from the Assembly before embarking on model law making on

¹⁸ These reforms are manifest in the provisions of the Constitutive Act and the various AU instruments aimed at promoting AU agenda on constitutionalism and democratic governance especially the Governance Charter, as well as the integration agenda.

¹⁹ See art 4(2) of the Protocol and art 5(a) of the Revised Protocol respectively which provides for each member state to be represented by a delegation of 5 members.

any subjects/areas based on its own initiative, or whether it can proceed to propose model law and thereafter present same to the Assembly for its consideration and approval.²⁰ The possible institutional implications of the eventual operationalization of the Revised Protocol was identified to include the challenges of inadequate administrative structure, lack of professional staff, funding and transitional challenges.²¹

The study made a case for the transformation of the PAP as a necessary step towards making the PAP more effective in promoting the agenda. Furthermore, the transformation process was justified on grounds of its being in tandem with the ultimate aim of the PAP as provided for under the Protocol.²² The chapter concluded with a discussion on the need for the PAP to develop a structured approach to stakeholders' (including national governments' officials, regional and national parliaments, AGA Platform members and CSOs) collaborative engagement²³ on the advocacy for the ratification of the AU legal instruments (including the Revised Protocol).

Chapter 6 of the study examined the powers and functions of other supranational parliaments including the Parliamentary Assembly of the Council of Europe PACE and the EP in promoting constitutionalism in Europe. The role of other relevant regional parliaments in Africa including the EALA and the ECOWAS Parliament in promoting constitutionalism in their member states was also examined. This is with a view to identifying areas from where the PAP could possibly learn based on their experiences. This was undertaken by looking at the: establishment, membership and system of operation; legislative and oversight powers and functions; and relationship with their member states and citizens respectively.

Based on the information gathered, the study demonstrated that the EP, EALA and the ECOWAS Parliament are comparative supranational legislative bodies from which the PAP could learn and upon which it could model itself. The examination of these comparable regional

²⁰ This ambiguity is discussed in 5.3.

²¹ These challenges are discussed in 5.5.

²² See Article 2(3) of the Protocol which provides that 'the ultimate aim of the Pan-African Parliament shall be to evolve into an institution with full legislative powers' and Article 25 which provides for the review of the Protocol at intervals for that purpose.

²³ This is discussed in 5.6 and 5.7.

parliaments disclosed that in the EU for instance, members of the EP are directly elected²⁴ and under the ECOWAS Supplementary Act direct election is provided for.²⁵ Though direct election of members of the PAP is envisaged by the Protocol, what has been provided for by the Revised Protocol²⁶ is indirect election. In any case, as already noted in chapter 5, the process has not yet become operational because the Revised Protocol has not been ratified.

It was also gathered that unlike the practice in EP and ECOWAS Parliament the principle of proportional representation which is not applicable under the Protocol remains unaddressed by the Revised Protocol. On this issue of the adoption of proportional representation, the thesis argued²⁷ that following the example of the EP and ECOWAS is not only fair but ideal in order to strengthen the PAP as a people centered institution rather than a state centered one. More importantly, the adoption of direct election is important for the democratic legitimacy, independence, strength and integrity of the PAP to undertake its oversight functions.

On the issue of the limited powers and functions of the PAP to advisory and consultative role only, the study in chapter 6²⁸ disclosed that the EP constitutionally exercises legislative powers as a co-legislator with the Council and carries out effective oversight powers on the other EU organs. It was also disclosed that within Africa, the legislative roles of the EALA and ECOWAS Parliament respectively under their founding treaties²⁹ are even weightier than that provided for the PAP under Articles 8 (1) (a) and 8 (2) of the Revised Protocol. Hence the EALA can, on its own initiate Bills under the Treaty of the EAC, while under the Supplementary Act, the ECOWAS Parliament participates in the making of all laws of the ECOWAS Community and can jointly with the Council and the Commission propose model laws without the authority of Heads of state and Government.

The study noted however, that unlike the EU which is modeled on a principle of integration and voluntary transference of authority to supranational institutions which can be explained based on

²⁴ This is discussed in chapter 6.

²⁵ See chapter 6 at 6.5

²⁶ See art 5 of the Revised Protocol

²⁷ In 6.6

²⁸ See particularly chapter 6 at 6.6.

²⁹ As discussed in 6.4 and 6.5 respectively.

the integration theory of neofunctionalism, the AU remains highly intergovernmental. Thus, the chapter argued that it is the system of intergovernmentalism which determines and prescribes the structure and limits of integration in the AU. This is why African integration, unlike the experience of EU integration has shown no notable gradual ceding of powers to AU institutions including the PAP.³⁰

In justification for the above argument, it was explained³¹ that this can easily be gleaned from the attitude of the AU member states which shows their unwillingness to empower AU institutions (particularly the PAP) to effectively execute their mandates. This apparent unwillingness or reluctance is demonstrated in the challenge of the ratification of the Revised Protocol which as this study argues,³² is substantially related to fears on the part of member states that enhanced powers of the PAP could infringe on their sovereignty.³³ As explained above, this is easily understandable given the AU's emphasis on sovereignty and its traditional inter-governmental character as explained above which constrains the PAP's transformation process. In view of the above, the thesis concluded the discussion in chapter 6 that the likelihood of PAP transforming into a full legislative body as envisioned by the Protocol may be difficult to achieve in the nearest future without sustained advocacy and informal diplomatic engagements with stakeholders with the PAP as the lead actor.

7.3 Recommendations

In the light of the key findings and conclusions of the study as highlighted above, and in order to enhance the prospects of the PAP to effectively promote the AU agenda, the thesis made a number of recommendations which are classified into three sections as outlined hereunder.

³⁰ The slow pace of African integration is understandably as the result of the high premium African states attach to sovereignty while still emphasizing unity. This state of affairs arguably gives the impression that African leaders are not serious with the AU integration agenda or at best not yet ready for deep integration which is a twin process with supranationalism and accordingly determines its level and speed.

³¹ See n 23 above.

³² In chapter 5, section 5.

³³ See the ACEPA: 'Assessment of the implications of the revised protocol of the Pan-African Parliament', final report, December 2015. See also Valérie RAMET BRIEFING 'The Pan-African Parliament: getting ready for the 2017 AU-EU Summit' [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/570486/EXPO_BRI\(2017\)570486_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/570486/EXPO_BRI(2017)570486_EN.pdf) (accessed 14 February 2018).

7.3.1 Proposals for Further Review/Amendment of the Protocol

The PAP having existed for more than 14 years now without clear legislative powers, it is recommended that the Protocol should be amended to enable the PAP to participate in AU law making processes, at least as a co-legislator with the Council and the Assembly learning from EP, EALA and ECOWAS Parliament.

7.3.1.1 Following our argument that the absence of PAP's scrutiny over the AU budget and how it is executed diminishes its influence and relevance in the AU, the Protocol should be amended to empower the PAP to monitor and exercise control over how the people's resources are budgeted and spent. This is necessary to enable the PAP to hold the leaders accountable for the mismanagement of the people's resources in its capacity as the representative of the people.

7.3.1.2 There should be gradual ceding of reasonable powers from the AU policy organs to the PAP in order to enhance its legitimacy and democratic accountability by giving it financial autonomy which is necessary to enhance its independence and effectiveness.

7.3.1.3 In view of the importance of democratic legitimacy as a major determinant of the independence and strength of a parliament to perform effectively, it is recommended that the Protocol be amended to clearly introduce direct election into the membership of the PAP based on universal adult suffrage. This will truly reflect its status as the true representatives of the people, drawing from the experience of the EP and ECOWAS Parliament.

7.3.1.4 Drawing from the experiences of the EP, EALA and the ECOWAS Parliament, the Protocol should be amended to introduce the principle of proportional representation on the bases of population size. This is important for fairness hence the AU and the PAP are people centered institutions.

7.3.1.5 Pursuant to the preamble to the Protocol that AU member states are 'firmly convinced that the strengthening of the PAP will ensure effectively the full

participation of African peoples in the economic development and integration of the continent', the Protocol should be amended to make it obligatory on the policy organs of the AU to consult the PAP, seek and receive its input prior to making decisions on important matters of concern to the African citizens as in the case of the EP and the ECOWAS Parliament.

7.3.1.6 The PAP as the legitimate representatives of the people of Africa should be empowered by the Protocol to confirm or at least recommend the approval of certain high profile appointees of the AU (including the Chairperson of the AUC and Heads of organs) as part of its oversight functions as it is being practiced in the EU with the EP.

7.3.1.7 With regard to the power to propose model laws as provided for by the Revised Protocol, Article 8 (2) (b) should be amended to clearly empower the PAP to on its own initiative propose model laws for possible adoption by the Assembly without the prior authorization of the Assembly.

7.3.1.8 The above proposal notwithstanding, the PAP should sustain the current initiative of proposing model laws aimed at promoting the harmonization of laws and policies which are aimed at promoting the AU agenda. Such model laws can guide or assist national parliaments in bringing their domestic laws in alignment with common continental objectives and accepted regional minimum standards or benchmarks.

7.3.2 Non-Classical Legislative Options

7.3.2.1 PAP members should be trained on the art of parliamentary diplomacy (through capacity building activities) which should be deployed to lobby member states for the gradual ceding of westphalian sovereignty in favor of responsible and pooled sovereignty. This will also aid the introduction of member states to the need to drop the lukewarm approach to the much taunted African integration agenda in favor of mutual cooperation and understanding between states for the collective good.

7.3.2.2 The PAP should assume non-formal or classical parliamentary functions by involving itself in any other activities of parliaments that complement, strengthens and support all its classical functions with the aim of achieving its objectives by innovative and creative utilization of its available powers under the extant Protocol especially its wide powers to adopt its Rules of Procedure aimed at realizing its objectives. It should undertake non-formal or classical parliamentary functions that complement, strengthen and support its classical functions with the aim of achieving its objectives. The PAP can achieve these by innovative and creative utilization of its available powers under the extant Protocol especially its wide powers to adopt its Rules of Procedure.

7.3.2.3 In view of argument of the thesis that diplomacy and advocacy are crucial to PAP's influence and institutional growth within the broader AU system, the PAP should assert its influence and relevance in the AU through informal diplomatic engagements in functional cooperation with other AU organs and institutions.

7.3.2.4 In the absence of clear mechanism formally linking the PAP with the governance architecture of the AU, it is recommended that strategize on how it can make itself relevant or 'market' itself to the AU policy organs especially the PRC, the Executive Council and the Assembly. This will require PAP to establish a diplomatic channel through which to engage in functional cooperation with the AU policy organs especially through the AUC as its ally. This will enable the PAP to effectively communicate its advice, recommendations or decisions to the policy organs on issues and challenges facing the continent.

7.3.2.5 .In addition to the above, PAP should develop (in consultation with the PRC and the Executive Council) a clear mechanism formally linking it with the governance architecture of the AU which can be proposed to the Assembly for adoption. This mechanism will enable the PAP to channel its input to the policy organs for consideration and possible adoption.

7.3.2.6 Meanwhile, more robust functional engagements with the recently aligned committees of the PAP to that of the AUC should be leveraged upon to exert greater influence in the AU decision making processes.

7.3.2.7 Considering that the support and cooperation of stakeholders is critical to the effective promotion of the PAP's mandate in member states, the maintenance of liaison and engagement with regional and national parliaments to exchange briefs and ideas on how to effectively promote the AU agenda is recommended.

7.3.2.8 The PAP is also encouraged to formalize and restructure the conference of Speakers of African Parliaments and the Inter-organ Meetings to make them more result based rather than a talk shop. The program should include reading of the /reports/decision of the previous conference or meeting and review of progress reports from member states pursuant to decisions at previous meetings.

7.3.2.9 In addition to the above, the PAP should take advantage of the establishment of the AGA platform for synergy and collaboration with other organs and institutions with constitutionalism and democratic governance mandate, to effectively deliver on its mandate in a more cost effective manner.

7.3.2.10 With regard to its non-classical legislative and informal functions, the PAP ought to develop and strengthen its investigative role on pertinent governance and human rights issues that pose a threat to peace and security in parts of the continent and make appropriate recommendations to the AU policy organs for necessary actions to avoid escalation.

7.3.2.11 While waiting for the ratification of the Revised Protocol the PAP in anticipation of the transformation of PAP into a legislative body should begin to proactively develop the professional and administrative skills required to effectively undertake its enhanced legislative responsibilities.

7.3.3 Visibility, Civil Society and Citizens' Engagement

7.3.3.1 Having concluded in this thesis, that national and regional parliaments have crucial role to play in the domestication/implementation of regional policies at the national level, PAP should leverage on non-formal parliamentary opportunities like building and strengthening institutional relationships with these parliaments to bolster its campaign for the ratification and domestication of AU legal instruments. This can be achieved by sometimes attending their sessions and participating in debates and other activities in member states' national and regional parliaments. This practice can enhance the visibility of the PAP outside its headquarters.

7.3.3.2 With regard to the ratification of the Revised Protocol, it is recommended that the PAP should conduct a study on the systems and procedures of ratification of treaties in each member states, identify focal persons and accordingly develop national specific ratification strategies that will be deployed to each country.

7.3.3.3 The PAP should conduct sensitization, trainings/meetings to build capacities for a strategic ratification campaign missions to member states, targeting government line ministries such as Justice Department, Foreign Affairs and Parliamentary Committees on Foreign Affairs. PAP should also start engaging CSOs to partner with it in the ratification drive.

7.3.3.4 In furtherance of the above, the PAP should constitute a ratification advocacy committee comprising of the President and Vice President of the PAP from each region to be visited, a parliamentarian for each country to be visited, a support staff and a representative of the Commission to visit each member state to push for the ratification of the Revised Protocol and other governance instruments with a follow up strategy to monitor result.

7.3.3.5 Having argued that the visibility of the PAP at the global level is of strategic importance for the PAP both in terms of financial and technical support, PAP needs to

strengthen its relationship with international partners especially those whose objectives and programs are in tandem with the AU agenda. In this vein, the PAP should strengthen and sustain its existing partnership with more experienced parliamentary institutions like the EP for their technical and professional assistance.

7.3.3.6 In line with its vision as a people centered institution, the PAP should be able to introduce a system under its Rules of Procedure to give African citizens the opportunity to petition the PAP in cases of state sponsored or condoned violations of human rights learning from the EP experience. This is one of the non-formal activities that can bring the PAP closer to the people and make it more visible and relevant pending its formalization by the amendment of the Protocol.

7.3.3.7 The PAP should improve on its visibility in member states especially by formalizing regular engagement with CSOs including the youth, women and the media and getting them involved in discussions on thematic issues of interest and challenges facing the continent. These groups need to be specifically enlightened on the role of the PAP, what it is doing in that regard and how the civil society can come in to support. In this way the citizens will better appreciate their role and the need to support the strengthening of the institution to serve their interest more effectively.

7.3.3.8 To acquire legitimacy and credibility and attract the confidence and support of stakeholders particularly the AU leaders, the PAP should ensure that transparency and accountability are entrenched in its governance by effective internal control mechanisms. This can be achieved through the PAP Committee on Finance, Evaluation and Administration (CAFÉ) investigations to ensure budgetary oversight and accountability in terms of the management of its own funds and enforcement of parliamentary ethics.

Following the above recommendations, the thesis proceeded to present draft samples of some of the suggested amendments in the Protocol.³⁴

³⁴ See Annexure 1.

7.4 Concluding Remarks

As this thesis has clearly demonstrated, the AU has boldly responded to the declining constitutionalism and democratic governance in Africa by setting the agenda as evidenced in the various legal instruments examined in chapter 2 of this study. The challenge however, is that some of these instruments embodying the agenda are not ratified by member states. Even those that are ratified are not domesticated and as such not implemented at the national level hence the citizens do not feel their impact. This problem has been explained in this study from the context of the historical resistance to supranationalism which can only be overcome gradually with sustained advocacy.³⁵ As this thesis has established, the PAP remains the key institution to lead the advocacy and promote the AU agenda.

The thesis has demonstrated that the effectiveness of the PAP in promoting the agenda is challenged by its weak foundation as a mere consultative and advisory organ, coupled with its institutional weaknesses. However, assessed within the framework of its limited powers, the thesis has clearly demonstrated that the scorecard of the PAP during its 14 years of existence shows that it has managed to make some modest achievements in promoting the agenda despite the legal and institutional weaknesses.

With regard to the lessons from the PACE, it is instructive to note that though the PACE is a consultative body of the Council of Europe without legislative powers, it has been proactive and effective in promoting constitutionalism and human rights in Europe. Unlike the PAP, many of the organization's important instruments were conceived by the Assembly hence it is often called the Council of Europe's "engine".³⁶ Therefore, in relation to the first research assumption which states that 'the PAP possesses the potential to promote constitutionalism and democratic governance in Africa despite its limited mandate'³⁷, the PAP can learn from the experience of PACE and make itself relevant without waiting for legislative powers. However, for the PAP to effectively deliver on its mandate relying on its non legislative potentials, it must be provided with the necessary institutional capacity.

³⁵ See chapters 2 & 5 respectively.

³⁶ www.europewatchdog.info/en/structure/parliamentary-assembly/ (accessed 30 May 2017).

³⁷ This is discussed in chapter 4 of this study below.

This study has argued that parliamentary legitimacy, strength and credibility are crucial for parliamentary effectiveness and that they have bearing with the manner of the composition of the members of the parliament. Therefore, for the legitimacy and integrity of the PAP its members should be derived directly from the people through direct election by universal adult suffrage. Until this process is adopted, the legitimacy and independence of PAP members will remain open to question. Furthermore, related to issue of democratic election into the PAP is the issue of the distribution of member states' representation. As argued in this thesis, a situation for instance, in which a country like Nigeria with a population of 198,654,767 million³⁸ sends equal number of representatives to the PAP with a country like Cape Verde with a population of 557,116³⁹sends equal number of representatives to the PAP with Cape Verde with a population of is totally unfair to some highly populous countries and contradicts the idea of PAP being a people-centered institution.

On the status of the PAP as a legislative organ of the AU with powers to participate in legislation or at least propose model laws, it is submitted as this thesis has argued that this is generally recognized as an important activity of modern regional parliaments. This thesis has also shown that this is in tandem with the ultimate aim of the PAP which is to evolve into an institution with full legislative powers whose members are elected by universal adult suffrage.⁴⁰ The experiences of comparable parliamentary institutions studied in this thesis especially the EP, the EAELA and the ECOWAS Parliament also support this submission.

Therefore, while the legislative powers of the PAP could evolve gradually as envisioned under the Protocol, the ratification of the Revised Protocol remains a priority project for the enhancement of the effectiveness of the PAP without reinventing the wheel. However, it is instructive to note that whereas the transformation of the PAP remains a credible and justifiable aspiration, in the absence of clear indication as to when the PAP wil acquire legislative powers

³⁸ This figure is based on the latest United Nations estimates as of January 19, 2019. See www.worldometers.info/world-population/nigeria-population (accessed 23 January 2019).

³⁹ This is the position as at January 15, 2019 based on the latest United Nations estimates. see www.worldometers.info/world-population/Cbo-verde-population (accessed 23 January 2019).

⁴⁰ See art 2(3) of the Protocol.

or have the Revised Protocol ratified, creative utilization of its current powers and functions remains the viable option for the time being as recommended above.

In the final analysis, the thesis concluded in line with the first hypothesis/assumption, that PAP possesses the potential to promote constitutionalism and democratic governance in Africa despite its limited mandate. Furthermore, in line with our second hypothesis/assumption, the transformation of the PAP from a parliament with advisory and consultative powers only to a parliament with enhanced legislative powers is imperative for the enhancement of its prospects of effective promotion of constitutionalism and democratic governance in Africa. Thus, the thesis has demonstrated that the transformation of the PAP is not only imperative to enhance its effectiveness but also consistent with the ultimate aim of the PAP.

Annexure

Recommend Draft Amendment of the Constitutive Act of the African Union Relating to the Pan African Parliament.

Article 4

Membership

Proposal to amend Article 4 of the Constitutive Act of the African Union Relating to the Pan African Parliament to make provision for the composition of membership and proportional representation or distribution of seats in the Pan African Parliament by replacing paragraphs 1 and 2 with new ones and adding a new paragraph 3 as follows:

1. The Pan African Parliament shall be composed of (to be determined by the Assembly) seats. Each member state shall have a guaranteed minimum of five (5) seats. The remaining (to be determined by the Assembly) seats shall be shared on the bases of population.

1. Representation for each member state shall be as follows:

List of Member States and number of seats

2. The Assembly may on its own initiative or on the recommendation of the Pan African Parliament whenever it is considered necessary review the number and distribution of seats.

Article 5

Election

Proposed draft amendment of Article 5 of the Protocol to make provision for direct election members of the PAP in order to strengthen the democratic legitimacy as well as for the conduct of the elections, to read as follows:

1(a) Members of the Pan African Parliament shall be elected by direct universal suffrage by the citizens of member states.

(b) The elections of members of the Pan African Parliament shall be conducted as far as possible in the same month throughout the member states as may be decided by the Assembly.

(c) Pending when members of the PAP are elected by direct universal suffrage, the National Parliaments or other deliberative organs shall elect members of the PAP from amongst themselves.

Article 8

Functions and Powers

Proposed draft amendment of Article 8 (1) (b) of the Revised Protocol on the power of the PAP to propose model laws to read as follows:

(c) The Pan African Parliament may on its own initiative propose draft model laws for the consideration and approval by the Assembly.

Proposed draft amendment of Article 8 (2) (b) of the Revised Protocol to empower the PAP to participate effectively in approving the African Union budget by adding a proviso thereof to read as follows:

(b) Debate and discuss its own budget and the budget of the Union and make recommendations thereon to the relevant policy organs. Provided that in the case of disagreement with the recommendations of the Parliament, a joint meeting of the committee of the relevant policy organs and the Pan African Parliament shall be convened to harmonize the budget.

Proposed draft amendment of Article 8 2 (a) and (f) of the Revised Protocol to make it obligatory on the organs of the African Union to submit their reports to the PAP for consideration as follows:

(a) Request the organs of the African Union to, and who shall submit their respective annual reports including audit reports or other reports for its consideration and recommendations thereon.

(f) Request the officials of other organs of the African union to, and who shall attend its sessions to offer assistance to the Parliament in the discharge of its duties.

Proposed draft amendment of Article 8 2 (h) of the Revised Protocol to make it obligatory on the Council and the Assembly of the African Union to submit the draft text of legal instruments, treaties and other international agreements to the PAP for its consideration as follows:

(h) Receive, consider and submit its opinion or recommendations on draft text of legal instruments, treaties and other international agreements which shall be submitted to it by the Council and the Assembly before adoption. Provided that where there is disagreement on the opinion or recommendations of the Pan African Parliament and the position of the council or the Assembly as the case may be, these shall be harmonized in a joint meeting of a committee of the Pan African Parliament and the organ concerned.

Proposed draft amendment of Article 8 (2) of the Revised Protocol to enable the PAP to express opinion on the appointment of certain officials of the African Union by moving Article 8 (2) (j) to read Article 8 (2) (k) and replacing same with a new Article 8 (2) (j) to read as follows:

(i) Express opinion on the appointment of persons into the offices of the Head of the organs and institutions of the African Union.

Article 16

Budget of the Pan African Parliament

Proposed draft amendment of Article 16 of the Constitutive Act of the African Union Relating to the Pan African Parliament to make provision for the financial autonomy of the PAP by adding Article 16 (4) as follows:

4. The Pan African Parliament shall have financial autonomy over the execution of its budget

List of Treaties, Statutes and Instruments

African Charter on Democracy, Elections and Governance (2007/2012)

African Charter on Human and Peoples' Rights (1981/1986)

African Charter on the Rights and Welfare of the Child (1990)

African Youth Charter (2006/2009)

African Union Convention on Preventing and Combating Corruption and other Related Offences (2003/2006)

African Union Convention on the Assistance to Internally Displaced Persons (2009/2012)

Banjul Declaration (2006)

Charter of the Organization of African Unity (1963)

Constitutive Act of the African Union (2000/2001)

Declarations on the Principles Governing Democratic Elections in Africa (2002)

Declaration on Rights and Duties of States (1949)

Declaration on Unconstitutional Changes of Government (2000)

East African Community (EAC) Treaty (1999)

Economic Community of West African States Treaty ECOWAS Revised Treaty of (1993)

ECOWAS Supplementary Act A/SA/1/12/16

Guidelines for Election Observation Missions (2004)

International Covenant on Economic, Social and Cultural Rights (1966)

NEPAD Declaration on Democracy, Political and Corporate Governance and the establishment of the African Peer Review Mechanism (APRM).

Protocol on the African Human and Peoples' Rights (1981/1986)

Protocol on the African Human Rights Court (1998/2004)

Protocol on the Amendment of the Constitutive Act (2003)

Protocol on the Statute of the African Court of Justice and Human Rights

Protocol on the Peace and Security Council (2002/2003)

Protocol to the Treaty Establishing the African Economic Community Relating to the Pan African Parliament (2001/2003)

Protocol to the Constitutive Act of the African Union Relating to Pan African Parliament (2014)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of

Women in Africa (2003)
Rules of Procedure of the PAP (2004/2010)
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Treaty of Paris (1951/1952)
Treaty on European Union (Consolidated version 2016)
Lisbon Treaty (2007/ 2009)
Treaty on the Functioning of the European Union (Consolidated version 2016)
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UN Convention on the Rights of the Child (1989)
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Universal Declaration of Human Rights (1948)
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ICJ Advisory Opinion on Reservations to the convention on the Prevention and Punishment of Crime of Genocide ICJ Reports 1951. 3.
Imonikhe v Attorney General (1992) 7 SCNJ 197.
Labiya v Enretiola (1991) 3NWLR Pt 615 p. 640.
Merits ICJ Reports 1986, 14.
Nicaragua v United States of America.
Portugal v. Australia, East Timor case, ICJ Reports 1995, 90.
SA Roquette Frères v Council of the European Communities. Isoglucose - Production quotas. Case 138/79. European Court Reports 1980 -03333.
Senate of National Assembly v Tony Momoh (1983) 4 NCCR 269.
The United States of America v. Netherlands see Year book of the ILC.
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